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TESTIMONY.

For Complainants.

For Defendant.

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BILL OF COMPLAINT.

In Chancery of New Jersey

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

The complainants, Morris Nass and Minnie Nass, his wife, residing in the City of Newark, County of Essex and State of New Jersey, say:

1. That heretofore and on the fifteenth day of February, Nineteen Hundred and Twenty-six, your complainants, and the defendant, Eleanor F. Munzing (widow), entered into a written agreement, a true copy of which is hereto annexed and made part hereof, and is hereby expressly referred to as if herein set forth fully and at length, wherein and whereby the defendant agreed to sell, and your complainants agreed to buy the lands and premises more particularly described as follows:

"Premises in the Town of Irvington, County of Essex and State of New Jersey:

BEGINNING in the southeasterly line of Lyons Avenue distant twenty-six feet easterly from the easterly side of Normandy Place; thence running south thirty-eight degrees fifty-nine minutes east seventy-five feet; thence running south fifty-two degrees twenty-one minutes west one hundred feet; thence running thirty-eight degrees fifty-nine minutes west seventy-five feet; and thence running north fifty-two degrees twenty-one minutes east one hundred feet to the southeasterly side of Lyons Avenue and the point and place of BEGINNING.

Together with a strip of land in the rear of the said premises ten feet in width running to Normandy Place.

Being known and designated as Nos. 580-584 Lyons Avenue."

2. At the time of the making of the said agreement, there was erected upon the lands and premises hereinabove described, a large apartment house, and it was agreed, amongst other things, that at the time of closing, the sellor would deliver a certificate of the New Jersey State Tenement House Department and the Board of Health of the City of Newark.

3. In accordance with the said agreement, the complainants paid to the defendant the sum of One Thousand Dollars ($1,000.00), which was part of the purchase price as set forth in said agreement.

4. That after entering into said agreement, the complainants incurred expenses for the examination of the title and the making of a survey.

5. In accordance with the terms of said agreement, the defendant was to convey to the complainants the said premises by deed of warranty, free and clear of all encumbrances, except those expressly agreed upon in the said agreement of sale.

6. Your complainants allege that the title to the said premises was and is defective and unmarketable in that, in violation to the terms of said agreement, the said lands and premises are encumbered by an easement which is contained in a deed from the Welfare Realty Company, a corporation of New Jersey, to the defendant herein, which deed is dated October 1, 1923, and is recorded in Book E-69 of Deeds for Essex County, on page 302, and is as follows:

> "TOGETHER with a strip of land in the rear of said premises approximately eight feet front and rear by one hundred and one feet more or less in depth, and which strip runs to Normandy Place.
>
> The said party of the first part, its successors and assigns, reserves the right of way in and over the strip of land above described, and which strip of land is to be used in common by and between the said party of the first part, its successors and assigns, and the party of the second part, their heirs, administrators and assigns, and as tenants and occupants of the above described premises and the premises adjoining on the south, at all times, freely to pass and re-pass on foot or with animals, vehicles or otherwise to, from and over the same.
>
> The cost of maintaining and repairing the driveway over the strip of land hereinabove referred to is to be paid equally by and between the owners of the property herein conveyed and the owner of the property adjoining on the south."

7. The complainants have notified the defendant of the defects in the title to the said premises, and have demanded that the defendant comply in each and every respect with the said contract, and have offered on their part, to comply with each and every the terms of the said agreement on their part to be performed, but the defendant has refused, and still refuses to perform her part of the contract, and she is now unable to do so.

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

1. That Eleanor F. Munzing (widow), may answer, without oath, this bill of complaint.

2. That a decree may be made directing the said defendant to re-pay to the complainants the sum of One Thousand Dollars ($1,000.00), together with interest and costs and the reasonable

expenses of examining the title and making the survey.

3. That the said sum of One Thousand Dollars ($1,000.00), together with interest and costs and the complainants' expenses in this behalf, be impressed as a lien upon the premises hereinbefore described, and in the event that the said defendant does not pay the same that the said property be sold to raise and satisfy the amount so due to the complainants.

Dated May 10, 1926.

JACOB L. NEWMAN,
Solicitor for Complainants.

ARTICLES OF AGREEMENT, made the fifteenth day of February, in the year of Our Lord One Thousand Nine Hundred and Twenty-six,

BETWEEN Eleanor F. Munzing (widow), of the Town of Irvington, in the County of Essex and State of New Jersey, party of the first part;

AND Morris Nass and Minnie Nass, his wife, of the City of Newark in the County of Essex and State of New Jersey party of the second part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Fifty-two Thousand ($52,000.00) Dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that she the said party of the first part, will well and sufficiently convey to the said party

of the second part, their heirs and assigns, by Deed of Warranty free from all encumbrance, except as hereinafter mentioned on or before the first day of May, next ensuing the date hereof, all lot , tract , or parcel , of land and premises, hereinafter particularly described, situate, lying and being in the Town of Irvington in the County of Essex and State of New Jersey.

BEGINNING in the southeasterly line of Lyons avenue distant twenty-six feet easterly from the easterly side of Normandy Place; thence running south 38 degrees 59 minutes east 75 feet; thence running south 52 degrees 21 minutes west 100 feet; thence running 38 degrees 59 minutes west 75 feet; and thence running north 52 degrees 21 minutes east 100 feet to the southeasterly side of Lyons avenue and the point and place of BEGINNING.

Together with a strip of land in the rear of the said premises ten feet in width running to Normandy Place.

Being premises known as No. 508-584 Lyons avenue.

Subject to restrictions of record.

Subject to existing tenancies, and leases.

The within premises are conveyed expressly subject to mortgages on said premises, held by the West End B. & L. Association, in the sum of $39,200.00.

The within premises are conveyed expressly subject to a mortgage held by Samuel Schechner in the nominal sum of $6,000.00.

AND the said Morris Nass and Minnie Nass, for themselves, their heirs, executors and administrators, doth covenant, promise and agree to and

with the said party of the first part, her heirs, executors, administrators and assigns, that they the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of Fifty-two Thousand ($52,000.00) Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On execution of this agreement for which this is also a receipt $1,000.00.

On delivery of deed, cash $6,000.00.

By assuming first mortgage at present a lien on the premises, and paying the same according to the terms thereof held by the West End Building & Loan Association, in the nominal sum of $39,200.00.

By assuming the second mortgage at present a lien on the premises and paying same according to terms thereof, held by Samuel Schechner $6,000.00.

WHEREAS, there has accrued to the party of the first part certain back shares in the West End B. & L. Association by reason of the mortgage now held by the said West End B. & L. on the aforementioned premises, it is therefore mutually stipulated and agreed upon that the parties of the second part shall make, execute and deliver to the party of first part a purchase money mortgage equivalent to the value of the back shares to date of closing of title and delivery of deed less the sum of $200.00, which $200.00 are included in the cash to be paid upon delivery of deed and closing of title.

It is further understood and agreed upon that parties of the second part will assign unto the party of the first part, aforementioned back

shares as additional security to the bond and mortgage about to be executed, until the payment of that mortgage in full.

Aforementioned purchase money mortgage shall be for a period of three years containing the usual interest, tax, assessment insurance and installment default clauses and an agreement not to claim credit on the interest payable on bond and mortgage by reason of any tax assessed or to be assessed against premises, with interest at 6% payable semi-annually; parties of second part reserving the right to pay off said mortgage in whole at any time before expiration thereof, with interest to date of payment.

It is expressly understood that any and all apportionments, deductions for tax and interest shall be included or deducted from said purchase money mortgage, it being intention of parties hereto that parties of second part will pay $6,000.00, in cash upon closing of title.

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

And the said party of the first part hereby agrees to pay to a commission of % on the purchase price aforesaid, said commission to be paid in consideration of services rendered in consummating this sale; said commission to become due and payable upon the execution of

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, heirs and assigns, may enter into and upon the said land and premises on the day of next ensuing

the date hereof, and from thence take the rents, issues and profits to and their use,

And It Is Further Agreed, by the parties hereto, that the said Deed shall be delivered and received at the office of Meyer M. Semel, 116 Market street, Newark, N. J., between the hours of ten in the forenoon and four o'clock in the afternoon on the said first day of May, next ensuing the date hereof.

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

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

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

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

It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State Tenement

House Act as enforced by the State Board of Tenement House Supervision, to be shown by the report of the department or board enforcing the same where such ordinances, regulations and said act apply.

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

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

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

And for the performance of all and singular the covenants and agreements aforesaid, the said parties to bind themselves and their respective heirs, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of

which they hereby fix and settle as liquidated damages therefor.

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

ELEANOR F. MUNZING (L. S)
MORRIS NASS (L. S)
MINNIE NASS (L. S)

SIGNED, SEALED AND DELIVERED in the presence of

M. M. SEMEL.

ANSWER.

IN CHANCERY OF NEW JERSEY.

Between MORRIS NASS and MINNIE NASS, his wife, *Complainants,* *and* ELEANOR F. MUNZING (widow), *Defendant.*	*On Bill, etc.* *Answer.*

The defendant, by way of answer to the complaint filed in the within matter, says that:

1. The defendant admits the allegations set forth in paragraph 1 of the complaint.

2. The defendant denies so much of paragraph 2 of the complaint as alleges "the sellor would deliver a certificate of the New Jersey State Tenement House Department and the Board of Health of the City of Newark."

3. The defendant admits the allegations set forth in paragraph 3 of the complaint.

4. The defendant denies the allegations set forth in paragraphs 4, 5, 6 and 7 of the complaint.

FIRST SEPARATE DEFENSE.

1. The complainants were not, on May 1, 1926, or at any other time, ready or able to take title to the said lands and premises as per the terms of said agreement.

SECOND SEPARATE DEFENSE.

1. Complainants, on or before May 1, 1926, and thereafter, abandoned their rights under said contract and so advised the defendant or her agents, because of complainant's inability to comply with the terms of the said agreement.

COUNTER-CLAIM.

The defendant, Eleanor F. Munzing, by way of cross-bill or counter-claim, respectfully shows unto your Honor that:

1. On February 15, 1926, the defendant and complainants did enter into the agreement set forth in paragraph 1 of the complainant's bill.

2. For a long time prior to the 15th day of February, 1926, and on many occasions prior thereto the complainants did visit and inspect the lands and premises set forth in the said bill and were made acquainted with and apprised of the facts of the easement set forth in paragraph 6 of the bill of complaint, by defendant and her agents. That on the 15th day of February, 1926, and prior thereto and before the said agreement was reduced to writing, the complainants did agree to purchase and accept a deed to the said lands and premises subject to the conditions and limitations of the said easement and to pay the purchase price set forth in the said agreement, subject to the terms and conditions set forth therein and to the conditions and limitations of the said easement.

3. That due to error, mistake, surprise and inadvertence, the facts and conditions of said easement were omitted from the written agreement contrary to the terms of the conditions and

facts of sale orally and originally agreed upon between the parties and in spite of the fact that it was the intention of complainants to take and purchase said lands and premises subject to the conditions of the said easement, which were to be included in and made a part of the said written agreement.

4. That by error, mistake, surprise and inadvertence, the following sentence, to wit: "Together with a strip of land in the rear of said premises ten feet in width running to Normandy Place" was incorporated in the said agreement, in the place and stead of the facts of the aforementioned easement.

Wherefore your defendant respectfully charges:

1. That the bill of complaint filed herein by the complainants is inequitable, without merit and is not brought in good faith as required by the principles and maxims of this Honorable Court.

2. That the said proceedings are brought by complainants as a means of subterfuge and to avoid the liability incurred by them by reason of the agreement of sale entered into by them with the defendant because of their inability to take title to the said lands and premises.

3. That the defendant has not been guilty of any neglect in the failure to fully and completely include in the written agreement all of the facts agreed upon by her and complainants orally and which made up the original terms of sale.

4. That this Honorable Court has the jurisdiction and power to correct and reform the

aforementioned written agreement so as to include so much of the original terms and particularly those relating to the aforementioned easement, which were inadvertently omitted from the written agreement contrary to the intent of the parties thereto and at that time without their knowledge.

5. That this Honorable Court has the jurisdiction and power upon the correction and reformation of the said agreement, to enforce the terms of said agreement as thus reformed and to compel complainants to specifically perform the same in accordance with the terms of the same.

6. That your defendant has always been ready, able and willing to perform the agreement according to its true intent and meaning and does herewith tender herself ready and willing to convey and transfer to complainants the said lands and premises as per the original terms of said agreement and as this Honorable Court shall order and direct.

Your defendant being without adequate remedy in the courts of law, therefore honorably prays that:

1. The bill of complaint filed by complainants be dismissed for the causes hereinbefore set forth and charged.

2. The agreement of sale referred to in the bill of complaint be corrected and reformed to include all the original terms of sale as agreed upon by the parties hereto and particularly the conditions and limitations of the easement set forth in paragraph 6 of the bill of complaint.

3. The complainants be ordered, decreed and compelled to specifically perform the terms and conditions of said agreement as reformed and to take and accept a deed of conveyance to said lands and premises and to pay the purchase price therefor to defendant as per the terms and conditions of said agreement as formed and corrected; and that

4. The complainants be ordered and decreed to abide by and comply with such order and decree as to your Honor shall deem suitable, fit and proper to make in the premises.

5. And your defendant humbly prays for such other and further relief as to your Honor shall seem meet and suitable in the premises.

And your defendant will ever pray, etc.

M. M. SEMEL,
Solicitor for and of Counsel with Defendant.

REPLICATION.

IN CHANCERY OF NEW JERSEY.

Between MORRIS NASS and MINNIE NASS, his wife, *Complainants,* *and* ELEANOR F. MUNZING (widow), *Defendant.*	*On Bill, etc.* *Replication.*

The complainants join issue on the answer of the defendant.

ANSWER TO COUNTER-CLAIM.

Answering the counter-claim of the defendant, the complainants say:

1. They admit paragraph 1.

2. They deny paragraphs 2, 3 and 4.

Wherefore, these complainants pray for the relief granted in the bill of complaint herein.

Dated, June 4, 1926.

JACOB L. NEWMAN,
Solicitor for and of Counsel with Complainants.

AMENDED ANSWER AND COUNTER-CLAIM.

IN CHANCERY OF NEW JERSEY.

Between MORRIS NASS and MINNIE NASS, his wife, *Complainants,* *and* ELEANOR F. MUNZING (widow), *Defendant.*	*On Bill, etc.* *Amended Answer and Counter-claim.*

The defendant, by way of answer to the complaint filed in the within matter, says that:

1. The defendant admits the allegations set forth in paragraph 1 of the complaint.

2. The defendant denies so much of paragraph 2 of the complaint as alleges "the sellor would deliver a certificate of the New Jersey State Tenement House Department and the Board of Health of the City of Newark."

3. The defendant admits the allegations set forth in paragraph 3 of the complaint.

4. The defendant denies the allegations set forth in paragraphs 4, 5, 6 and 7 of the complaint.

FIRST SEPARATE DEFENSE.

1. The complainants were not, on May 1, 1926, or at any other time, ready or able to take title to the said lands and premises as per the terms of said agreement.

SECOND SEPARATE DEFENSE.

1. Complainants, on or before the 1st day of May, 1926, and thereafter, abandoned their rights under said contract and so advised the defendant or her agents because of the complainants' inability to comply with the terms of the said agreement.

THIRD SEPARATE DEFENSE.

1. The defendant has always been ready, able and willing to perform the written agreement in accordance with all of the terms and provisions thereof, according to its true intent and meaning, and does herewith tender herself ready and willing to transfer and convey to complainants the said lands and premises as per the original terms of the agreement as this Honorable Court shall order and direct.

COUNTER-CLAIM.

Defendant, Eleanor F. Munzing, by way of cross-bill or counter-claim, respectfully shows unto your Honor that:

1. On February 15, 1926, the defendant and complainants did enter into the agreement set forth in paragraph 1 of the complainant's bill.

2. For a long time prior to the 15th day of February, 1926, and on many occasions prior thereto, the complainants did visit and inspect the lands and premises set forth in the said bill and were made acquainted with and apprised of the facts of the easement set forth in paragraph 6 of the bill of complaint, by the defendant and her agents. That on the 15th day of February, 1926, and prior thereto and before

the said agreement was reduced to writing, the complainants did agree to purchase and accept a deed to the said lands and premises subject to the conditions and limitations of the said easement and to pay the purchase price set forth in the said agreement subject to the terms and conditions set forth in the said agreement and to the conditions and limitations of the said easement.

3. That due to error, mistake, surprise and inadvertence, the facts and conditions of said easement were omitted from the written agreement contrary to the terms of the conditions and facts of sale orally and originally agreed upon between the parties and in spite of the fact that it was the intention of the complainants to take and purchase the said lands and premises subject to the conditions of the said easement, which were to be included in and made a part of the said written agreement.

4. That by error, mistake, surprise and inadvertence the following sentence, to wit: "Together with a strip of land in the rear of the said premises ten feet in width running to Normandy Place," was incorporated in said agreement, in the place and stead of the facts of the aforementioned easement.

Wherefore, your defendant respectfully charges:

1. That the bill of complaint filed herein by the complainants is inequitable, without merit and is not brought in good faith as required by the principles and maxims of this Honorable Court.

2. That the said proceedings are brought by complainants as a means of subterfuge and to avoid the liability incurred by them by reason of the agreement of sale entered into by them with the defendant because of their inability to take title to said lands and premises.

3. That the defendant has not been guilty of any neglect in the failure to fully and completely include in the written agreement all of the facts agreed upon by her and complainants orally and which made up the original terms of sale.

4. That this Honorable Court has the jurisdiction and power to correct and reform the aforementioned written agreement so as to include so much of the original terms and particularly those relating to the aforementioned easement, which were inadvertently omitted from the written agreement contrary to the intent of the parties thereto and at that time without their knowledge.

5. That this Honorable Court has the jurisdiction and power upon the correction and reformation of the said agreement, to enforce the terms of said agreement as thus reformed and to compel complainants to specifically perform the same in accordance with the terms of the same.

6. That your defendant has always been ready, able and willing to perform the agreement according to its true intent and meaning and does herewith tender herself ready and willing to convey and transfer to complainants the said lands and premises as per the original terms of the said agreement and as this Honorable Court shall order and direct.

Your defendant being without adequate remedy in the courts of law, therefore, honorably prays that:

1. The bill of complaint filed by complainants be dismissed for the causes hereinbefore set forth and charged.

2. The agreement of sale referred to in the bill of complaint be corrected and reformed to include all the original terms of sale as agreed upon by the parties hereto and particularly the conditions and limitations of the easement set forth in paragraph 6 of the bill of complaint.

3. The complainants be ordered, decreed and compelled to specifically perform the terms and conditions of the said agreement as reformed and to take and accept a deed of conveyance to the said lands and premises and to pay the purchase price therefor to the defendant, as per the terms and conditions of the said agreement as reformed and corrected; and that

4. The complainants be ordered and decreed to abide by and comply with such order and decree as your Honor shall deem suitable, fit and proper to make in the premises.

5. And your defendant humbly prays for such other and further relief as to your Honor shall seem meet and suitable in the premises.

And your defendant will ever pray, etc.

M. M. SEMEL,
Sol'r for and of Counsel with Deft.

SUPPLEMENTAL COUNTER-CLAIM.

IN CHANCERY OF NEW JERSEY.

Between

MORRIS NASS and MINNIE NASS, his wife,
Complainants,

and

ELEANOR F. MUNZING (widow),
Defendant.

On Bill, etc.

Supplemental Counter-claim.

The defendant, Eleanor F. Munzing, by way of cross-bill or counter-claim, respectfully shows unto your Honor that:

1. On February 15, 1926, the defendant and the complainants did enter into the agreement set forth in paragraph 1 of the complainants' bill.

2. For a long time prior to the 15th day of February, 1926, and on many occasions prior thereto, the complainants did visit and inspect the lands and premises set forth in the said bill and were made acquainted with and apprised of the facts of the easement set forth in paragraph 6 of the bill of complaint, by the defendant and her agents. That on the 15th day of February, 1926, and prior thereto and before the said agreement was reduced to writing, the complainants did agree to purchase and accept a deed to the said lands and premises subject to the conditions and limitations of the said easement and to pay the purchase price set forth in the said agreement, subject to the terms and

conditions set forth in the said agreement and to the conditions and limitations of the said easement.

3. That due to error, mistake, surprise and inadvertence, the facts and conditions of the said easement were omitted from the written agreement contrary to the terms of the conditions and facts of sale orally and originally agreed up between the parties and in spite of the fact that it was the intention of the complainants to take and purchase the said lands and premises subject to the conditions of the said easement, which were to be included in and made a part of the said written agreement.

4. That by error, mistake, surprise and inadvertence, the following sentence, to wit: "Together with a strip of land in the rear of the said premises ten feet in width running to Normandy place" was incorporated in said agreement, in the place and stead of the facts of the aforementioned easement.

5. The complainants, by their bill, did tender and offer themselves as ready and willing to accept the deed and conveyance of the aforementioned lands and premises. The complainants have not rescinded the contract, but have by the terms of the bill of complaint filed in the within matter, demanded that the defendant comply in each and every respect, with the said contract and have offered, on their part to comply with the terms of the said agreement on their part to be performed.

6. That the defendant has been, since the 13th day of December, 1926, and before the entry of final decree in the within matter, ready, able and willing to perform and comply with the

terms of the said contract in accordance with the provisions thereof, and does herewith tender herself as ready, willing and able to comply fully and completely with the terms of the said agreement.

7. That the defendant has, since the inception of the within suit, diligently and promptly endeavored to perfect said title in accordance with the terms of the aforementioned contract, without any delay, and is now able to convey the said lands and premises as per the terms and conditions of the aforementioned agreement in such manner that the complainants will not, in anywise whatsoever, be injured or adversely affected by the conveyance to them of the said lands and premises.

8. That the complainants have not been in any way injured, affected or damaged by any delay in the conveying of the said lands and premises after the 1st day of May, 1926, as provided in the said agreement, time not being of the essence of the said contract.

9. That the defendant has acted in good faith and has not been negligent, nor has said defendant wilfully hindered or deterred the delivery of the deed and passing of title in accordance with the terms of the said agreement.

10. That the complainants were at all times apprised of the said easement and did consent to the making and execution of the said contract as drawn, with full knowledge of the fact that the easement was not set forth in the said agreement in its full terms and as it appears on record in the office of the Register of Deeds and Mortgages for the County of Essex.

11. Wherefore, defendant respectfully charges that the bill of complaint filed herein by the complainants, is inequitable and without merit and that the complainants are not entitled to the relief sought for by them in their bill of complaint.

12. Your defendant has always been ready, able and willing to perform the agreement in accordance with the intent of the parties and is now ready, able and willing to perform said agreement in accordance with all its terms and conditions and does herewith tender herself ready and willing to convey and transfer said premises as per the terms of the said agreement and as this Honorable Court shall order and direct.

Your defendant, being without adequate remedy in the courts of law, therefore humbly prays that:

1. The bill of complaint filed by the complainants be dismissed for the causes hereinbefore set forth and charged.

2. That the complainants be ordered, decreed and compelled to specifically perform the agreement according to its terms and conditions and to take and accept the deed and conveyance of the said lands and premises and pay the purchase price therefor to the defendant as per the terms of the said agreement.

3. That the complainants be ordered, decreed to abide by and comply with such order and decree as your Honor shall deem suitable, fit and proper to make in the premises.

Supplemental Counter-claim.

4. And your defendant humbly prays for such other and further relief as to your Honor shall seem meet and suitable in the premises.

And your defendant will ever pray, etc.

M. M. SEMEL,
Solicitor for and of Counsel with the Defendant.

Answer to Supplemental Counter-claim.

ANSWER TO SUPPLEMENTAL COUNTER-CLAIM.

IN CHANCERY OF NEW JERSEY.

Between MORRIS NASS and MINNIE NASS, his wife, *Complainants,* *and* ELEANOR F. MUNZING (widow), *Defendant.*	*On Bill, etc.* *Answer to Supplemental Counter-Claim.*

The complainants answering the supplemental counter-claim filed by the defendant, say:

1. They admit paragraph 1.

2. They deny paragraphs 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12.

FIRST SEPARATE DEFENSE.

1. The complainants further state that on May 1, 1926, on or before which said date the defendant, in accordance with the written agreement, a copy of which is annexed to the bill of complaint herein, agreed to convey the premises described therein to the complainants, free and clear of all encumbrances, except those specifically set forth in said agreement of sale, the defendant was not ready, able and willing to perform her agreement, in accordance with all its terms and conditions, inasmuch as the said defendant did not have title to the premises agreed to be conveyed to the complainants; and the said

complainants immediately upon ascertaining the lack of and defect in the title which the defendant had to the said premises, elected to rescind and repudiate the said agreement of sale, and did on the tenth day of May, Nineteen Hundred and Twenty-six, institute the within suit, having for its object the return of the monies paid by these complainants to the defendant, on account of said agreement of sale.

SECOND SEPARATE DEFENSE.

1. The defendant is guilty of laches.

THIRD SEPARATE DEFENSE.

1. The defendant breached the agreement of sale as aforesaid and the complainants thereupon and on or about May 1, 1926, immediately rescinded and repudiated said agreement of sale, and at the final hearing in the above-entitled cause, to wit: December 13, 1926, the defendant tendered to the complainants an alleged Quit Claim deed for the property, to which the defendant had no title at the time set in the agreement of sale for the delivery of the deed and payment of the balance of the consideration monies, and an unreasonable and inordinate length of time having elapsed between the time set for the passing of title and the date on which the said alleged deed was tendered, the defendant is not entitled to have the extra-ordinary and discretionary relief of specific performance.

FOURTH SEPARATE DEFENSE.

1. The value of the premises in question fluctuated, and the defendant cannot at the present time give to the complainants the prem-

ises of the same value for which the complainants contracted.

WHEREFORE, the complainants pray that the supplemental counter-claim be dismissed, and the relief prayed for in the bill of complaint herein, be decreed.

Dated, December 28, 1926.

JACOB L. NEWMAN,
Solicitor of Complainants.

IN CHANCERY OF NEW JERSEY.

December 13, 1926.

Between

MORRIS NASS and MINNIE NASS, his wife,
Complainants,

and

ELEANOR F. MUNZING,
Defendant.

Transcript of shorthand notes of testimony taken in the above-entitled matter before his Honor John H. Backes, Vice-Chancellor, at the Chancery Chambers in the City of Newark, N. J., in the presence of Jacob L. Newman (Mr. Lionel P. Kristeller) for complainants; and Meyer M. Semel, for defendant.

Mr. Kristeller: Will you admit the contract?

Mr. Semel: Yes, sir.

Mr. Kristeller: I offer the contract in evidence.

(Paper marked Exhibit C. 1.)

CHARLES J. GARROMONE, sworn for complainants.

Direct examination by Mr. Kristeller.

Q What is your business? A Title searcher.

Q Did you, at the request of our office make a search of property on Lyons avenue belonging to Eleanor F. Munzing? A Yes, sir.

Q And are these your search notes? A Yes, sir; they are.

Q Will you tell us the deed by which Eleanor F. Munzing, the defendant, obtained title to the property in question?

Mr. Semel: To expedite matters we will offer the original in evidence.

Q What is the deed? A Deed, Book E. 69, page 302.

Mr. Kristeller: I offer certified copy of the deed.

(Paper marked Exhibit C. 2.)

Q Now, will you tell us whether in that deed there is any—(interrupted).

The Court: The deed shows for itself.

(No cross examination.)

Mr. Semel: I wish to state that the defendant is ready to perform. We have, since the inception of this suit, and because of the nature of the bill, obtained a release of the easement.

The Court: I will hear the testimony and you can amend your pleadings to conform with the facts and the legal questions can be discussed later.

Marshall Congleton, direct.

MARSHALL CONGLETON, sworn for complainant.

Direct examination by Mr. Kristeller.

Q What is your profession? A Engineer and surveyor.

Q And did you at my request or the request of our office prepare that map of the property on the southeasterly side of Lyons avenue, Irvington, in conformity with the description in the agreement of sale that was handed to you? A I did.

Q And is this a plotting of that description? A This is a plotting of the description.

Q And did you make an examination of the premises, of the land surrounding the property there, the alley way and fences? A I made an inspection as to the location of the fences.

Q And does this map which you have now show the location of the fences? A It shows a fence along the rear of the corner plot, 100 feet in from Lyons avenue, and a fence running southeasterly from Normandy Place, southeasterly 101 feet, and that is distant 110 feet from Lyons avenue.

Q Is there any fence 100 feet southerly from Lyons avenue in back of the premises in question commencing 36 feet from Normandy Place and running 75 feet along Lyons avenue? A No.

Q When did you make this inspection? A December 8th.

Mr. Kristeller: I offer the map.

(Paper marked Exhibit C. 3.)

Morris Nass, direct.

MORRIS NASS, sworn for complainant.

Direct examination by Mr. Kristeller.

Q You are one of the complainants in this case? A Yes, sir.

Q And you are one of the—you are one of the purchasers of the property at Lyons avenue near Normandy Place, Irvington? A Yes, sir.

Q And you are the man that signed this agreement that we have offered here? A Yes, sir.

Q When you went up to look at the property, what property did they show you on Lyons avenue? A They showed me the apartment on Lyons avenue and then we went through the building and then back on the rear and they show me that in back—rear there is a place to build garages; then they took me down to another place, they showed me over a driveway of 10 feet, belongs to the building, and even—I was standing on Normandy Place—and even I asked Mr. Weber the question "How is this," I said, "is that driveway belong to the building there and here is a party who owns the building on the corner?" "Well," he says, "that is 110 feet deep, is the other building, and this is less and I consider it belonged to it and I figured that that belonged to the building."

Q Weber is who? Who is Weber? A Weber, he was the man who closed the deal.

The Court: The broker.

Mr. Semel: We consider he was not only the broker—(interrupted).

The Court: He was the broker or real estate agent?

Witness: Yes, sir.

Q After this talk did you go down and talk about this agreement? A Mr. Weber came down with me to the store of Mr. Munzing and at that time we closed the agreement and give the deposit.

Q How much deposit? A Thousand five hundred dollars.

Q How much did you pay for the search? A Hundred dollars.

Q And the interest on the thousand dollars from the 15th of February until the 13th of December is how much? A I figure it to be around about $48.

Q Forty-nine dollars and sixty-seven cents.

Cross examination by Mr. Semel.

Q What was the date when you made this agreement? A It was during the middle of February.

Q When was the first time you went up there to look at this property? A The first time was one time long ago already; that time I was only outside. Mr. Weber take me down, it was around the middle of the summer—it was a year before that; that was the first time.

Q And when was the next time you went to see it? A The next time was around—I think it was around—the last time was only about—I think it was—it was around in January.

Q How many times did you go to see this property before you made the contract at my office? A How many times?

Q Yes. A I was about three times over there.

Q And each time you were on that driveway, weren't you? A Each time I was there.

Q Did you ever ask Mr. Weber how much the upkeep would cost for that driveway? A I didn't ask for the upkeep cost of the driveway. I asked him—he told me he would give me a little information on the whole building, but not on the driveway.

Q Did Mr. Weber ever say anything to you about the man who owned the house, the little house alongside of the driveway? A Nothing at all.

Q He never did? A He never did.

Q Never told you anything about the cost of the upkeep of this driveway? A No, sir.

MINNIE NASS, sworn for complainants.

Direct examination by Mr. Kristeller.

Q You are Mr. Morris Nass' wife? A Yes, sir.

Q You are one of the purchasers in this agreement that has been referred to? A Yes sir.

Q Did you go up with Mr. Weber or Mr. Munzing to look at this property? A Only with Mr. Weber.

Q When, before the agreement was signed or after? A Before the agreement was signed.

Q Did he show you what the property was? A He showed me all around. He showed me—he said the driveway belongs to the property.

Q And what did he say?

The Court: She says he said the driveway belonged to the property.

Q Were there any fences up there at your property or the property that you were buying? A No fences, no.

Q You also signed this contract? A Yes, sir.

(No cross examination.)

The Court: Am I correctly informed that the property involved is 75 feet on the southerly side of Lyons avenue and 100 feet in depth to an alley and that the property is 26 feet easterly from the corner of Lyons avenue and Normandy Place, and that the owner of the land across the alley and southerly of the 10 foot strip had an easement to his lot facing on Normandy Place?

Mr. Kristeller: That is right.

The Court: All right. And the 10 foot strip extends from Normandy Place easterly 101 feet and to the easterly line of the land in question.

MORRIS NASS, recalled for further

Direct examination.

Q From whom did you find out that there was this easement on the property on this alley way in the rear? A Mr. Newman.

Q Mr. Newman told you about it? A Yes, sir.

Q What was the reason then that you didn't take the property?

Mr. Semel: I object to his reasons.

Q When did Mr. Newman tell you? A When he made the search on it.

Q When? That was about when? A About May.

Q At the time this contract was closed? A Yes, sir.

The Court: When was the contract to close?

Mr. Kristeller: May 1st.

Q What did you do when you were told about this alley way? A Well, after he explained to me I said, "Mr. Weber he sold me this property and even we make a remark there to build garages."

Q You told this to Weber? A Mr. Weber told me.

Q After you found out? A After I found? When Mr. Weber was up there, well, I did make a remark that we could build garages.

Q Wait a minute. After Mr. Newman told you about the alley way, what did you do? A Well, of course, I don't want—I think to build garages there.

Q Never mind what you think. What did you do? A Of course I don't like to have any partners in an alley that didn't belong to them.

Q Then you didn't take the title? A I didn't take the title on account of that.

The Court: Then the bill was filed, that shows the history.

Mr. Semel: It is very evident from the map that there couldn't be any garages built there.

COMPLAINANT RESTS.

FRANK W. WEBER, sworn for defendant.

Direct examination by Mr. Semel.

Q You are a licensed real estate broker and agent? A Yes, sir.

Q Of the State of New Jersey? A Yes, sir.

Q About the middle of February of this year and before? A Yes, sir.

Q And were you the agent who transacted the sale of this property? A I am.

Q Did you negotiate with Mr. and Mrs. Nass before the contract was drawn? A I did.

Q How many times were you—were they on the premises, about? A Three or four times, if not more.

Q Mr. Weber, did you ever speak to Mr. and Mrs. Nass about this easement on the driveway? A I did.

Q Before or after the drawing of the agreement? A Before.

Q Can you tell us, if you remember, what the text of the conversation was with reference to the easement?

Mr. Kristeller: I object.

The Court: I think I will hear it.

Q Will you please tell us what the conversation was—what you said about the easement? A After showing them through the property and speaking of the investment part I showed them the driveway showing them that they had an entrance from Normandy Place; I stated the size of it and told them positively that the property belonged with this property, but the man on the south had the right of way, and that didn't—(interrupted).

Q Over the 10 foot strip? A Over that 10 foot strip. Told them that positively; not once, but spoke of it several times; and I believe each time we spoke of it it was brought to their attention, knowing that this other party on the south had the right of way over that strip—there were no fences between either of the properties.

The Court: How did you know that fact?

Witness: Why, I was the agent when it was sold to Mrs. Munzing from the Welfare Realty Company.

The Court: What?

Witness: I was the agent when this owner took title to it.

The Court: When you sold to Nass, you mean?

Witness: When I sold prior to that, the first time, to Mrs. Munzing.

The Court: She was the landlord?

Witness: Yes, sir.

Q As a matter of fact, you have been in absolute control and charge of this property, haven't you, for Mrs. Munzing since that time? A Before Mrs. Munzing had it, for the Welfare Realty Company.

Q And you, of course, were familiar with the property of the Welfare Realty Company in that particular vicinity? A Positively.

Q Now, when the agreement was drawn in my office was any mention made of the driveway then? A Was there any?

Q Yes. A Surely there was mention made of the driveway then and it was stated clearly to

them that the driveway belonged to the Munzing property, but that the other had the right of way and must share equally in the expense of maintaining the same.

The Court: By "the other" you mean the adjoining owner on the south of the alleyway?

Witness: Yes, sir.

The Court: The entire length?

Witness: The entire length.

Q Do you know where the deed was to this property at the time the agreement was drawn?

The Court: You mean the deed to Munzing?

Mr. Semel: Yes.

Witness: At the West End Building & Loan Association office.

Q It was not in your possession at that time? A No, it was not.

Q Do you remember whether there was any conversation at that time with reference to the deed? A As to having—(interrupted).

Q Having the deed there while the agreement was drawn? A You asked for the deed and I said we didn't have the deed, and I said that the lawyer from the West End Building & Loan still had it.

The Court: From what did you get the description?

Mr. Semel: I can bring that out. I got the description from the search.

Q Where was the description obtained from, do you know? A I didn't know particularly where you got it from, but I knew what the dimensions were.

Q Do you remember that there was a search in my office at the time of the property? A Yes, sir; I do.

The Court: Were the Nasses represented by counsel at that meeting?

Mr. Semel: They were not. Both parties came into my office to have the agreement drawn.

The Court: You acted as scrivener?

Mr. Semel: That is the idea. The terms were all made.

The Court: You were not counsel for either side?

Witness: I was retained by Mr. Munzing later on.

The Court: At that time you were merely scrivener for both?

Witness: Scrivener for both, yes, sir.

Q Do you remember whether I mentioned anything about the easement at that time? Before I ask that question, were Mr. and Mrs. Nass in my office at the time that the agreement was dictated and being drawn? A They were.

Q Was Mrs. Munzing there? A Yes, sir.

Q Do you remember whether I mentioned anything about this easement at that time in connection with asking for the deed? A I couldn't state sir about that, whether I remember—I do not remember what was stated because I had brought it to their attention so clearly myself,

not once, but several times—I wouldn't say how many times.

Q Did you know at that time that the easement was not being set forth in the agreement? A There was no question about that.

Q Do you know whether at that time—did you know at that time that the easement was not being set forth fully and completely in the agreement? Were you apprised of that fact?

The Court: Did you observe at that time that the easement was not referred to in the agreement?

Witness: No. I did not. I left that really to the counsel.

The Court : You didn't notice it, eh?

Witness: I didn't take notice of that.

Q Did you ever have any conversation with Mr. Nass or Mrs. Nass after the first of May? A Positively no.

Q Was there ever anything said to you about these garages? A No.

Q Was there ever anything mentioned about garages? A Not a word.

Q Has Mr. or Mrs. Nass ever asked you for the return of their money? A Never. They asked me why don't I sell it, they wanted me to resell it if it were possible.

Q When was that? A Some time after they refused to take title, or didn't settle. They didn't refuse to take title, but they didn't settle.

Cross examination by Mr. Kristeller.

Q You represent Mrs. Munzing in this property, you say, since the day she bought it? A Yes, sir.

Q And the deed was never in your possession or her possession from the time she bought the property until some time later—some time after this contract was signed? A No. We had the deed, but we made an additional loan and then we again took it before the Welfare Realty Company—we made an additional loan of nine thousand dollars after part payment had been made, and we called for the additional loan to take care of some second mortgage.

Q You mean the West End Building & Loan? A West End Building & Loan, yes, sir.

Q Did you take the deed back to the West End Building & Loan? A Yes, sir.

Q You had sold this property before for Mrs. Munzing, hadn't you? A I received a deposit of five hundred dollars once before.

Q From whom? A Mr. Frank Slavitt was the agent representing the parties.

Q Didn't you have an agreement to sell this property to a man by the name of Jentes? A No.

Q Didn't you know—do you know whether Mrs. Munzing had such an agreement? A No.

Q An agreement of April 30, 1925, between Mrs. Munzing and Oscar Jentes for fifty-two thousand dollars for this property? A Jentes? No, I do not.

The Court: What has it got to do with it?

Mr. Kristeller: The object is, it is a recorded instrument and in that instrument is this easement.

The Court: Of course they knew it.

Mr. Kristeller: But it was not included in this agreement.

Frank W. Weber, cross.

Q Now, you say there were no fences on this property south of the Munzing property along the alleyway? A No, sir.

Q Have you been up there lately? A There was a fence on the property adjoining, on the lower end.

Q Wasn't there a fence on the southerly end?

The Court: Southerly side of the alley?

Witness: That has just been put up in the last few months.

Q You went with Mr. and Mrs. Nass to Semel's office to draw this agreement, didn't you? A Yes, sir.

Q Nothing was said by Nass when you were showing this property that there was room there to put garages in the rear of this house for the use of this alley at any time? A Oh, yes; I said if he saw fit—if he wanted to build garages on the end of the line towards the most easterly side. I said he had title to this property and the adjoining people only had a right of way of crossing this, so he could arrange his garages so it wouldn't interfere with the driveway, and hold it open, backing the garages up to that property. I had gone over that with him several times.

Q When this contract was finished in Semel's office did you read it over to the people in the place or did Mr. Semel read it over? A I believe Mr. Semel read it over.

Q You listened to the reading of it? A Yes, sir.

Q When they were reading it you did not hear anything about this right of way and the up-

Frank W. Weber, re-direct.

keep of that alley, did you? A Surely I didn't hear anything if it wasn't there.

Q When that wasn't read off out of the agreement was anything said by you or by the Nasses why that was not included? A It was talked over?

Q No. I say when the contract was read and there was nothing in it about the right of way of the southerly owner and the upkeep of this alley, was anything said why it was not put in the agreement? A Mr. Semel I believe mentioned at that time that he would give them an exact description when he got the deed.

The Court: You haven't answered the question at all.

Q (Question read.) A Not that I recall.

Mr. Semel: I offer the deed.

(Paper marked Exhibit D. 1.)

Re-direct examination.

Q Mr. Weber, you have negotiated and arranged with Mr. and Mrs. Munzing with the owners of the property on the south to obtain a deed from them—

The Court: Release.

Q —a quit claim deed and this paper marked D. 1, is what you received from them this morning? A Yes, sir.

Q When did you start negotiations for the obtaining of this quit claim deed and release? When was the first time you began to negotiate with them for that? A Right after we were

notified that the Nasses had engaged counsel to not accept it on account of not having this driveway with the property; then I began to see whether I could get possession of it.

Q And you just got possession this morning? A This morning.

Q When did you close with them? A Yesterday afternoon the arrangements were made, but the papers were signed this morning about twenty minutes to eight.

Q How many times were you there? A Half a dozen times.

The Court: Did you ever tell the Nasses what you were doing?

Witness: No, sir, I did not.

The Court: Or anybody for them. You didn't tell the Nasses or anybody for them what you were doing.

Witness: Mr. Semel. I didn't tell either of the Nasses or their counsel, no.

Q Who suggested to you that you try to obtain this release? A Counsel.

Q This is the receipt for the money which you paid? A Yes, sir.

The Court: I am not interested.

DEFENDANT RESTS.

TESTIMONY CLOSED.

EXHIBIT C. 1.

Same as exhibit annexed to bill of complaint and printed in full on pages 4 to 10.

EXHIBIT C. 2.

WELFARE REALTY CO. TO ELEANOR F. MUNZING

THIS INDENTURE, Made the first day of October, in the year of our Lord One Thousand Nine Hundred and twenty-three, BETWEEN Welfare Realty Co. a corporation of the State of New Jersey, party of the first part. And Eleanor F. Munzing of the City of Newark, County of Essex and State of New Jersey, party of the second part: WITNESSETH, That the said party of the first part, for and in consideration of One Dollar ($21.00) and other good and valuable consideration lawful money of the United States of America, to it in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, has given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents does give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to her heirs and assigns, forever, All that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Town of Irvington, in the County of Essex and State of New Jersey.

Exhibit C. 2.

Beginning in the Southeasterly line of Lyons Avenue distant twenty six feet Easterly from the Easterly side of Normandy Place; thence running along Lyons Avenue South thirty eight degrees fifty nine minutes East seventy five feet; thence running South fifty two degrees twenty one minutes West one hundred feet; thence running North thirty eight degrees fifty nine minutes West seventy five feet; and thence running North fifty two degrees twenty one minutes East one hundred feet to the Southeasterly side of Lyons Avenue and the point and place of Beginning.

Together with a strip of land in the rear of said premises approximately eight feet front and rear by one hundred and one feet more or less in depth, and which strips runs to Normandy Place. The said party of the first part, its successors or assigns reserves the right of way in and over the strip of land above described and which strip of land is to be used in common by and between the said party of the first part, its successors or assigns and the said party of the second part, her heirs, administrators, executors or assigns, and their servants and agents, tenants and occupants of the above described premises and the premises adjoining on the South at all times freely to pass and re-pass on foot or with animals, vehicles or otherwise, to and fro over the same. The cost of maintaining and improving the driveway over the strip of land hereinabove referred to is to be paid equally by and between the owners of the property herein conveyed, and the owner of the property adjoining on the South. Subject to a mortgage held by The West End Building & Loan Association of Newark, N. J. given to

Exhibit C. 2.

secure the sum of Thirty-six Thousand Dollars, to rights of tenants and restrictions of record. The strip of land hereinabove referred to runs between the southerly line of the premises herein described and the northerly line of the property owned by the said party of the first part, adjoining the above described premises on the south as described in a mortgage made by the said party of the first part to the Outlook Building & Loan Association.

Together with all and singular the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining: Also, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof, To Have and to Hold, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, her heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, her heirs and assigns forever: And the said party of the first part does for itself and its successors, covenant and agree to and with the said party of the second part, her heirs and assigns, that the said party of the first part is the true, lawful and right owner of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment or limitation, or by any encumbrance whatsoever, by which the title of the said party

Exhibit C. 2.

of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever: except as above stated. And Also that the said party of the first part now has good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid; And Also, that the said party of the first part, will Warrant, secure, and forever defend the said land and premises unto the said party of the second part, her heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever, except as above stated.

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

(Seal—Welfare Realty Co. Incorporated 1922 New Jersey)

WELFARE REALTY CO.

By Frank Zwigard,
President

Attest

Otto Kuhn,
Secretary

Exhibit C. 2.

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

Be It Remembered, That on this 4th day of October, Nineteen Hundred and Twenty-three, before me, the subscriber, an Attorney-at-Law of New Jersey, personally appeared Otto Kuhn and made proof to my satisfaction that he is the Secretary of Welfare Realty Co. the Grantor named in the foregoing Instrument; that he well knows the corporate seal of said corporation; that the seal affixed to said Instrument is the corporate seal of said corporation; that the said seal was so affixed and the said instrument signed and delivered by Frank Zwigard who was at the date thereof the President of said corporation, in the presence of this deponent, and said President, at the same time acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, and as the voluntary act and deed of said corporation, and that deponent, at the same time, subscribed his name to said Instrument as an attesting witness to the execution thereof.

OTTO KUHN.

Sworn and subscribed before me at Newark, N. J. the date aforesaid.

Louis Levy,
Attorney at Law of N. J.

Received in the office October 8, A. D., 1923 at 3:23 P. M. No. 69

Exhibit C. 2.

Office of

REGISTER OF DEEDS AND MORTGAGES

Essex County, New Jersey.

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

I, Howard S. Dodd, Register of Deeds and Mortgages of the County of Sssex, State of New Jersey, do hereby certify that the foregoing is a true and correct copy of the record of a certain Deed made by Welfare Realty Co. to Eleanor F. Munzing and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in book E-69 of Deeds for said County on pages 302-303.

In Testimony Whereof, I have hereunto set my hand and official seal this 4th day of December, A. D. 1926.

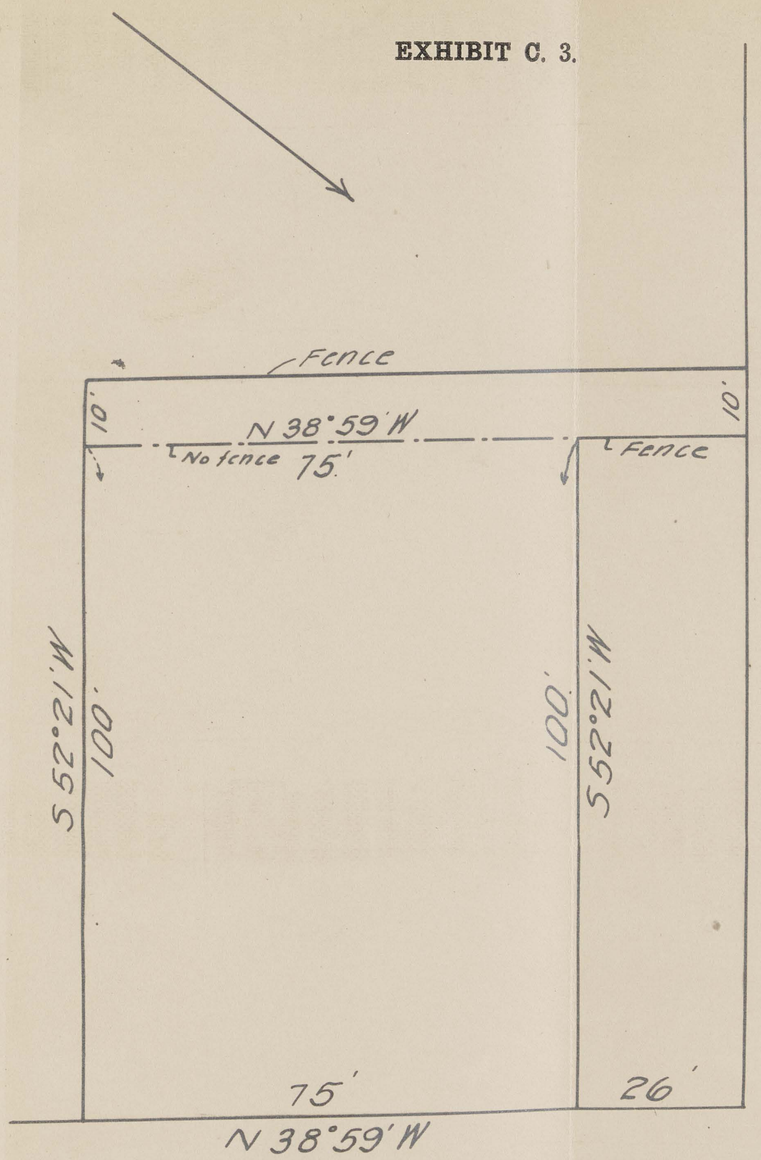
HOWARD S. DODD,
(seal) Register of Deeds and Mortgages.

Compared by 43 & 24
Office of
Register of Deeds and Mortgages
Essex County, New Jersey

Certified Copy of
Deed

Welfare Realty Co.
to
Eleanor F. Munzing
Recorded October 8th. 1923 in Book E-69 of Deeds Pages 302-303.

EXHIBIT C. 3.



OPINION.

IN CHANCERY OF NEW JERSEY.

Between

MORRIS NASS and MINNIE NASS, his wife,
Complainants,

and

ELEANOR F. MUNZING,
Defendant.

Opinion.

1. Where time is not of the essence of a contract for the sale of land, ordinarily, it is timely performance if a conveyance, in conformity with the contract, can be made at the time of the decree for specific performance.

2. Where time is not of the essence of a contract to convey lands, neither party can put the other in default, and rescind, without giving a reasonable time limit in which to perform; and a suit for the recovery of down money is premature if brought before the defendant is put in default. Such suit is not a substitute for the notice of a time limit for perfecting the contract, and has not the effect of relieving the vendee of specifically performing.

3. A vendor, able to perform at the time of the decree for specific performance and not before, though willing, is not guilty of laches. Nor is a vendee relieved of performance, because the value of the property fluctuated during the pendency of his prematurely-brought suit for the purchase money.

For complainants, Jacob L. Newman and Lionel P. Kristeller.

For defendant, Meyer M. Semel.

BACKES, *V.-C.*

This litigation is presented by a vendee's bill to recover part purchase money paid on a contract to convey land, and a counter-claim by the vendor for specific performance of the contract. The contract between the parties calls for a conveyance by the defendant to the complainants, by warranty deed, free from all encumbrances, except as therein mentioned, of an apartment house and curtilage on Lyons avenue, Irvington, "Together with a strip of land in the rear of said premises ten feet in width running to Normandy Place." This strip was subject to a right of way of an adjoining owner. It was known to be so encumbered by the complainants, and the failure to especially note it in the contract was mutually accidental. It is, however, stated in the contract that the conveyance was to be "Subject to restrictions of record." The contract was to be executed May 1, 1926, and complainants' counsel was still investigating the title on the closing day, and on May 5th wrote the defendant's attorney, in reply to his letter concerning the transaction, that he would be glad to take the matter up with him in a few days. Instead, and without intimation, the complainants brought this suit, on May 10th, to recover the down money, $1,000, and to impress it as a lien on the property, and, for cause of action, alleged the encumbrance of the easement, with particularity; that the defendant contracted to convey by deed of warranty, free from all encumbrances, except those

agreed upon, which did not include the easement; that the title therefore was defective and unmarketable, and that although they were ready, the defendant, upon demand, refused to perform her contract, and was unable to do so. The answer denies the allegation and sets up that the defendant was and always had been ready and tendered herself ready to perform, and by counter-claim alleges that the omission of a notation in the contract of the encumbrance of the easement was by mutual mistake, and prays its reformation, and, as reformed, its specific enforcement. On the day of trial the defendant was ready to convey free of the easement, she having on that day procured a release. If reformation were necessary the contract could not be reformed and enforced as reformed. Wirtz *v.* Guthrie, 81 N. J. Eq. 271. It is, however, conceivable that the contract might be enforced as drawn, and the complainants be decreed to take the property subject to the easement, for it would not be a strained construction if it were held that the easement was a "restriction," within the meaning of the provision of the contract to convey "Subject to restrictions of record," in view of the forehand knowledge of the complainants of its existence, and the fact that it is a matter of record. But it is not necessary that the defendant pursue that course for she now is able to convey free of the easement. Time was not of the essence of the contract. It is timely performance if conveyance, in conformity with the contract, can be made at the time of the decree. Gerba *v.* Mitruske, 84 N. J. Eq. 141. And the defendant is not to be deprived of this privilege, afforded by equity in this class of relief, unless he had breached the

contract and the complainants had the right, for that reason, to treat it at an end when they brought their suit to recover the purchase money. And that they had not. Had they become aware of the easement after the engagement they could have repudiated the contract, provided they acted promptly upon discovery, else the right would be waived. Fry, Spec. Perf. 224; Salisbury *v.* Hatcher, 2 Y. & C. (C. C.) 54; Haggart *v.* Scott, 1 R. & N. 293; Halkett *v.* Earl of Dudley (1907), 1 Ch. 590. The right to repudiate arises out of want of mutuality and is coupled with the notion that the facts were concealed and the vendee deceived. But here the complainants all along knew of the easement, and they must be treated as if they had discovered the easement after making the contract and had waived the right to repudiate, and the cause must be considered simply as one of failure of the vendor to perform on the day stipulated in the contract. The defendant stood ready to go forward, and the presence of the easement did not warrant the charge in the bill that she could not and refused to perform the contract, any more than the existence of a mortgage or other removable lien would justify the assumption. Fixing of a day for closing was a mere formality. Either party was entitled to fair leeway; neither could arbitrarily put an end to the contract, and before one could put the other in default, and rescind, reasonable notice of time to perform was required. Orange Society *v.* Konski, 94 N. J. Eq. 95, *Id.* 254; Fry on Spec. Perf. (6th Ed.), 510. In this the complainants failed, and to this day. Their suit was brought before they matured their cause for action by the requisite notice and demand for performance, and it

is not maintainable. The suit cannot be regarded as a substitute for the notice and demand; it amounts only to a gesture that the complainants regarded themselves as no longer bound; it is not founded on a right to rescind, and has not the legal effect of relieving them of liability to perform.

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

Nor is the plea, set up in the answer to the counter-claim, that the value of the property has fluctuated and that it is not now worth what it was at the time fixed for the closing, available to them. Their precipitate and ill-conceived suit, and reprobation of the contract, preclude the argument that the loss, if any, should fall on the defendant for her failure to do that which the complainants rejected in advance.

The prayer of the bill will be denied and a decree for specific performance will be ordered on the counter-claim.

FINAL DECREE.

IN CHANCERY OF NEW JERSEY.

Between MORRIS NASS and MINNIE NASS, his wife, *Complainants,* *and* ELEANOR F. MUNZING, *Defendant.*	*On Bill, &c.* *Final Decree.*

This cause coming on to be heard in the presence of Jacob L. Newman and Lionel P. Kristeller, solicitors for and of counsel with the complainants, and Meyer M. Semel, solicitor for and of counsel with the defendant; and the Court having examined the pleadings, having taken proofs orally and in open court and having heard the arguments of counsel thereon;

And it appearing to the satisfaction of the Court that the defendant, Eleanor F. Munzing, on the fifteenth day of February, 1926, was the owner of all that certain lot, tract or parcel of land and premises situate and being in the Town of Irvington, County of Essex and State of New Jersey and more particularly described as follows:

> BEGINNING in the southeasterly line of Lyons avenue distant twenty-six feet easterly from the easterly side of Normandy Place; thence running along Lyons avenue south thirty-eight degrees fifty-nine minutes east seventy-five feet; thence running south fifty-two degrees twenty-one minutes west

one hundred feet; thence running north thirty-eight degrees fifty-nine minutes west seventy-five feet; thence running north fifty-two degrees twenty-one minutes east one hundred feet to the southeasterly side of Lyons avenue and the point and place of BEGINNING.

Together with a strip of land in the rear of the said premises approximately ten feet front and rear by one hundred and one feet more or less in depth and which strip runs to Normandy Place.

Subject, however, to the easement particularly described in the bill of complaint.

And it further appearing that on the said 15th day of February, 1926, the defendant, Eleanor F. Munzing (widow), entered into an agreement in writing with the complainants herein, Morris Nass and Minnie Nass, his wife, wherein and whereby the said defendant agreed to convey the aforementioned lands and premises by deed of warranty as particularly described in the contract annexed to the bill of complaint on or before the first day of May, 1926, to the said complainants, Morris Nass and Minnie Nass, his wife, and the said Morris Nass and Minnie Nass, his wife, were to pay the sum of fifty-two thousand ($52,000) dollars for the same by the payment of one thousand ($1,000) dollars which was to be paid on the execution of the said agreement and by the payment of the remainder of the price which the vendor was to receive by the payment of approximately six thousand ($6,000) dollars in cash, and by assuming a mortgage held by the West End Building & Loan Association in the nominal sum of thirty-nine thousand two hundred ($39,200) dollars, and by assuming a second mortgage held by Samuel Schechner in the sum of six thousand ($6,000) dollars, and by

the execution of a purchase money mortgage on the said premises, equivalent to the value of the back shares which have accrued to the said Eleanor F. Munzing in the West End Building & Loan Association, less the sum of two hundred ($200) dollars which sum of two hundred ($200) dollars is included in the cash to be paid upon the delivery of deed and closing of title, the said Morris Nass and Minnie Nass, his wife, to assign unto the said Eleanor F. Munzing, the aforementioned back shares as additional security for the bond and mortgage about to be executed, until payment of that mortgage in full.

And it further appearing to the satisfaction of the Court that the complainants, Morris Nass and Minnie Nass, did, on the tenth day of May, 1926, file their bill in this court demanding a return of the deposit made on account of the same, alleging therein their readiness to comply with each and every the terms of the said agreement on their part to be performed, and that the defendant, Eleanor F. Munzing, was unable to comply with the terms of the said contract on her part to be performed; and

It further appearing to the satisfaction of the Court that the said defendant did file her answer in this cause denying the allegations aforesaid and praying a reformation of the contract sued upon, to except from the grant agreed to be made, the easement referred to in the bill of complaint, upon the ground of surprise and mistake; and a further counter-claim asking specific performance of the contract as it was prayed to be reformed, and to include the exception of the said easement;

And it further appearing that the said defendant was unable to comply with the terms of her contract as alleged in the bill of complaint, until the 13th day of December, 1926, that being the date of the final hearing in this cause, and the defendant then in open court tendered herself ready at that time to perform the contract as set out in the bill of complaint, and announcing at the conclusion of the complainant's case that she was now in possession of a quit-claim deed covering the easement referred to in the bill of complaint, and the Court having allowed the defendant to withdraw the two counter-claims filed in her original and amended answers and permitting a supplemental counter-claim to be filed praying specific performance of the contract as annexed to the bill of complaint;

And the Court being further satisfied that the defendant is entitled to the relief prayed for in her supplemental counter-claim and that the bill of complaint filed by the complainants should be dismissed and that the relief prayed for in the supplemental counter-claim should be allowed, and that the defendant is entitled to specific performance of the aforementioned contract as prayed for in the supplemental counter-claim, it is thereupon on this 8th day of March, 1927,

ORDERED, ADJUDGED AND DECREED, that the bill of complaint filed by the complainants in the within matter be and hereby is dismissed with costs to be taxed, and it is further

ORDERED, ADJUDGED AND DECREED, that the said agreement be in all things specifically performed by the said complainants, and that the said complainants on the first day of April, 1927, at the hour of ten o'clock in the forenoon, at the office of Meyer M. Semel, No. 116 Market

street, Newark, New Jersey, do pay to the defendant, the sum of six thousand ($6,000) dollars, or such other sum or sums as may be found to be due, with interest thereon from the first day of May, 1926, together with costs taxed in this suit, as hereafter to be allowed; and at the same time to make, execute and acknowledge in due form of law and deliver to the said Eleanor F. Munzing, their bond in a penal sum, being double the amount of the value of the back shares which have accrued to the said Eleanor F. Munzing in the West End Building & Loan Association, by reason of the mortgage held by the West End Building & Loan Association on the aforementioned lands and premises, up to and including the first day of May, 1926, less the sum of two hundred ($200) dollars, and that the complainants do assign unto the said Eleanor F. Munzing, the aforementioned back shares as additional security for the aforementioned bond and mortgage about to be executed, until that mortgage is paid in full; the aforementioned mortgage to contain the usual interest, tax assessment, insurance and installment default clauses and an agreement not to claim a credit on the interest payable on the bond and mortgage by reason of any tax assessed or to be assessed against the said premises, with interest at six per cent. payable semi-annually; said complainants reserving unto themselves the right to pay off the said mortgage in whole at any time before the expiration thereof with interest to the date of payment, said mortgage to become due and payable on the first day of May, 1929; and it is further

ORDERED, ADJUDGED AND DECREED, that all taxes mortgage interest, water, rents and any other

adjustments and apportionments relating to the said premises in question shall be adjusted between the complainants and defendant as of May 1, 1926; and it is further

ORDERED, ADJUDGED AND DECREED, that the complainants shall have and receive to their own use and benefit, the rents and income of the said premises from and after the first day of May, 1926; but that there shall be credited to the defendant against the amount of such rents and income allowed to the complainants, the cost of maintaining and caring properly and reasonably, for the said lands and premises since the first day of May, 1926; and it is further

ORDERED, ADJUDGED AND DECREED, that if, at the said time and place hereinbefore mentioned the complainants shall fail or neglect to pay the aforementioned sum of approximately six thousand ($6,000) dollars with interest as hereinbefore mentioned, together with taxed costs as hereinbefore mentioned, and to deliver the bond and mortgage hereinbefore referred to, duly executed and acknowledged, and upon tender of the deed at the above time and place by the said Eleanor F. Munzing, the aforesaid sum of six thousand ($6,000) dollars, or such other sum or sums as shall be found to be due, with interest as aforesaid and the further amount of the aforementioned purchase money mortgage with interest from the first day of May, 1926, together with taxed costs of this suit as hereinbefore mentioned, and such further sum or sums as may be found to be due to the said defendant upon an accounting as of May 1, 1926, shall become and hereby are impressed as a lien on the said premises and lands, in favor of the said Eleanor F. Munzing, to the end that the said

lands and premises may, at the option of the said defendant, be sold pursuant to and under the direction of this court, to satisfy such lien and that in case deficiency shall arise in such sale, said complainants shall be ordered by this court to pay such deficiency. And it is further

ORDERED, that the said complainants do pay to the solicitor of the defendant, Meyer M. Semel, all of the costs of this suit to be taxed, and a counsel fee in the sum of three hundred ($300) dollars, which is allowed to the solicitor of the defendant; and it is further

ORDERED, that true copies of this decree and of the said taxed costs, be served on the solicitor for the complainants within ten days after the date of the taxed bill of costs, which copies of decree need not be certified to, except by the solicitor of defendant.

Respectfully advised,

JOHN H. BACKES,
V.-C.

Consent is hereby given to the entry of the above decree as to form.

JACOB L. NEWMAN,
Solicitor for and of Counsel
with Complainants.

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

Between MORRIS NASS and MINNIE NASS, his wife, *Complainants,* and ELEANOR F. MUNZING, *Defendant.*	*On Bill, &c.* *Notice of Appeal.*

The complainants, Morris Nass and Minnie Nass, his wife, hereby appeal from the whole and every part of the final decree dated the eighth day of March, nineteen hundred and twenty-seven, made in this court, by the Chancellor, on the advice of Vice-Chancellor John H. Backes, in the above-entitled cause, to the Court of Errors and Appeals, the court of last resort in all causes.

Dated, March 10, 1927.

JACOB L. NEWMAN,
Solicitor for and of Counsel
with Complainants.

PETITION OF APPEAL.

Filed March 12, 1927.

New Jersey Court of Errors and Appeals

Between MORRIS NASS and MINNIE NASS, his wife, *Complainants-Appellants,* and ELEANOR F. MUNZING, *Defendant-Respondent.*	*On Appeal, &c.* *Petition.*

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

The petition of Morris Nass and Minnie Nass, his wife, the appellants in the above-stated cause, respectfully shows:

1. That your petitioners find themselves aggrieved by the final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the eighth day of March, nineteen hundred and twenty-seven, in a cause therein pending, wherein the said Morris Nass and Minnie Nass, his wife, were complainants, and the said Eleanor F. Munzing, was defendant, in the following respects, to wit:

(A) That the said decree adjudges that the complaint filed in the Court of Chancery by the appellants, be dismissed, with costs; and

Petition of Appeal.

(B) That the respondent was permitted to withdraw her amended counter-claims praying for reformation of the contract mentioned in the bill of complaint, and for specific performance of the contract of sale as reformed, and permitting the said respondent to file a supplemental counter-claim, and because said decree adjudged that the respondent was entitled to specific performance of the agreement set out in the bill of complaint, because the said decree adjudged that the appellants do pay to the respondent the consideration monies to be found due, pursuant to the terms of the contract mentioned in the bill of complaint, and required the said appellants to pay counsel fees and costs, pursuant to said decree.

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

Dated March 10, 1927.

JACOB L. NEWMAN,
Solicitor of Complainants-Appellants.

Answer to Petition of Appeal.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between MORRIS NASS and MINNIE NASS, his wife, *Complainants-Appellants,* *and* ELEANOR F. MUNZING, *Defendant-Respondent.*	*On Appeal, &c.* *Answer to Petition of Appeal.*

The answer of Eleanor F. Munzing, the above-named defendant-appellee, to the petition of appeal of Morris Nass and Minnie Nass, his wife, the above-named appellants.

This appellee, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that a decree was, on the 8th day of March, 1927, made and entered in the Court of Chancery of New Jersey in the above-entitled cause for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, this appellee begs leave to refer thereto when the same shall be produced.

This appellee is advised and believes that the said decree is agreeable to equity; and she prays that the same may be affirmed with costs to be taxed in favor of this appellee.

MEYER M. SEMEL,
Solicitor for and of Counsel
with Appellee.

Exhibit D. 1.

EXHIBIT D. 1.

THIS INDENTURE made this 13 day of December, in the year of Our Lord One Thousand Nine Hundred and Twenty-six, BETWEEN:

KARL FARR and JOHANNA FARR, his wife of the Town of Irvington, County of Essex and State of New Jersey

hereinafter referred to as the party of the first part, and

ELEANOR F. MUNZING, of the Town of Irvington, County of Essex and State of New Jersey

hereinafter referred to as the party of the second part, WITNESSETH THAT:

The said parties of the first part, in consideration of the sum of One Dollar and other good and valuable consideration to them in hand paid before the delivery hereof, hath remised, released and forever quit-claimed and by these presents doth remise, release and forever quit-claim to the party of the second part and to her heirs administrators, executors and assigns, all of their right title and interest in and to all that lot, tract or parcel of lands and premises hereinafter particularly described, situate, lying and being in the Town of Irvington, County of Essex and State of New Jersey:

BEGINNING in the south-easterly line of Lyons Avenue distant twenty-six feet easterly from the easterly side of Normandy Place; thence running along Lyons Avenue south thirty-eight degrees fifty-nine minutes east seventy-five feet; thence running south fifty-two degrees twenty-one minutes west one hundred feet; thence running north thirty-eight degrees fifty-nine minutes west

Exhibit D. 1.

seventy-five feet; thence running north fifty-two degrees twenty-one minutes east one hundred feet to the south-easterly side of Lyons Avenue and the point and place of BEGINNING.

Together with a strip of land in the rear of the said premises approximately eight feet front and rear by one hundred and one feet more or less in depth and which strip runs to Normandy Place.

Together with all the appurtenances and all the estate, right, title and interest, claim or demand whatsoever of the parties of the first part, to have and to hold the above mentioned and described premises with the appurtenances unto the said party of the second part, her heirs, executors, administrators and assigns forever.

WHEREAS, by certain deed dated the first day of October, 1923, the Welfare Realty Co. a corporation of the State of New Jersey, did sell, transfer and convey unto Eleanor F. Munzing, then of the City of Newark, County of Essex and State of New Jersey, the aforementioned lands and premises, and

WHEREAS, by the terms of the aforementioned deed the said Welfare Realty Co. did reserve unto itself, its successors or assigns, the right of way in and over the strip of land above described and which strip of land was to be used in common by and between the said Welfare Realty Company, its successors and assigns, and the party of the second part herein, her heirs, administrators, executors or assigns, and the servants and agents, tenants and occupants of the above described premises and the premises adjoining on the south, at all times freely to pass and repass on foot or with animals, vehicles or

Exhibit D. 1.

otherwise, to and fro over the same and by the terms of the aforementioned deed the cost of maintaining and improving the driveway over the strip of land hereinabove referred to, was to be paid equally by and between the owners of the property conveyed to the said Eleanor F. Munzing and the owner of the property adjoining on the south, and

WHEREAS, by deed dated the 11th day of October 1923, the Welfare Realty Co. aforementioned did give, grant, bargain, sell and convey unto Albert Scherer Daly and Magdalene Z. Daly, his wife, the lands and premises adjoining on the south of the aforementioned premises, and

WHEREAS, the said Albert Scherer Daly and Magdalene Z. Daly, his wife, did give, grant, bargain, sell and convey unto the parties of the first part herein, the said lands and premises adjoining on the south of the aforementioned premises, by the terms of which deeds and by virtue of the aforementioned conveyance to the said parties of the first part herein, all of the right, title and interest of the Welfare Realty Co. in and to the aforementioned easement and the right of way to and over the lands and premises of the party of the second part herein vested in the said parties of the first part herein and inured to the benefit of the said parties of the first part herein and their lands and premises which are more particularly described as follows:

BEGINNING at a point in the south-easterly line of Normandy Place distant southwesterly 110 feet from the intersection of the same with the southerly line of Lyons Avenue; thence running (1) south 38 degrees 59 minutes east 100 feet; thence (2) south 52 degrees 21 minutes west 33 feet; thence (3)

Exhibit D. 1.

north 38 degrees 59 minutes west 100 feet to Normandy Place as aforesaid; thence (4) along the same north 52 degrees 21 minutes east 33 feet to the point and place of BEGINNING.

and

WHEREAS, it is the desire of the parties hereto that the lands and premises of the said Eleanor F. Munzing and more particularly described herein, be released from the easement created against the said lands and premises of Eleanor F. Munzing aforementioned in and by virtue of the provisions of the said deed of the Welfare Realty Co. to Eleanor F. Munzing dated October 1st, 1923 and recorded in Book E 69 of Deeds on pages 302-303 in the office of the Register of Essex County; and

WHEREAS, it is also the desire of the parties of the first part to be released from the obligation of the cost of maintaining and improving said driveway over the strip of land hereinbefore referred to as is more particularly set forth in the said deed of Eleanor F. Munzing aforementioned, it being the intention of the parties hereto and the said parties to these presents do herewith in consideration of the sum of One Dollar and other good and valuable consideration, *each* to the other in hand paid agree that the said parties of the first part, their heirs executors, administrators or assigns, be and hereby are released and discharged from any and all obligations heretofore incurred and hereafter to be incurred by reason of any cost of maintaining and improving the driveway over the said strip of land hereinabove referred to and that the lands and premises of the said parties of the first part be likewise released and discharged from

any liens costs or charges which have heretofore incurred or hereafter may be incurred by reason of the maintenance and improvement of the said driveway; and the said lands and premises of the said Eleanor F. Munzing aforementioned be and hereby are released, discharged and freed from any easement or any other obligation in favor of the said parties of the first part and their lands and premises aforementioned, and that the said easement be and hereby is abrogated, nullified, cancelled and made void and of no effect.

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

CARL FARR (L. S.)
JOHANNA FARR (L. S.)
ELEANOR F. MUNZING (L. S.)

Signed, sealed & delivered in
the presence of

FREDERICK W. WEBER,
A Notary Public of New Jersey.

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

BE IT REMEMBERED, That on this 13th day of December in the year of our Lord One Thousand Nine Hundred and Twenty-six, before me, the subscriber, a Notary Public of New Jersey personally appeared Karl Farr and Johanna Farr, his wife, who, I am satisfied, are the grantors mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon they acknowledged that, they signed, sealed

and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed; and the said Frederick W. Weber, Johanna Farr being by me privately examined, separate and apart from her said husband, further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband.

FREDERICK W. WEBER,
A Notary Public of New Jersey.

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

BE IT REMEMBERED, That on this 13th day of December in the year of our Lord One Thousand Nine Hundred and Twenty-six, before me, the subscriber, a Notary Public of New Jersey personally appeared Eleanor F. Munzing (Widow) who, I am satisfied, is the grantor mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon she acknowledged that, she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed; and the said Frederick W. Weber.

FREDERICK W. WEBER,
A Notary Public of New Jersey.

Exhibit D. 1.

DEED

KARL FARR and JOHANNA FARR

TO

ELEANOR F. MUNZING (WIDOW)

(Rubber Stamp)

COMPARED
BY
48 & 33

Dated, November 1926.

Received in the Register's Office of the County of Essex, N. J. on the 17th day of March A. D., 1927 at 12:29 o'clock in the afternoon, and Recorded in Book C-76 of Deeds, for said County, on pages 103-105.

HOWARD S. DODD,
Register.

Law Offices,
MEYER M. SEMEL,
Proctor Theatre Bldg.,
116 Market Street,
Newark, N. J.

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

New Jersey Court of Errors and Appeals

Between

MORRIS NASS and MINNIE NASS, his wife,
Complainants-Appellants,

and

ELEANOR L. MUNZING (widow),
Defendant-Respondent.

BRIEF ON BEHALF OF APPELLANTS.

Statement.

This is an appeal from a final decree of the Court of Chancery entered on the 8th day of March, 1927, advised by Hon. John H. Backes, Vice-Chancellor, which after final hearing, dismissed the bill of complaint filed by the appellants and granted the extraordinary relief of specific performance to the respondent on the supplemental counter-claim *filed after the final hearing.*

The bill of complaint was filed in the Court below on May 10, 1926, for the purpose of impressing upon the lands of the respondent a vendee's lien for down money paid upon the contract of purchase and sale of premises owned by the respondent in the Town of Irvington, because it was therein alleged that the respondent was unable to make title in accordance with the terms of her contract.

The contract, Exhibit C. 1 annexed to the bill of complaint, provided for the purchase by the appellants and the sale by the respondent of a

tract of land in the Town of Irvington upon which there was erected a frame apartment house. It also was provided that the land to be sold was 75 feet front by 100 feet in depth, "*together with a strip of land in the rear of said premises 10 feet in width, running to Normandy Place.*" The purchase price was also included in the contract of sale and it was therein agreed that the deeds were to be delivered "*free from all encumbrances except as hereinafter mentioned.*" The exceptions mentioned were restrictions of record, existing tenancies and leases, and the mortgages upon the property. The search upon the property disclosed that in the deed conveying the land to the respondent, the Welfare Realty Company, the vendor in that deed, inserted in its conveyance the following:

> "TOGETHER with a strip of land in the rear of said premises approximately eight feet front and rear by one hundred and one feet more or less in depth, and which strip runs to Normandy Place.
>
> The said party of the first part, its successors and assigns, reserves the right of way in and over the strip of land above described, and which strip of land is to be used in common by and between the said party of the first part, its successors and assigns, and the party of the second part, their heirs, administrators and assigns, and as tenants and occupants of the above described premises and the premises adjoining on the south, at all times, freely to pass and re-pass on foot or with animals, vehicles or otherwise to, from and over the same.
>
> The cost of maintaining and repairing the driveway over the strip of land hereinabove referred to is to be paid equally by and between the owners of the property herein conveyed and the owner of the property adjoining on the south."

Upon the discovery of this easement and burden upon the land, the appellants refused to take title, inasmuch as the respondent was unable to convey title in accordance with the terms of her contract; rescinded and repudiated the agreement, and instituted the present litigation to impress their vendee's lien for the down money, search fees, and etc.

The respondent filed her answer and later an amended answer denying the allegations in the bill of complaint, and set out three defenses: *first,* that the appellants were not ready at any time to take title; *second,* that the appellants abandoned their rights under the contract; and *third,* that the respondent had always been ready, willing and able to perform her agreement and tendered herself ready and willing to convey "as per the original terms of the agreement," as said Court of Chancery shall order and direct.

Both the original and the amended answer contained two counter-claims.

(a) *A prayer for reformation of the contract annexed to the bill of complaint,* alleging therein that through error, mistake, surprise or inadvertence the written contract annexed to the bill of complaint omitted a recital of the easement above mentioned, and prayed that the easement in full as set out in the deeds to the respondent be included as a part of the written contract of purchase and sale between the appellants and the respondent; and

(b) *A prayer asking for specific performance of the agreement as reformed.*

To these answers and counter-claims the appellants joined issue and answered. *The case being at issue,* the cause was brought on for final

hearing at the Chancery Chambers in Newark seven months after the bill of complaint was filed, on December 13, 1926, upon the pleadings as herein outlined.

After the introduction of the appellants' evidence and after the Court had advised the respondent that relief on her counter-claim for reformation and specific performance of the reformed agreement could not be had under the authority of *Wirtz* v. *Guthrie,* 81 N. J. E. 271, the solicitor for the respondent announced in open court that the respondent waived the third separate defense in her amended answer and also the counter-claims for reformation and specific performance and offered to produce a release of easement or a quit-claim deed which she had that day (December 13, 1926), obtained, releasing the land described in the contract from the burden of the easement found upon the examination of the record. The appellant's evidence was then continued and the Court granted leave to the respondent at the conclusion of the final hearing to file a supplemental counter-claim.

That counter-claim, now praying specific performance of the contract as annexed to the bill of complaint, upon which the Vice-Chancellor granted the relief at final hearing is a complete turn-about on the part of the respondent, and although an answer was filed thereto by the appellants, we submit that the leave to file this supplemental pleading was an abuse of discretion by the trial court, and that the decree should therefore be reversed and the Court below directed to enter a decree in favor of the appellants upon the pleadings and proofs as presented at the final hearing.

The filing of this supplemental pleading resulted in the trial of an issue entirely different

from that which had been framed by the pleadings up to that point, and as the issues framed by the supplemental counter-claim were so opposed to the framed issues, it has resulted in the trial of an entirely different cause of action.

At this point it should also be taken into consideration that the respondent has acted in bad faith, inasmuch as she permitted the final hearing to be brought on, upon pleadings framed by her so that *the appellants were called upon to meet a situation* set out in her counter-claims, *i. e. that there was a mistake in the original agreement, and that that agreement was sought to be reformed* and then specifically enforced. That defense and cross-action the appellants stood ready and prepared to meet at the final hearing.

Had the respondent by her pleadings tendered herself ready, as she did upon the final hearing, to perform her written contract and tendered herself ready to deliver a deed free from the easement, then the appellants would not have been prejudiced by a delay of over seven months, and it is possible and more than likely that the title might have been closed. The respondent, however, by her pleadings, should now be estopped from filing a supplemental plea at this late date, tendering herself ready to perform an agreement, which throughout the litigation she has claimed was an erroneous agreement and which she has sought to reform to include an agreement that she desired incorporated therein for her protection and benefit. From the evidence it is apparent that at no time up to the date of the final hearing was the respondent in a position to convey in accordance with her written contract, as the deed removing the easement from the land was executed on the 13th day of December, 1926, the day of the final hearing. (Ex. D. 1.)

POINT 1.

The filing of the bill of complaint by the appellants in the court below was a rescission of the contract, and thereupon an absolute legal right accrued to them, and they thereupon became entitled to a return of their down money, search fees and expenses.

The evidence in the case at bar is that immediately upon ascertaining the defects in the title of the respondent, the appellants filed their bill in the court below, alleging a rescission of the contract and praying a return of their down money, search fees, etc.

In this situation the appellants were directly within the rule found in Pomeroy's Equity Jurisprudence, 2nd Ed., vol. 5, page 4979:

> "If however, the vendee had no knowledge of the vendor's inability to convey at the time of the agreement, he may at his election repudiate the agreement upon ascertaining the lack of, or defect in, the title."

Vice-Chancellor Bentley in *Gershonowitz* v. *Neider,* 95 N. J. E. 580, cites Pomeroy with approval.

In 27 R. C. L. 648, sec. 410, the general rule is laid down as follows:

> "As a general rule the default of the vendor in the performance of his contract to convey, the purchaser not being in default, is ground for the rescission of the contract by the purchaser. * * * If the contract is for the sale of a tract of land as a whole, the failure of the vendor's title to a part, will ordinarily entitle the purchaser to rescind * * *."

This is likewise the rule laid down in Thompson on Real Property, vol. 5, p. 428, and Williston on Contracts, vol. 2, p. 1685.

POINT 2.

The permission to file a supplemental counter-claim granted the respondent by the learned Vice-Chancellor, at the final hearing after the trial of the issues joined upon the filed pleadings, thereby changing the form and nature of her defense, was an abuse of discretion.

Permission to amend pleadings to conform to the proof introduced, is the subject of discussion in 21 R. C. L., p. 577, Sec. 130, and in the sections following. The general rule is there stated, after admitting that it is the practice liberally to allow amendments, that:

> "It is only essential that in the exercise of this power, no vested right shall be disturbed; that the cause of action or defense shall not be substantially changed; or that the theory of the case is not altered."

In this case it is to be observed that by the filing of the supplemental counter-claim after issue joined and the trial of the issue, the nature and theory of the respondent's cause of action in the counter-claim was entirely changed: the original counter-claim was based upon a disaffirmance of the contract and sought a reformation thereof; the supplemental counter-claim was based on an affirmance of the contract as it was originally made and sought specific performance thereof.

In New Jersey this rule of pleading, disallowing amendments which change the form and nature of causes of action (and defenses), has been approved in a very recent case, *Blum Building Co.* v. *Ingersoll,* 4 N. J. Adv. Rep. 1394-1398:

> "A word as to the practice. Setting up a maintainable, new and inconsistent cause of action is not allowable after issue."

It would seem, therefore, that the permission to file the supplemental counter-claim setting up a maintainable, new and inconsistent cause of action, in which the respondent assumed a completely contrary attitude and cause of action (defense) from that asserted in the original counter-claims as filed, was without the bounds of judicial discretion.

POINT 3.

The respondent by her original and amended counter-claims elected to declare the contract annexed to the bill of complaint at an end, and by such election is estopped from filing a supplemental counter-claim, after the final hearing, seeking affirmance of the contract, which she had heretofore repudiated, and permission to file such supplemental counter-claim was an abuse of discretion.

The respondent by her pleadings filed prior to the final hearing made an election. The filing of the bill of complaint in the Court below gave to the respondent her opportunity to admit the existence of the contract annexed to the bill of complaint, or admit its rescission as alleged by the appellants. Her original pleadings in the Court below substantiate the appellants' allegations that the contract was rescinded, for the respondent throughout the proceedings and until the very day of the final hearing, by her pleadings, never admitted that the contract, annexed to the bill of complaint, was still in existence, but endeavored to have the Court below make a new contract to contain what she maintained was the true agreement between the parties. She thereby made an election, which election, we maintain, is a bar to the relief of specific performance just as effectively as if the appellants had commenced their suit at law for damages, and then, discontinuing that suit, commenced a suit in the Court below for specific performance of the contract. See *Blum Building Co.* v. *Ingersoll, supra.*

> "An election of remedies is defined as the choosing between two or more different and co-existing modes of procedure and relief allowed by law on the same state of facts. On this question the language of the Scottish law is sometimes used; a man shall not be allowed to approbate and reprobate * * *, *the basis for the application of the doctrine is in the proposition that where there is, by law or by contract, a choice between two remedies, which proceed upon opposite and irreconcilable claims of right, the one taken must exclude and bar the prosecution of the other—the same principle being applicable also to a choice of defenses.* The doctrine of the election of remedies is, therefore, generally regarded as being an application of the law of estoppel, upon the theory that a party cannot in the exertion or prosecution of his rights, occupy inconsistent positions." (italics ours).
>
> *Election of Remedies,* 9 R. C. L., Section 1, p. 956.

The doctrine of election of remedies as adopted in this State has very recently been fully summarized in the *Blum Building Co. case, supra,* in an opinion by Backes, *V.-C.,* from whose opinion the present appeal is taken (p. 1398):

> The complainant having by its original bill elected to be no longer bound by the contract is not privileged to again chose to be bound. Having committed itself to a recovery of the deposit, its right to have the property is forever gone. The election is irrevocable. Claron *v.* Thommessen, 2 N. J. Adv. R. 1509; Heller *v.* Elliott, 44 N. J. Law 467. The commencement of an action, where

all the facts are known, is conclusive evidence of an election. Conrow *v.* Little, 115 N. Y. 387. "A party," says Bigelow, "cannot either in the course of litigation or in dealings *in pais,* occupy inconsistent positions. Upon that rule election is founded. A man shall not be allowed to approbate and reprobate. And where a man has an election between several inconsistent causes of action he will be confined to that which he first adopts. The election, if made with knowledge of the facts, is in itself binding. It cannot be withdrawn without due consent. It cannot be withdrawn though it has not been acted upon by another by any change of position." Big. Estop. (6th ed.) 732. A comprehensive statement of the effect of an election is given in 20 Corp. Jur. 38, thus: "An election once made between co-existing remedial rights which are inconsistent is not only irrevocable and cannot be withdrawn without due consent even though it has not been acted upon by another to his detriment, but it is also conclusive and constitutes an absolute bar to any action, suit or proceeding based upon a remedial right inconsistent with that asserted by the election or to the maintenance of a defense founded on such inconsistent rights." Chancellor Kent, in Sanger *v.* Wood, 3 John. Ch. 416, put it in this way: "Any decisive act of the party, with knowledge of his rights, and of the fact, determines his election in the case of conflicting and inconsistent remedies." In Connihan *v.* Thompson, 111 Mass. 270, it is said that *"the defense of waiver by election arises when the remedies are inconsistent, as where one action is founded on an affirmance and the other upon the disaffirmance of a voidable contract, or sale of property. In such cases any decisive act of affirmance or disaffirmance, if done with knowledge of the fact, determines the legal rights of the parties once for all. The institution of a suit is such a decisive act, and if its maintenance necessarily involves an election to*

affirm or disaffirm a voidable contract or sale, or to rescind one, it is generally held to be a conclusive waiver of inconsistent rights, and thus to defeat any action subsequently brought thereon. In Thompson *v.* Howard, 31 Mich. 312, this language is used: "A man may not take two contradictory positions, and where he has a right to chose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one with knowledge or means of knowledge of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again." In Rodermund *v.* Clark, 46 N. Y. 354, the principle is stated in this manner: "*Where there exists an election between inconsistent remedies the party is confined to the remedy which he first prefers and adopts.* The remedies are not concurrent, and the choice between them being once made, the right to follow the other is forever gone." (Italics ours.)

POINT 4.

The respondent is guilty of gross laches and in equity ought not to prevail upon her supplemental counterclaim for specific performance filed after the final hearing as this extraordinary relief and the discretion of the Court ought not to be exercised in her favor in a situation as in this case where by her conduct and pleadings from the inception of the cause to its final hearing, she maintained a position that the contract annexed to the bill of complaint was not the real contract and sought its reformation and specific performance as reformed, and later finding relief impossible in a court of equity, procured on the day of the final hearing a confirmatory conveyance and then retracted her defenses, and completely reversed her former position seeking specific performance of an entirely different agreement.

This Court, affirming Vice-Chancellor Leaming in the case of *Lean* v. *Leeds,* 92 N. J. E. 455, very clearly discusses the theory of discretion in the case of specific performance, and part of the Vice-Chancellor's opinion, which this Court affirms, is:

> "The sound discretion which is so frequently referred to in cases of specific performance, I understand to be largely a technical term; it is essentially the exercise of sound judgment based upon right and justice in accordance with defined equitable principles, as established by precedents in cases of this class; the established principle must control the discretion. A court of equity is not permitted to disregard established equitable rules in the exercise of its discretion in cases of this class; the discretion to be exercised must be judicial and not a capricious discretion."

In that case specific performance was granted for no legal justification could be shown for the failure of the sellers to convey.

In the instant case it is submitted that that same discretion should be used to permit the appellants the recovery of their down money rather than, that discretion be used to permit the respondent to take one stand in her pleadings and maintain that position for seven months, and then finding herself without relief take an entirely opposite position and obtain the extraordinary relief granted by equity to compel the specific performance of the contract.

Assuming, but not admitting, that there is some merit in the plea for specific performance in the supplemental counter-claim of the respondent, the same rule of evidence applies as in any other case, that to sustain an affirmative plea, the pleader must sustain the burden of proof. This, we submit, the respondent has utterly failed to do. In order that equity grant the relief which it has in this case, the respondent must convince the Court by clear and convincing evidence that the Court's discretion should be moved in her favor. In *Kelleher* v. *Bragg,* 96 N. J. E. 25 (aff. 97 N. J. E. 547), Lewis, Vice-Chancellor, referring to the right of specific performance says:

> "Specific performance is a remedy within the sound discretion of the Court, and should not be granted unless the right thereto is clearly and conclusively established. The complainant has the burden of proof in establishing her right to specific performance, and, under the circumstances of this case, I do not feel that she has sustained the burden."

POINT 5.

The appellants were justified in refusing to accept title because of the fact that the land in question was subject to a private existing easement rendering it unmarketable.

The general doctrine is set out in 27 R. C. L., Sec. 226, p. 503, and has been followed by the New Jersey cases. It was held in *Melick* v. *Cross,* 62 N. J. E. 545, that where land was subject to an easement right to pipe water away from the springs upon the premises in question, it was such a substantial defect in title that the vendee had the right to abandon the contract inasmuch as the water right and easement lessened the vendee's enjoyment of the property.

In *Goldstein* v. *Erhlich,* 96 N. J. E. 52, Vice-Chancellor Backes held that "a valid reason for refusing specific performance such as a defect in title, warrants a rescission of the contract."

In *Bier* v. *Walbaum,* 4 N. J. Adv. Rep. 251, this Court in an opinion by Justice Black held "an Encumbrance means a right to, or interest in, an estate to the diminution of its value; a paramount claim or interest resting as a charge upon land."

A reading of the easement found upon the property by an examination of the records, presents just such an interest or claim upon the land that is described by Justice Black, and that discovery presented, we maintain, a valid ground for the rejection of title by the appellants.

POINT 6.

The ability of the vendor to perform at the time of a decree for specific performance is only available to a vendor who acts in good faith upon a then subsisting contract, and a vendor who acts in bad faith as in this case, cannot, where there has been a rescission of the contract, obtain from equity the discretionary and extraordinary relief of specific performance by permitting the vendee to be lulled into the belief throughout the entire proceeding, that the title was defective and beyond the power of the vendor to perfect.

Unfortunately, the Vice-Chancellor in the Court below in his memorandum has stated some facts that are not in the evidence. He writes "Complainant's counsel was still investigating the title on the closing day and on May 5th wrote the defendant's attorney in reply to his letter concerning the transaction, that he would be glad to take the matter up with him in a few days." Nowhere in the evidence can this be discovered. This is very misleading and should be disregarded in a consideration by this Court of the evidence in the case.

It appears, too, that the Vice-Chancellor forced his opinion for he uses the following language with reference to the easement above referred to: "For it would not be a strained construction if it were held that the easement was 'a restriction,' within the meaning of the provision of the contract to convey 'Subject to restrictions of record,' in view of the forehand knowledge of the complainants of its existence and the fact that it is a matter of record."

The fact that the easement—which is properly not a restriction in the sense it is used in the ordinary agreement to sell real estate—was a

matter of record cannot militate against the appellants' position because the respondent had agreed to convey free and clear of the easement.

Again the Court below seems to have overlooked the fact that, in the case of *Gerba* v. *Mitruske,* 84 N. J. E. 141, referred to in the opinion, the contract sought to be enforced was still in existence at the time of the final hearing and at the time of the tender of performance, which is not the situation in the instant case. There had been no rescission by either party, nor any attempt at rescission in the Gerba case, and the party seeking specific performance was not the counter-claimant in a suit to enforce a vendee's lien, as in the case at bar; that suit *was brought by the vendor at a time when the contract was still in full force and effect.* Substituting in the instant case the counter-claim as an original bill for specific performance, the respondent should not be entitled to prevail, because in the original counter-claim as filed, the contract was not attempted to be enforced as it read, but was attempted to be reformed, and enforcement prayed of a completely new agreement different from the one signed by the parties. The facts in the Gerba case were that an agreement of sale was entered into on September 27, 1911, for the sale and purchase of a tract of property, the deed to be delivered and the balance of consideration to be paid on or before November 1, 1911. The bill of complaint for specific performance was filed by the vendor on December 29, 1911, and the defendant's answer to that bill was not filed until July 28, 1913, in which answer the defendant set up that the title was not clear because of an agreement of sale on record entered into by the vendor with a third party on September 11, 1911, recorded October 17,

1911, to be performed October 24, 1911. Under the statute (Comp. Stat. 1573) the agreement of sale with a third party ceases to be a lien against the land three months after the date set for its performance. No suit to enforce it having been filed, thus making that encumbrance void on January 24, 1912, the Court granted specific performance because title was good at the time that the decree was rendered. *The opinion, however, does not intimate what the decision would have been, had the purchaser rescinded or filed his bill to impress a vendee's lien upon the property or filed suit to recover his down money at law, prior to the institution of the specific performance suit.*

It is impossible to reconcile the opinion of the Court below that the respondent stood ready to go forward and that the presence of the easement did not warrant the charge in the bill of complaint that the respondent could not, and refused to, perform the contract any more than the existence of a mortgage or other removable lien would justify such assumption, in view of the fact that the record discloses that it took upwards of seven months to obtain the release of the lien. (S. C. 45.)

> "Q When did you start negotiations for the obtaining of this quit-claim deed and release? When was the first time you began to negotiate with them for that? A Right after we were notified that the Nasses had engaged counsel to not accept it on account of not having this driveway with the property; then I began to see whether I could get possession of it.
>
> Q And you just got possession this morning? A This morning.
>
> Q When did you close with them? A Yesterday afternoon the arrangements were made, but the papers were signed this morning about twenty minutes to eight.

Q How many times were you there? A Half a dozen times.

The Court: Did you ever tell the Nasses what you were doing?

Witness: No, sir, I did not.

The Court: Or anybody for them? You didn't tell the Nasses or anybody for them what you were doing?

Witness: Mr. Semel. I didn't tell either of the Nasses or their counsel, no.

Q Who suggested to you that you try to obtain this release? A Counsel."

It is quite apparent by a reading of this testimony, which is very short that even if a reasonable time or extension would have been allowed that the respondent could not have made title and it therefore follows that where it is apparent that one party to a contract cannot perform, tender of performance by the other is unnecessary.

Justice Kalisch in the Court of Errors and Appeals in the case of *Bernstein* v. *Kohn,* 96 N. J. L. 223, held:

"The universally recognized legal rule is, where there are concurrent covenants to be performed by vendor and vendee, that before the latter is enabled to rescind and sue for a breach of the contract, he must show tendered performance of such concurrent covenants on his part and that he has demanded performance by the vendor of concurrent covenants on his part.

It is equally well a recognized exception to this general rule, and that is, in case a vendor is unable to perform at the time agreed upon for the passing of title, tender of performance by the vendee is not required in order to enable him to rescind and to sue his vendor for a breach of the contract. Cases cited." (Italics ours.)

The *Bernstein* case, *supra,* was approved in a later opinion of the Court of Errors and Appeals by Justice Kalisch in *Naugle* v. *McVoy,* 96 N. J. L. 515.

It follows, therefore, from the reasoning in the above cases that the appellants were under no obligation to tender themselves ready and willing to perform their part of the agreement on the day set in the contract as tender of performance on their part would have been futile, the respondent being unable to comply with her part of the agreement.

It is hard to reconcile the last paragraph of the opinion in the Court below with the preliminary discussion in the opinion. In the first part of the opinion, quoting from Fry's "Specific Performance" and old English cases, the Court insists that the appellants must, to preserve their legal right, act promptly upon discovery; in the concluding paragraph the Court pronounces the action of the appellants as "precipitate and ill-conceived." It is hard to understand what was in the mind of the Court below. Did he mean that the appellants should have refrained from instituting suit and merely serve a written notice upon the respondent, stating that they would reject the title if it was not made good within a reasonable time (and thus possibly lose their remedy of holding the land for the down money in the event the respondents conveyed away their title)? If the appellants had followed that course, they would have been in no better position, because, as by the pleadings and the evidence, the respondent would not have made the title good within a reasonable time, because, as a matter of fact, they could not. (Testimony—Weber S. C. 45.) *Her original pleadings show that at that time and within a reasonable*

time after the commencement of the within suit, she never intended to make good the title; she intended to reform the agreement if possible to conform with what title she had, and obtain performance of the reformed agreement. The appellants certainly cannot be penalized for their diligent tactics and vigilance as distinguished from what the Court below has termed their "precipitate and ill-conceived suit." This Court has always fostered and approved of litigant's diligence and has never termed such efforts to protect just legal rights as "precipitate and ill-conceived."

CONCLUSION.

The respondent having by her conduct lulled the appellants into the belief that the contract annexed to the bill of complaint was not the proper contract between the parties; and having maintained that position in her pleadings throughout the course of this litigation up to the day of the final hearing; and having then reversed her position, offered a quit-claim deed and then prayed specific performance of the contract, which up to that time she had refused to recognize, her position is most inequitable and the discretion of the Court should not be moved in her favor to permit an injustice to be done the appellants; and the permission granted the respondent to file her supplemental counter-claim upon the day of the final hearing being an abuse of discretion and highly prejudicial to the appellants, and the respondent even if entitled to the discretion allowed, having failed to sustain the burden of proof, should not in equity be granted the relief of specific performance and the decree of the Court of Chancery should be reversed to the end that the supplemental counter-claim should be

dismissed and the prayer in the bill of complaint be granted together with costs.

Respectfully submitted,

JACOB L. NEWMAN,
Solicitor for and of Counsel with Appellants.

JACOB L. NEWMAN,
LIONEL P. KRISTELLER,
On the Brief.

May 1927, Term.

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

New Jersey Court of Errors and Appeals

Between

MORRIS NASS and MINNIE NASS, his wife,
Complainants-Appellants,

and

ELEANOR F. MUNZING, widow,
Defendant-Respondent.

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT.

Statement.

The statement of facts set up by appellants in their brief is not correct, for the following reasons:

FIRST: Appellants in the first paragraph on page three of their brief, contend that:

> "Appellants refused to take title inasmuch as the respondent was unable to convey title in accordance with the terms of her contract; rescinded and repudiated the agreement and instituted the present litigation to impress their vendee's lien for the down money * * * etc."

The respondent disagrees with this contention and maintains that there was no act or declaration on the part of the appellants prior to the filing of the bill upon which an action in rescission and for the impression of a lien could be based.

There is no allegation in the bill of complaint setting forth a repudiation or even asking for a rescission. In fact, the bill of complaint, in

paragraph seven (State of Case, p. 3, ll. 21-31 inclusive), charges defendant-respondent only with a refusal and inability to perform in spite of appellants' offer and desire to do so and prays only for re-payment of deposit moneys and for a lien to secure the same. (State of Case, p. 3, ll. 36-40 inclusive, and State of Case, p. 4, ll. 1-14 inclusive.)

The respondent's contention is supported fully by the decision rendered in the case of *Orange Society* v. *Konski,* 94 N. J. Eq., p. 95, where the Chancery Court laid down the rule that a reasonable time must be given by the party desiring to rescind, before a rescission or repudiation can be invoked. In view of the above decision, the Vice-Chancellor in the case at bar was justified in holding that:

> "Their (appellants) suit was brought before they matured their cause for action by the requisite notice and demand for performance and it is not maintainable."

(State of Case, p. 57, ll. 37-40 inclusive; State of Case, p. 58, l. 1.)

In the case of *Patterson* v. *J. D. Loiseaux Lumber Co.,* 114 Atl. Rep., p. 336, 92 Eq., p. 569, Vice-Chancellor Buchanan says:

> "Still further and of perhaps even greater significance, not only was no claim made by Mr. Loiseaux in his testimony that a rescission or termination had been made by agreement, nor any such claim made in the vendor's pleadings * * * ."

It will be observed from a careful reading of this case, that before there can be a rescission in fact of a contract of this nature, there must be a notification from the party desiring to rescind to the other, to the effect that that party has elected to rescind.

The only mention of rescission ever made by the appellants herein appears after the hearing and in the replication to the answer filed by the defendant. There was absolutely nothing in the testimony of the appellants from which the Vice-Chancellor could have concluded that there had been an election to rescind and certainly nothing of any act on the part of the complainants-appellants of their desire to rescind.

In the case of *Dennis* v. *Jones,* 44 N. J. Eq., p. 513, decided by the New Jersey Court of Errors and Appeals, the decision was to the same effect and held that even though there be fraud, the right to rescind must be exercised and with reasonable promptness after the discovery of the fraud.

To the same effect are the cases of *Goldstein* v. *Ehrlich,* 124 Atl. Rep. 761, 96 E. 52 and *Lyons* v. *Pyat,* 51 N. J. Eq., p. 60, which also holds that where the vendor and vendee are endeavoring to remove some supposed encumbrance or cloud on the title, neither one has a right to consider his obligations to the other determined, without reasonable notice.

The above rule is also embraced in the case of *Brown* v. *Ely,* 113 Atl. Rep. 698, 92 N. J. Eq., p. 487; and in the case of *Falkner* v. *Wassmer,* 77 N. J. Eq., p. 537.

SECOND: The appellants contend that the counter-claim praying specific performance upon which the Vice-Chancellor granted the relief is a complete turnabout on the part of the respondent and that the leave to file this supplemental pleading was an abuse of discretion.

Gerba v. *Mitruske,* 84 N. J. Eq. 141, establishes the rule that it is timely performance if conveyance in conformity with the contract can be made at the time of the decree. Under this doctrine and because of the court's broad jurisdiction to permit pleadings to be amended to properly frame and conform to the issues involved, it was certainly not an abuse of discretion to allow the respondent to file an amended counter-claim alleging her ability to perform according to the strict letter of the contract, particularly in view of the fact that the respondent procured the deed of release on the morning of the hearing and was unable to plead to that effect before. Particularly is it to be noted that the complainants-appellants were given leave to file an answer to the amended counter-claim and to bring in further testimony to meet that phase of the issue, but did not do so, submitting to the Vice-Chancellor's decision on the pleadings as then filed.

ANSWER TO POINT 1.

The filing of the Bill of Complaint by the appellants was not a rescission, because:

1. The bill of complaint did not allege or charge an act of rescission by the complainants, or any act or declaration from which the court could spell out a rescission.

2. The bill of complaint did not pray for a rescission but merely for a return of the deposit and a lien to secure the same.

3. Conceding, for the sake of argument, that the complainants had grounds for rescission (which is not, however, admitted), complainants did not give defendant reasonable notice of their

election or intention to repudiate as required by the principle laid down in the case of *Orange Society* v. *Konske, supra,* and filed their bill irrationally and prematurely.

4. By filing their bill of complaint before giving the defendant a reasonable notice of rescission, the complainants opened the way for the defendant to perfect the title to conform with the strict letter of the contract, and opening the way, thereby enabled the defendant to invoke the aid of the Court of Chancery for the specific performance which was granted to the defendant. Coming into the Chancery Court, the complainants were met with the principles and doctrines of the Court of Chancery, which are applied to cases of this kind, and the rule generally in the Court of Chancery as laid down by Prof. Pomeroy and as adopted in the Courts of New Jersey, is as follows:

Pomeroy, Vol. 5 (4th ed.) sec. 2230:

> "Where, however, the vendor gets in the title before the decree, the doctrine of equity is when time is not made of the essence, a decree will be made against the purchaser, if the seller can make a good title at the time of decree, unless there has been bad faith or an improper speculation attempted."

In the case of *Van Riper* v. *Wickersham,* 77 N. J. Eq., p. 232, the Court of Chancery, adopting the above section as a basis, went a step further and held:

> "When the vendor in a suit for specific performance by reason of the silence or the conduct of the vendee regarding the title to be conveyed, during the negotiations or in the progress of the cause, has lost an opportunity to perfect his title before the decree, this opportunity will still be afforded

to him by the allowance of a reasonable time even after the entry of the decree, if it can be done without hardship to the vendee."

In the case of *Gershonowitz* v. *Neider* reported in 95 N. J. Eq. at 580, decided by Vice-Chancellor Bentley February 8th, 1925, the court laid down the rule that when a vendee had no knowledge of the vendor's inability to convey land at the time an agreement to convey was made, the vendee may, at his election, repudiate the agreement upon ascertaining the lack or defect in the title. But should he not then repudiate the agreement, he is bound to perform if title can be made by the time of the decree. In that case the court found that there was no repudiation of the contract by the vendee, or no effort to terminate the contract until the time when the title had been cleared.

That case shows, that similarly to the case at bar, the vendor continued to go to the expense and trouble of clearing the defects, and the Vice-Chancellor, in that case, was of the opinion that the complainants would not have gone to the expense and trouble of clearing the defects if they had known that the defendants had put an end to their relations with the complainants.

ANSWER TO POINT 2.

The permission to file a supplemental counter-claim granted the respondent by the Vice-Chancellor was not an abuse of discretion, for the following reasons:

1. The court is invested with the power to permit such amendments to be made as may appear to it to be necessary to properly frame the issues, or even after trial to conform to the evi-

dence. This principle is embraced in the provisions of RULE 82 of the Rules of the Court of Chancery, which holds as follows: (Page 21):

> "If the defendant object to the bill for want of parties, or other defect which does not go to the equity of the whole bill, the complainant may amend of course at any time within ten days after serving the notice of objections upon payment of costs to be taxed."

2. The supplemental counter-claim filed by the respondent did not substantially change the cause of action or defense and did not alter the theory of the case, as is alleged by appellants. On the contrary in her answer and counter-claim respondent prayed for specific performance, in her first answer (State of Case, page 15, paragraph 3), as she did also in her amended answer (State of Case, page 21, paragraph 3) and as she likewise did in her supplemental counter-claim (State of Case, page 25, paragraph 2).

In the case of *Blum Building Co.* v. *Ingersoll* cited by appellants in support of their contention, the Vice-Chancellor found that the first bill filed was for a rescission, and the amended bill for a specific performance. This the Vice-Chancellor called a "face about" and ruled that rescission and specific performance were "inconsistent" and by praying first for the one and then for the other, the parties were setting up two separate and distinct causes of action.

The appellants, in the case at bar, overlooked the fact that in the Blum case, *supra,* the parties completely reversed their positions. In the case at bar, the appellants confuse inconsistent causes of action with one or more current bases for obtaining the same relief.

It will not be disputed that respondent could have based her prayer for specific performance:

a. Willingness and ability to comply with the terms of the contract.

b. On a reformation of the contract and specific performance in accordance with the terms of the contract as reformed.

c. On her ability to perfect the title at any time before the entry of final decree.

The three grounds or bases were for the same relief, to wit: specific performance, and were set up in the first two answers and counter-claims, the third being set up in the supplemental counter-claim on the advice of the Vice-Chancellor.

Respondent could, at the hearing, have proceeded on any one of the aforementioned grounds —and waiving reformation—chose to proceed on the theory of having perfected her title before entry of the decree. The only change in the entire proceedings effected by the respondent, was a *change in the evidence* upon which she relied for her relief; and the Vice-Chancellor, when this evidence was offered, in order to do full justice, permitted appellants to bring in further evidence to meet that new evidence offered by the respondents. That appellants did not see fit to adduce any further evidence was due to the fact, presumably, that they did not deem it necessary to do so. Respondent did not create a new cause of action or seek different or other relief, but by the supplemental counter-claim met squarely the demands of the complainants-appellants, by proving that she was able to perform and was willing to do so in accordance with the strict letter of the contract set up in the bill.

ANSWER TO POINT 3.

Respondent, by her original counter-claim, did not elect to declare the contract annexed to the complaint, at an end, but on the contrary contended that the contract was not complete and sought to have it reformed to make it so.

1. It is true that by the supplemental counter-claim, the respondent offered to conform to the terms of the contract as set forth in the bill of complaint, thereby waiving the relief of reformation. This right was given to the respondent under the principles and doctrines of the Court of Chancery and in the case of Gershonowitz *v.* Nieder, *supra,* and she could take advantage of it so long as the court saw fit to entertain it, which the court in fact did, finding that it could be done without any prejudice to the complainants.

2. In short, the respondent did not disaffirm the contract by denial or otherwise. The original answer merely sought to include in the agreement that which by consent had been omitted. (See testimony of F. W. Weber, State of Case, p. 45, ll. 10 to 16 inclusive.) The appellants knew of the omission and brought the action to recover their deposit, which action was based on that omission. When respondent learned the nature of the action she sought and obtained the deed of release which overcame the defect in title alleged as the basis for the suit, and the court finding that she acted in good faith and that the appellants were not harmed by the delay, permitted the respondent to bring the release into the issue by amending the pleadings to conform to the issue as then raised and granted respondent the relief sought.

ANSWER TO POINT 4.

The respondent is not guilty of laches as charged.

The Vice-Chancellor in his opinion found so and in fact lays the blame for the delay upon the pendency of complainants' suit. The Vice-Chancellor in his opinion says:

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

POINT ONE FOR RESPONDENT.

The Vice-Chancellor properly found that the appellants had knowledge of the easement before and at the making and execution of the agreement of purchase.

The Vice-Chancellor, in his opinion (State of Case, p. 55, ll. 19-24 inclusive), says:

> "This strip was subject to a right of way of an adjoining owner. It was known to be so encumbered by the complainants, and the failure to especially note it in the contract was mutually accidental."

The Vice-Chancellor, in his opinion (State of Case, p. 57, ll. 17-24 inclusive), says further:

> "But here the complainants all along knew of the easement and they must be treated as if they had discovered the easement after making the contract and had waived the right to repudiate, and the cause must be considered simply as one of failure of the vendor to perform on the day stipulated in the contract."

The Vice-Chancellor evidently based these findings of fact upon the testimony of Mr. F. W. Weber (State of Case, p. 38, ll. 31-40 inclusive), to wit:

> "Q Will you please tell us what the conversation was—what you said about the easement? A After showing them through the property and speaking of the investment part I showed them the driveway showing them that they had an entrance from Normandy Place; I stated the size of it and told them positively that the property belonged with this property, but the man on the south had the right of way, and that didn't—(interrupted).

also (State of Case, p. 39, ll. 1-10 inclusive), to wit:

> "Q Over the 10-foot strip? A Over that 10-foot strip. Told them that positively; not once, but spoke of it several times; and I believe each time we spoke of it it was brought to their attention knowing that this other party on the south had the right of way over that strip—there were no fenses between either of the properties."

Also testimony of Mr. Weber (State of Case, p. 39, ll. 36-40 inclusive), to wit:

> "Q Now, when the agreement was drawn in my office was any mention made of the driveway then? A Was there any?

(continued on p. 40, State of Case, ll. 1-4 inclusive) to wit:

> "Q Yes. A Surely there was mention made of the driveway then and it was stated clearly to them that the driveway belonged to the Munzing property, but that the other had the right of way and must share equally in the expense of maintaining the same."

Also testimony of Mr. Weber (State of Case, p. 41, ll. 34-40 inclusive):

"Q Was Mrs. Munzing there? A Yes, sir.

"Q Do you remember whether I mentioned anything about this easement at that time in connection with asking for the deed? A I couldn't state, sir, about that, whether I remember—I do not remember what was stated because I had brought it to their attention so clearly myself, not once, but several times—I wouldn't say how many times."

(continued, State of Case, p. 42, ll. 1-5 inclusive):

"Q Did you know at that time that the easement was not being set forth in the agreement? A There was no question about that."

Testimony of Mr. Weber (State of Case, p. 44, ll. 20-32 inclusive):

"Q Nothing was said by Nass when you were showing this property that there was room there to put garages in the rear of this house for the use of this alley at any time? A Oh, yes; I said if he saw fit—if he wanted to build garages on the end of the line towards the most easterly side. I said he had title to this property and the adjoining people only had a right of way of crossing this, so he could arrange his garages so it wouldn't interfere with the driveway, and hold it open, backing the garages up to that property. I had gone over that with him several times."

Testimony of Mr. Weber (State of Case, p. 44, ll. 39-40, and continued on p. 45, ll. 1-17 inclusive):

"Q When they were reading it you did not hear anything about this right of way and upkeep of that alley, did you? A Surely I didn't hear anything if it wasn't there.

"Q When that wasn't read off out of the agreement was anything said by you or by the Nasses why that was not included? A It was talked over?

"Q No. I say when the contract was read and there was nothing in it about the right of way of the southerly owner and the upkeep of this alley, was anything said why it was not put in the agreement? A Mr. Semel, I believe, mentioned at that time that he would give them an exact description when he got the deed."

There was no testimony offered or introduced by the appellants to contradict, deny or refute the testimony of Mr. Weber and the court was justified in accepting that testimony as being the fact.

POINT TWO FOR RESPONDENT.

The Vice-Chancellor was justified in finding that the complainants had actual or constructive notice of the existence of this easement.

The Vice-Chancellor, in his opinion, on (p. 55, State of Case, ll. 23-26), says:

"It is, however, stated in the contract that the conveyance was to be 'subject to restrictions of record.'"

The Vice-Chancellor, in his opinion, continues (State of Case, p. 56, ll. 21-31 inclusive):

"It is, however, conceivable that the contract might be enforced as drawn and the complainants be decreed to take the property subject to the easement, for it would not be a strained construction if it were held that the easement was a restriction within the meaning of the provision of the contract to convey subject to 'Restrictions of record.'"

The Vice-Chancellor is supported in his opinion by the case of *Parker* v. *Parker,* 56 Atl. Rep.

1094 at page 1100 (unable to find Equity citation) in which the Chancery Court of New Jersey laid down the rule, that:

> "Being put upon warning and having chosen not to make inquiry, he is charged constructively with knowledge of these facts, which a reasonable investigation would have disclosed to him."

The case of *Haslett* v. *Stephany,* 36 Atl. Rep. 498, 55 E. 68, is a case in which the principles invoked are somewhat similar. Vice-Chancellor Pitney held that:

> "Applegate undoubtedly had actual notice of the plan which the Misses Lee had adopted of establishing and maintaining this alleyway for the benefit of the other lots, and he had constructive notice of the attempt to give it in writing, contained in the deed to Lippincott (this deed having been previously recorded)."

The Vice-Chancellor goes on to say:

> "The general doctrine, that facts which are sufficient to put a party upon inquiry, are sufficient to charge him with all such knowledge as he would have acquired by a proper inquiry in the ordinary course of business."

The Vice-Chancellor in the concluding paragraph says:

> "Now, coming to the conclusion that the defendant had knowledge of facts which made it his duty to inquire as to the rights of these persons, including the complainant who was using this passageway in the way described, the next question is, what information would he, in the due course of business, have acquired if he had made proper inquiry? His first duty was to inquire of those who were using the passageway to learn from them what their claim was; and in the second place, to inquire of his own immediate grantor, and, in succession, or

> his grantor, as to what right the claimants had. Now, it seems to me that, if he had made that inquiry, it must be presumed that he would have ascertained the truth, which was, that Mr. Applegate had bought the premises on the understanding that the owners to the west of it were to have a right of passageway, three feet wide, and that he built the passageway in question in express acknowledgement of that right."

Mr. Weber, in his testimony (State of Case, p. 39, ll. 9-10), says:

> "there were no fences between either of the properties."

Mrs. Minnie Nass, in her testimony (State of Case, p. 36, ll. 1-3) says:

> "Q Were there any fences up there at your property or the property that you were buying? A No fences, no."

The appellants, by Exhibits C. 3 (State of Case, p. 53) have put in fences on the sketch of the property in question, together with the easement, which shows that the areaway covered by the easement was open.

The testimony also shows that the premises to which the areaway was subsurvient by reason of the easement was directly south of and adjoining the said areaway. (See testimony, State of Case, p. 36, ll. 10-20 inclusive):

> "The Court: Am I correctly informed that the property involved is 75 feet on the southerly side of Lyons avenue and 100 feet in depth to an alley and that the property is 26 feet easterly from the corner of Lyons avenue and Normandy Place and that the owner of the land across the alley and southerly of the 10-foot strip had an easement to his lot facing on Normandy Place?
>
> Mr. Kristeller: That is right.

(Also see Exhibit C. 3, p. 53, State of Case.)

Your respondent respectfully contends that had the complainants made inquiry of the owner of the premises adjoining on the south, they would have been apprised of the existence of this easement and the circumstances and conditions attending the same, assuming, of course, that Mr. Weber, the agent, had, as appellants inferred in their testimony, concealed the fact of the easement.

In the case of *Hodge* v. *United States Steel Corp.*, 54 Atl. Rep. p. 1, 64 N. J. Eq. 807, this court, sustaining Vice-Chancellor Pitney in the case of *Haslett* v. *Stephany, supra,* says:

> "But if prefer not to examine, it must be because he is satisfied to act as if the matters disclosed in the notice were true; and he cannot afterwards complain if his rights are made to rest upon them so far as they are true. The information given by the notice is equivalent to that obtained by inquiry."

It is for the above reasons that your respondent respectfully contends and maintains that the Vice-Chancellor was correct in his findings of fact and in the application of the law as applied to these findings of fact, and for that reason the decree be affirmed, together with costs.

Respectfully submitted,

M. M. SEMEL,
Solicitor for and of Counsel
with the Defendant-Respondent.

Due and legal service of a copy of the within brief is acknowledged this 12 day of May, 1927.
J. L. Newman, Att'y of Applts.