

INDEX.

	PAGE
Bill of Complaint.....	1
Schedule "A"	8
Schedule "B"	9
Schedule "C"	9
Schedule "D"	10
Schedule "E"	11
Schedule "F"	13
Answer	14
Replication	18
Opinion	19
Final Decree	28
Notice of Appeal.....	31
Petition of Appeal.....	32
Testimony	35

WITNESSES FOR COMPLAINANTS.

Richard S. Whitesell, Direct	36
Patrick Monahan, Direct	38
Cross	53
Gerald A. McElligott, Direct	67
Fayette N. Talley, Direct	69
Cross	71

WITNESSES FOR DEFENDANTS.

	PAGE
Ellen McElligott,	
Direct	72
Cross	81
Gerald A. McElligott,	
Direct	82
Cross	85
Nathan Krauss,	
Direct	90
Cross	93

EXHIBITS.

	<i>Admitted</i>	<i>Printed</i>
	<i>at Page</i>	<i>at Page</i>
C-1—Receipt	45	103
C-2—Contract	45	105
C-3—Letter	47	106
C-4—Letter	52	...

Bill of Complaint.

In Chancery of New Jersey

TO THE HONORABLE LUTHER A. CAMPBELL, CHAN-
CELLOR OF THE STATE OF NEW JERSEY:

Complainants, Patrick Monahan and Nora C. 10
Monahan of Roselle Park, County of Union and
State of New Jersey, respectfully show that:

1. On April 25th, 1944, Gerald A. McElligott
and Ellen McElligott, his wife, entered into a cer-
tain contract in writing, a true copy of which is
hereunto annexed and made a part hereof and
marked Schedule "A," whereby they agreed to
convey to the complainants for the sum of Ninety- 20
three Hundred Dollars (\$9300.00) the premises
known as No. 701 Woodlawn Avenue, Roselle
Park, New Jersey, which premises are more par-
ticularly described as follows:

All that lot, tract or parcel of land, situate,
lying and being in the Borough of Roselle Park,
in the County of Union, and State of New Jersey,
more particularly described as follows:

Being the Southwesterly 40 feet of those 5 lots
being known, numbered and designated as lots 30
1 to 5 both inclusive, Block 26, as shown on a
certain map entitled "Map of property of City
Realty Company, Roselle Park, New Jersey,
1907," and filed in the Register's Office of Union
County, N. J. as Map No. 71 C.

Being the premises conveyed by deed of Valen-
tine Scheuerman and Anna Scheuerman, his wife,
to the defendants herein by deed dated May 1,
1931, and recorded on July 20th, 1931, in Book
1234 of Deeds on page 368. The sum of \$200.00 40
was paid by the complainants to the defendants

Bill of Complaint.

at the execution of said contract and it was agreed that the balance of \$9100.00 was to be paid at the closing of said transaction.

10 2. Complainants further show that the said premises consist of a 2½ story frame and brick one-family dwelling situated on a lot 40 feet by 100 feet at the above mentioned address.

20 3. Complainants further show that simultaneously with the agreement of April 25th, 1944, referred to hereinabove as Schedule "A," the defendants executed a receipt for the aforementioned sum of \$200.00 for the purpose of causing same to be delivered to the prospective mortgagee, who was to grant a purchase money mortgage on the said premises to the complainants to enable them to raise part of the consideration necessary to purchase the said premises. A copy of said receipt, the original of which is in the possession of the Federal Housing Administration, a governmental agency, is annexed hereto, and made part hereof and marked Schedule "B."

30 4. Complainants further show that both Schedule "A" and Schedule "B" were signed by the defendant, Ellen McElligott, who also signed the name of her husband, Gerald A. McElligott, the said defendant stating at that time to the complainants that she had a power of attorney from her husband to execute the said agreements for the sale of said premises.

40 5. Complainants further show that for approximately three weeks prior to April 25th, 1944, they had negotiated with the defendants for the purchase of said premises, said negotiations taking place principally between the complainant, Patrick Monahan, and the said defendants.

Bill of Complaint.

6. Complainants further charge that the price was not agreed upon immediately. However, after three or four conferences between the complainants and the defendants prior to April 25th, 1944, the price of \$9300.00 was arrived at and the agreements above mentioned were executed by the parties hereto, the defendant, Ellen McElligott, stating that her husband was employed in a defense plant at the time and could not take time off from his employment and that she had proper authority to execute the agreements in his behalf. 10

7. Complainants further charge and aver the fact to be that they relied upon said agreements as executed, as hereinabove set forth, and delivered the deposit of \$200.00 to the defendant, Ellen McElligott, and proceeded forthwith to raise the funds necessary to purchase the said premises. 20

8. Complainants further charge and aver the fact to be that they immediately applied to the Central Home Trust Company of Elizabeth, New Jersey, for a mortgage in the sum of \$3,000.00 on the said premises to raise a portion of the purchase price, which mortgage was subsequently increased to \$5,000.00, and turned over to the said Central Home Trust Company the said Schedule "B" for the use of the Federal Housing Administration. 30

9. Complainants further show that after April 25th, 1944, they made several trips to the premises at No. 701 Woodland Avenue, Roselle Park, New Jersey, where the defendants reside and complainant, Patrick Monahan, discussed the sale with the defendant, Gerald A. McElligott, and at no time until the last week in May was any question raised about the validity and propriety of the 40

Bill of Complaint.

agreement entered into between the complainants and the defendants.

10 10. Complainants further show that on or about May 18th, 1944, they received a letter from the Central Home Trust Company requesting that the complainants procure the deed to the premises known as No. 701 Woodland Avenue, Roselle Park, New Jersey, in order that said Central Home Trust Company, the prospective mortgagee, could proceed with the examination of title to the said premises.

20 11. Complainant, Patrick Monahan, thereupon called on the defendant, Gerald A. McElligott at said premises, No. 701 Woodland Avenue, Roselle Park, New Jersey, and requested the deed, and stated to the said Gerald A. McElligott the purpose for which it was needed. Said Gerald A. McElligott stated to the complainant, Patrick Monahan, that he did not know where the deed was but that his wife, the defendant, Ellen McElligott, who was away on vacation, knew where the deed was and requested that he, the complainant, Patrick Monahan, return the last week of May when the defendant, Mrs. McElligott, would return from her vacation, at which time the deed would be given to said complainants.

30 12. Complainants further show that in the last week of May, upon their requesting the old deed from the defendants, were informed by the defendants that they refused to consummate the transaction.

40 13. Complainants further show that on or about May 31st, 1944, they received a letter from one Nathan Krauss, a counsellor at law, representing

Bill of Complaint.

the defendants herein, which letter purports to change the terms of the agreement already arrived at between the complainants and the defendants. A copy of said letter of May 31st, 1944, is annexed hereto and made part thereof and marked Schedule "C."

14. Complainants further show that on June 8th, 1944, their solicitor received another letter from said Nathan Krauss, a copy of which is annexed hereto and made part hereof and marked Schedule "D."

10

15. Complainants further show that thereupon upon the advice of their counsel, on June 8th, 1944, a notice was prepared to the defendants herein making time of the essence of said contract of April 25th, 1944. Said notice was served personally upon the defendants herein on June 8th, 1944, a copy of which notice is annexed hereto and made part hereof and marked Schedule "E."

20

16. Complainants charge and aver the fact to be that on July 31st, 1944, a letter was received by their solicitor from one Emanuel Wagner, a counsellor at law of this State, advising the said solicitor that the defendants herein refused to deliver a deed to complainants. A copy of said letter is annexed hereto and made part hereof and marked Schedule "F."

30

17. Complainants further show that the mortgage for which an application had been made immediately after April 25th, 1944, and long prior to any intimation on the part of the defendants that they refused to consummate the said contract, was approved and granted, and said mortgagee was and is ready, willing and able to supply

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Bill of Complaint.

that portion of the funds needed by the complainants to pay the balance of \$9100.00 in cash.

10 18. Complainants further show that on July 31st, 1944, between 3:30 and 4:30 o'clock in the afternoon complainant, Patrick Monahan, and one of the attorneys for the said mortgage company appeared at No. 701 Woodland Avenue, Roselle Park, New Jersey, with the sum of \$9100.00 in cash for the purpose of making a tender of said cash to the defendants and obtaining a deed to the said premises. The attorney for the mortgagee had with him \$5,000.00 in cash and the complainant, Patrick Monahan, had with him \$4100.00 in cash for the purpose of tendering same as aforesaid. However, the said premises were
20 closed and no one was present, and neither the defendants nor anyone else representing them was present at the said premises at that time.

30 19. Complainants are desirous of obtaining a conveyance and title to the premises hereinabove described and are ready and able and now tender themselves ready and willing to perform their part of said agreement and to pay the full purchase price in cash in accordance with the terms thereof, upon the delivery to them of a proper deed according to law.

40 20. Complainants further charge and aver the fact to be that numerous conversations were had between the complainant Patrick Monahan and the defendant Gerald A. McElligott immediately after April 25th, 1944, and prior to the end of May, 1944, at which times the said defendant repeatedly stated that he knew the terms of the agreement entered into and referred to herein as Schedule "A," and that he was in accord with

Bill of Complaint.

the terms of the said agreement and did not by any word or act or conduct state or intimate to the complainants that his wife had no authority to enter into the agreement on his behalf, but on the contrary, ratified and reaffirmed same to the complainants.

10

21. Complainants further charge and aver the fact to be that the defendant, Gerald A. McElligott, is estopped by his conduct from refusing to join with his wife in a deed for the said premises above described to the complainants, or from denying the agency of his wife in the premises, and from particularly denying the right of his wife to bind him by the agreement above set forth.

22. Complainants further charge and aver the fact to be that the defendants are endeavoring to perpetrate a fraud upon said complainants by their contention that they are not bound by the agreement of April 25th, 1944, by reason of the fact that said agreement was not executed by Gerald A. McElligott and that the execution of said agreement in his behalf by the defendant, Ellen McElligott, was not authorized and binding.

20

Complainants are without adequate remedy in the Courts of Law and therefore pray:

30

1. That Gerald A. McElligott and Ellen McElligott, his wife, who are the defendants in this suit, may answer this bill of complaint and each statement therein made.

2. That the said Gerald A. McElligott and Ellen McElligott, his wife, may be decreed specifically to perform the said agreement entered into with the complainants.

40

Schedule "A".

3. That the deposit heretofore paid by the complainants to the defendants be decreed to be a lien on the premises.

10 4. That the defendants herein be restrained and enjoined from selling said premises to any other person, firm or corporation, and from mortgaging the said premises.

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

6. That the complainants have such other and further relief as may be just and proper in the premises.

20 WALTER H. FLAHERTY,
Solicitor for and of Counsel
with Complainants.

Schedule "A."

April 25, 1944.

30 I hereby agree to sell my property at 701 Woodlawn Ave., Roselle Pk., New Jersey to Patrick Monahan and Nora C. Monahan for the sum of Ninety three hundred (\$9300.) dollars.

I hereby acknowledge receipt of the sum of Two Hundred (\$200.) Dollars, balance of (\$9100.) to be paid at closing of transaction.

40 PATRICK MONAHAN,
NORA C. MONAHAN,
GERALD A. McELLIOTT,
ELLEN McELLIOTT.

Schedule "B."

4-25-1944.

Received from Patrick Monahan the sum of Two Hundred Dollars (\$200.00) as a deposit on a 2½ story frame and brick one-family dwelling situated on a lot 40' x 100' and known as 701 Woodland Avenue, Roselle Park, New Jersey, price agreed Nine Thousand three hundred Dollars (\$9,300.00). 10

GERALD A. McELLIGOTT,
ELLEN McELLIGOTT.

Schedule "C."

NATHAN KRAUSS
COUNSELLOR AT LAW
139 Warren Avenue
Roselle Park, N. J.

20

May 31, 1944.

Patrick Monahan and Nora C. Monahan
15 Butler Avenue
Roselle Park, N. J.

Dear Sir and Madam:

30

I have been consulted by Mr. and Mrs. McElligott with reference to an alleged contract for the sale of their property to you. While there was a deposit of \$200.00 given by you, it was contemplated by my clients that a formal contract would be entered into, specifically setting forth all the terms and conditions of sale, and also an additional deposit of \$1000.00 towards the purchase price.

Please be advised that unless an additional sum of \$1000.00 is deposited with my clients on Satur- 40

Schedule "D".

day, June 3, 1944, and a formal contract entered into, the deposit of \$200.00 will be returned to you and the matter will be closed.

Very truly yours,

NATHAN KRAUSS.

10

Schedule "D."

NATHAN KRAUSS
COUNSELLOR AT LAW
139 Warren Avenue
Roselle Park, N. J.

June 8, 1944.

20

Walter H. Flaherty, Esq.
1210 E. Grand Street
Elizabeth, N. J.

Re: McElligott-Monahan

Dear Walter:

30 The failure of your clients to enter into a formal contract for the purchase of my clients property, and the failure to produce an additional \$1000.00 and in refusing to agree that possession would be given on September 1st, 1944, after a valid and binding contract was drawn and executed by the parties, has resulted in the withdrawal of my clients from any and all negotiations with your clients on and after Saturday, June 10, 1944.

40 The return of the deposit will be returned in the sum of \$200.00, said sum being deposited with Mrs. McElligott and a receipt signed only by her was given to Mr. Monahan, and a further receipt drawn by Mr. Monahan and signed by him and his

Schedule "E".

wife, and not by my clients, but the names of my clients were written by Mrs. McElligott on the lower part of this paper. Upon receipt of the receipts mentioned above, the deposit will be returned.

Very truly yours,

NATHAN KRAUSS.

10

Schedule "E."

To: MR. GERALD A. McELLIGOTT and
MRS. ELLEN McELLIGOTT, his wife,
701 Woodlawn Avenue
Roselle Park, New Jersey

SIR AND MADAM:

20

Under date of April 25, 1944, you agreed to sell to us your property at 701 Woodlawn Avenue, Roselle Park, New Jersey, for the sum of Ninety Three Hundred (\$9300.00) Dollars, and on account of said purchase price we paid you the sum of Two Hundred (\$200.00) Dollars, and the balance of Ninety One Hundred (\$9100.00) Dollars is to be paid you at the time of closing title, and which said receipt of said sum of \$200.00 on account of purchase of said property was subsequently acknowledged and ratified in writing by your agent, your attorney Nathan Krauss, Esq.

30

You are therefore hereby notified that we shall be prepared to and will tender to you the said balance of Ninety one Hundred (\$9100.00) Dollars on July 31, 1944, between the hours of 3:30 o'clock and 4:30 o'clock, (E.W.T.) in the afternoon, at 701 Woodlawn Avenue, Roselle Park, New Jersey, or at such other reasonable and agreeable place you may designate, at which time all proper ad-

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Schedule "E".

justments shall be made, and we shall expect that in return therefor you shall simultaneous therewith deliver a deed conveying marketable title to the said premises to us together with possession of the said premises as of August 1st, 1944.

- 10 The purpose of this notice is to designate a time and place for closing title and to make time of the essence for the performance of your agreement to sell and our agreement to purchase said property, the title of which we are causing to be searched.

You are further notified that in the event you default, a suit for specific performance in Chancery shall be instituted and in addition thereto a claim made for an assessment of such damages as we may have sustained by reason of your default.

20

PATRICK MONAHAN

Patrick Monahan.

NORA C. MONAHAN

Nora C. Monahan.

Dated: June 8, 1944.

30

40

Schedule "F."

EMANUEL WAGNER
 COUNSELLOR AT LAW
 1143 E. Jersey Street
 Elizabeth, N. J.

July 31, 1944 10

Walter H. Flaherty, Esq.
 1210 E. Grand St.
 Elizabeth, N. J.

Dear Walter:

Confirming our telephone conversation, this is to again advise you that Gerald A. McElligott and Ellen McElligott refuse to deliver a deed to Patrick Monahan and Nora C. Monahan for the Roselle Park property. As outlined to you by Mr. Krauss, a formal contract was contemplated by the parties. 20

I am again advising you that Mr. McElligott did not sign the deposit receipt. Mrs. McElligott has left with me the sum of \$200.00 to repay the Monahans and I am authorized to make this payment.

Very truly yours,

EMANUEL WAGNER. 30

Answer.

IN CHANCERY OF NEW JERSEY.

Between

10

PATRICK MONAHAN and
 NORA C. MONAHAN,
 Complainants,

and

GERALD A. McELDIGOTT and
 ELLEN McELDIGOTT,
 Defendants.

On Bill, &c.
 Answer.

20

The defendants Gerald A. McElligott and Ellen McElligott, his wife, of the Borough of Roselle Park, County of Union and State of New Jersey, in answering the bill of complaint herein say:

1. The defendant Ellen McElligott admits signing the paper marked Schedule "A" as mentioned in paragraph 1 and the defendant Gerald A. McElligott denies signing said paper. The defendants deny that said paper is a valid contract requiring defendants to convey lands to the complainants.

30

2. Paragraph 2 is admitted.

3. The defendant Ellen McElligott admits signing the paper designated as Schedule "B" in paragraph 3 of the bill of complaint and the defendant Gerald A. McElligott denies having signed the same. The rest of the allegations of said paragraph 3 are denied.

40

Answer.

4. The defendants admit that the defendant Ellen McElligott signed the paper mentioned in paragraph 4 and that she also signed the name of the defendant Gerald A. McElligott. The rest of the allegations of paragraph 4 are denied.

5. With reference to the allegations of paragraph 5 the defendants admit there were negotiations prior to April 25, 1944. 10

6. Paragraph 6 is denied.

7. The defendants admit the delivery of a deposit as alleged in paragraph 7 but do not have sufficient information with which to form a belief as to the rest of the allegations.

8. The defendants do not have sufficient information with which to form a belief as to the allegations in paragraph 8 and leave the complainants to their proof. 20

9. Paragraph 9 is denied.

10. The defendants do not have sufficient information with which to form a belief as to the allegations in paragraph 10 and leave the complainants to their proof. 30

11. The visit of the complainant Patrick Monahan as mentioned in paragraph 11 is admitted but the allegation that a deed would be given to the complainants is denied.

12. Paragraph 12 is denied.

13. Defendants admit the letter mentioned in paragraph 13 was written at the request of the defendants. 40

Answer.

14. Paragraph 14 is admitted.
15. Defendants admit receiving the notice mentioned in paragraph 15.
16. Paragraph 16 is admitted.
- 10 17. The defendants do not have sufficient information with which to form a belief as to the allegations in paragraph 17 and leave the complainants to their proof.
18. The defendants do not have sufficient information with which to form a belief as to the allegations in paragraph 18 and leave the complainants to their proof.
- 20 19. The defendants do not have sufficient information with which to form a belief as to the allegations in paragraph 19 and leave the complainants to their proof.
20. Paragraph 20 is denied.
21. Paragraph 21 is denied.
22. Paragraph 22 is denied.
- 30

FIRST DEFENSE.

1. The defendants have an estate by the entirety in the lands mentioned in paragraph 1 of the bill of complaint and have had such estate by the entirety since the year 1931.
2. The defendant Gerald A. McElligott did not sign the papers known as Schedules "A" and "B" annexed to the bill of complaint and upon
- 40

Answer.

which complainants rely, nor did he lawfully authorize his name to be signed thereto.

3. The defendant Gerald A. McElligott did not sign any memorandum or note thereof or any agreement relating to the sale of said lands, nor did he lawfully authorize any other person to sign the same for him. 10

SECOND DEFENSE.

The said Schedules "A" and "B" do not constitute valid agreements for the sale of the lands mentioned in paragraph 1 of the bill of complaint.

THIRD DEFENSE.

20

The Schedules "A" and "B" were signed by the defendant Ellen McElligott in contemplation of the drawing of a formal contract.

EMANUEL WAGNER,
Solicitor of Defendants.

30

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Replication.

IN CHANCERY OF NEW JERSEY.

10	<p>Between</p> <p>PATRICK MONAHAN and NORA C. MONAHAN, Complainants,</p> <p style="text-align: center;"><i>and</i></p> <p>GERALD A. McELLAGOTT and ELLEN McELLAGOTT, his wife, Defendants.</p>	} On Bill, etc. Replication.
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20 Complainants join issue on the answer of the defendants.

WALTER H. FLAHERTY,
Solicitor for Complainants.

30

40

Opinion.

IN CHANCERY OF NEW JERSEY.

Between

PATRICK MONAHAN and
NORA C. MONAHAN,
Complainants,

and

GERALD A. McELLAGOTT and
ELLEN McELLAGOTT, his wife,
Defendants.

(Decided
November 20,
1944.)

10

On Bill for
Specific
Performance.

Docket 148,
page 162.

Opinion.

Appearances:

20

MR. WALTER H. FLAHERTY, for complainants.

MR. EMANUEL WAGNER, for defendants.

1. A memorandum of a contract for the sale of land complies with the statute of frauds, if from a consideration of the whole memorandum it may be gathered that it is the intention of one party to convey and the other party to purchase.

2. Authority to sign an agreement for the sale of lands binding on the principal under our statute of frauds, may be expressly conferred upon an agent by parol, or by proof of circumstances from which such authority may be reasonably inferred.

30

3. The receipt and the agreement in the instant case read together form a complete contract in which is set forth the purchase price, the description of the property and the amount of the deposit, and where the time for passing title is not fixed, the contract will be construed to provide for

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Opinion.

the delivery of the deed on demand, within a reasonable time, accompanied by a tender of the balance of the purchase price.

STEIN, V.-C.

10 This suit is brought for specific performance of an agreement to sell real estate. Sometime prior to April 25, 1944, the complainants, Patrick Monahan and his wife, Nora, read an advertisement in a newspaper to the effect that the defendants, Gerald A. McElligott and Ellen McElligott, desired to sell their property at 701 Woodlawn Avenue, Roselle Park, N. J. Thereupon several visits were made by the complainants to the home of the defendants and negotiations were opened and discussions had between them as to the price for the property, with the result that the price agreed upon finally was the sum of \$9300.00.

20

There was produced in evidence on the hearing the following agreement and receipt:

“April 25, 1944.

I hereby agree to sell my property at 701 Woodlawn Ave. Roselle Pk. New Jersey to Patrick Monahan and Nora C. Monahan for the sum of Ninety three hundred (\$9300.) dollars.

30

I hereby acknowledge receipt of the sum of Two Hundred (\$200.) Dollars balance of (\$9100.) to be paid at closing of transaction.

Patrick Monahan
Nora C. Monahan.
Gerald A. McElligott
Ellen McElligott.”

40

Opinion.

“4.-25-1944.

Received from Patrick Monahan, the sum of Two Hundred Dollars (\$200.00) as a deposit on a 2½ story frame and brick one family dwelling situated on a lot 40' x 100' and known as 701 Woodland Avenue, Roselle Park, New Jersey. Price agreed Nine Thousand, three hundred Dollars, \$9,300.00.

10

Gerald A. McElligott
Ellen McElligott.”

It is not disputed that both the agreement and receipt were handed to the complainants by the defendant, Ellen McElligott, on the day of the date which they bear and that when they were tendered to complainants, they objected because the defendant Gerald A. McElligott's name was not signed thereon, whereupon Mrs. McElligott signed her husband's name to both papers.

20

The defense offered on the hearing was (1), that Gerald A. McElligott did not sign nor authorize his wife to sign his name to the receipt and the agreement, and (2), that Mrs. McElligott signed and delivered both in contemplation of the drawing of a formal contract.

It appears from the evidence that about fifteen days after the deposit was paid Monahan received a letter from the Central Home Trust Company at which institution he applied for a mortgage loan and brought it to the home of the defendants, where he spoke to Mr. McElligott. He says Mrs. McElligott was not at home and that he handed the letter to Mr. McElligott saying, “This is from the bank in reference to the deed.” “I would like to get that deed down to the bank”, to which McElligott replied, “Well, Mrs. McElligott isn't

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Opinion.

home and I don't know exactly where to lay my hands on the deed, which the deed is in the house. As soon as Mrs. McElligott gets home from her trip, I will see the deed gets to the bank." Monahan says, "I told him then, I says, 'I had my house sold and these people just pulled out.' I showed
 10 him that letter. I didn't have enough money for a down payment. So I said, 'I will have to get a little more mortgage,' for the same reason. I said, 'How much mortgage do you really think I could get here?' 'Well,' he says, 'I don't see—You can get plenty of mortgages. You can get at least six or seven thousand dollars.' 'After all,' I said, 'I don't need that much. I am only paying ninety-three hundred for this place. I don't really need that much. If I could get five thousand, that is all
 20 I would need.' " "Q. What did he say? A. Well, he said, 'You will get that easily enough.' "

This conversation related by the complainant Monahan is not denied by the defendant McElligott. Two days later Monahan again went to the defendants' home and saw both defendants and again requested the deed at which time Mr. McElligott said, "No, we haven't sent it down yet."

Up to that time the witness says the understanding was that title was to be closed July first, but
 30 that on a later occasion when he went to see both defendants they said, "Well, we can't find a place where we were supposed to go" and asked him if he could give them until September first and wanted him to take back his deposit which he refused to do. The defendants also at that time said to Monahan that if the title was to be closed September first they would have to have a new contract to which Monahan says he replied, "If it is going to be like this, I have got to turn it over to
 40 my lawyer." There was also something said at

Opinion.

that time about the payment of an additional \$1,000.00 on account of the purchase price, all of which Monahan refused to do.

Mr. McElligott, called by the complainants as a witness, testified that certain portions of the receipt are in his handwriting. The receipt is type-written with the exception of the words "Patrick Monahan", "Two Hundred Dollars (\$200.00)" and "Nine Thousand, three hundred Dollars, (\$9,300.00)". The portions of the receipt which Mr. McElligott said were in his handwriting are "Monahan", "\$200.00" and "9300.00." He says the signature "Gerald A. McElligott" attached thereto is not his handwriting. 10

The defendant, Ellen McElligott, identified her signature to both papers. She says that when Mr. Monahan came to the house (which was after the price for the property had been agreed upon by all parties), "I told him that my husband had left a receipt for that \$200, which they were to deliver the night before. Mr. McElligott left it because I didn't know what Mr. Monahan's first name was, I filled in the 'Patrick Monahan' and when Mr. Monahan showed me his receipt—I showed him the receipt I had, he also handed me this. (Indicating the agreement to sell prepared by the bank.) I read it over and asked him why their names was on the receipt. He said that the bank wanted their names on there. He said that they wanted them on there as they were on their deed. * * * I said, 'Well, you don't need my husband's signature on the receipt for \$200. My husband's signature is not necessary.' He said, 'I don't know. All I know is the bank asked me.' He said 'Aren't both your names on your deed?' And I said, 'Yes, they are.' And then I told him I would put my husband's name on here." 20 30 40

Opinion.

Mrs. McElligott says that she and her husband were going to move to Massachusetts and that she went up to Massachusetts to look for a place and told complainants, "I would try to let them have it by July 1st, if possible." She also says that her husband wrote everything in the receipt except the words "Patrick Monahan" and that the receipt had been written out at the time she put the ad in the paper "in case anybody came in and took the property", and that her husband filled in the purchase price and the amount of deposit later. In reply to the Court's question, "So that your husband had agreed all the time to sell it at that price?" She answered "That is right." And to another question "He authorized you to sign and take the deposit for anybody that wanted to buy?" the witness replied, "That is right, your Honor."

Mr. McElligott said that all he wanted was time until September to remove from the premises, and when asked "Well, now September had gone and passed, and that was all you wanted; you wanted to stay until September?" he replied, "That is right, your Honor." "Why don't you want to give the title now?" "Just because this has caused so much of a fuss in between and Mrs. McElligott has become so terribly upset about the whole thing that I do not care to go through with the deal."

The proof clearly establishes that the minds of the parties met in every essential detail requisite for the making of a valid contract for the sale of real property. The defendants wanted to sell and move elsewhere. Complainants agreed to buy. The deposit and the price was agreed to in conferences between complainants and both defendants. When the deposit was paid, the evidence makes it clear that the wife had authority from her hus-

Opinion.

band to hand over a receipt prepared by him and left with her for the express purpose of issuing it to the complainants. I hold that the receipt of itself was sufficient to bind the parties and that the circumstances here are such that it may be reasonably inferred that the wife had authority from her husband to affix his signature thereto as well as to the agreement of sale prepared by the bank, and that she was his agent for that purpose. Moreover, that McElligott in conversation with the complainant Monahan, ratified and confirmed such authority in his wife. 10

In *Lindley et al. v. Keim et al.*, 54 N. J. Eq. 418, 34 A, 1073, it was said:

“* * * The learned vice-chancellor laid down three propositions which he applied in the trial of this cause, the correctness of which has not been, and, I think, could not be, successfully contested. The first proposition is that authority to sign a memorandum of agreement for the sale of lands may be conferred by parol, and authority so conferred will satisfy the provisions of our statute of frauds. In some states the statute of frauds has been extended so as to require that such authority shall be exhibited by writing. *Reid St. Fr.* §380. But our statute has never been thus extended, and it needs no citation of authorities to show that the construction of the statute from which ours was taken, and which construction we follow, has been, however inconsistent with its general purpose, that authority to sign a memorandum of agreement for the sale of lands (which is required to be in writing) need not be conferred by writing, but may be conferred by parol. But obviously courts should require proofs of authority con- 20 30 40

Opinion.

ferred by parol in such case to be clear and decisive, or the wholesome provisions of the statute of frauds may be thus evaded.

10 “The second proposition was that such authority to sign an agreement for the sale of land could be established either by proof that it had been expressly conferred, or by proof of circumstances from which its grant may be reasonably inferred.

20 “The last proposition was that a signature for another to such an agreement, if done without antecedent authority, expressly or impliedly conferred, may be ratified by the person for whom the signature was made, and that such ratification would establish authority to make it as effectually as proof that such authority had been expressly conferred
* * *

A memorandum of a contract for the sale of land complies with the statute of frauds, though it does not in terms state an agreement to sell, if from a consideration of the whole memorandum it may be gathered that it is the intention of one party to convey and the other party to purchase. *Wollenburg v. Rynar*, 96 N. J. Eq. 38, 124 A. 361; *Bateman v. Riley*, 72 N. J. Eq. 316, 73 A. 1006.

30 The defendant McElligott prepared and wrote the receipt for the deposit which the complainants received. Upon the theory that all persons are inherently honest, it must be presumed that he intended to carry out his agreement. He will in good equity be held to have so intended and bargained.

40 The receipt and the agreement read together form a complete contract in which is set forth the amount of deposit, the purchase price and the de-

Opinion.

scription of the property, and where the time for passing title is not fixed, the contract will be construed to provide for the delivery of the deed on demand, within a reasonable time, accompanied by a tender of the balance of the purchase price. *Reynolds v. O'Neil*, 26 N. J. Eq. 223, 225.

In the instant case it is admitted that legal tender for the balance of the purchase price was made. The agreement meets the requirements of the law as announced in the cases. But even if it were not a complete written contract it is a sufficient memorandum of an oral agreement to satisfy the statute of frauds. *Celendano v. Blazejewski*, 98 N. J. Eq. 45, 129 A. 708. 10

No legal obstacle is here perceived to the enforcement of the agreement and there will be a decree for specific performance. 20

30

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Final Decree.

IN CHANCERY OF NEW JERSEY.

148-162.

10

Between

PATRICK MONAHAN and
 NORA C. MONAHAN,
 Complainants,

and

GERALD A. McELLIOTT and
 ELLEN McELLIOTT, his wife,
 Defendants.

On Bill, &c.
 Final Decree.

20

30 This cause coming on to be heard in the presence of Walter H. Flaherty, Esquire, solicitor of the complainants, Patrick Monahan and Nora C. Monahan, and Emanuel Wagner, Esquire, solicitor of the defendants, Gerald A. McElligott and Ellen McElligott, his wife, and the Court having examined the pleadings and having taken proofs orally and in open Court, and having heard and considered the argument of counsel thereon, and it appearing to the satisfaction of the Court that on the 25th day of April, 1944, the defendants, Gerald A. McElligott and Ellen McElligott, his wife, entered into a contract in writing whereby they agreed to convey to the said complainants for the sum of \$9300.00 all those certain lands and premises known as #701 Woodlawn Avenue, Roselle Park, New Jersey, and that \$200.00 was duly paid by said complainants to the said defendants upon the execution and delivery of said agreement,

40

Final Decree.

and the Court being of the opinion that the complainants are entitled to the specific performance of said contract as prayed, it is thereupon, on this 20th day of November, 1944,

ORDERED, ADJUDGED AND DECREED that the said agreement be specifically performed by said defendants and that the defendants, Gerald A. McElligott and Ellen McElligott, his wife, do make, execute and acknowledge in due form of law and deliver to the complainants on the 27th day of November, 1944, between the hours of two o'clock and four o'clock in the afternoon, at the office of Walter H. Flaherty, counsellor-at-law, #1210 East Grand Street, Elizabeth, New Jersey, a good and sufficient deed of conveyance, with the exception that taxes be apportioned as of the date of closing of title, in accordance with the statute in such case made and provided, all that lot, tract or parcel of land, situate, lying and being in the Borough of Roselle Park, in the County of Union and State of New Jersey, more particularly described as follows:

Being the southwesterly 40 feet of those 5 lots being known, numbered and designated as lots 1 to 5, both inclusive, Block 26, as shown on a certain map entitled "Map of property of City Realty Company, Roselle Park, New Jersey, 1907", and filed in the Register's office of Union County, N. J., as Map #71 C.

Being known and designated as #701 Woodlawn Avenue, Roselle Park, New Jersey

and deliver at the same time to the said Patrick Monahan and Nora C. Monahan, possession of said lands and premises; and it is further

Final Decree.

ORDERED that said complainants pay to the said defendants, at the time of passing of title, the sum of \$9100.00, being the balance due from the said complainants to the said defendants in accordance with the terms of said agreement, after deducting therefrom the payment of \$200.00 made by them on account thereof at the time of the execution of said agreement; and it is further

ORDERED that the said defendants pay to the said complainants the costs of these proceedings to be taxed, in which shall be included a counsel fee of \$100.00, which is hereby allowed to the said complainants, and which costs are hereby directed to be paid by said defendants to said complainants, and in the event same are not paid before the date of closing of title, the same shall be deducted from the purchase price to be paid at the closing of title in accordance with this Decree.

It is further ORDERED that true copies of this Decree and of said taxed costs, which may be certified as being true copies by the solicitor of the complainants, be served upon the defendants or their solicitor, Emanuel Wagner, within three days from the date hereof.

Respectfully advised:

ALFRED A. STEIN,
V.-C.

LUTHER A. CAMPBELL,
C.

Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

Between

PATRICK MONAHAN and
NORA C. MONAHAN,
Complainants,

and

GERALD A. McELLIOTT and
ELLEN McELLIOTT, his wife,
Defendants.

10

On Bill, etc.
Notice of
Appeal.

TAKE NOTICE that Gerald A. McElligott and Ellen McElligott, the defendants, appeal from the final decree made in the above entitled cause on November 27, 1944 to the Court of Errors and Appeals of New Jersey, which final decree was made by the Chancellor on the advice of Vice-Chancellor Alfred A. Stein.

20

Dated: January 4, 1945.

EMANUEL WAGNER,
Solicitor for and of Counsel
with Defendants.

30

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

EMANUEL WAGNER,
Of Counsel with Defendants.

Service of a copy of the within Notice of Appeal acknowledged this 8th day of January, 1945.

WALTER H. FLAHERTY,
Solicitor for and of Counsel
with Complainants.

40

Petition of Appeal.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10 PATRICK MONAHAN and
 NORA C. MONAHAN,
 Complainants-Appellees,

 vs.

 GERALD A. McELDIGOTT and
 ELLEN McELDIGOTT,
 Defendants-Appellants.

On Appeal from
the Court of
Chancery.

Petition of
Appeal.

20 *To the Honorable the Court of Errors and Ap-
 peals in the Last Resort in All Causes:*

The petition of Gerald A. McElligott and Ellen McElligott, the appellants in the above entitled cause, respectfully shows that:

30 Petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor Luther A. Campbell, Chancellor of the State of New Jersey, bearing date November 27, 1944, in a certain cause in said Court of Chancery wherein the said Patrick Monahan and Nora C. Monahan were complainants and the said Gerald A. McElligott and Ellen McElligott were defendants, in this respect, to wit, that the said decree adjudges that the petitioners specifically perform a purported agreement for the sale of lands, dated April 25, 1944, by conveying to the complainants the lands therein mentioned.

40 And petitioners appeal from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that:

Petition of Appeal.

1. The defendants have an estate by the entirety in the lands mentioned in paragraph 1 of the bill of complaint and have had such estate by the entirety since the year 1931. The defendant Gerald A. McElligott did not sign the papers known as Schedules "A" and "B" annexed to the bill of complaint and upon which complainants rely, nor did he lawfully authorize his name to be signed thereto. 10

2. The defendant Gerald A. McElligott did not sign any memorandum or note thereof or any agreement relating to the sale of said lands, nor did he lawfully authorize any other person to sign the same for him.

3. Said schedules "A" and "B" do not constitute a valid agreement for the sale of said lands. 20

4. Said schedules "A" and "B" were signed by the defendant Ellen McElligott in contemplation of the drawing of a formal contract.

5. Said schedule "A" does not constitute a valid agreement for the sale of lands because it is incomplete in its terms, in that it does not fix a time for delivery of a deed and giving up possession of the lands. 30

6. Said schedule "A" is merely a deposit receipt.

7. Time of delivery of possession was a contemplated condition of sale and the purported agreement was silent thereon. Parol evidence could not be used for the purpose of showing when possession of said lands was to be delivered. 40

Petition of Appeal.

8. The Court erred in not permitting in evidence a draft of a formal written agreement drawn at the request of the appellants, which fixed September 1, 1944 as the time for delivery of possession.

10 9. The bill of complaint should have been dismissed on the testimony adduced before the Court.

Petitioners therefore pray that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden, and that petitioners may have such other relief in the premises as to this court shall deem proper.

20

EMANUEL WAGNER,
Solicitor for and of Counsel
with Appellants.

30

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Testimony.

IN CHANCERY OF NEW JERSEY.

November 13, 1944.

Between

PATRICK MONAHAN and
NORA C. MONAHAN,
Complainants,

and

GERALD A. McELIGOTT and
ELLEN McELIGOTT,
Defendants.

Testimony.

10

20

Transcript of shorthand notes of testimony taken in the above entitled cause before his Honor, ALFRED A. STEIN, Vice-Chancellor, at the Chancery Chambers, Elizabeth, New Jersey, in the presence of Walter H. Flaherty, Esq., for complainants; Emanuel Wagner, Esq., for defendants.

The Court: Are you ready to go on?

Mr. Flaherty: Yes, your Honor.

Mr. Wagner: Sorry to have delayed your Honor.

Mr. Flaherty: If your Honor please, I have a man here from the F. H. A., and he has informed me—or, rather, informed my associate that he is quite busy over in Newark with some personal matters, and he asked me if I wouldn't ask the Court to allow him to be put on out of the usual order.

30

40

Richard S. Whitesell, for Complainants—Direct.

The Court: Well, we are usually busy, too, but we will put him on. Every witness who comes to court is a busy man.

Mr. Flaherty: Will you take the stand, Mr. Whitesell?

10

RICHARD S. WHITESELL, called as witness on behalf of the complainant, being duly sworn according to law on his oath testified as follows:

Direct examination by Mr. Flaherty:

Q. Mr. Whitesell, where do you reside? A. I reside in Seagirt, New Jersey.

20 Q. And where are you employed? A. I am employed by the Federal Housing Administration in the Newark office.

Q. And you were employed there in March or April of this year? A. I was.

Q. In what capacity? A. The executive assistant of the State Director.

Q. Do you know whether or not an application was made by Patrick Monahan and Nora Monahan to the Central Home Trust Company for a mortgage loan? A. There was.

30 Q. And does the Central Home Trust Company operate through a housing committee? A. They are an approved mortgagee of the Federal Housing Administration.

Q. And when was the application made, sir? A. The application was received in the office on the 3rd day of May, 1944.

Q. Is the application dated, sir? A. The application is executed on April the 28th, 1944.

40 Q. Now, was there any contract or receipt delivered to your organization, signed by either Patrick Monahan or Nora Monahan or the defendant,

Richard S. Whitesell, for Complainants—Direct.

Gerald McElligott and Ellen McElligott? A. There is a receipt signed by a Gerald A. and Ellen McElligott, yes.

Q. May I see that receipt, sir? Can that be taken out, sir? A. It can be (handing paper to counsel).

Mr. Flaherty: I ask that this be marked for identification, if your Honor please. 10

(Receipt above referred to marked Identification C-1.)

By Mr. Flaherty:

Q. Now, do you also have the application, sir?

A. There is an application in the binder there.

Q. May I have it, sir? A. (Witness produces paper.) 20

Q. That is the application for the loan? A. The application for the loan is here, sir. Do you wish this removed from the binder?

Q. Yes, so I can offer it for identification.

The Witness: If the Court please, I would like to have the whole file admitted so it can be mailed, and kept intact.

Mr. Wagner: Very good.

The Court: You are offering what now? 30

Mr. Flaherty: Yes. I am offering the application for identification.

He has asked the privilege of offering the whole binder so it can be kept intact.

The Court: Can't you admit this application for the loan was made and the loan granted?

Mr. Wagner: If the witness says the loan was applied for, I will admit it. I was not consulted on this. 40

The Court: Was the loan granted?

Patrick Monahan, for Complainants—Direct.

Q. Was there a commitment? A. There was a commitment issued.

Q. Do you know if the loan was granted? A. I don't know. That would be the function of the mortgagee.

10 The Court: It is admitted there was an application for a loan.

Mr. Flaherty: The dates, if your Honor please, I mentioned were April 28th—

The Court: All right. And you can let him take these things back with him.

Mr. Flaherty: Well, no, I will need this here.

The Court: Well, that is the agreement?

Mr. Flaherty: That is right.

20 The Court: The proposed agreement.

Mr. Flaherty: That is right.

I don't know of anything else to ask this man.

Mr. Wagner: No questions.

The Court: That is all. That part of your file I won't be responsible for. You look to Mr. Flaherty for it.

The Witness: I think it is identified. The number is stamped on it.

30 Mr. Flaherty: Yes, it is.

The Witness: All right. That will be fine.

Mr. Flaherty: Mr. Monahan.

PATRICK MONAHAN, called as a witness on behalf of the complainants, being duly sworn according to law on his oath testified as follows:

40 *Direct examination by Mr. Flaherty:*

Q. Mr. Monahan, you are one of the complainants in this matter? A. That is right, sir.

Patrick Monahan, for Complainants—Direct.

Q. Speak up so the Court and counsel can hear you. Where do you reside? A. 155 Butler Avenue, Roselle Park.

Q. How long have you resided there? A. Seven years.

Q. Nora Monahan is your wife? A. That is right, sir. 10

Q. Now, in and about the beginning of March, 1944, did there come to your attention the fact that a house was for sale in Roselle Park? A. Yes, sir.

Q. And by what means did that come to your attention? A. Through an ad in the Elizabeth Daily Journal.

Q. And, as a result of that ad, did you or your wife get in touch with the defendants in this matter? A. My wife, sir, got in touch. 20

Q. And, as a result of anything that took place between your wife and Mr. or Mrs. McElligott, did you subsequently see Mr. and Mrs. McElligott? A. That is right, sir.

Q. And can you tell the Court approximately when it was that you first spoke with either or both of the defendants? A. Well I spoke with the defendants on March—in March, on the first occasion. That was in the night time.

Q. And how long was it after you noticed it in the newspaper? A. Well, I had noticed that in the newspaper a day or so ahead of that. 30

Q. And where did you go? A. Well, my wife called the telephone number that was in the ad and the party answered from the other side and they gave the house number and gave directions how to get there. So we got there. I got in my car and I drove over there.

Q. Who did you see? A. I saw Mr. and Mrs. McElligott. 40

Patrick Monahan, for Complainants—Direct.

Q. Did you talk with them? A. Yes, sir.

Q. What did you talk about? A. I asked them if they would show me around. And Mrs. McElligott showed me around.

10 Q. What did you talk to him about, first? A. About the property, what they wanted.

Q. What did you say to him about the property? A. I asked him how much they wanted for the property.

Q. Did Mr. or Mrs. or both parties respond? A. Mrs. McElligott responded that time.

Q. What did she say? A. She said she wanted \$9,600 for the property.

20 Q. What did Mr. McElligott say? A. Mr. McElligott didn't have nothing to say that night. He was going out, so he left me with Mrs. McElligott. And he said "Mrs. McElligott will take care of you." And that is all.

Q. Where was your wife? A. My wife was with me.

Q. And did you look around the premises? A. That is right.

30 Q. And afterwards what did you do? Did you leave the place? A. I left the place. But I stayed talking with Mrs. McElligott quite a while after Mr. McElligott left.

Q. What did you talk about? A. The property. We were talking about the property: how much was the taxes, and different questions on the property; how much.—they had a loan on the property, and all details.

Q. Did you make an offer? A. Yes, I made an offer of \$9,000 that night.

40 Q. And what was Mrs. McElligott's attitude towards that? A. Well, Mrs. McElligott's attitude was she said there was a party on the street was

Patrick Monahan, for Complainants—Direct.

willing to give \$9,000 for the house, but they wouldn't sell it for that price.

Q. Did you leave the house then? A. That is right, sir.

Q. Did you return any other time? A. Yes, I returned about three nights after.

Q. Were you alone or with your wife? A. My wife was with me. 10

Q. And who did you see on this occasion? A. I see Mr. and Mrs. McElligott.

Q. And what did you talk about on this occasion? A. Talked about the—mostly, the same things we had been through.

Q. Did you talk about price? A. Yes, sir. I asked the price, and Mr. McElligott said, "Well," he said, "Mrs. McElligott has showed you around. You have seen everything now. Now," he said, "I think I will do the talking tonight." 20

Q. And what did he say to you then? A. I asked him the price. First, I asked if the house was for sale and he said, "Yes." So we were talking there quite a little while and I asked him about the taxes, how much they were, and about the paving of this street, and different questions in respect to the property. So I asked if he could do any better with the price. He said, "Yes, being we know you, we will get it down to nine thousand four hundred." 30

Q. And what did you offer? A. I offered him ninety-two.

Q. Then what was the next thing that occurred? A. Well, the next thing that occurred, then, I got up and was getting ready to go home. So, before I left for home, I said, "There is only two hundred between us." I said I would give him ninety-three hundred.

Q. What did he say? A. So he let me go. 40

Patrick Monahan, for Complainants—Direct.

Q. What did Mrs. McElligott say? A. Mrs. McElligott was sitting on a chair. She didn't say nothing.

Q. Did you and your wife then leave? A. That is right.

10 Q. When did you next see either or both of these parties? A. Well, I didn't see either of the parties, I would say, in the neighborhood of three weeks, and I went back this night, I rang the doorbell and Mrs. McElligott came to the door. I asked if she had her property sold. And she said, "No. Come on in." So I asked her if she would mind if I took a look around once more. She said "O. K." So she took me around. And I asked her if the price was still the same. And she said, "No. Mr. McElligott and myself have agreed to give you
20 the property at \$9,300. That is the price." So then I asked her what deposit she wanted, and she said \$200.

Q. And what did you say? A. I told her, "Well, I don't have that much money with me tonight", but the next night, I said, I would be there with the deposit.

Q. And did you leave there then? A. Left there then.

30 Q. Was there anyone with you on that occasion, or were you alone, or was your wife with you? A. My wife was with me.

Q. Now, then, the next day, did you return with the \$200? A. The next day I told my wife to go to the bank and get me the money. So that same day—

The Court: Did you return with the money? was the question.

The Witness: Not the next day.

Patrick Monahan, for Complainants—Direct.

Q. What happened that day and why didn't you return? A. My wife called Mrs. McElligott up the next day.

Q. And, as a result of what was said between your wife and Mrs. McElligott, why didn't you go there that night? A. A storm came up that night and I couldn't—and Mr. McElligott had to go out. 10

Q. That is the night you were supposed to return? A. That is right.

Q. And Mr. McElligott had to go out? A. He went out to dinner.

Q. Then did you go there the next day after that? A. Yes, the next day I went there. I took off from work and went there.

Q. And what time did you arrive there? A. I arrived there at—I arrived there about twelve-thirty. 20

Q. And whom did you see? A. I seen nobody at that time.

Q. Well, did you see somebody after that time? A. Yes, I see Mrs. McElligott at about half-past four or five o'clock.

Q. And did you talk with her? A. That is right.

Q. What did she say to you and you say to her? A. I handed her the deposit. And she says "Well, Mr. McElligott" she says, "has a copy made out here for this deposit." So I said, "I have got two also, which I had made up by the bank." 30

Q. What bank did you refer to? A. The Central Home Trust. So—

Q. What did you do then? A. I handed her the deposit and I said, "You will have to sign those." She said "That is"—she said, "Yes, I will sign them." I said, "Mr. McElligott has to sign them, too." "Well," she said, "Mr. McElligott has given me power of attorney that I can handle the situation." 40

Patrick Monahan, for Complainants—Direct.

Q. And what did you say to her? A. Well, I said "I think Mr. McElligott should sign them anyway."

Q. And what did she say? A. And she replied she had power of attorney.

10 Q. And what did she do then? A. She signed them.

Q. Did she sign the copies that she had already made up? A. She signed the copies—she signed the copies that Mr. and Mrs. McElligott made up and she signed the copies that I had made up.

Q. I show you Identification C-1 and ask you if that is the paper you referred to as being signed by Mrs. McElligott. A. That is the one.

20 Q. And she signed that not only in her own name but also the name of— A. Mr. McElligott. Q. —her husband. I notice there is some other writing in there. Is that your handwriting, sir? A. No.

Mr. Flaherty: I want to offer that. Do you want to see it?

Mr. Wagner: Yes.

Mr. Flaherty: I didn't offer it in evidence yet.

By Mr. Flaherty:

30 Q. Now, Mr. Monahan, I show you another paper and ask you if that is the one you had prepared. A. Yes, this is the one I had prepared.

Q. And does that bear your signature? A. That is right.

Q. Does it bear the signature of your wife? A. That is right.

Q. And who are the other two named? A. Gerald A. McElligott and Ellen McElligott.

40 Q. And who wrote those in there? A. Mrs. McElligott.

Patrick Monahan, for Complainants—Direct.

The Court: Now, these papers are not distinguishable on the record.

Mr. Flaherty: Not as yet, your Honor.

The Court: Well, they should be now.

Mr. Flaherty: Yes. Well, I am going to mark this copy in evidence. I ask this copy be marked in evidence. 10

The Court: You say "this"?

Mr. Flaherty: This.

The Court: The first one has been marked?

Mr. Flaherty: The first one has been marked. I already identified that in the record as C-1.

Now, this one I am offering in evidence as being the contract he had prepared through the bank. 20

The Court: Objection?

Mr. Wagner: May I see it?

The Court: Wait a minute.

(Paper handed to Mr. Wagner.)

Mr. Wagner: I suppose I could object to it on the ground that there is no proof of authority of Mrs. McElligott to sign Mr. McElligott's name, but I would like to have the whole case before the Court. There is nothing to conceal. 30

The Court: Offer it.

(Contract above referred to marked Exhibit C-2 11/13/44.)

The Court: Do you offer the other one?

Mr. Flaherty: I offer in evidence, if your Honor please, C-1 for identification.

(Paper formerly C-1 for identification now marked Exhibit C-1.)

The Court: All right. 40

Patrick Monahan, for Complainants—Direct.

By Mr. Flaherty:

Q. Now, as a result of Mrs. McElligott's having signed Exhibits C-1 and C-2, Exhibit C-1 being the one that she had prepared and Exhibit C-2 the one that you prepared, did you deposit the \$200? A. That is right.

10 Q. Now, prior to this particular date, or on that date when it was signed, did you make application for a mortgage? A. The same day.

Q. With what company? A. With the Central Home Trust.

Q. What amount did you ask for? A. I asked for \$2,000.

Q. That was on April the 25th? A. Yes, around that time.

20 Q. And did you subsequently see Mr. McElligott and Mrs. McElligott? Did you see them after that date? A. Yes, after that.

Q. About how long after the date when you gave the \$200, did you see either or both of these parties? A. Well, I didn't see them—I see them one Sunday in their automobile but I wasn't speaking with them.

Q. I mean, to talk to. A. To talk to, I would say, in the neighborhood of fifteen or sixteen days.

30 Q. What was the occasion for your going to see Mr. and Mrs. McElligott, or both of them? A. The occasion was I received a letter from the Central Home Trust Company in reference to the deed of the property 701 Woodlawn Avenue.

Q. I show you a letter of the Central Home Trust Company and ask you if that is the one you referred to. A. That is the one.

Q. That is dated what, sir? A. May 17th.

40 (Paper handed by Mr. Flaherty to Mr. Wagner.)

Patrick Monahan, for Complainants—Direct.

Mr. Flaherty: I offer it in evidence, if your Honor please.

(Letter of Central Home Trust Company dated May 17 above referred to marked Exhibit C-3 11/13/44.)

Mr. Flaherty: I would like to show your Honor this. 10

(Handing Exhibit C-3 to Court.)

By Mr. Flaherty:

Q. Now, when you received this letter, marked Exhibit 3, from the Central Home Trust Company, what did you do? A. I took it over to the McElligott's home.

Q. And whom did you see? A. I see Mr. McElligott. 20

Q. Did you talk with him? A. Yes, I did.

Q. What did you talk to him about? A. I handed him this letter and I said, "This is from the bank in reference to the deed. "Now," I says, "I would like to get that deed down to the bank." So he said, "Well, Mrs. McElligott isn't home and I don't exactly know where to lay my hands on the deed, which the deed is in the house. As soon as Mrs. McElligott gets home from her trip, I will see the deed gets to the bank." 30

Q. He did say that? A. That is right.

Q. Did he say anything about not giving her the power or authority to sign a receipt or a contract or a—

The Court: What is the use of asking him about something he did not say?

Mr. Flaherty: I withdraw that.

The Court: Ask him what he did say. 40

Patrick Monahan, for Complainants—Direct.

By Mr. Flaherty:

10 Q. What else did he say? A. Well, I told him then, I says, "I had my house sold and these people just pulled out." I showed him that letter. I didn't have enough money for a down payment. So I said, "I will have to get a little more mortgage," for the same reason. I said, "How much mortgage do you really think I could get here?" "Well," he says, "I don't see— You can get plenty of mortgagees. You can get at least six or seven thousand dollars." "After all," I said, "I don't need that much. I am only paying ninety-three hundred for this place. I don't really need that much. If I could get five thousand, that is all I would need."

20 Q. What did he say? A. Well, he said, "You will get that easily enough."

Q. Now, did you go inside or did you— A. No.

Q. —leave the place then? A. I left the place and didn't go inside.

Q. Now, you say he mentioned something about his wife returning and the deed would be brought back?. A. He said his deed would be returned on Monday.

30 Q. When did you next see Mr. or Mrs. McElligott? A. I next went to see Mr. and Mrs. McElligott, I would say, three or four days after.

Q. And what was the occasion for your going there then? A. The occasion was in reference to that deed getting to the bank.

Q. Whom did you see at that time? A. I seen Mr. and Mrs. McElligott.

40 Q. What did you say and what did they say to you? A. I asked them if the deed had been sent to the bank, and they said, no. So I asked them when they intended sending it, and they said, as soon as they had a chance they would send it over.

Patrick Monahan, for Complainants—Direct.

Q. What else was said? A. So then Mrs. McElligott says "Well, we can't find a place where we were supposed to go. I have just come back, and I can show you some letters where the real estate people we have cannot furnish places for us," and they asked me if I could give them until the 1st of September. 10

Q. Up to this time, what was the understanding between you and McElligott as to when this title was to close? A. July the 1st.

Q. Well, now, what was said then? A. It was said at that time "That was your last agreement."

Q. Well, I mean, you mentioned they said they wanted to close— A. They said they wanted until September 1st, and I said I would have to think about giving them until September 1st. So, of course, I didn't really know how I stood at the time, so I didn't say yes or no. So, when I was leaving, Mrs. McElligott said, if I wasn't satisfied with September the 1st, that she would get her call in and if that wasn't satisfactory to me, I could have my deposit back. 20

Q. And what did you say? A. Well, I said I couldn't see why I should take my deposit back.

Q. Did you tell her that you had already made application for a mortgage? A. She already knew I had made application for a mortgage. 30

Q. How did she know that? A. Because I had told Mr. McElligott I had application made for it.

Q. Well, did you leave there that night, then, Mr. Monahan? A. Yes, sir.

Q. Was there anything else said, now, that you can recall, that night? A. There was nothing else said that night, no.

Q. When did you next see Mr. or Mrs. McElligott? A. About two days after. 40

Patrick Monahan, for Complainants—Direct.

Q. And what was the occasion for your going there then? A. The occasion was still that deed.

Q. And what happened then? A. I asked him again if anything had been done about the deed, and he said, "No, we haven't sent it down yet." So he said "If we are going to go until
10 September 1st," he said—I asked him—no. He said to me, "If you want September the 1st," he said, "for title," he said, "we will have to get into a new contract."

Q. What was said then? A. So—well, I said, "If it is going to be like this, I have got to turn it over to my lawyer."

Q. Is this the first time a new contract was mentioned? A. That is the first time.

Q. What was mentioned then? Tell us in detail. A. He mentioned we would have to get into
20 a new contract and see his lawyer and in two days he would notify me with reference to the contract. Two days went by. He never notified me. I finally had to make this trip and go back to him again and ask him what he intended to do.

Q. What was his statement then? A. His statement then was—I asked him if he had seen his lawyer. He goes inside and he says "I will call my lawyer up." And he says, "He is in town."
30 So, when he came out, the excuse he gave me was that his lawyer was out.

Q. What was the next thing? A. That left that out that night. Then I had to go back again.

Q. How long afterwards did you go back? A. I would say, about three times.

Q. Whom did you see then? A. I seen Mr. and Mrs. McElligott again.

Q. What was said by them and what was said by you with reference to the property? A. I
40 asked him what he had done in reference to this

Patrick Monahan, for Complainants—Direct.

new contract he wanted drawn, and he said, "Well, there will be nothing in the new contract", he said, "only the one item that will be in there, you will have to put up another thousand dollars as a down payment."

Q. Was there anything originally said, either by Mr. McElligott or Mrs. McElligott, about an additional thousand dollars, or is this the first time you heard about it? A. That is the first time. 10

Q. Then what did you say and what did they say to you? A. Well, I said to him, "In that case, if I have to put down an additional thousand dollars, I am going to turn over this case to my lawyer." So, in the meantime, I sent my wife down to see Judge Tally, which she did. She went down to see Judge Tally, and she said to Judge Tally, "Judge Tally"—— 20

Mr. Wagner: I——

Q. Just a minute. As a result of what your wife told you that Judge Tally had told her, what did you do then? Do not tell us any conversation with Judge Tally and your wife. A. Well, I had to go see Mr. McElligott that night to make arrangements to meet at Judge Tally's office or in Mr. McElligott's lawyer's office. 30

Q. What did Mr. and Mrs. McElligott tell you? A. They told me they would call Judge Tally in reference to the balance.

Q. The next thing was what, sir? A. The next thing I had was a letter from Mr. Krauss.

Q. I show you a letter dated May 31, 1944, from Nathan Krauss, and ask you if that is the letter you received from him? A. Yes, this is the letter. 40

Patrick Monahan, for Complainants—Direct.

Mr. Flaherty: I offer this in evidence, if your Honor please.

(Letter above referred to, dated May 31, 1944, marked Exhibit C-4 11/13/44.)

10 (Mr. Flaherty hands Exhibit C-4 to Court.)

By Mr. Flaherty:

Q. Now, you mentioned something about a trip that Mrs. McElligott had made to Boston and what she would do when she came back. Going back to the original conversation you had with both these parties, Mr. and Mrs. McElligott, was there any reason stated as to why they were selling their home? A. The reason was he was moving out of the home. He stated that right in the ad in the paper, which I got from the clerk.

20

Q. The ad did state that? A. I believe it did.

Q. Now, after you received the letter from Mr. Krauss, did you then receive another letter—

Mr. Flaherty: I withdraw that question.

Q. Did you then make up and sign a paper, making time of the essence as to the closing of title?

30 A date?

The Court: I think that can be agreed upon. Counsel agrees that letter was forwarded.

Mr. Wagner: Yes.

The Court: Copy is annexed to the bill of complaint.

By Mr. Flaherty:

40 Q. Now, Mr. Monahan, in any of the conversations you had with Mr. McElligott, after you had

Patrick Monahan, for Complainants—Cross.

received the contract or the receipt from Mrs. McElligott, was there anything ever mentioned by him that his wife did not have authority to sign for him, or anything like that? A. No.

Q. Was the price agreed between you and Mr. McElligott? A. That is right.

Q. And you mentioned, I think, in your conversation, when you went up on the date of the mortgage—the date you received the letter about the deed, rather, that you were paying \$9,300 for the property? A. That is right. 10

Q. Was there anything said by Mrs. McElligott with reference to that? A. No.

Q. Now, you have made a tender. That is, you had money with you on the date, I think it was July 31st—the 31st of July, 1944, between three-thirty and four-thirty P. M. Did you have the necessary cash with you in order to effect the tender, proper tender? A. That is right. 20

Q. For the deed? A. That is right.

Q. You are still willing to pay the balance of \$9,100? A. That is right.

Mr. Flaherty: I think that is all.

Cross examination by Mr. Wagner:

Q. Mr. Monahan, just to get a few dates in my mind straight: You say that you first came to the McElligott home in response to the ad, one evening in March. Is that correct? A. That is correct. 30

Q. And then you returned three nights later. Is that correct? A. That is right.

Q. Then three weeks went by and then one night you came back again. Is that right? A. That is right.

Q. And then you said you would be there the next night. Is that so? A. That is so. 40

Patrick Monahan, for Complainants—Cross.

Q. And you did not return the next night because the McElligott's were not home. Then you took off from work the next day and went there about twelve-thirty? A. That is right.

Q. Is that correct? A. That is correct.

10 Q. You came back that afternoon between four and five in the afternoon. Is that so? A. That is right.

Q. And then you called again about May 17, which was the time you received a letter from the Central Home Trust Company about the mortgage? A. That was right.

Q. Was that in the evening you called? A. No.

20 Q. When was that? A. I didn't call that evening.

Q. No. I mean, did you call at their home that evening, talking about this deed? A. That is right.

Q. You said you wanted the deed? A. That is right.

Q. That was at night? A. At night.

Q. About May 17? A. About that time.

30 Q. Yes. And then you next saw Mr. and Mrs. McElligott about three or four days later, and you again asked them about the deed. Is that right? A. That is right.

Q. And that was at night time, was it? A. That was at night time, yes, sir.

Q. And then you next saw them about two days afterwards. Is that correct? A. That is right.

Q. And that was at night time. A. At night time, yes.

Q. And you went back again after that, and that was at night, too, wasn't it? A. All at night.

40 Q. All at night? A. All at night.

Patrick Monahan, for Complainants—Cross.

Q. So that every time you were at McElligott's home, it was at night time, except the one time when those papers were signed. Is that correct?

A. That is correct.

Q. Now, you say that this—

Mr. Wagner: May I see those exhibits, your Honor? 10

The Court: Here they are.

Mr. Wagner: Oh.

(Mr. Wagner gets papers from Court's desk.)

By Mr. Wagner:

Q. I show you Exhibit C-1—C-2, which is dated April 25, 1944, and reads: "I hereby agree to sell my property at 701 Woodlawn Avenue, Roselle Park to Patrick Monahan and Nora C. Monahan for the sum of \$9300. I hereby acknowledge receipt of the sum of \$200, balance of \$9100 to be paid at the closing of the transaction." Now, you say that was prepared by the Central Home Trust Company? A. That is right. 20

Q. Who in the Central Home Trust Company prepared that? A. The teller. She was there in the mortgage department. 30

Q. Is she here in court? A. No.

Q. Who prepared Exhibit C-1, which is a receipt for the \$200? A. That was handed by Mrs. McElligott to me.

Q. At her home? A. At her home.

Q. In Roselle? A. Yes.

Q. Now, you work during the day, don't you? A. That is right.

Q. And you went to visit the McElligotts about seven or eight times, and every time, except this 40

Patrick Monahan, for Complainants—Cross.

particular time the papers were signed, you called in the evening. Is that right? A. That is right.

Q. You knew where Mr. McElligott worked? A. Sure I did.

Q. Where did he work? A. He worked some place in Kearny, Western Electric, I think.

10 Q. Did you know whether he was usually home evenings? A. Well, I didn't know whether he was usually home evenings, because he was supposed to be back and forth to the place he was to move in Boston.

Q. But you saw him home many evenings that you called there, didn't you? A. That is right.

Q. Why didn't you call on the evening of that day instead of noon or late in the afternoon? A. The reason I called for him is I took off from work
20 that same afternoon to make arrangements for a loan.

Q. You say you had your wife get the money from the bank. A. You are going back to the deposit now?

Q. Yes, I am going back to the deposit. You made arrangements with your wife to get the money from the bank. Is that correct? A. I made arrangements for the deposit, not the mortgage.

30 Q. No. The \$200 that you paid as a deposit, your wife got from the bank. Is that correct? A. That is right.

Q. And you say that was the day she got it, was it? A. No.

Q. When did you get the money, the day before? A. Day before, I believe.

Q. Why didn't you call at their home the night before when you were supposed to bring the \$200? A. My wife called up the home and Mr. McElligott stated they were going out and they would
40

Patrick Monahan, for Complainants—Cross.

be back about nine o'clock. I got there about nine or nine-thirty. Nobody was there.

Q. Did you make arrangements for this loan before you paid the deposit? A. The same day that I paid the deposit I made arrangements.

Q. The same day? A. Yes.

Q. And did you sign the application the same day? A. I am not sure whether I stated that day or not. 10

Q. Did you tell us that day? A. I went to the bank.

Q. Did you make application for a loan? A. That is right.

Q. And did you sign an application for a loan? A. I believe I did that same day.

Q. The same day— A. Yes. 20

Q. —that you signed and made these arrangements? A. That is right.

Q. And whose idea was it that this paper, known as C-2— At whose suggestion was that drawn by one of the persons in the bank? A. That was drawn by the girl that takes care of mortgages. I didn't know who the girl—

The Court: Did you ask her to draw it?

The Witness: I asked—I first told her I would like to have my own lawyer in the situation; I don't want to go into it. She definitely stated there was no need of my lawyer; that their lawyer had to make the search and they would take care of the whole situation. 30

Q. And did this girl draw all the papers herself? A. This girl gave me a written copy with a pencil and I copied that off it.

Q. Oh, so you did that in pencil? A. In pencil. 40

Patrick Monahan, for Complainants—Cross.

Q. So this was not drawn by the girl at all, it was drawn by you? A. That is the copy what she drew.

Q. Where is the copy that she gave you? A. That copy is in the garbage can. What was the use of keeping that, sir?

10 The Court: What are you attempting to show?

Mr. Wagner: I am trying to show this is not a contract and I would like to show the source of it.

The Court: What difference does it make who drew it?

Mr. Wagner: I think it may go to the veracity of the witness. All right.

20 The Court: If this was an agreement, Mr. Wagner, I don't see what you have in this case.

Mr. Wagner: You don't see what we have in this case? Well, your Honor—

The Court: Looking at your answer and looking at your pleadings. Go ahead. Looking at your pleadings and your answer, I don't see it.

Mr. Wagner: Well, I think that—well.

30 By Mr. Wagner:

Q. Is this your signature, "Patrick Monahan"?

A. That is my signature.

Q. And is that "Nora C. Monahan"? A. That is correct.

Q. Now, this says, "I hereby agree to sell my property." Who does that refer to? A. That refers to Mr. Monahan.

40 Q. Mr. Monahan or Mrs. Monahan or both? A. Both.

Patrick Monahan, for Complainants—Cross.

The Court: Won't you let me decide the writing?

Q. You say that you signed this agreement the same day, and you took off that day to make arrangements for the loan. Now, Mr. Whitesell, who had the application, said that that application was dated April 28th, which is three days later. A. That could be possible. I don't know. After all, I just made the application to the bank. That doesn't mean to say it is done the same day. 10

Q. Did you sign the application on the day that you paid the deposit?

The Court: He said he doesn't know. He went down to the bank that day to make arrangements. Whether he signed it that day, he doesn't know. 20

Q. What is a power of attorney, Mr. Monahan, do you know? A. That I don't know. That is why I was giving him the facts, the power of attorney stuff.

Q. You knew that, if Mr. McElligott had an interest in this property, it would be necessary for him to sign an agreement? A. Well, I had already understood that Mrs. McElligott was more or less the agent for the sale of the property, from the way she had been carrying on. 30

Q. But Mr. McElligott spoke to you on a number of occasions? A. That is right.

Q. Didn't Mr. McElligott tell you in the latter part of May his attorney had drawn a formal agreement for you to sign? A. Yes. He told me he would sign it.

Q. Didn't he tell you that on Wednesday evening of May 24? A. May 24? 40

Q. Yes. A. No, sir.

Patrick Monahan, for Complainants—Cross.

Q. When did he tell it to you? A. He told me that just around that time, I believe it was.

Q. May 24. And did he make the appointment?

A. No. I beg to differ with you, not at that date.

Q. When was it? A. That was the day they went back after Mrs. McElligott came back. He didn't mention a contract that night.

Q. When did he mention drawing a formal written contract? A. He mentioned it after I made about three or four different trips to him.

Q. Well, when was that? A. Well, I would say it was in—I would say, maybe, June.

Q. In June? A. Yes.

Q. Didn't you receive a letter dated May 31 from Mr. Krauss, which letter is in evidence, in which he said he expected a formal, written contract to be signed, and asked for an additional thousand dollars? A. Yes, that is right.

Q. So you say, having received that letter in May, you would change your mind as to when he spoke to you about the written contract? A. I are not changing my mind.

Q. You say it was June. A. You got me mixed up in the dates.

Q. I don't want to do that. A. There is so many dates you got me mixed up.

Q. Did he speak to you about a written agreement before Mr. Krauss sent you that letter?

A. Yes, he did.

Q. And did he make an appointment for you to call at his home, you and Mrs. Monahan, the following Friday evening, to sign such an agreement? A. No, sir.

Q. He did not make such an appointment with you? A. No.

Q. Did he make any appointment with you for the signing of the written agreement? A. He

Patrick Monahan, for Complainants—Cross.

made no appointment whatsoever for the signing of the written agreement, because I wouldn't be there alone myself to sign that contract.

Q. Well, you could bring someone with you, couldn't you? A. I definitely stated to him, if he was willing for a new contract, that I would have my attorney and we would make arrangements. 10

Q. Couldn't you have brought your attorney at the time that was fixed for the signing of the contract? A. The trouble was they wouldn't make any special place. And, another thing, I couldn't see why I had to go to Mr. McElligott's home to sign a contract.

Q. Did Mr. McElligott say to you that, depending on your convenience, it could be either at his home or Mr. Krauss' office? A. That is correct —no, he didn't say "Mr. Krauss' office". 20

Q. Did he say Mr. Krauss' home? A. No. He said it could be done either in his home or in my home.

Q. Oh. But he said that he was going to draw a written agreement and that it could be signed in your home or his home. Is that correct? A. Yes, that is right.

Q. Now, then, an appointment was made for that purpose, wasn't it, for the signing of that written agreement? A. Yes, there was supposed to be an appointment. 30

Q. Well, where was it made for? Was it made for his home or your home? A. It was not made for either place.

Q. It was not made for either place? A. No.

The Court: Now, this was after you paid your deposit and got your receipt?

The Witness: That is right, your Honor. 40

Patrick Monahan, for Complainants—Cross.

The Court: That was the first you heard of a formal contract?

The Witness: That is right, your Honor.

By Mr. Wagner:

10 Q. Now, at the time this agreement was made, was there anything in this—at the time this was drawn, did you tell the girl in the bank when you were to get possession of this property? A. I told her, on July the 1st.

Q. You told her July the 1st? A. Yes.

Q. So that both you and she knew that you were to get possession on July 1st? A. Well, that was the understanding between me and Mr. McElligott.

20 Q. Yes. Now, then, that being so, why didn't you, in drawing this, include the date that you were to get possession of the property? A. Well, there was just an error made, I guess, that is all.

Q. An error made? A. There must have been.

Q. But you knew of it at the time? A. Yes.

Q. Isn't it a fact, Mr. Monahan, that—I withdraw that. Isn't it a fact that where there is an agreement on the part of a person to sell something—would you know this—the signature is underneath the agreement?

30 The Court: Do not answer that.

Q. Will you explain why your name and Mrs. Monahan's name is directly underneath the wording "Wherein it is agreed to sell the property"? A. I just simply wrote my name on there. I knew my name should be on it.

Q. Why? A. Because, after all, I am investing nine thousand three hundred, aren't I?

40 Q. It is not your property, is it? A. It is not my property, but it is my money, though, isn't it?

Patrick Monahan, for Complainants—Cross.

Q. That is right. And you did not agree to sell the property, did you? A. No.

Q. Of course not. A. I agreed to buy the property, not to sell it.

Q. Yes. Now, where does it say in there that you agreed to buy it? A. It doesn't say that.

Q. It doesn't say there— A. That I agreed to buy it? 10

Q. That is right. Is there anything in there that says you agreed to buy the property?

The Court: No, there is not.

A. No.

Q. Well, now, why wasn't that in there?

The Court: I suppose because he is not a lawyer.

Mr. Wagner: Well, I think that I have a right, your Honor, to ask if he knows why it was not in there. 20

The Court: Do you know why you did not put that in there, that you agreed to buy? Did you write that receipt? The girl in the bank wrote it, didn't she?

The Witness: The girl in the bank gave me a copy.

The Court: Yes. 30

By Mr. Wagner:

Q. What is the name of the girl in the bank?

The Court: Do you know who the girl was?

Mr. Flaherty: Yes, I know her. It is Miss Griffith.

By Mr. Wagner:

Q. I would like to ask you if you knew why—I withdraw that. Knowing that Mr. McElligott was 40

Patrick Monahan, for Complainants—Cross.

one of the owners of the property, why didn't you go there in the evening to get his signature, when he would be available after his day's work, having gone on every other occasion during the evening, except the time these papers were signed? A. Well, that was just an unfortunate time that he

10 was not there.

Q. Well, you knew he would not be there, didn't you? A. I didn't know he wouldn't be there.

Q. But you know his working hours? A. I didn't know his working hours and I still don't know his working hours.

Q. Were you free that evening? A. I certainly was free. I stopped my work to be free.

Q. Sure.

20

The Court: As I understood the witness to say, Mr. Wagner, he took off that day to make arrangements with the bank for his loan. That is the day he went down and had the receipt made. Previous conversations had with the McElligotts brought him to the house that day to make his deposit. And he made his deposit and then went to the bank, took off that day.

30 By Mr. Wagner:

Q. But, if you knew that Mr. McElligott's signature was required to this, why didn't you pick a time to get it when you thought he would be home? A. When I thought he would be home?

Q. Yes. A. All right. Mrs. McElligott give me the understanding that she had full power from her husband and a power of attorney to do such things.

40 Q. When did she give you that understanding?
A. That same day that she signed it, that she took the deposit.

Patrick Monahan, for Complainants—Cross.

Q. That is correct. Now, let us see; if she gave you that information the same day, you didn't have that information before that day, did you?

A. No.

Q. So when you went there, you didn't know whether or not there was a power of attorney? In fact, you don't know yet what a power of attorney is, do you? A. No, I don't. 10

Q. You don't. So at that place when you went there during the day you knew that Mr. McElligott would not be there at that time, didn't you? A. I didn't know anything of the kind, whether he would be there or not.

Q. Well, why didn't you pick a time when you knew he would be there? You knew he worked during the day, didn't you? A. I knew he left and he worked during the night. I didn't exactly know his working hours. 20

Q. Did I understand you correctly, Mr. Monahan, to say, before, that it didn't make any difference what time you went there, because Mrs. McElligott had told you that she had a power of attorney from her husband? A. No. My wife, Mrs. Monahan, called Mrs. McElligott and told her that I would be there a certain time to put the deposit on the property when I wasn't there the night before, she called him that morning and Mrs. McElligott had to go to Newark and she made the appointment that I should be there between four and five o'clock, which I was. How did I know but what Mr. McElligott would be there at that time, too? She was calling him and notifying him, too, wasn't she? 30

Q. All right, Now, you said that at the time this was signed, you thought that Mr. McElligott could sign it also, didn't you? A. I definitely stated to his wife that Mr. McElligott should sign it. 40

Patrick Monahan, for Complainants—Cross.

Q. Should sign it. And, having that belief, if you had intended to make an agreement, why didn't you go to Mr. McElligott that evening, which you say you were free, and ask for his signature? A. Well, Mrs. McElligott led me to believe, under power of attorney, it was O. K. to sign her husband's name.

Q. Did you ask to see the power of attorney?

A. I did not, because I was ignorant of the fact.

Q. All right.

Mr. Wagner: That is all.

Mr. Flaherty: That is all, Mr. Monahan.

The Court: Now, wait a minute.

Mr. Flaherty: Yes, sir.

The Court: Now, as I understood the testimony—and you correct me if I am wrong—before you had this receipt signed by Mrs. McElligott, you had talked with Mr. McElligott as to the price?

The Witness: That is right, your Honor.

The Court: And as to the appointment?

The Witness: No. Mrs. McElligott had stated the appointment.

The Court: The price was settled?

The Witness: The price—the last time I spoke to Mrs. McElligott, Mr. McElligott was satisfied to sell me the property at ninety-four hundred. So, about three weeks after, I come back and Mrs. McElligott said they had agreed to give me the property at ninety-three hundred.

The Court: At \$9,300.

The Witness: Now, Mr. McElligott was not there that night, your Honor.

The Court: All right. Call your next.

Mr. Flaherty: Mr. McElligott.

Gerald A. McElligott, for Complainants—Direct.

GERALD A. McELLOGOTT, called as a witness on behalf of the complainants, being duly sworn, according to law, on his oath testified as follows:

Direct examination by Mr. Flaherty:

Q. Mr. McElligott, you are one of the defendants in this matter? A. That is right. 10

Q. I show you Exhibit C-1 and ask you if that is your writing? A. This is my writing. But this is not my writing (indicating).

The Court: Let me see it. Which do you say is your writing?

The Witness: This is my writing (indicating).

The Court: All the handwriting except the typewritten "Patrick". 20

The Witness: Except that. That is not my handwriting.

The Court: The "Patrick" is not.

The Witness: No.

The Court: But "Monahan"?

The Witness: That is.

The Court: "\$200, \$9,300"?

The Witness: Is my handwriting.

The Court: Is your handwriting.

The Witness: That is all. 30

The Court: And isn't this yours, too (indicating)?

The Witness: No. No, that is not, your Honor.

The Court: But the rest is your handwriting, in that receipt?

The Witness: With that exception, yes.

The Court: With the exception of the name "Patrick".

The Witness: That is right "Patrick Monahan". 40

Gerald A. McElligott, for Complainants—Direct.

The Court: All right.

Mr. Wagner: I would like to have that clarified. So far as the body was concerned, that would leave the impression the signature is his signature and also——

The Court: I made it very clear.

10

Mr. Wagner: All right. I am sorry.

The Court: Everything that is in that receipt, that is in handwriting, in pen and ink, is yours, with the exception of the type-written portion and the name "Patrick" and the signature.

The Witness: Yes, your Honor.

The Court: Otherwise, it is all in your own handwriting?

The Witness: Yes, sir.

20

Mr. Flaherty: That is all. Do you want to question him?

Mr. Wagner: Well, if that is your case——

Mr. Flaherty: No, that is not.

Mr. Wagner: Well, no questions.

The Court: Step down.

Mr. Flaherty: If your Honor please. I have Mrs. Monahan, who would be a similar witness, who would testify the same as her husband, if your Honor wants to go into that.

30

The Court: It is your case.

Mr. Flaherty: Mrs. Monahan.

The Court: I don't know how much she could testify to. She was not with her husband at some of these trips.

Mr. Flaherty: Suppose you just wait, Mrs. Monahan.

40

Mr. Talley, will you take the stand, please?

Fayette N. Talley, for Complainants—Direct.

FAYETTE N. TALLEY, called as a witness on behalf of the complainants, being duly sworn according to law, on his oath testified as follows:

Direct examination by Mr. Flaherty:

Q. Mr. Talley, you are a practicing attorney at law and counselor at law of this state? A. Yes. 10

Q. And you are a member of the firm of? A. Leavitt & Talley.

Q. And your office is located where? A. 286 North Broad Street, Elizabeth.

Q. Do you represent the Central Home Trust Company? A. At times.

Q. And did you represent them in the application for a mortgage by Mr. Patrick Monahan and his wife, Nora, for the premises known as 701, I think it is—yes—Woodlawn Avenue, Roselle Park, New Jersey? A. I was requested by the bank to examine the title to that property for the purpose of a mortgage loan, yes. 20

Q. And in connection therewith did you write a letter to Mr. Monahan to procure an old deed? A. No, I wrote a letter to the bank; after I had been requested to examine the title, I called the bank to get the deed for me, because I had no starting point from which to make the examination. The bank may have written to Mr. Monahan about it. I did not. 30

Q. And did you make a search of these premises? A. I did.

Q. And were you satisfied with the title? A. I was, yes.

Q. And the application and mortgage amounted to what amount? A. Well, originally, according to the correspondence in my file, the application was for \$3,500, and this was later increased to 40

Fayette N. Talley, for Complainants—Direct.

\$5,000, and the commitment—the final commitment issued by the F. H. A. is for \$5,000.

Q. The original commitment was three thousand, you say? A. Thirty-five hundred.

Q. Thirty-five hundred? A. According to my file, yes.

10 Q. And when was that? Have you got the date of that? A. Well, the original application, only a copy of which I have—the F. H. A. would have the original—and which is presumably dated April 28, 1944, is an application for a loan of \$3500. I do not know what transpired later, but I was notified by the bank at a later date that the F. H. A. had approved and increased that loan from thirty-five hundred to five thousand.

20 Q. Now, Judge Talley, do you recall on July 31, 1944, accompanying Mr. Monahan and myself to the premises 701 Woodlawn Avenue, Roselle Park? A. Yes, I do.

Q. Do you know, of your own knowledge, at that time, that Mr. Monahan had certain cash moneys with him? A. Yes, I know I had with me \$5000 in currency, the amount of the mortgage loan, and I recall that while we sat in the car in front of the premises that Mr. Monahan counted out the forty-three—forty-one hundred, I believe
30 it was, \$4100, the balance that was needed to make tender, if the McElligotts were there for tender to be made.

Q. And what time did we arrive at the premises, Judge? A. As I recall it, it was about three-thirty. I think we were there probably two or three minutes before three-thirty.

Q. And how long did you stay? A. Well, we waited around there. You got out of the car and went to the door and knocked or rang the bell, I
40 have forgotten which.

Fayette N. Talley, for Complainants—Cross.

Mr. Wagner: I will admit tender was made.

The Court: Tender was made?

Mr. Wagner: Yes, sir.

The Court: You admit legal tender was made?

Mr. Wagner: Yes.

10

Mr. Flaherty: That is all, if your Honor please. That is all.

Cross examination by Mr. Wagner:

Q. Judge Talley, what was the date of the second application? A. June 20.

Q. June 20? A. Yes.

Q. And when was your search completed? A. My county search was completed on July 1st. My tax search is dated July 11; and the Supreme and District Court search at Trenton, also, July 11th: so I would say that my search was completed around July 11th, probably, the 11th or 12th.

20

Q. In the normal course of events, when would you have been ready to close? A. I could have closed by July 12, I would say, if that was not a Sunday. I don't know what day of the week it fell on.

Mr. Wagner: All right, Judge, thank you.

30

Mr. Flaherty: I think that is all, if your Honor please.

Mr. Wagner: Mrs. McElligott.

40

Ellen McElligott, for Defendants—Direct.

ELLEN MCELLIGOTT, called as a witness on behalf of the defendants, being duly sworn according to law on her oath testified as follows:

Direct examination by Mr. Wagner:

10 Q. Mrs. McElligott, you are one of the owners of this property? A. I am.

Q. And you signed the papers which are known as Exhibits C-1 and C-2: one is a deposit and one is a paper purporting to be an agreement— A. I signed the receipt, Judge.

Q. These are your signatures? A. Yes. I signed this as a receipt.

Q. You signed this as a receipt.

The Court: Pointing to?

20 Mr. Wagner: This is C-1, which is a receipt for \$200.

The Witness: This is my husband's writing on this.

Q. Now, did Mr. Monahan ask you to sign another paper which he had prepared? A. This paper here (indicating) he had with him.

Q. And he asked you to sign it? A. When he came in he—first, he wanted the deed to the house, which I said was not in the house—

30 Q. Yes. A. —as the building and loan had it at their office.

Q. Did he tell you why he wanted the deed? A. He said that his bank—I didn't know what bank he was referring to—he just said the bank wanted the deed, and, of course, I couldn't understand that, I didn't know, and with that Mr. Monahan said that the bank had made out a receipt for his deposit.

40 Q. And what did you say to that? A. I told him that my husband had left a receipt—

Ellen McElligott, for Defendants—Direct.

Q. Yes. A. —for that \$200, which they were to deliver the night before.

Q. And that is what is marked Exhibit C-1.

A. That is right. Mr. McElligott left it because I didn't know what Mr. Monahan's first name was, I filled in the "Patrick Monahan" and when Mr. Monahan showed me his receipt—I showed him the receipt I had, he also handed me this. I read it over and asked him why their names was on the receipt. 10

Q. Yes. A. And he said—

Q. What did Mr. Monahan say to that? A. He said that the bank wanted their names on there.

Q. Did he say for what reason? A. He said that they wanted them on there as they were on their deed. I put them on here, when he said that he wanted—I said "Well, you don't need my husband's signature on the receipt for \$200. My husband's signature is not necessary." He said, "I don't know. All I know is the bank asked me." He said, "Aren't both your names on your deed?" and I said, "Yes, they are." And then I told him I would put my husband's name on here. 20

Q. Which you did? A. Which I did, and I signed my name under it.

Q. Now, when you say "on here", you mean the deposit receipt? A. The deposit receipt— 30

The Court: Exhibit—?

Mr. Wagner: Exhibit C-1.

A. —that my husband left.

Q. That your husband had left? A. That is right.

Q. And you signed that and you put your husband's name on, as well. Is that right? A. Yes, that is right, because they both appeared on the 40

Ellen McElligott, for Defendants—Direct.

deed, and I put them on there for the benefit of the bank: I was giving him a receipt for the two hundred.

Q. You say he asked you to put your name and your husband's name on? A. Yes, he insisted the bank wanted this paper back.

10 Q. Was that in addition— I withdraw that. Was that after you had signed C-1, the deposit receipt?

A. Yes, that is right.

Q. Was this paper mentioned to you before you had signed the deposit receipt? A. Only that he said he had a receipt that the bank made out for him for \$200.

Q. And you said in response to that— A. That I had one.

Q. —that you had one? A. Yes, that is right.

20 Q. Now, then, you say you asked him why they wanted your names on C-2 as they were on your deed? A. Yes, I did.

Q. And what was the explanation?

The Court: The bank wanted it.

Q. The bank? A. He said the bank wanted the names on there.

30 Q. And, at the time that paper was signed, or prior to the time that paper was signed, had you consulted anyone as to whether or not that was anything other than a receipt? A. No, I had not.

Q. The first time you saw it? A. No, that is the first time I saw it. He took it out of his pocket.

Q. And you say the reason you put your name and your husband's name on that was because the bank wanted those names? A. Wanted the names as they appeared on the deed, they said.

40 Q. And that was for the purpose of showing them how your names were spelled? A. That is right, as they appeared on the deed, yes, because

Ellen McElligott, for Defendants—Direct.

I didn't have the deed in the house to show Mr. Monahan or to take to the bank at that time.

Q. All right. Now, then, at the time he called and you signed those papers, was anything said about when you were to give up possession of the property? A. It had been discussed when they had mentioned buying the property, they wanted to know when we could give it up, and I asked them how much time they had on their place, and he said they had given themselves six months. 10

Q. I see. And was anything said by you as to when you would be willing to give them possession? A. I said I would go up to Massachusetts, to Haverhill to look for a place and I would try to let them have it by July 1st, if possible.

Q. Was there any definite agreement as to the time? A. No, there was no agreement at all. I was to go—I wanted a deposit and I was to wait until the appraisers came and then, as soon as the appraisers came and appraised the place, I left for Massachusetts. 20

Q. At the time, on April 25, when these papers were signed, was there anything said about the drawing of a formal agreement? A. No, because I didn't even think about such a thing. I knew my husband had to make those arrangements.

Q. Neither you discussed it nor he discussed it? A. No, nobody did. 30

The Court: What is this, the question of time?

Mr. Wagner: I beg your pardon, sir?

The Court: What seems to be the trouble here, the question of time?

Mr. Wagner: No.

The Court: The question of possession?

Mr. Wagner: Well, one question is possession and another a question of whether 40

Ellen McElligott, for Defendants—Direct.

or not this constitutes a valid agreement, whether it was intended to draw a formal agreement. That is our case.

10 The Court: You used the words "at the time". It is the intention of the parties in equity. What was the intention of the parties? In equity it doesn't have to be a signed agreement, it could be a memorandum—

Mr. Wagner: That is correct.

The Court: —which the parties agreed to beforehand.

Mr. Wagner: Yes.

20 The Court: If we can find out what the agreement of the parties was, if there is a memorandum, it might be unsigned, we could enforce it.

Mr. Wagner: Yes, but it has to be pleaded to stand.

The Court: I asked the question: What is the difference here between the parties, the question of possession?

Mr. Wagner: There is more than a question of possession.

30 The Court: Mr. Monahan wrote in this receipt in his handwriting the amount of the deposit, which shows the property was to be sold.

Mr. Flaherty: Mr. McElligott did.

The Court: Mr. McElligott. Mrs. Monahan signed it and signed her husband's name to it, too.

Mr. Wagner: That is right. Her husband was one of the owners and Mrs. McElligott had no—

40 The Court: And perfectly willing to sell and arranged the price and left the paper to sign.

Ellen McElligott, for Defendants—Direct.

Mr. Wagner: That is right, but under what conditions? Not set forth in the memorandum.

The Court: What is it, a question of the time?

Mr. Wagner: Yes, sir, a question when possession was to be given. 10

The Court: Are they still waiting to give possession?

Mr. Wagner: No, they are not.

The Court: Oh, well. All right. That is the reason I said what I did a little while ago, Mr. Wagner. The case seems to be so clear for equitable enforcement, perfectly clear.

Mr. Wagner: Well—— 20

The Court: And made doubly clear and doubly certain by the statement of Mr. McElligott that he filled in these spaces in there in his own handwriting, with the exception of his first name.

The Witness: I wrote the whole name, your Honor, "Patrick Monahan". I wrote in the whole name.

The Court: I am only repeating what your husband said. He said that everything in here, "Monahan, \$200"—— 30

The Witness: No. I wrote this, your Honor.

The Court: Well, you disagree with him on that. All right.

The Witness: Well, it is in my handwriting.

The Court: All right.

The Witness: I wrote the name at the time the receipt was made out. 40

Ellen McElligott, for Defendants—Direct.

The Court: It may be I misunderstood your husband. I understood he wrote everything in there except the word "Patrick".

10 The Witness: This agreement was written out by my husband, when I put the ad in the paper, in case anybody came in and took the property.

The Court: That is the price you wanted to sell for?

The Witness: Yes. He filled in the price after.

The Court: And the deposit?

The Witness: Yes, that is right.

The Court: So that your husband had agreed all the time to sell it at that price?

20 The Witness: That is right. The price——

The Court: No matter who the buyer was, and the deposit was agreed to by him. All you had to do was to fill out the rest of the receipt?

The Witness: That is right.

The Court: All right.

The Witness: That is because the Monahans were to come.

30 The Court: He left that with you for anybody that might want to buy?

The Witness: No, not the price, that was agreed upon. I think there is a misunderstanding there, Mr. Wagner.

The Court: Please, please! Maybe I misunderstood you. You said "My husband left that with me"——

The Witness: Yes.

The Court: "——for anybody that wanted to buy."

40 The Witness: That is right, your Honor.

The Court: That is what I said.

Ellen McElligott, for Defendants—Direct.

By Mr. Wagner:

Q. Did your husband authorize you to sign his name to that memorandum? A. No, he did not, Mr. Wagner.

Q. He did not? A. No, he did not.

The Court: Now, let me understand you. Didn't you tell me, Mrs. McElligott, your husband left this receipt with you with the \$200 written in, and the price of the property— 10

The Witness: But he didn't authorize me to sign—

The Court: Please!

The Witness: —your Honor.

The Court: Please! One moment.

Well, I won't finish my question. You didn't even know what I was going to ask you. 20

Go on.

Mr. Wagner: If the Vice-Chancellor asks you something, Mrs. McElligott, you wait until—

The Witness: I am sorry.

Mr. Wagner: —he finishes.

The Court: You need not apologize for the lady. It is all right. 30

The Witness: I am sorry, Mr. Wagner, and your Honor.

By Mr. Wagner:

Q. Were you ever in court, before, Mrs. McElligott? A. No, I was not.

The Court: I understand she has never been in court, before. I can tell from the way she is testifying, but, when the judge asks a question, a witness ought to have 40

Ellen McElligott, for Defendants—Direct.

sufficient respect to wait for his question and then answer.

I am sure she did not mean any disrespect. It is only anxiety in the litigation that makes people do these things that are so very wrong.

10 Now, I will ask you again, Mrs. McElligott— now, do not be unnerved or excited: Your husband, you told me, left this receipt with you, this typewritten receipt, with certain blank spaces in it, which he filled out in his own handwriting which blank spaces are filled out as to the deposit and the price of the property. Right?

The Witness: That is right, your Honor.

20 The Court: He wrote that in there?

The Witness: Yes.

The Court: And left it with you. Is that right?

The Witness: That is right, your Honor.

The Court: And that was for the purpose of having you sign your name to it, your name, and give it as a receipt for anyone that wanted to buy the property. Is that right?

30 The Witness: That is right, your Honor.

The Court: He authorized you to sign and take the deposit for anybody that wanted to buy?

The Witness: Uh-huh.

The Court: Is that right, now?

The Witness: That is right, your Honor.

The Court: All right.

By Mr. Wagner:

40 Q. Get this clear, Mrs. McElligott. Did he authorize you to sign—

Ellen McElligott, for Defendants—Cross.

The Court: Do not use the word “authorize”. The witness—

Q. Did he tell you that you could sign his name for him? A. No, he did not, Mr. Wagner.

The Court: No, he did not tell you that. He left it with you as a receipt to give to anyone who paid a deposit on the property. Is that right? 10

The Witness: That is right.

The Court: He did not specifically tell her to sign his name, no.

Cross examination by Mr. Flaherty:

Q. Mrs. McElligott, after you had signed the deed known as Exhibit C-1 and C-2, you mentioned that certain appraisers came to the house? 20

The Court: I did not hear her say that. Did she say that?

Mr. Flaherty: Yes, your Honor.

Q. An appraiser came to the house? A. After this receipt here.

Q. And that was before you made your trip to Boston? A. That is right.

Q. Can you approximate the date? A. I can't say offhand, no. 30

Q. Do you remember when you went to Boston, Mrs. McElligott? A. I went around the middle of May.

Q. So that— A. (Continuing) I would say around the 14th or 15th, something like that, of May.

Q. So that before you went, the appraisers were at your home? A. That is right.

Q. And you informed Mr. McElligott to that effect, didn't you? A. Yes. 40

Gerald A. McElligott, for Defendants—Direct.

Q. When Mr. McElligott came home the night you signed his name and your name, did you mention to him that you had signed his name? A. Yes.

Q. You——

10 Mr. Flaherty: I think that is all, if your Honor please.

Mr. Wagner: Mr. McElligott.

The Court: That is all, Mrs. McElligott.

GERALD A. McELLIGOTT, called as a witness on behalf of the defendants, being duly sworn according to law, on his oath testified as follows:

20 *Direct examination by Mr. Wagner:*

Q. Mr. McElligott, did you tell your wife she could sign your name to either of those papers C-1 or C-2? A. No, I did not.

Q. At the time you had your discussions with Mr. Monahan, or at any of those times, was there any discussion about a formal agreement being signed? A. Yes, there was.

30 Q. And when was that? A. One evening when he came over, I told him there would have to be a formal contract, the \$200 that he had given Mrs. McElligott was definitely only a deposit.

Q. Yes. A. And I told him that I would have a formal contract drawn up——

Q. And what did he say? A. —as to the possession and certain items that I intended to include in the contract.

Q. Such as what? A. Well, such as tax liens and screens and storm windows.

40 The Court: Tax liens?

Gerald A. McElligott, for Defendants—Direct.

The Witness: Well, tax payments on it, that our taxes were up to date, and an agreement as to how we would arrive at it.

Q. Was there any personal property that the Monahans were to get, under your arrangements with them? A. Just how do you mean that? 10

Q. Well, anything besides the real estate were they to get anything? A. Well, that was what I wanted included in the contract,, such as screens and storm sash.

Q. Well, anything else? A. Nothing else.

Q. Was there anything said about coal? A. No, there was nothing said about coal.

The Court: You mean, they were not to get the screens.

The Witness: I wanted that included in the contract. 20

The Court: That they were to get them?

The Witness: What?

The Court: They would, anyway, wouldn't they?

The Witness: Well—

The Court: Storm sash and screens.

The Witness: No, I can't see that they would, because when I bought the place of Mr. Scheurman, those items were included in a legal contract I had drawn up and there were screens at that time. 30

The Court: You mean, you put it in?

The Witness: Yes.

By Mr. Wagner:

Q. Was any appointment made for the drawing of a contract and, if so, when was the appointment made? A. Well, the appointment was made 40

Gerald A. McElligott, for Defendants—Direct.

around the—oh, I would say around the latter part of May, approximately the 24th.

Q. And did Mr. Monahan consent to meet with you— A. Yes, he did.

Q. —for the execution of the contract? A. Yes, he did.

10 Q. And when was the appointment made for, and where? A. The appointment was made for a Friday night.

Q. And where was the appointment made for? A. It was made for at my home.

Q. And as a result of that conference with him, did you have a contract drawn? A. Yes, I did have a contract drawn.

Q. Who drew the contract for you? A. Mr. Krauss drew the contract.

20 Q. And when did you ask him to draw the contract? A. Approximately the 24th of May.

Q. And when was the contract ready, if you know? A. The contract was ready on Friday, approximately the 26th.

Q. That would be two days later? A. Yes.

Q. And were you at home the evening of the appointment with Mr. Monahan? A. Yes, I was.

Q. At that time Mr. Krauss was your lawyer? A. Yes, Mr. Krauss was our lawyer.

30 Q. Did Mr. Monahan appear? A. No, he did not.

Q. What brought about the drawing of this contract? Outside of your reference to screens, did you have any conversation with him that resulted in drawing the contract? Did he come to your house for any particular purpose? A. Well, we wanted to arrive at a time when he was to take possession.

40 Q. That had never been discussed between you? A. That had never been discussed, that is right.

Gerald A. McElligott, for Defendants—Cross.

Q. And what was said about the date? A. I told Mr. Monahan that I could not give him the place before September the 1st.

Q. And what did he say to that? A. He said that he was not going to wait that long.

Q. And was that before you discussed drawing the written agreement, or after you discussed it? 10

A. That was after we discussed it.

Q. Well, was it after you had made the appointment—was it after that time the appointment was fixed for that he said that, or before that time?

A. Will you please repeat that question, Mr. Wagner?

Q. When did he say that with reference to the time that was fixed for drawing a contract or signing a contract? A. That was before.

Q. Before? A. Before. 20

Q. Was that something that was still to be ironed out— A. That is right.

Q. —in the contract itself? A. In the contract.

Q. Were you definite at any time in your conversation that time? A. At that time I was definite that it would be September the 1st.

Q. Did he say anything to you about still having the contract and that he would— A. No, he never mentioned that he had a contract.

Q. Is this the contract that was drawn by Mr. Krauss? A. Yes, that is. 30

Q. Was that at your home on the evening of May 26— A. Yes, that was at my home—

Q. Awaiting Mr. Monahan? A. That is right.

Mr. Wagner: That is all.

Cross examination by Mr. Flaherty:

Q. Mr. McElligott, after you had written into Exhibit C-2, I think it is, the receipt that bears 40

Gerald A. McElligott, for Defendants—Cross.

your handwriting, that is right, isn't it? A. C-2 is the one that I never did see.

Q. Excuse me. C-1. A. That is right.

Q. Did you speak with your wife that evening when you came home? A. Yes, I did.

10 Q. Did she tell you that she had signed your name to the deed? A. Yes, she did.

Q. What did you tell her? A. I told her she had no business to sign my name.

Q. What did you do about it? A. I waited to see Mr. Monahan.

Q. How long did you wait? A. A couple of days he was around.

Q. He was around when? A. I would say, a couple of days later, if I remember correctly.

20 Q. Did you see the appraisers? A. No, I did not.

Q. Did your wife tell you the appraisers had been to the house? A. Yes, she did.

Q. Had you seen Mr. Monahan before that or after that? A. After that.

Q. The first time you saw Mr. Monahan was when he came up and asked for a deed? A. Mr. Monahan? He didn't ask me first for a deed.

30 Q. Mr. Monahan asked you for— A. He asked Mrs. McElligott for the deed.

Q. No, but he did ask you for a deed, didn't he? A. No, he did not.

Q. Didn't he come up and speak with you and show you a letter? A. Yes, one evening he did, when I was outside, he showed me a letter by the parties that were interested in buying his place and couldn't raise the money.

40 Q. Didn't he show you a letter from the Central Home Trust Company— A. No, he did not.

Gerald A. McElligott, for Defendants—Cross.

Q. —this Exhibit C-3? A. No, he didn't show me this. The first I heard of this was this morning.

Q. Uh-huh. Well, you did tell him at that time that your wife was in Boston? A. That is right.

Q. And you did tell him, did you not, that the deed—you did not know where the deed was? A. That is right. 10

Q. And that is the first time you saw Mr. Monahan, from the time the agreement was made with your wife? A. I believe so.

Q. That has been after the 17th of May and after the appraisers had been at the house? A. That is right.

Q. Did you take any steps to notify Mr. Monahan? You knew he had a telephone, of course, didn't you? A. No, I did not. He didn't have a telephone. He told me that he didn't have a telephone. 20

Q. Did you know where he lived? A. Yes, I did.

Q. Did you take any—I withdraw that question. You did see Mr. Monahan. You did not speak to him, but you were in an automobile—shortly after the receipts were signed? A. Not that I know of. I don't remember seeing him, until I heard the question here this morning. 30

Q. Did you go to see him or did you send any individual to him or did you transmit anything to him— A. No, I did not.

Q. —that you were dissatisfied? A. No, I did not.

Q. The price that was agreed upon was satisfactory to you? A. Positively.

Q. And the deposit was satisfactory? A. It was not. 40

Gerald A. McElligott, for Defendants—Cross.

Q. Why did you write "two hundred dollars" in there? A. I didn't—I wrote the two hundred as the receipt until the formal contract was drawn up.

Q. Did you draw up the receipt yourself, sir?

A. Here it is right here.

10 Q. You have it in front of you? A. That is right.

Q. What does it say? A. It says "Received from Patrick Monahan." The words "Patrick Monahan" I did not write in there.

Q. Read it all. What does it say? A. It says "Received from Patrick Monahan the sum of \$200 as a deposit."

Q. "As a deposit." A. That is right.

20 Q. Why do you say the two hundred dollars that he gave you was not satisfactory? A. As a deposit it was not satisfactory to bind the contract or to make the sale of the house. I considered it a deposit until the formal contract could be drawn.

Q. Why didn't you put that in the receipt? A. Because I am not acquainted with the law.

Q. The property to be sold, Mr. McElligott, was a forty-foot by one-hundred-foot lot. Is that correct? A. That is correct.

30 Q. And the premises—the dwelling, rather, consisted of a two-and-a-half-story frame and brick one-family dwelling? A. That is right.

Q. And the property was located at 701 Woodlawn Avenue, Roselle? A. That is right.

Q. The agreed price is \$9300? A. That is right.

Q. The deposit you got was \$200? A. That is right.

40 Q. Can you tell the Court anything more that would have been necessary, so far as you are concerned? A. Yes. I would say the inclusion of

Gerald A. McElligott, for Defendants—Cross.

the screens and the inclusion of things that I had installed personally there myself, which I think—

Q. You mean, you expected some more money for those? A. No, I didn't expect any more money, but I expected the additional deposit to tie up the sale for my price in case he changed his mind. 10

Q. What difference would it have made if he had put \$1200 down there?

The Court: Don't argue with him.

Mr. Flaherty: Oh, excuse me, your Honor.

The Court: Don't argue.

Then, if I understand, Mr. McElligott, the thing which you objected to was that you wanted a definite time stated for passing title? 20

The Witness: That is right, your Honor.

The Court: Well, now, you were agreeable to have title passed July 1st.

The Witness: I never agreed to July 1st, your Honor.

The Court: Did your wife tell you that she had?

The Witness: I heard her testify this morning she did, and she said we may be able to get out by July 1st. 30

The Court: Well, now, September had gone and passed, and that was all you wanted: you wanted to stay until September?

The Witness: That is right, your Honor.

The Court: Why don't you want to give the title now?

The Witness: Just because this has caused so much of a fuss in between and 40

Nathan Krauss, for Defendants—Direct.

Mrs. McElligott has become so terribly upset about the whole thing that I do not care to go through with the deal.

The Court: All right.

Mr. Flaherty: That is all.

Mr. Wagner: That is all. Mr. Krauss.

10

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

Direct examination by Mr. Wagner:

Q. Mr. Krauss, you are a lawyer? A. Yes, sir.

Q. And how long have you been practicing law?

20 A. Since 1927.

Q. And are you acquainted with the defendants in this suit? A. Well, I know them very well.

Q. You were at their home in March of 1944?

A. Yes, I was making a return for Mr. McElligott, his income tax return.

Q. And was there any discussion about the sale of this property? A. He said that he expected to sell this house and, when he does, he will call upon me to draw a contract.

30 Q. Did he call upon you to draw a contract? A. Well, in the latter part of May, I would say, about a week before the 1st of June, he called upon me and wanted to see me. I went over to see him, and he gave me all the terms. That is, he said he and Mr. Monahan had agreed upon, and I wrote them down on a piece of paper, and he told me to be back Friday night. That was Wednesday, I think, I was there Wednesday or Thursday, I am not sure, and I appeared at his home about eight
40 o'clock at Woodlawn Avenue, and we waited for Mr. Monahan.

Nathan Krauss, for Defendants—Direct.

Q. Did you have the contract with you, two copies? A. I had the original and a copy.

Q. Did he tell you he had an appointment to have it executed at that time? A. He said that Mr. Monahan would meet him at his home at that time, about eight o'clock.

Q. And did Mr. Monahan appear? A. No. I waited about until a little after nine o'clock. 10

Q. Is this the original of the contract you drew (handing witness paper)? A. This is the original.

Mr. Wagner: I offer this in evidence.

Mr. Flaherty: Did Mr. Monahan see this contract?

The Witness: No, never saw it.

Mr. Flaherty: I object to it, if your Honor please. I do not see the materiality of it. 20

Mr. Wagner: I think it is very material, because one of the defenses is that there was a contemplation of a——

The Court: Let me see it.

(Mr. Wagner hands paper to Court.)

The Court: Now, this you prepared when, do you say?

The Witness: I think it was a day after or the same night, about May 26th. 30

The Court: May 26?

The Witness: Yes.

The Court: Let me see those exhibits.

(Mr. Flaherty hands papers to Court.)

The Court: Did you know, at that time, that Mr. Monahan had been requested, as early as May 17, to present any deed for examination of title? 40

Nathan Krauss, for Defendants—Direct.

The Witness: I didn't know that, your Honor, but I saw the two papers that are in evidence, at that time.

The Court: One dated April 25— both dated April 25.

10

The Witness: Yes, sir.

The Court: You saw those?

The Witness: Yes.

The Court: Who brought them to you?

The Witness: Well, when I was at Mr. McElligott's home, he showed me those papers.

The Court: You mean, copies of them?

The Witness: Oh, yes, copies, yes, your Honor.

20

The Court: Yes. On what theory do you think it is evidential?

Mr. Wagner: I think it is evidential for this reason—

The Court: I mean, the paper itself. The testimony is in. How do you make the paper evidential?

Mr. Wagner: Well, it is true that the testimony is in, but it is corroboration of the fact—

30

The Court: No, I won't allow the paper in evidence.

The testimony is in. The paper itself is an unsigned paper, which Mr. Monahan did not even see. The testimony is in on the part of your client to establish a defense that you urge that this receipt should not be embodied in an alleged agreement to pass title September 1st.

Mr. Wagner: That is correct.

40

The Court: That is in.

Nathan Krauss, for Defendants—Cross.

Mr. Wagner: Well, I think, also, I am entitled—

The Court: This paper won't help it any. It won't even punctuate it. The testimony is in that he went to Mr. Krauss in the month of May to have this paper prepared.

10

Mr. Wagner: Well, I don't suppose it makes much difference. It shows his intention.

That is all.

Cross examination by Mr. Flaherty:

Q. Now, Mr. Krauss, you knew, of course, when you saw the receipts or contracts, or whatever they may be called, copies of them, at the home of Mr. McElligott, that he had made the transaction on April 25. A. Well, I saw that is the date in there, which I think it is, I saw that.

20

Q. And you then were at Mr. McElligott's home on May 26? A. Yes, within a day or so. I don't know the exact date.

Q. Over a month later? A. Yes.

Q. In the meantime, had you seen Mr. McElligott before May 25? A. Only in March when I made out his income tax.

30

Q. I understand, at April and May, between that month? A. No.

The Court: He told him in March that he expects to sell his property. Is that right?

The Witness: Yes.

The Court: When you were making out his income tax?

The Witness: Yes, sir.

The Court: Of course, that was a subject which would come up anyway, when a man is making up an income tax.

40

Nathan Krauss, for Defendants—Cross.

The Witness: Yes, but at that time there was two people looking at the home.

The Court: Yes.

The Witness: And he mentioned it to me.

10 The Court: Yes. I mean, that would come up if a man was making up his income tax, what it would be for a sale within a certain time.

The Witness: I don't think he asked me any details. He just gave me his salary and—

The Court: All right.

By Mr. Flaherty:

20 Q. In your letter to Mr. Monahan and his wife, under date of May 31, 1944—you recall writing that letter? A. Yes, sir.

Q. You mention in there you have drawn a formal contract. A. Well, I really don't remember the contents.

The Court: Whatever the letter says.

The Witness. Whatever the letter says, I wrote it.

30 Q. Why did you mention in the letter that a formal contract had been made? A. Well, I really don't remember the exact terms of the letter at all.

Q. Here, I will show you the letter. Here it is (indicating). A. Well, this was just the preliminary steps to it.

40 Q. This was five days after you were at the home waiting for Mr. Monahan to appear? A. No, it wasn't five days, because there is a Saturday and Sunday in there. I might have said I would write the letter tomorrow. I wrote the let-

Nathan Krauss, for Defendants—Cross.

ter as soon as possible and this letter was—I expected them to get in touch with me. In fact, you got in touch with me.

Q. Just a moment. Did you arrange to go to Mr. McElligott's home? A. On a Friday night?

Q. On a Friday night. A. Yes.

Q. Now, you got in there that it must close on what date? A. Saturday, June 3. 10

Q. Saturday, June 3, so this came about after this particular Friday night, isn't that so, that you are talking about? A. Yes.

Q. Why didn't you mention the fact that Mr. Monahan did not appear on Friday night, when you were supposed to— A. If you read the letter, it will show that.

Q. Let me make myself clear, Mr. Krauss. That letter is addressed to Mr. and Mrs. Monahan? A. That is correct. 20

Q. That is correct? A. That is right.

Q. That is before you and I ever spoke about this case? A. That is right.

Q. The previous Friday or two Fridays, whatever it was, a previous time before May 26—on May the 31st— A. Yes.

Q.—you had been at the home of McElligott? A. That is right.

Q. And you had certain contracts prepared? A. Yes. 30

Q. Did Mr. or Mrs. Monahan appear? A. No, no one was there.

Q. Five days after that, on March—on May the 31st, you wrote a letter to Mr. and Mrs. Monahan? A. That is right.

Q. Didn't you mention in the letter you had arranged to make, or arrangements were made to meet Mr. and Mrs. Monahan at the McElligotts' home on the previous Friday night? A. 40

Nathan Krauss, for Defendants—Cross.

Because I said there was a formal contract contemplated.

10 Q. Because there was never any such meeting arranged for. Isn't that right? A. Well, I didn't arrange any meeting. Mr. McElligott—I was there Friday night with my copy there, with the original and the copy, and then the Saturday and Sunday, I think, overlapped. That is the reason the letter is dated a little later. I didn't write the letter immediately. And then you called me.

Mr. Flaherty: That is all.

Mr. Wagner: That is our case, your Honor.

Mr. Flaherty: That is our case, if your Honor please.

20 Mr. Wagner: Your Honor, I am inclined to think your mind is made up, but for the record I would like to say a few remarks.

The Court: I will give you that privilege, of course.

30 Mr. Wagner: It is our contention that, first of all, the Court cannot grant specific performance on the theory that there is no memorandum, writing signed, that it is within this receipt, and, in law, it is nothing more than a receipt, Exhibit C-1 is nothing more than a receipt and is not a contract. That is a paper that was drawn by Mr. Elligott. And the fact that he drew it and left it there as a paper, signed by his wife, acknowledging receipt of a deposit, the law is very clear that that is nothing more than a receipt, and not an agreement.

40 Now, then, even if it were an agreement, the mere fact that it was prepared by Mr. McElligott would not be chargeable against him, because it is not such a memorandum,

Colloquy.

as signed by him, as is required by Section 5 of the Statute of Frauds. Now, then, the other paper, which was drawn, apparently, as testified to, from a writing in pencil of the girl in the Central Home Trust Company, says, "I hereby agree to sell my property." 10

Now, it was signed——

The Court: Suppose Mr. Monahan had telegraphed to Mr. McElligott: "Will you sell your property for \$9,300, and so and so?" and he telegraphed back, "Yes"?

Mr. Wagner: That is not what happened.

The Court: Suppose that had happened——

Mr. Wagner: Yes, but your Honor——

The Court: —would Equity enforce it? 20

Mr. Wagner: That is an entirely different situation. This paper which Mr. McElligott prepared was not a memorandum of sale.

The Court: Neither of these papers would have been signed, if a telegram had been sent, and Equity would enforce the contract.

Mr. Wagner: That is an entirely different situation. There were no telegrams. 30

The Court: I cannot see where it is any different. I think what you lose track of, Mr. Wagner, is the fact that outstanding is the evidence of the defendant, first, that their property was for sale; second, that the price for the property was \$9,300.

So outstanding is that fact that the husband left with his wife a receipt which he prepared, partially typewritten, with places left blank, and left it with her, in the event 40 that someone came along who would pay

Colloquy.

his price, \$9,300, which he wrote in there, and give him a deposit of \$200, which he wrote in there, she could give the receipt.

10 That was a full and complete delegation to her of authority to bind him to sell that property for a stated price, upon receipt of a deposit or a down payment of a certain price.

20 The difficulty comes that the receipts which he prepared did not specify when he was to turn over the property, the title to the property. He forgot to put that in. But he himself says he did not know enough about the law. So that you have here a clear case admitted by the defendants that they wanted to sell, intended to sell. The buyer made no difference; the price was fixed; the deposit was fixed; and the Monahans happened to be the people who got that receipt and paid that deposit.

Now, Mrs. McElligott said the title was to be passed, that she was willing to get out by July.

30 I realize the trouble that arose. It was not a question of price, not a question of deposit, not a question of formal contract; a question of "When do we have to get out?" That is the trouble in this case.

40 There was something said by Monahan about having sold his property and he had to raise more money than he at first anticipated, from the F. H. A., his application being for \$3,500 and make it \$5,000, in order to get this \$9,300 together, or the balance of \$9,100. Now, that is all there seems to be in this case.

Colloquy.

Now, when I asked Mr. McElligott why he did not pass title in September, or whether he was still willing to pass title, he said, no, he was not willing to pass title now, although he agreed to sell this particular piece of property for \$9,300, he was not willing now to do it because it caused his wife some disturbance. 10

Well, in Equity that does not go. In Equity, that sort of a contract, with this kind of evidence here, will be enforced.

It was sought to make time of the essence here, by some writings that went forward because of the fact that was not mentioned here, and there was no attempt to make that either.

Now, if that is all that troubles the McElligotts, the passing of title September 1st, after this suit was started, they could have still passed the title and there would be nothing to stop them, up to the very minute they came into court, from handing over this property. They had no quarrel with the price or the deposit until the new idea came up sometime subsequent in June or May, the latter part of May, of a formal contract. 20 30

Now, I cannot conclude other than that the motion of a formal contract was conceived later on because of some difficulties that the McElligotts had in moving and getting out of their place, but I cannot consider that. These contracts, having been made here in good conscience and in Equity, that contract would have to be enforced, and it is a good contract in Equity, absolutely good. 40

Colloquy.

Mr. Wagner: Does your Honor hold that Exhibit C-2, which is the paper which was drawn—

The Court: By Mr. McElligott?

Mr. Wagner: By Mr. McElligott.

The Court: No, that is not C-2.

10 Mr. Wagner: C-1.

The Court: C-1.

Mr. Wagner: It was identification C-1, I believe, and—

The Court: C-1 is the contract, the exhibit which was drawn by Mr. McElligott.

Mr. Wagner: C-1—

The Court: Yes.

Mr. Wagner:—that is the deposit agreement of \$200.

20 The Court: Yes.

Mr. Wagner: Your Honor holds that that is the agreement which is enforceable?

The Court: That together with the evidence here in the case. We try to arrive at what was the real intention here.

Mr. Wagner: Does your Honor—

30 The Court: There is no one disputes the fact, not even your client, that they made a sale, so far as the price was concerned, so far as the deposit was concerned, so far as the particular property was concerned. The difficulty came on the passing of title. They wanted until September 1st, latterly, Well, there is their contract. They didn't put it in there.

40 Mr. Wagner: Of course, conditions may change. Does it follow—the reason why this loan was increased was because the sale of the Monahan house fell through and therefore created a situation. At no time had

Colloquy.

there been any agreement between the parties, from the evidence, it would seem to me, as to when possession should be given. The agreement itself was silent and therefore incomplete on that. I do not think that extraneous evidence is even permissible to go outside of what the agreement is. If the agreement is the receipt of \$200, which was authorized and we acknowledge that was drawn by Mr. McElligott, but, if that was intended to be the agreement, then I say that it was not an agreement in law because it was not complete and did not have all of the terms that is required of an agreement for the sale of land. 10

The Court: Why, Mr. Wagner, the parties themselves here attempted to fix the time afterwards, which they had a right to do under the law where the time is not specified. They had a right to fix it, to attempt— 20

Mr. Wagner: That is correct.

The Court: —to make essence a part of the contract. But, if they had not done that—

Mr. Wagner: Does your Honor hold—

The Court: Please! —but if they had not done that, we could enforce this kind of a contract and the court could fix a reasonable time in which— 30

Mr. Wagner: Your Honor, if the contract complies with the Statute of Frauds, I take it also that Mr. Krauss is making time of the essence.

The Court: I am not holding anything further than what I have already said. That is what I am holding, that this is an en- 40

Colloquy.

forceable contract in Equity and must be enforced.

I could not see anything else to it for some time past in the hearing of the case.

Mr. Wagner: All right, sir.

The Court: It is very clear.


10 Now, in order that you may not make an application later, if you are obliged to make one later, I will allow you a counsel fee of \$100, and costs.

Mr. Flaherty: Thank you, your Honor.

The Court: Court stands adjourned.

Mr. Flaherty: Thanks, your Honor.

20 **Exhibit C-1.**

(Opposite )

30

40

W
Short C 1
11/17/44

4-25-1944.

Received from *Patrick Monahan*, the sum of *Two Hundred*
Dollars (200.00) as a deposit on a 2-1/2 story frame and brick
one family dwelling situated on a lot 40' x 100' and known as
701 Woodland Avenue, Roselle Park, New Jersey. Price agreed
Nine Thousand, three hundred dollars,
\$9,300.00

Gerald A. McEligott
Ellen McEligott

April 28, 1944.


I hereby agree to sell my property at 201 Madison Ave,
Schelle Pl, New Jersey to Patrick Monahan for
for the sum of Ninety three hundred (\$93,000) dollars.

I hereby acknowledge receipt of the sum of one hundred (\$100,)
dollars, balance of (\$100,) to be paid by the

Patrick Monahan
York and Spandau

Guadalupe McElroy
Ellen McElroy

Exhibit C-2.

(Opposite )

E4 C2
11/13/44

April 25, 1944.

I hereby agree to sell my property at 701 Woodlawn Ave.
Roselle Pk. New Jersey to Patrick Monahan and Nora C. Monahan
for the sum of Ninety three hundred (\$9300.) dollars.

I hereby acknowledge receipt of the sum of Two Hundred (\$ 200.)
Dollars, ballance of (\$9100.) to be paid at closing of transactio .

Patrick Monahan
Nora C. Monahan.

Gerald A. McElligott
Ellen McElligott

1874

1874

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Exhibit C-3.

CENTRAL HOME TRUST COMPANY
ELIZABETH, NEW JERSEY

10 N. R. LEAVITT, President
JACOB KRAUS, Jr., Vice President
FRANK A. ENGLISH, Vice President
WM. T. RITCHIE, Jr., Sect'y-Treas.
JOHN S. ANDERSON, Trust Officer
M. RAYMOND WOLFF, Branch Manager

MORTGAGE LOAN DEPARTMENT

May 17th, 1944

Mr. Patrick Monahan,
155 Butler Avenue,
Roselle Park, N. J.

Dear Sir:

20 Re: 701 Woodland Ave., Roselle Park, N. J.
Please procure for us the deed to the above
property so that we may proceed with the exam-
ination of title to the above property.

Thanking you, we are

Yours very truly,

F. H. A. MORTGAGE DEPT.

30 G. T. GRIFFITHS.
G. T. Griffiths.

40

214 MAY 7 1945

New Jersey Court of Errors and Appeals

PATRICK MONAHAN and
NORA C. MONAHAN,
Complainants-Appellees,

vs.

GERALD A. McELLIOTT and
ELLEN McELLIOTT,
Defendants-Appellants.

On Appeal from
the Court of
Chancery.

BRIEF OF DEFENDANTS-APPELLANTS.

Statement of Facts.

The suit is brought for specific performance of an alleged agreement to sell real estate. Prior to April 25, 1944 the complainants negotiated with the defendants for the purchase of the home of the defendants located at No. 701 Woodlawn Avenue, Roselle Park, New Jersey. Title to the premises was held by the defendants as tenants by the entirety.

The parties orally agreed upon a sale price of \$9,300. The defendant Gerald A. McElligott had prepared a receipt which was left with his wife, Ellen, in the month of March, 1944, to be used in the event the property was sold, the McElligotts having first advertised the property for sale during that month.

On April 23, 1944, Mr. McElligott filled in the blank spaces showing that the receipt was for \$200. and that the agreed price was \$9,300. The name "Patrick Monahan" was filled in by Mrs. Mc-

Elligott. Monahan was to call the next evening with a deposit of \$200. He called about 4:30 P. M. on April 25th, at which time Mrs. McElligott signed her name to the aforesaid receipt, known as Exhibit C-1. Mr. McElligott was working and not at home.

Monahan says he told Mrs. McElligott he required her husband's signature as well as hers and he says Mrs. McElligott told him she had a "power of attorney" and signed her husband's name (State of Case, p. 44). He also produced a typewritten paper dated April 25, 1944, which is marked Exhibit C-2. This paper had already been signed by the complainants and when Mrs. McElligott asked why it was necessary to sign this paper she was told by Monahan that the bank (Central Home Trust Co.) wanted the names of her husband and herself as they were in the deed to them (p. 74). She thereupon wrote her name and her husband's name on the paper about two inches below the names of the complainants. Mrs. McElligott denied she had power of attorney or permission to sign her husband's name (p. 81); he denied giving her authority (p. 82); and Monahan admitted he did not know what a power of attorney is nor did he ask to see one (pp. 59, 66). He also said he was free that evening and never asked Mr. McElligott to sign the papers (p. 66).

Complainants thereafter made application to Central Home Trust Co. for a loan and Monahan came to the McElligott home about May 18th to ask for the McElligott deed. This was the first time he spoke to McElligott since prior to April 23rd (pp. 42, 46 and 47). He came again about four days later (p. 48) and Mrs. McElligott told him if he didn't agree to September 1st as the time for delivery of possession he could have his deposit back (p. 49). Monahan says July 1st had been

agreed upon (p. 49) and Mrs. McElligott says she would try to give possession July 1st (p. 75) but both she and her husband say no time had been definitely fixed (pp. 75, 84 and 85). A formal contract fixing September 1st for delivery of possession was ready for signing on May 26th, at which time Mr. Krauss, Mr. McElligott's attorney, waited at McElligott's home for Monahan, who did not appear (p. 84). The formal contract was never executed by the parties.

The complainants allege that Exhibits C-1 and C-2, together, constitute the agreement of sale upon which they sue. They allege Mrs. McElligott was her husband's agent and that McElligott ratified the alleged agreement and is estopped from claiming he is not bound.

BRIEF OF THE ARGUMENT.

The defendant, Gerald A. McElligott, did not sign Schedules C-1 and C-2 nor did he authorize his wife to sign the same for him.

R. S. 25:1-5 provides "No action shall be brought upon any of the following agreements or promises, unless the agreement or promise, upon which such action shall be brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized:

d. A contract for sale of real estate, or any interest in or concerning the same;"

Although authority to sign an agreement for the sale of lands may be binding on the principal if expressly conferred upon an agent by parol we do not have that factor in this case. Both

defendants expressly deny such authority was given and there is a lack of proof to the contrary. The learned Vice-Chancellor found "that the wife had authority from her husband to hand over a receipt (C-1) prepared by him and left with her for the express purpose of issuing it to the complainants". No fault can be found with this conclusion because there actually was authority to issue the receipt, which was intended to be no more than a writing acknowledging the receiving of money. The paper is properly termed "a receipt" by the Court. Such authorization does not necessarily include authority to sign the husband's name and this is particularly true because an examination of C-1 discloses there was only one line shown thereon for signature and if it were intended that two persons sign there would have been two lines. Mr. McElligott knew Monahan was the prospective purchaser when he filled in the blank spaces and if he intended to be bound by contract why didn't he sign when he left the receipt with his wife? The facts negative an inference of authority.

The Court said "I hold that the receipt of itself was sufficient to bind the parties and that the circumstances here are such that it may be reasonably inferred that the wife had authority to affix his signature thereto as well as to the agreement of sale prepared by the bank (C-2), and that she was his agent for that purpose. Moreover, that McElligott in conversation with the complainant Monahan, ratified and confirmed such authority in his wife". It is hard to understand how he could authorize her to sign C-2 when he didn't even know of its existence. An examination of C-2 will disclose a purported unilateral agreement, the body of which does not contain the names of the sellers, and under which the Mona-

hans are not bound. The premises are agreed to be sold by some one designated in the body by the personal pronoun "I" and this would indicate it was not drawn with the intention of having more than one person sign it. The Monahans had signed it before Monahan showed it to Mrs. McElligott with the explanation the bank wanted the McElligotts names on it as they were spelled in the deed (p. 74). Mrs. ~~Monahan~~^{McElligott} thereupon wrote her husband's name and hers about two inches below the Monahan names. (The photostat Ex. C-2 is not in scale and the distance between the names "Nora C. Monahan and Gerald A. McElligott" is actually about two inches).

The Court cited *Lindley et al. vs. Keim et al.*, 54 N. J. E. 418, 34 A. 1073, as supporting the proposition that authority to sign may be conferred by parol, either expressly or by proof of circumstances from which its grant may be reasonably inferred. In that case it was also said "but obviously courts should require proofs of authority conferred by parol in such case to be clear and decisive, or the wholesome provisions of the statute of frauds may be thus evaded." The proofs should certainly be as clear and decisive as to any acts which could warrant an inference of such authority. It is interesting to note the Court of Errors reversed the Court of Chancery and found there was no authority granted because "It follows that he who seeks to establish the authority of an agent to bind his principal to the sale and conveyance of lands by proof of circumstances from which it may be inferred that such authority was granted will not be successful if the circumstances proved merely justify the inference that the principal had placed his lands in the hands of the agent as an ordinary real-estate broker. To establish the grant of the

greater authority, the circumstances must show more than the grant of the restricted authority.” * * * “All the facts together do not justify the inference that O’Reilly had conferred upon Gardner either general authority to bind him to the sale and conveyance of lands, or special authority to bind him to the sale and conveyance of the lands mentioned in the agreement in question.” So in the instant case the authority to deliver a receipt cannot be distorted into an authority to bind the husband without a formal agreement as contemplated by the defendants.

The defendant, Gerald A. McElligott, did not ratify his wife’s acts, but both defendants contemplated the drawing of a formal binding agreement because Exhibits C-1 and C-2 did not constitute a valid agreement.

The contention of the complainants that McElligott ratified the affixing of his signature to C-1 and C-2 is without merit. The facts clearly show there was a dispute as to the time for delivery of possession (p. 49, 75, 84 and 85). Monahan says (p. 62) an error was made in not including it. The dispute as to the time shows it loomed in the minds of the parties as a factor in connection with the proposed sale. It was not a matter of inconsequence in which the parties were not particularly interested. Mrs. Monahan said “It had been discussed when they had mentioned buying the property, they wanted to know when we could give it up, and I asked them how much time they had on their place, and he said they had given themselves six months” (p. 75). This was not denied by complainants. Ordinarily the time for delivery is presumed to be a reasonable time if the agreement is silent thereon. *Reynolds v.*

O'Neill, 26 N. J. Eq. 223. The case was decided in 1875 and it is respectfully urged that the conditions which existed at that time are not present today. (I find no subsequent case in New Jersey identical in point). It is general knowledge that there is and has been a housing shortage and many prospective sales have fallen through because of this situation. The law changes to meet conditions and under present conditions possession of a home is most certainly a determining factor, perhaps more so than any other factor involved in such a sale.

In *Schenck vs. Spring Lake Beach Improvement Co.*, 47 N. J. Eq. 44, it was held that a writing, to be entitled to be a compliance with that provision of the statute of frauds which requires that a contract for the sale of land shall be in writing, must contain all the essential terms of the bargain, expressed and with such certainty that they may be ascertained from the writing itself, without the aid of oral evidence. In such a case, parol evidence is inadmissible to show who the vendor or vendee is, the subject of the contract, the price to be paid, or the terms of credit. In *Johnson vs. Buck*, 35 N. J. Law, 338, the court said: "The memorandum must contain the full terms of the contract; that is, the names of the buyer and seller, the subject of the sale, the price and terms of the contract, and the conditions of sale, if any there be." This statement has been uniformly followed. It was also said in this case:

"It is not essential that the whole bargain be contained in one memorandum. It will be sufficient to satisfy the statute if its terms can be gathered from two or more detached papers, if the signed memorandum contains such reference to the other papers as to make the latter part of

the former. The connection between the signed and the unsigned papers cannot be made by parol evidence that they were actually intended by the parties to be read together, or of facts and circumstances from which such intention may be inferred. The connection between them must appear by internal evidence derived from the signed memorandum. Parol testimony will be received only for the purpose of interpretation or explanation, where technical terms are employed, or to identify papers which, by a reference in the signed memorandum, are made parts of it." There being no proof McElligott ever saw C-2 it could not be read together with C-1 and there would therefore be no proof of ratification of C-2.

The contemplated drawing of a formal contract resulted in one being drawn which fixed September 1st as the time of delivery of possession. There was nothing in C-1 and C-2 which bound the complainants to purchase. On the other hand if C-1 and C-2 constituted a binding agreement can it be said fairly that the defendants intended only to bind themselves and not complainants? Was this even the intention of complainants?

Was there a complete agreement between the parties and if so, did Mr. McElligott have enough facts to have it legally concluded that a ratification existed? The proof falls short of this. In *Entrikin v. Wister*, 100 N. J. Eq. 337, it was held that "knowledge of the act which has been done without authority is an essential element of the ratification of the act. When one does an act for or in the name of another, upon an assumption of authority, before ratification can be claimed, the person in whose name the act was performed must have full knowledge of all the facts and cir-

cumstances attending the transaction." The proof relating to the information McElligott received as to his name being signed is as follows: Q. (to Mrs. McElligott) When Mr. McElligott came home the night you signed his name and your name, did you mention to him you had signed his name? A. Yes. (p. 82) Q. (to Mr. McElligott) Did you speak with your wife that evening when you came home? A. Yes I did. Q. Did she tell you that she signed your name to the deed? A. Yes, she did. Q. What did you tell her? A. I told her she had no business to sign my name. Q. What did you do about it? A. I waited to see Mr. Monahan (p. 86). There is no proof he ever saw C-2. The testimony shows he next saw Monahan about May 18th and the next time he saw him, about four days later, he told him he must have a formal agreement. One was actually drawn at McElligott's direction. Would such a course of conduct indicate a ratification? In order to have full knowledge of all the facts would it not be necessary to show that McElligott consented to July 1st as the time for delivery of possession? Is it shown that he consented to be bound without binding the complainants? Was that the intention of any of the parties? Can there be ratification without intention to adopt the acts of the alleged agent? There is no evidence to show McElligott received any part of the deposit or benefitted in any way, particularly since the complainants were not bound, and therefore there should be no estoppel. McElligott considered the \$200. as a deposit until the formal contract could be drawn (p. 88). The intention to have a formal contract is clear from his attorney's testimony that in March McElligott told him he anticipated selling the home and would have him draw a formal contract (p. 90). There

seems to be an entire absence of the clear and decisive proof necessary to entitle complainants to a decree.

For these reasons we respectfully submit that the decree below should be reversed.

EMANUEL WAGNER,
Solicitor for and of Counsel
with Defendants-Appellants.

Submitted May Term, 1945.

214 MAY 1 1945

New Jersey Court of Errors and Appeals

MAY TERM—1945

PATRICK MONAHAN and
NORA C. MONAHAN,
Complainants-Appellees,

vs.

GERALD A. McELLAGOTT and
ELLEN McELLAGOTT,
Defendants-Appellants.

On Appeal from
the Court of
Chancery

Sat Below:
Campbell, C.
Stein, V.-C.

BRIEF OF COMPLAINANTS-APPELLEES

(Italics our except where otherwise noted)

Statement of Facts

This is a suit for specific performance whereby the complainants seek to obtain a decree compelling the defendants specifically to perform a contract calling for the sale of the premises known as No. 701 Woodlawn Avenue, Roselle Park, New Jersey, by the defendants-appellants to the complainants-appellees.

The term of the contract are not in dispute. The following facts are admitted:

1. The premises involved are No. 701 Woodlawn Avenue, Roselle Park, New Jersey.

2. The consideration is \$9,300.00 cash.
3. A deposit of \$200.00 was paid.

The above facts are established by an agreement entered into April 25th, 1944, copies of which are annexed to the bill of complaint and marked Schedules "A" and "B" (Exhibits C-2 and C-1, pp. 103-105, State of Case).

Argument

The only question in dispute is the effectiveness of said agreement by reason of the fact that the vendors did not both execute the said agreement. It was signed by the defendant Ellen McElligott for herself and for her husband. This was done by her signing her name and signing her husband's name.

The legal question involved therefore is whether this is such a binding agreement as can be specifically enforced by the decree of the Court of Chancery.

Our contention is that that agreement, taken together with some of the other exhibits annexed to the bill of complaint, and which are in evidence, constitutes a valid and binding contract which can be specifically enforced by the Court. We also contend that that agreement alone, coupled with the acts and representations of the defendant Gerald A. McElligott, is binding on him and that he is estopped from denying that his wife had the power to execute the agreement on his behalf.

Our first contention is apparent from the pleadings themselves. We respectfully submit that the

defendants in their answer have done the following:

1. They have admitted that Ellen McElligott signed the papers marked Exhibits C-1 and C-2 (pp. 103-105).

2. They deny that Gerald A. McElligott signed Schedule A and Schedule B annexed to the bill of complaint (Exhibits C-1 and C-2, pp. 103-105, State of Case), but admit by failing to deny that Ellen McElligott also signed Gerald A. McElligott's name.

3. The complainants received a letter dated May 31st, 1944 (which is annexed to the bill of complaint as Schedule C, p. 9, State of Case), from one Nathan Krauss, Esquire, attorney representing the defendants. This letter reads as follows:

"I have been consulted by Mr. and Mrs. McElligott with reference to an alleged contract for the sale of their property to you. While there was a deposit of \$200.00 given by you, it was contemplated by my clients that a formal contract would be entered into, specifically setting forth all the terms and conditions of sale, and also an additional deposit of \$1000.00 towards the purchase price. Please be advised that unless an additional sum of \$1000.00 is deposited with my clients on Saturday, June 3, 1944, and a formal contract entered into, the deposit of \$200.00 will be returned to you and the matter will be closed."

4. In paragraph 13 of the answer (p. 15, State of Case) the defendants admit that the said letter was written at their request.

We respectfully submit and we will substantiate our contention by citation of authorities that the aforementioned Exhibits C-1 and C-2, consisting of the Agreement and receipt of April 25th, 1944, in themselves constitute a valid agreement. Furthermore, the attorney's letter of May 31st, 1944 and paragraph 13 of the answer (p. 15) stating that it was written at the request of the defendants constitute a ratification of the Agreement of May 25th, 1944, on behalf not only of Ellen McElligott but of her husband, Gerald A. McElligott. Certainly, Nathan Krauss, the attorney for *both* defendants, as he states in his letter, ratifies this, and merely claims that a final contract had to be entered into and that an additional deposit of \$1,000.00 towards the purchase price had to be made by the complainants. We will submit competent authorities to show that Exhibits C-1 and C-2 constitute a valid contract, and if the McElligotts are bound by it, that contract itself is sufficient to enable the Court to compel specific performance of it. We will show by competent authorities that the said contract describing the property and setting forth the consideration needs no formal contract to make it more clear or more definite as the terms of the sale are amply set forth in said contract.

The testimony will show that when Exhibits C-1 and C-2 were produced for execution at the home of the McElligotts, that Exhibit C-1 had been typed by Mr. McElligott himself and the written portions in the body thereof with the exception of "Patrick" filled in by Mr. McElligott *in his own handwriting* (p. 67, State of Case).

Our second contention requires a more elaborate analysis of the facts. The evidence adduced

shows that immediately after the signing of the contract of April 25th, 1944, and the giving of the deposit, the complainants made application for a mortgage loan to enable them to finance in part the balance of the consideration for the purchase of the premises. The mortgage application was made with the Central Home Trust Company, which operates through the Federal Housing Administration. The search was forthwith commenced by Leavitt & Talley, Esquires, representing the bank, and a loan was granted with all due diligence in the sum of Five Thousand (\$5,000.00) Dollars. The complainants had had several conferences with the defendants to negotiate the purchase of the premises prior to April 25th, 1944. There was some bargaining over the price which, however, culminated in the aforementioned sum of \$9,300.00 and in the agreement of April 25th, 1944. The negotiations were carried on by both complainants with both defendants. At the execution of the Agreement on April 25th, 1944, Mr. McElligott not being present, Mrs. McElligott stated that she had the authority to execute the agreement in his behalf (pp. 43-44). She thereupon signed her name to Exhibits C-1 and C-2, and signed her husband's name to both exhibits.

Admittedly, the husband was not present. However, the evidence adduced shows that he knew this agreement was going to be signed. Subsequent to April 25th, 1944, the complainants called at the home of the defendants, said home being the subject of this litigation, to speak with Mr. McElligott and to look at the property which they had agreed to buy. It is a one-family house and was to be their home and they naturally would

look at the property. He also had to call on the McElligotts because the attorneys representing the lending institution requested the old deed for use in making their search. The testimony will show that in the discussions between Mr. Monahan and Mr. McElligott the existence of the contract was taken for granted. Its terms were known to Mr. McElligott and he knew that his wife had signed the contract on his behalf as well as on hers but not a single time did he repudiate his wife's authority in intimating in any way that his wife had no authority to sign the contract on his behalf or that he was not bound thereby. It was only as late as the end of May, 1944, that the defendants stated to the complainants that they would not consummate the transaction. Ordinarily there may be some dispute as to what was set forth or said between the parties but in this case the ground for their refusal to consummate the transaction is embodied in a letter written on May 31st, 1944, by their attorney, Nathan Krauss, to the complainants, and the grounds given there are two: first, that an additional \$1,000.00 deposit was required; second, that a formal contract was contemplated when the original contract was signed (p. 9).

It is respectfully called to the Court's attention that Mr. Krauss, writing on behalf of *both* the defendants, did not repudiate the existence of the original contract. He did not state that Mr. McElligott did not consider himself bound by the original contract of April 25th, 1944. There is no intimation in the letter of May 31st, 1944, to this effect (Schedule "C" annexed to the Bill of Complaint, p. 9, State of Case). There is no repudiation of the contract in any letter. It is

for that reason that we believe our first contention at the beginning of this brief is sound. But aside from time, and coming back to the second contention, we state that there was no dispute as to why the defendants refused to consummate the transaction. Their reasons are established in the above-mentioned letter of May 31st, 1944, to wit: that an addition \$1,000.00 deposit be made and that a formal contract be entered into.

It is clear from the authorities applicable to this case as will hereafter be shown, that for parties to be bound in a contract for the sale of real estate no definite formality is required. The only requisite is that there be certainty and that clearly exists in the contract of April 25th, 1944.

The defendants were not entitled to the additional deposit of \$1,000.00 because that did not appear in the contract dated April 25th, 1944. A formal contract could not have contained any more than the original contract of April 25th, 1944 contained.

Under the above state of facts the issue narrows a great deal. It becomes even narrower if this Court will consider our first contention, to wit: that the Agreement of April 25th, 1944, coupled with letter of Mr. Krauss dated May 31st, 1944, and the answer admitting that this was written at the request of the defendants, spell out a complete contract.

An additional letter of Nathan Krauss written June 8th, 1944, to the solliictor for the complainants, and which letter is annexed to the Bill of Complaint as Schedule "D" (p. 10, State of Case), repeats the position of the defendants, and again the answer in paragraph 14 (p. 16) admits the same.

The answer of the defendants, after answering the bill of complaint paragraph by paragraph in the usual manner, relies on four points. One, that Gerald A. McElligott did not sign Schedules "A" and "B." Two, that he did not lawfully authorize any other person to sign the same for him. Three, that said Schedules "A" and "B" do not constitute a valid agreement for the sale of lands. Four, that Schedules "A" and "B" were signed by the defendant Ellen McElligott in contemplation of the drawing of a formal contract.

These defenses actually constitute only two real defenses. One, that Gerald A. McElligott did not sign the contract, and therefore is not bound thereby, and two, that it was contemplated that a formal contract would be entered into.

And at this point I respectfully call the Court's attention to the manner in which the defendants are trying to avoid their responsibility. The third defense set forth by the defendants is that Schedules "A" and "B" were signed by the defendant Ellen McElligott in contemplation of the drawing of a formal contract. The letter written by Mr. Krauss dated May 31st, 1944, specifically states: "It was contemplated by my clients (*note use of the plural*), that a formal contract would be entered into." This alone will show the iniquity of the defense set up by these defendants. In the correspondence from their attorney before the litigation was entered into he definitely affirms that *both* defendants contemplated that a formal contract would be entered into. In the third defense of the answer after the litigation had already been commenced, the theory of the refusal was changed. It needed changing to the

effect that Schedules "A" and "B" were signed by the defendant's wife in contemplation of the drawing of a formal contract. Without that change in theory the defendants would have no defense. However, the law is clear that under conditions such as these, the Court will not permit litigants to use the Statute of Frauds as a weapon with which to perpetrate a fraud, nor will the Court permit a wrongdoer to use the Statute of Frauds as a shield. The defendant Gerald A. McElligott knew of the negotiations because he partook in them. He typed and wrote in ink the Exhibit "C-1." After the making of the agreement whereto his wife signed his name in addition to her own, Gerald A. McElligott discussed the transaction with the complainants several times. He knew of the execution of the agreement by his wife on her and his behalf, and he stood mute. On the direct examination by his own attorney Mr. Elligott admitted having a discussion with Mr. Monahan but he does not state that he repudiated the agreement or questioned his wife's authority to sign his name to it; his only statement of a difference with Mr. Monahan was that he discussed the signing of a formal agreement. The testimony (p. 82) is as follows:

"Q. At the time you had your discussions with Mr. Monahan, or at any of those times, was there any discussion about a formal agreement being signed? A. Yes, there was.

Q. And when was that? A. One evening when he came over, I told him there would have to be a formal contract, the \$200 that he had given Mrs. McElligott was definitely only a deposit."

These answers by Mr. McElligott have a double effect. In the first place, it establishes the truth

of Mr. Monahan's testimony that he did speak with Mr. McElligott after the delivery of Exhibits C-1 and C-2 on May 25, 1944, and it has the other purpose of estopping Mr. McElligott from asserting that his wife was unauthorized to sign an agreement on his behalf for the sale of the property. He certainly could have said to Mr. Monahan at this point that his wife had no authority to bind him; all he did say, even in his own testimony is that he wanted a formal contract, and that was said in the latter part of May 1944.

The opinion of the learned vice-chancellor in the Court below, ably summarizes the pertinent testimony which, in part, persuaded him to find for the complainants. We respectfully refer to those portions of the opinion found between the bottom of page 21 and the bottom of page 24 of the State of Case. He calls attention to the fact that the testimony as to the conversation concerning the mortgage between Monahan and McElligott is not denied by the latter. He also calls attention to the fact that McElligott, the defendant, upon being called to the stand by the *complainants* testified that the written portions of Exhibit "C-1" were in his (McElligott's) handwriting. The rest of the opinion above referred to further analyzes the testimony and much more ably than we could ourselves. For this reason we respectfully refer the Court thereto, inasmuch as a reading thereof will convince the Court, as it convinced the vice-chancellor below that, not only did Mrs. McElligott have authority from her husband to affix his signature, but also that Mr. McElligott in his said conversation with Monahan, which the Court found McElligott did not deny, ratified and confirmed such authority in his wife (p. 25, S. of C.).

Under the circumstances, knowing that the complainants were relying upon the existence of the agreement, it was his duty to speak and by his failure to speak he is in law and equity deemed to have acquiesced in the act of his wife. His wife in signing the agreement either had or did not have the lawful authority to sign his name. If she had the lawful authority to sign his name, then of course there would be no defense whatever. If she did not have the lawful authority to sign his name she misled the complainants. She caused them great difficulty and is a wrongdoer herself. In addition, however, the husband, having sat by and permitted this wrongdoing to be perpetrated upon the two complainants as two innocent parties, he should be the one to be compelled to carry out the acts which he permitted to be undertaken in his name.

LAW

POINT I

The written instruments, which are in evidence in this case, spell out a complete contract enforceable in the Court of Chancery.

To be enforceable under the Statute of Frauds, a contract for the sale of lands must be certain and signed by the party to be charged. This, of course, is elementary. The answer of the defendants relies particularly on their contention that the alleged contracts were not signed by Gerald A. McElligott and do not constitute valid agreements for the sale of the lands mentioned in paragraph 1 of the bill of complaint. The Schedules "A" and "B" annexed to the bill of

complaint were not drawn in a formal manner, but have, it is submitted, all of the elements to satisfy the requirements of the statute of frauds with respect to the certainty of contract. These schedules name the purchasers, they name the amount and they adequately describe the premises involved. There are numerous cases where the agreement between the parties is less certain than that in the case at bar. Still they have been held by our courts to be entirely adequate.

In the case of *Lewis' Administrator v. Reichey*, 27 N. J. Eq. 240, the agreement consisted of a receipt reading as follows:

“Received, Newark, N. J., December 9th, 1874, of George Lewis the sum of five hundred dollars, in full for title to property held by Henry Reichey, on Bruce street and Thirteenth avenue, and South Orange avenue, in city of Newark, N. J., which said title is held by said Reichey by declaration of sale from mayor and common council of Newark, and which shall be assigned to said Lewis within two days from the date hereof.

Abraham M. Hassell,
Attorney for Henry Reichey.”

The questions there were twofold, as they are in this case. The first question was whether the receipt if made by the authority of the defendant was sufficient to bind him, and secondly, if so, whether Mr. Hassell was authorized to contract for the defendant. Chancellor RUNYON held that the receipt was sufficient, using the following language:

“The defendant does not claim to have had any other title by declaration of sale from the corporation of the city of Newark.

The description is sufficient. The maxim *id certum est quod certum reddi potest*, applies. Where an agreement in writing for the sale of a house did not, by description, ascertain the particular house, but spoke of it merely as 'the house &c., in Newport,' and referred to the deeds by saying, 'the money to be paid as soon as the deeds can be had from Mr. Deere,' it was held that the agreement was sufficiently certain, if it could be ascertained by inquiry before a master that the deeds in the possession of the person named referred to the house in question. *Owen v. Thomas*, 3 M. & K. 353. Here the declaration of sale referred to will give all requisite certainty as to the subject of the contract."

As to the second question, the Court held that that was a question of fact and decided that the attorney had the power to bind the owner of the property.

In the case of *Wollenburg v. Rynar*, decided by Vice Chancellor BACKES in 96 N. J. Eq. 38, the agreement was the following receipt:

"Newark, N. J. Nov. 15, 1922. Received from F. R. Wollenburg, \$60.00 deposit on 10 ft. (ten ft.) land adjoining stores at Clinton Place and Hawthorne Avenue; depth according to deed. Balance to be paid within two months, the sum of five hundred dollars."

The defense in that case was also that the memorandum did not contain sufficient facts to comply with the statute. The Vice Chancellor held as follows:

"The memorandum must contain all the essential terms of the contract, expressed with such degree of certainty that it may be understood without recourse to parole evidence to show the intention of the parties; but, as stated in 27 Corp. Jur. 277, it

‘Need not contain apt, definite and explicit words expressing the agreement to convey; it is sufficient if such an agreement may be implied from the language employed, and if, from a consideration of the whole contract, it may be gathered that it is the intention of one party to convey and the other party to purchase.’”

The reasoning used by the Court in that case in the Vice Chancellor’s language is the following:

“The land is sufficiently described so that with the aid of parole evidence it can be readily identified. Evidence for this purpose is admissible. *Pateman v. Riley*, 72 N. J. Eq. 316. The point particularly stressed is that the memorandum does not disclose an agreement to sell. It does not in terms, but there is no other reasonable interpretation. If the preposition for after the word ‘deposit’ had been used instead of on, and the memorandum read ‘Received \$60 deposit for ten feet of land,’ &c., there could be little or no question as to its sufficiency. The contracting parties are of a foreign mother tongue and unschooled in our language, and ‘on’ was obviously used to denote ‘for’. The purchase price is stated, and the recital that the balance was to be paid implies a purchase.”

In the later case of *Friedman v. Gold*, 105 N. J. Eq. 177, the premises to be sold were described as the

“two-family frame building now in the course of erection on Jefferson street, and being the fifth house from the intersection of Joralemon and Jefferson streets, Belleville, New Jersey, including a two-car cement block garage.”

The Vice Chancellor disposed of the contention that this was an insufficient description in the following language:

“A point of law is raised, that the description of the lot to be conveyed is indefinite. ‘The fifth house from the intersection of Joralemon and Jefferson streets’ is sufficient for accurate identification. Five houses adjacent the corner, including the one involved, were in the course of erection and equally distant apart, at the time of the contract. An equal division of the total frontage among the five houses will give the width of lot for each house and a definite description, which may be determined aliunde. *Wollenburg v. Rynar*, 96 N. J. Eq. 38.”

In the very recent case of *Moran v. Fifteenth Ward Building & Loan Ass'n*, 25 Atl. Rptr. 2nd Series, 426, every conceivable objection to the lack of certainty in a contract under the statute of frauds was raised by the defendants. They argued that the property was inadequately described, that the consideration which was partly in building and loan stock, was not definite, that the type of deed to be given was not set forth and that there was no mention of apportionment of taxes, interest, insurance or rents. The Court held in part as follows:

“Defendant also argues that the contract was too uncertain to permit of specific performance. The letter addressed by the secretary of the association to complainant, dated April 25, 1941, reads: ‘Your offer for 97 Arlington Boulevard, North Arlington, of \$5,000 in stock and \$500 in cash, less \$150 in lieu of commission, was accepted, provided the frontage of the property sold be 27 feet. Please advise us whether or not this provision is acceptable.’”

For the purpose of ascertaining the meaning of a contract, the court must consider the situation of the parties and the accompanying circumstances.” Citing numerous cases.

“Defendant says, first, that the description of the property is uncertain. At the time this letter was written, defendant owned a parcel of land known as Nos. 97 and 99 Arlington Boulevard. I gather that the property had been conveyed to the defendant by two deeds, of which the one for 97 Arlington Boulevard conveyed a frontage of 29.16 feet. The parties agree that it was their intention that a frontage of only 27 feet should be conveyed to complainant, but the defendant says that there is no telling whether the extra 2.16 feet should be cut off from the side adjoining No. 99 so as to increase the width of that lot, or whether the slice should be taken from the opposite side, leaving defendant an isolated ribbon of land. The latter supposition borders on the absurd, since nothing in the case indicates a possible use for a parcel 100 feet deep by 2.16 feet wide. A reasonable meaning should be given to a contract.” Citing numerous cases.

“Plainly, the parties intended that there should be conveyed to complainant the 27 feet furthest from No. 97.”

Vice Chancellor BIGELOW even held that the term “\$5,000.00 in stock” was readily ascertainable. As to the remainder of the objections on the part of defendants that the contract was not a definite one, the Vice Chancellor held as follows:

“Complainant further contends that the contract evidenced by the memorandum is incomplete and uncertain since it fails to set forth ‘the type of title and deed to be given and whether there was to be any apportionment of taxes, interest, insurance or rents.’ The law provides all these terms. In the absence of special equities or agreement to the contrary, the grantor must convey good title in fee simple, by deed of bargain and

sale, without covenants. *Lounsbery v. Locander*, 25 N. J. Eq. 554. Taxes are apportioned according to the statute. R. S. 54:4-56, N. J. S. A. 54:4-56; *Millville Aerie v. Weatherby*, 82 N. J. Eq. 455, 88 A. 847. The right of possession and rents go with the legal title so that rents falling due before title passes belong to the vendor. 66 C. J. 1034 and 1041; *Handlan v. Bennett*, 4 Cir., 51 F. 2d 21. As to interest, it is not stated that any mortgage encumbers the title. If interest on the purchase price is meant, the price is not payable until the deed is delivered. *Ackley v. Richman*, 10 N. J. L. 304. And no interest runs until then or until the vendee is put in possession. Fire or liability insurance which a land owner procures for his own protection is entirely separate from his estate in the land and does not pass to the grantee of the land as an incident of the land title. Generally the parties agree that the grantee shall take over the insurance and pay to the grantor the pro rata unearned premiums, since this course is advantageous to both; but such an assignment is collateral to the sale of the land. Unless the vendee agrees to buy the insurance, he is not obligated to do so. *Millville Aerie v. Weatherby*, supra."

It is therefore respectfully submitted that the written instruments which are in evidence in the case at bar and which are annexed to the bill of complaint as part of complainants' case, clearly set forth all the requisites of a contract as required by the state of frauds. The premises are at #701 Woodlawn Avenue, Roselle Park, New Jersey. In fact the defendants admit paragraph 2 of the bill of complaint which alleges that "the said premises consist of a 2½ story frame and brick one-family dwelling situated on a lot 40 feet by 100 feet at the above mentioned address."

The consideration is fully set forth and the complainants are ready to pay same in cash upon the delivery of a bargain and sale deed in accordance with the statute and as interpreted by Vice Chancellor BIGELOW in *Moran v. Fifteenth Ward Building & Loan Ass'n, supra*, which provides that in the absence of special equities or an agreement to the contrary, the grantor must convey good title in fee simple by deed of bargain and sale without covenants. This, we are ready to accept.

POINT II

The defendant, Gerald A. McElligott, is estopped from relying on the statute of frauds in his contention that he did not sign Schedules "A" and "B."

The next contention and which we consider as really the important defense in this case is that the defendant, Gerald A. McElligott did not personally sign the agreement.

It is admitted that Gerald A. McElligott did not sign the agreements known as Schedules "A" and "B," and that it was proved that Ellen McElligott signed same in his behalf. We contend that this manner of affixing the signature of Gerald A. McElligott is sufficient to bind him in the sale of this property to the complainants.

Our first contention on that score is that Ellen McElligott, the wife of Gerald A. McElligott, was his agent for that purpose. The law is well established that verbal authority is sufficient to authorize the agent to make an agreement in writ-

ing binding the principal to convey real estate. (See *Brown v. Honiss*, 74 N. J. L. 501, 505.)

One of the earliest cases on this subject is *Lindley v. Keim*, decided by the Court of Errors and Appeals, 54 N. J. Eq. 418, 422, where that Court held as follows:

“The first proposition is that authority to sign a memorandum of agreement for the sale of lands may be conferred by parol, and authority so conferred will satisfy the provisions of our statute of frauds. In some states the statute of frauds has been extended so as to require that such authority shall be exhibited in writing. Reid St. Fr. par. 380. *But our statute has never been thus extended and it needs no citation of authorities to show that the construction of the statute from which ours was taken, and which construction we follow, has been, however, inconsistent with its general purpose, that authority to sign a memorandum of agreement for the sale of lands (which is required to be in writing) need not be conferred by writing, but may be conferred by parol.*”

In the case at bar we respectfully submit that Mr. McElligott designated his wife as his agent for the purpose of executing the agreement. Not only did he designate her as his agent but he himself prepared the forms used as Schedule “B” (Exhibit C-1) which was subsequently signed. The facts in the case at bar are, and have been proven to be, that Ellen McElligott was designated by her husband to sell the property and to execute an agreement for that purpose in the amount agreed upon. The deposit was given and retained by the defendants without any offer of return from April 25, 1944 to May 31, 1944, and it was only at

that time that Nathan Krauss, by letter written to the complainants, advanced new terms and stated that he would return the deposit of \$200.00 by June 3rd, 1944, unless a formal agreement was entered into and an additional deposit made towards the purchase price. As a matter of fact, as pointed out elsewhere herein, Mr. Krauss' letter of May 31, 1944, and his letter of June 8, 1944, which are annexed to the bill of complaint as Schedules "C" and "D" respectively, ratify the agency which existed whereby Mrs. McElligott signed Mr. McElligott's name and ratified the agreement as above stated.

As pointed out above, Mr. McElligott in his direct examination impliedly ratified the agency of his wife by merely asking for a formal agreement and not saying a word to Mr. Monahan that his wife had no authority to bind him.

Our second contention that Mr. McElligott cannot deny the agency of his wife is based on the theory of estoppel. The facts in this case are clear that Mr. McElligott together with his wife entered into lengthy negotiations for the sale of the property in question with the complainants prior to April 25, 1944. The evidence also shows that subsequent to April 25, 1944, the complainants had conferences with Mr. McElligott where the sale was discussed, the old deed was requested, and Mr. McElligott, knowing of the existence of the contract, took no steps to repudiate it nor did he even intimate that he was dissatisfied with the contract. His only argument now is that he wanted a formal agreement. However, the law is clearly against him on this point. It will be shown at the appropriate point in this brief that the memoranda in evidence in this case are sufficient

to bind the parties without the necessity of a formal agreement. Furthermore, the evidence clearly shows that entire question of a formal agreement was merely an afterthought. This has been amply shown in the testimony. However, the Vice Chancellor put his finger on the crux of the situation when he asked the witness (p. 89), "Why don't you want to give the title now?" and the witness answered: "Just because this has caused so much of a fuss in between and Mrs. McElligott has become so terribly upset about the whole thing that I do not care to go through with the deal." It was only on June 1, 1944, when Mr. Krauss' letter of May 31, 1944, was received, that any intimation was given that something was wrong with the contract. Legally, of course, nothing was wrong with the contract. The contract itself was complete in every detail.

We maintain that the effect of Mr. Krauss' letter of May 31, 1944, and of his subsequent letter of June 8, 1944, is such as to reaffirm the contract. Mr. Krauss stated that he has been consulted "by Mr. and Mrs. McElligott with reference to an alleged contract for the sale of their property to you." He goes on to say "while there was a deposit of \$200.00 given by you, it was contemplated by my clients (*note the plural*), that a formal contract would be entered into." This, of course, must admit the existence of the former instrument and ratifying it. Whether or not it is a binding contract is up to the court to decide, but the fact that it was signed by Mr. Krauss' "clients" can be no longer questioned, because Mr. Krauss admits it in his letter.

Furthermore, the answer filed by the defendants specifically states and admits in paragraph

13 of the answer that the said letter was written at the request of the defendants. This is a chain of evidence which the defendants cannot escape. They have bound themselves personally by the statement in their attorney's letter and by their answer filed in this Court that they consented to the terms set forth in Schedule "A" and Schedule "B."

Under this state of facts the theory of equitable estoppel comes into full play. One of the most recent cases on this subject was decided by our Court of Errors and Appeals, *New Jersey Suburban Water Co. v. Town of Harrison*, 3 A. 2nd 623, where Justice HEHER summed up the law of estoppel as follows:

"In modern usage, equitable estoppel and estoppel in pais are convertible terms, embracing also quasi-estoppel. They embody the doctrine, grounded in equity and justice, that one shall not be permitted to repudiate an act done or position assumed where that course would work injustice to another who, having the right to do so, has relied thereon. An estoppel arises 'where a man is concluded and forbidden by law to speak against his own act or deed; yea, even though it is to say the truth.' *Termes de la Ley*, tit. Estoppel, cited in *Demarest v. Den ex dem. Hopper*, 22 N. J. L. 599, 619. It is operative where a person 'has done some act which the policy of the law will not permit him to gainsay or deny.' 1 *Greenleaf on Evidence* (16th Ed.) c. Vi, Sec. 22. See, also, *Blackstone's Com.* 308. While the creature of equity, and governed by equitable principles, it is a doctrine enforceable in courts of common law jurisdiction. *La Rosa v. Nichols*, 92 N. J. L. 375, 105 A. 201, 6 A. L. R. 412; *Central R. Co. v. MacCartney*, 68 N. J. L. 165, 52 A. 575. It is of the essence of equitable estoppel that one is

precluded from taking a position inconsistent with that previously assumed and intended to influence the conduct of another, if such repudiation 'would not be responsive to the demands of justice and good conscience,' in that it would effect an unjust result as regards the latter. *Rothschild v. Title Guarantee & Trust Co.*, 204 N. Y. 458, 97 N. E. 879, 41 L. R. A., N. S., 740."

Justice DALY speaking for the same Court in *Willig v. Friedberg*, 108 N. J. Eq. 17, in characterizing an attempt by a party to hide behind the statute of frauds stated as follows:

"It is indeed true that this vitally necessary statute shall be maintained in full force and vigor within its proper scope and operation, and that it is operative in equity as well as in law. *Yet, the statute to prevent frauds is not to be used as an instrument of fraud.* Powell v. Yearance, 73 N. J. Eq. 117."

In the case of *Central R. R. Co. v. MacCartney*, 68 N. J. L. 165, 175, Justice PITNEY stated the doctrine as follows:

"The doctrine of equitable estoppel, although the creature of equity and depending upon equitable principles, is recognized and enforced alike by the courts both of law and of equity. Pom. Eq. Jur., par. 802. For an ample discussion of its principles and their application, reference may be had to Mr. Pomeroy's treatise, Id. par. 801, 821; Big. Estop. (5th ed.) 570 et seq., 11 Am. & Eng. Encycl. L. (2d ed.), tit. 'Estoppel' 385, &c.

The courts of this state have been called upon to deal with the doctrine in all its phases. Among other cases, the following may be mentioned." Citing numerous cases.

"The essential elements which must unite in order to create an equitable estoppel by

conduct may be stated with approximate accuracy, as follows:

1. That the party against whom the estoppel is urged has, on a previous occasion, by words or conduct, made a representation or concealment of material facts inconsistent with the facts forming the basis of his present claim.

2. That such party either knew the facts to be otherwise than represented, or except for gross negligence would have known; or that he pretended to know the facts when he knew that he did not know them.

3. That such representation or concealment was made either with the intent to influence the conduct of another or else was made under such circumstances that a reasonably prudent man would suppose it was intended to be acted upon as true.

4. That the party to whom it was made was ignorant of the facts and had no convenient opportunity to ascertain them.

5. That the latter party, in good faith, relied upon the representations or conduct of the other party and thereby was led into such a course of conduct that he will not be substantially prejudiced if the other party be permitted to repudiate his former action or representation."

This is peculiarly a case where the Court should bring into play the doctrine of equitable estoppel. The defendant, Gerald A. McElligott, permitted the agreement to be entered into. He took part in the negotiations before the making of the agreement. He took part in the conversations after the agreement was entered into, knowing it to exist and not denying it in any way. However, Vice Chancellor STEIN stated in the opinion below:

“Mr. McElligott said that all he wanted was time until September to remove from the premises, and when asked ‘Well, now September has gone and passed, and that was all you wanted; you wanted to stay until September?’ He replied, ‘That is right, your Honor.’ ‘Why don’t you want to give the title now?’ ‘Just because this has caused so much of a fuss in between and Mrs. McElligott has become so terribly upset about the whole thing that I do not care to go through with the deal.’ The proof clearly establishes that the minds of the parties met in every essential detail requisite for the making of a valid contract for the sale of real property. The defendants wanted to sell and move elsewhere. Complainants agreed to buy. The deposit and the price was agreed to in conferences between complainants and both defendants. When the deposit was paid, the evidence makes it clear that the wife had authority from her husband to hand over a receipt prepared by him and left with her for the express purpose of issuing it to the complainants. I hold that the receipt of itself was sufficient to bind the parties and that the circumstances here are such that it may be reasonably inferred that the wife had authority from her husband to affix his signature thereto as well as to the agreement of sale prepared by the bank, and that she was his agent for that purpose. Moreover, that McElligott in conversation with the complainant Monahan, ratified and confirmed such authority in his wife.”

The above really summarizes the entire case. The Vice Chancellor had the benefit of observing the witnesses and of obtaining first hand impression of the testimony and came to the proper conclusion that Mr. McElligott ratified and confirmed the authority of his wife and that the

only reason he didn't want to go through with the deal was "because this has caused so much of a fuss in between and Mrs. McElligott has become so terribly upset about the whole thing."

Mr. McElligott ignores, of course, the fact that the Monahans have also become upset because they had entered into an agreement to purchase the house as their own home. He also ignores the fact that although the agreement was entered into on April 25th, 1944, and although the Final Decree of the Court of Chancery was entered on November 20th, 1944, it is now, at the writing of this brief, May, 1945, and he has still kept the complainants out of possession.

However, returning to the argument as stated above, Mr. McElligott retained counsel who ratified the agreement by implication on behalf of both defendants, and this Court should not permit the said defendants to escape their liability behind a tenuous argument that the statute of frauds was not complied with.

The complete contract is before the Court in Exhibits C-1 and C-2. Schedule "C," the letter that Nathan Krauss wrote, annexed to the bill of complaint and admitted by Nathan Krauss (p. 94, State of Case), is an additional ratification of the contract, if such is necessary. The answer filed with this Court admits that the letter known as Schedule "C" was written at the request of *both* defendants. Under these circumstances it is respectfully submitted that the defendant, Gerald A. McElligott, is estopped from denying that his wife was authorized to affix his signature to the contracts and to bind him in selling the premises involved.

POINT III

The contract in the case at bar is complete on its face and no formal contract was necessary to bind the parties, nor was it a condition that such a contract would be entered into.

It is well established that a complete contract may be gathered from letters and other documentary evidence where the writings are so inter-related that they may be fairly construed collectively as the agreement.

Hardy v. Hangen, 134 N. J. Eq. 176; 34 A. 2d 642.

This point is well settled and the above we believe is the latest expression of the Court on this subject. Usually when a case of this sort comes before the Court where an agreement is entered into between the parties themselves, without benefit or advice of counsel, the first defense which is put up in a suit to enforce specific performance is that it was contemplated by the parties that a formal contract would be entered into. Due to the fact that many laymen have drawn their own contracts without benefit of counsel, it is natural that this situation has come before the Court numerous times.

It is, of course, elementary that when parties enter into negotiations and reach a tentative agreement, *but do not intend to be bound until a formal contract be executed*, they cannot be held to their tentative bargain. This is an elementary principle of law and is well stated by Vice Chancellor BIGELOW in the case of *Moran v. Fifteenth*

Ward Building & Loan Ass'n, supra. The Vice Chancellor concludes, however, as follows:

“But if the negotiations are finished and the contract between the parties is complete in all its terms and the parties intend that it shall be binding, then it is enforceable, although lacking in formality and although the parties contemplate that a formal agreement shall be drawn and signed. *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266.”

In the *Moran* case the Vice Chancellor by drawing an inference from an inference (which he was loathe to do), found that there was some proof that the parties did not intend to be bound until the execution of a formal contract. However, the Vice Chancellor concluded:

“But there are weightier circumstances to the contrary: The acceptance of \$100 on account of the purchase price, and the absence of any mention of a formal contract in the offer and acceptance. *In every case cited by counsel, the memorandum sued on expressly referred to another paper to be drawn and signed.*” (Citing numerous cases.)

The Vice Chancellor clinches the argument then by stating that:

“Lastly, the defendant for four months, or until September 19, did not suggest that the want of a formal contract was a reason for refusing performance. I conclude that the parties intended to be bound and are bound accordingly.”

In the case at bar the facts are strangely analogous to the *Moran* case. In the first place, the terms of the agreement as set forth in Ex-

hibits C-1 and C-2, are complete on their face. Not a word need be added to the agreements to make them more complete. If anything is lacking, the lack is supplied by the operation of law. It is true that if a lawyer had drawn these contracts, he probably would have provided for apportionment of insurance and taxes and for the nature of the deed which was to be given. However, all these omissions are provided for by the operation of law as shown in the *Moran* case above. The consideration was to be paid in cash. If the time of closing was not set forth, it would mean a reasonable time. Time to be made of the essence if a reasonable time had elapsed. There was therefore nothing lacking in the contract which had to be remedied by a formal contract. In addition no request was made that a formal contract be entered into until May 31, 1944, which is more than five weeks after April 25, 1944, and, as the evidence will show, after the complainants had caused their search to be made and completed, had raised their mortgage money and were ready to close title. The proofs show that the FHA acted on the contracts as embodied in Exhibits C-1 and C-2 and approved the mortgage on the property.

Under these circumstances the contention on the part of the defendants that a formal contract was contemplated can be considered only an afterthought. There was clearly no requirement that a formal contract be entered into and it was never contemplated by the parties when the negotiations were completed and the agreement was signed and the deposit given that any further contract had to be entered into.

It is therefore respectfully submitted that both on the law and on the facts the Decree of the Court of Chancery should be affirmed.

Respectfully submitted,

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