INDEX

In Chancery of New Jersey

Between

MICHAEL J. TANSEY,
Complainant,

and

HEIME SUKONECK,
Defendant.

On Bill for Specific Performance.

BILL OF COMPLAINT.

To Honorable Edwin Robert Walker, Chancellor:

Michael J. Tansey, residing in the City of Newark, in the County of Essex and State of New Jersey, complains of Heime Sukoneck, of the same City, County and State, and says:

1. On October 28, 1924, complainant was the owner in fee simple of a tract of land situate in the City of Newark, aforesaid. BEGINNING at a point being the interesction of the southerly line of Miller street with the westerly line of Avenue C running thence southerly along the westerly line of Avenue C, one hundred feet more or less to a point, being the northerly line of the building on the lot adjoining to the south; thence (2) westerly and along the said line of said building and at right angles to the first course, one hundred feet more or less, to a point; thence (3) northerly parallel with Avenue C, one hundred feet more or less to the southerly line of Miller street; thence (4) easterly along the southerly line of Miller street, one hundred feet to the westerly line of Avenue C, the place of

BEGINNING, and being so seized, on the said day complainant entered into an agreement in writing with defendant, to sell to defendant, said plot of ground, one hundred feet in front, by one hundred feet in depth, on the southwest corner of Avenue C and Miller street, in Newark, New Jersey, for the sum of ten thousand dollars; five thousand dollars being in cash and five thousand dollars being in a mortgage; two hundred and fifty dollars being paid as deposit for which receipt was given; and an additional amount to be paid on November 7, 1924, when a formal agreement was to be executed, and title was to be taken as soon as searches were made: as from said agreement in writing in the form of a receipt, signed by both parties and duly witnessed, attached hereto and forming part hereof, will more fully appear. $250.00 was paid by said defendant on said day.

2. On November 7, 1924, defendant failed to appear and to execute a formal agreement and pay an additional amount as deposit in accordance with his agreement, but one, Isadore V. Davis, a lawyer, did appear and made claim that said Sukoneck had assigned his contract to said Davis, and that he was acting for a client, the real party in interest and wanted to renig, as he put it, meaning to cancel said contract, but that in order to give some color of acting in accordance with its provisions, he proposed to pay an additional deposit of one dollar to take title in three months, and to give a mortgage to run for 25 years, at 4 per cent., which complainant refused, and said Davis immediately said he would sue to recover the deposit paid, and thereafter he did bring suit against complainant, in the Second District Court of New-

ark, to recover the $250.00 deposit paid; in which action, judgment was entered on Monday, December 1, 1924, in favor of defendant (complainant) after hearing thereon.

3. On November 8, 1924, complainant gave notice to defendant by registered letter, postage prepaid, directed to the defendant's place of abode, 26½ Winans avenue, Newark, New Jersey, to appear on Wednesday, November 12, 1924, at his office, 164 Market street, Newark, New Jersey, at 11 o'clock in the forenoon and execute formal agreement and pay additional amount on the purchase price of said tract of land, in accordance with the terms of his contract of October 28th, and in default of his so doing, proceedings would be taken to enforce the existing Agreement. Defendant made no response to this notice, and has not since appeared as requested, and has made no effort to carry out the aforesaid Agreement.

Complainant was and still is ready, willing and able to make conveyance of said lands to Defendant and to do everything and all things necessary to carry out the Agreement of the parties made in connection therewith.

Complainant is without adequate remedy in the Courts of Law and therefore prays:

1. That Defendant, Heime Sukoneck may answer this Bill of Complaint and each statement therein made.

2. That said Defendant may be decreed to specifically perform the contract for the conveyance to him of the lands and premises hereinbefore mentioned and described, and pay the balance of the purchase money therein provided, and do all things necessary to carry out the same.

3. That a Writ of Subpoena may issue commanding said Defendant to answer this Bill of Complaint and to abide by such Decree, as this Court may make in the premises.

KRAEMER & SIEGLER,
Solicitors and Counsel with Complainant.

ark, to recover the $250.00 deposit paid; in which action, judgment was entered on Monday, December 1, 1924, in favor of defendant (complainant) after hearing thereon.

3. On November 8, 1924, complainant gave notice to defendant by registered letter, postage prepaid, directed to the defendant's place of abode, 26½ Winans avenue, Newark, New Jersey, to appear on Wednesday, November 12, 1924, at his office, 164 Market street, Newark, New Jersey, at 11 o'clock in the forenoon and execute formal agreement and pay additional amount on the purchase price of said tract of land, in accordance with the terms of his contract of October 28th, and in default of his so doing, proceedings would be taken to enforce the existing agreement.

AGREEMENT.

Michael J. Tansey,
Counsellor at Law,
164 Market street,
Newark, N. J.
Telephone: Market 6193.
Witness, Wm. Grossman.

Received, Newark, N. J., Tuesday, October 28, 1924, from Heime Sukoneck, two hundred and fifty dollars on account of purchase price 100 x 100 s. w. cor. Miller street and Avenue C., Newark, for $10,000 formal agreement to be executed and additional amount paid on November 7, 1924; Title to be taken as soon as searches are made.
$5,000 cash and $5,000 mortgage.

H. SUKONECK.

$250.00 MICHAEL J. TANSEY.

Notice.

NOTICE.

IN CHANCERY OF NEW JERSEY.

Between	
MICHAEL J. TANSEY, *Complainant,*	*On Bill for Specific Performance.*
and	
HEIME SUKONECK, *Defendant.*	*Notice.*

To Messrs. Kraemer & Siegler, Solicitors for Complainant:

PLEASE TAKE NOTICE, that on Tuesday, December 23, 1924, before the Chancellor at the Chancery Chambers in Newark, New Jersey, at ten o'clock in the forenoon on said day or as soon thereafter as counsel can be heard, I shall object to the bill of complaint filed in the above-entitled cause and move to strike it out on the following grounds:

1. It does not disclose a cause of action.

2. Because it appears by said bill that the alleged contract is uncertain and incomplete and as to material incidents is left to be ascertained by subsequent negotiations.

3. Because the alleged contract is with reference to lands, tenements or hereditaments or some interest in or concerning them, and it does not appear that the parties have concluded their alleged agreement in all its particulars sufficiently to warrant this court in decreeing specific performance.

Notice.

4. Because the Statute of Frauds requires every agreement for the sale of lands, tenements or hereditaments or any interest in or concerning them to be in writing, and the alleged agreement set out in the bill of complaint does not comply with the provisions of the statute.

Dated, Newark, N. J., Dec. 17, 1924.

Yours respectfully,

SAMUEL ROESSLER,
Solicitor for Defendant.

ORDER DISMISSING BILL.

IN CHANCERY OF NEW JERSEY.

Between

MICHAEL J. TANSEY,
Complainant,

and

HEIME SUKONECK,
Defendant.

On Bill, etc.

This matter coming on to be heard in the presence of Joseph A. Siegler, solicitor of the complainant, Michael J. Tansey, and of Samuel Roessler, solicitor of the defendant, Heime Sukoneck, and the Court having heard the arguments of the said solicitors, and being of the opinion that the bill of complaint filed herein discloses no cause of action;

And it appearing that due notice of the said defendant's motion to dismiss the said bill of complaint for the cause aforesaid has been given to said complainant;

IT IS thereupon, on this 29th day of December, 1924, ORDERED, ADJUDGED and DECREED that the complainant's said bill of complaint be and the same is hereby dismissed with costs.

Respectfully advised,

JOHN E. FOSTER,
V.-C.

Notice of Appeal.

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

Between MICHAEL J. TANSEY, *Complainant,* *and* HEIME SUKONECK, *Defendant.*	*On Bill, &c.*

The complainant, Michael J. Tansey, hereby appeals from the order dismissing bill, made in the above-entitled cause on December 29, 1924, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated, December 30, 1924.

KRAEMER & SIEGLER,
Solicitors for and of Counsel with
Complainant Michael J. Tansey.

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

JOSEPH SIEGLER,
Of Counsel with Complainant
Michael J. Tansey.

Service of the above Notice of Appeal and the Petition of Appeal acknowledged January 2, 1925.

SAMUEL ROESSLER,
Solicitor for Defendant-Respondent.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between MICHAEL J. TANSEY, *Complainant-Appellant,* *and* HEIME SUKONECK, *Defendant-Respondent.*	*On Appeal from the Court of Chancery.*

To the Honorable, The Court of Errors and Appeals in the Last Resort in All Causes:

The petition of Michael J. Tansey, the appellant in the above-entitled cause, respectfully shows that:

1. Petitioner finds himself agrieved by a final decree, made in the Court of Chancery of New Jersey, by his Honor, Edwin Robert Walker, Chancellor, bearing date the 29th day of December, 1924, in a certain cause in said Court of Chancery, wherein the said Michael J. Tansey was complainant and the said Heime Sukoneck. was defendant, in this respect, to wit,

That the said decree adjudges that the bill of complaint filed therein discloses no cause of action, and the same therefore should be dismissed with costs.

2. And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that it should have decreed that the said bill of com-

plaint did disclose a cause of action, and that the defendant be put upon his answer with costs.

Petitioner therefore prays that the said decree of the Chancellor, may be wholly reversed, set aside and for nothing holden, and that petitioner may have such other relief as to this Court may seem proper.

KRAEMER & SIEGLER,
Solicitors for and of counsel with Appellant.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between MICHAEL J. TANSEY, *Complainant-Respondent.* *vs.* HEIME SUKONECK, *Defendant-Respondent.*	*On Appeal from the Court of Chancery.*

The answer of Heime Sukoneck, the above-name respondent, to the petition of appeal of Michael J. Tansey, the above-named appellant.

This respondent, 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 December 29, 1924, 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 respondent begs leave to refer thereto when the same shall be produced.

This respondent is advised and believes that the said decree is agreeable to equity; and he prays that the same may be affirmed with costs to be taxed *ub favir* if this. respondent.

SAMUEL ROESSLER,
Solicitor for and of Counsel
with Respondent.

Receipt for Deposit.

STATE OF NEW JERSEY.

DEPARTMENT OF STATE.

Trenton, January 30, 1925.

Messers. Kraemer & Siegler,
Newark, N. J.

Gentlemen:

We are in receipt of your favor of the 29th inst., enclosing check of Michael J. Tansey, for $100 for deposit in re Tansey v. Sukoneck. This check has been properly endorsed and delivered to the clerk in Chancery, as this deposit should be made in his court.

Very truly yours,

THOMAS F. MARTIN,
Clerk.

MTS.

Notice of Argument.

NOTICE OF ARGUMENT.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

MICHAEL J. TANSEY,
Complainant-Appellant,

vs.

HEIME SUKONECK,
Defendant-Respondent.

On Appeal.

SIR:

Please take notice of the argument of the appeal in the above-stated cause, on Tuesday, March 17, 1925, in the Court of Errors and Appeals, State House, Trenton, New Jersey, at ten-thirty o'clock in the forenoon or as soon thereafter as the matter can be heard.

KRAEMER & SIEGLER,
Solicitors for Complainant-Appellant.

To

SAMUEL ROESSLER,
Solicitor for Deft.-Resp.
or whom it may concern.

Dated February 25, 1925.

Service of the within notice of argument hereof acknowledged this 26th day of February, 1925.

SAMUEL ROESSLER,
Solicitor for Defendant-Appellee.

IN CHANCERY OF NEW JERSEY.

Between MICHAEL J. TANSEY, *Complainant,* *and* HEIME SUKONECK, *Defendant.*	*On Motion to Dismiss Bill.*

Michael J. Tansey, solicitor *pro se* complainant.

Messrs. Kraemer & Siegler, for complainant.

Samuel Roessler, for defendant.

FOSTER, *V.-C.*

This bill is filed for the specific performance of an alleged contract for the sale of real estate, which is evidenced by a paper reading as follows:

> "Received, Newark, N. J., Tuesday, October 28, 1924, from Heime Sukoneck, two hundred and fifty dollars on account of purchase price 100 x 100 s. w. cor. Miller street and Avenue C, Newark, for $10,000, formal agreement to be executed and additional amount paid on November 7, 1924. Title to be taken as soon as searches are made.
>
> $5,000 cash and $5,000 mortgage."

This receipt is incomplete in the following particulars:

1. The state in which the property is situated is not mentioned. So far as the receipt indicates, it may be out of our jurisdiction.

2. The nature of the conveyance is not stated, nor is it stated whether the premises are to be conveyed clear of encumbrances.

3. No place nor hour is fixed for the payment of the "additional amount" on November 7, 1924.

4. The additional amount to be paid on November 7th is not stated.

5. No definite time or place is fixed for the passing of title, or for the delivery of the deed or for the completion of the cash payment of $5,000.

6. The terms and conditions of the mortgage to be given are not stated, nor is the time for its payment.

7. The rate of interest, if any, on the mortgage, and how payable, is not stated; and
The bill fails to allege that the time for performance, viz., "As soon as the searches are made" has been reached.

The receipt further provides that a formal agreement is to be executed.

Under the authority of the cases the omissions in the receipt relating to the rate of interest and to the maturity of the mortgage might be supplied by assuming that the legal rate of interest was intended, and that the mortgage was payable on demand, in the absence of anything to the contrary. *Green* v. *Richards,* 23 N. J. Eq. 32, 536; *Paterson* v. *Loiseau Lumber Co.,* 92 Atl. 516; *Luczak* v. *Marion,* 114 Atl. 343; 92 Eq. 377; 93 Eq. 501; *South Jersey Furniture Corp.* v. *Dorsey,* 123 Atl. 545.

The other omissions in this receipt cannot be so supplied by assumptions, because the parties by the terms of this receipt stipulated and apparently contemplated that they should be set forth in the formal agreement which they were to execute. It is clear from these omissions that the parties had not completed their negoiations and concluded a contract definite and complete in all its terms, and which they intended should be binding; and it is equally clear that they intended by the execution of the formal agreement to supply the deficiencies in, or these omissions of this receipt. Until this has been done there cannot be said to be a complete and definite agreement between the parties which can be decreed to be specifically performed. Furthermore, as the receipt does not disclose that the property is situate in this State and as the bill does not allege that the searches have been made (as called for by the receipt), and that therefore the time has arived for the performance of the contract, I will advise that the motion to dismiss be granted.

The Chronicle Press, Printers, Orange, N. J.

New Jersey Court of Errors and Appeals

MICHAEL J. TANSEY,
Complainant-Appellant,

vs.

HEIME SUCKONECK,
Defendant-Appellee.

APPELLANT'S BRIEF.

This is an appeal from the final decree of the Court of Chancery, dismissing the appellant's bill of complaint, praying specific performance of a contract for the sale of land. The bill was filed by the appellant, the complainant below, and was dismissed without answer or final hearing, on the motion of the appellee, the defendant below, directed to the sufficiency of the bill.

Facts.

The bill of complaint alleges that on October 28, 1924, the appellant, as vendor, agreed to sell to the defendant, the vendee, the lands on the southwest corner of Miller street and Avenue C, Newark, New Jersey, for the price of Ten Thousand ($10,000) Dollars. The memorandum of the sale, signed by both parties, is as follows:

> "Received Newark, N. J., Tuesday, October 28, 1924, from Heime Sukoneck, Two Hundred and Fifty Dollars on account of purchase price 100x100 southwest corner Miller street and Avenue C, Newark, for $10,000, formal agreement to be executed and additional amount paid on November 7, 1924; title to be taken as soon as the

searches are made. $5,000 cash and $5,000 mortgage."

On November 7, 1924, the date set for the execution of the formal agreement, the appellee did not appear, but one Isadore V. Davis, a lawyer, appeared at the law office of the appellant, the vendor, claiming to represent the assignee of the contract, and proposed that, in compliance with the terms of the same, he would pay an additional deposit of One ($1.00) Dollar, and enter into a formal agreement providing for the closing of title in three months and requiring that the purchase money mortgage of Five Thousand ($5,000) Dollars, should be payable in twenty-five years, with interest at four per cent. This, the appellant refused to accept, and thereafter said Davis instituted suit in the Second District Court for the return of his Two Hundred and Fifty ($250) Dollars deposit, which suit was decided in favor of the defendant in that suit, the appellant here. Prior to the judgment of the District Court, and on November 8, 1924, the appellant sent the appellee a registered letter, directed to his address at No. 26½ Winans avenue, Newark, New Jersey, requesting him to appear at his law office on November 12, 1924, to execute the formal agreement, and advised him that in default thereof, proceedings would be taken to enforce the memorandum agreement. The appellee did not reply to the letter and did not appear, and the appellant filed his bill of complaint, which was dismissed on the motion of the appellee, as above mentioned.

ARGUMENT.

Vice-Chancellor Foster, in his opinion advising the dismissal of the bill, gave seven grounds for the same, which are as follows:

> "1. The state in which the property is situated is not mentioned. So far as the receipt indicates, it may be out of our jurisdiction.
>
> "2. The nature of the conveyance is not stated, nor is it stated whether the premises are to be conveyed clear of encumbrances.
>
> "3. No place nor hour is fixed for the payment of the 'additional amount' on November 7, 1924.
>
> "4. The additional amount to be paid on November 7th is not stated.
>
> "5. No definite time or place is fixed for the passing of title, or for the delivery of the deed or for the completion of the cash payment of $5,000.
>
> "6. The terms and conditions of the mortgage to be given are not stated, nor is the time for its payment.
>
> "7. The rate of interest, if any, on the mortgage, and how payable, is not stated; and the bill fails to allege that the time for performance, viz., 'As soon as the searches are made' has been reached."

POINT I.

A court of equity may enforce the specific performance of a contract for the sale and purchase of land located in another state.

The case of *Potter, et al.,* v. *Hollister,* 45 N. J. E. 508, 18 Atl. 204, was a suit for the specific performance of a contract for the sale of land which was located in the Town of Norwich, in

the State of Connecticut, and Vice-Chancellor Van Fleet held:

> "The fact that the land which is the subject of the suit is beyond the jurisdiction of the Court, and situate in another state, constitutes no reason why relief should be refused, if in other respects the complainants have made a case which entitled them to a decree; for the principle is firmly established that it is not necessary to jursdiction in such cases, that the land which is the subject of the suit should be located within the territory over which the Court in which the suit is brought may rightfully exercise its power. All that is necessary in such cases to enable the Court to exert its power is that it shall have jurisdiction of the parties; for in all suits in equity the primary decree is in *personam* and not *rem.*"

On appeal to this Court the decree was affirmed for the reasons given in the Court below. See 46 Equity 609, 22 Atl. 56. See also the case of *Bullock* v. *Bullock,* decided by this Court, and reported in 52 N. J. E. 561; 30 Atl. Rep. 676.

Equity will not refuse to decree specific performance merely because the agreement does not state in what state the lands agreed to be conveyed lie. In the case of *Robeson* v. *Hornbaker,* reported in 3 N. J. E. 60, the Court of Chancery was asked to decree specific performance of a contract for the sale of land which was described as "forty acres of land and the water rights," no township, county or state being designated. A demurrer was filed to the bill of complaint and the reasons assigned for the demurrer was that the memorandum of sale did not set forth the township, county or state in which the lands agreed to be conveyed lie, and Chancellor Vroom held:

> "The omission of the town or county will not necessarily render the descripton of the

> property altogether indefinite. It may be sufficiently defined in a variety of ways without mentioning either. There are many places or streams that are so well known as to form better marks of designation to property than the names of the county or township would furnish; and as the only object is reasonable certainty, it is not material in what way the certainty is attained."

And in the case of *Bateman* v. *Reilly,* 72 Equity 316, 73 Atl. 1006, a bill was filed by the vendees to procure specific performance of a contract for the sale of land in which the property was described as, "the beach front and marsh land that I own at, or near Fortesque Island," and one of the objections made by the defendant was that the description of the land, as contained in the contract was too uncertain to entitle the Court to decree specific performance. Vice-Chancellor Leaming advised the bill, allowing the relief prayed for, and in his opinion, held:

> "It is enough if the property is described so that it may be with certainty ascertained, and parol evidence is admissible to show that the defendant owned only certain lands which would answer the description of the contract."

And in the case of *Wollenburg* v. *Rynar,* 124 Atl. 361, there was a bill for the specific performance of a contract to sell land. The contract consisted of a receipt almost identical in form with the receipt in question. It described the premises as "Ten foot land adjoining stores at Clinton Place and Hawthorne avenue." Vice-Chancellor Backes advised a decree for specific performance, and in his opinion, held:

> "The land is sufficiently described so that, with the aid of parol evidence it can be readily identified. Evidence for this purpose is admissible."

We respectfully submit that the Court can take judicial notice of the fact that there are only four municipalities by the name of Newark in the United States, and they are located in the States of New York, Ohio, Delaware and New Jersey, and that where, as here, the receipt in question is dated Newark, New Jersey, and describes premises corner Miller street and Avenue C, Newark, there can be no question that the lands are in Newark, New Jersey, but even if there was any ambiguity as to that, the complainant, the appellant here, was entitled, on the authority of the opinions of Vice-Chancellors Leaming and Backes in the cases of *Bateman* v. *Reilly,* and *Wollenburg* v. *Rynar, supra,* to offer evidence at the final hearing to explain the ambiguity.

We respectfully submit that the first ground for the dismissal of the bill should not be sustained.

POINT II.

The second reason for the dismissal of the bill is that the nature of the conveyance is not stated, nor is it stated whether the premises are to be conveyed free and clear of encumbrances. It is not necessary for the enforcement of an agreement, for the sale of land, that it should provide for the character of the conveyance or whether the conveyance should be made free and clear of encumbrances or not. Where parties contract for the sale of lands, it is presumed that the vendor agrees to sell a fee simple estate, and where the character of the conveyance is not mentioned, it is presumed that a bargain and sale deed, or any deed sufficient to convey that is intended, and unless the contract provides

that the premises are to be sold subject to encumbrances, the purchaser is entitled to a title free and clear of encumbrances. The bill in the instant case alleges that the appellant was willing to convey a fee simple estate to said premises, free and clear of encumbrances. That is all that, under the terms of the contract, the vendee, the appellee, was entitled to. In the case of *Lounsberry* v. *Locander,* reported in 25 Equity 554, there was involved an appeal from a decree made for the specific performance of a contract to convey lands. The decree provided for the conveyance by "a good and sufficient deed of conveyance, containing the several full covenants and warranty, for the conveying and assuring of a perfect title in fee simple, free from all encumbrances." Mr. Justice Depue, speaking for the Court of Errors and Appeals, held:

> "The estate the complainant was to have, in case he accepted the option to purchase, is not mentioned in the agreement. As a general rule, an agreement to convey means a conveyance in fee, unless it appears that the parties intended to contract on the basis of a lesser estate. New Barbadoes Toll Bridge Co. *v.* Vreeland, 3 Green's Ch. R. 157. A stipulation that a party shall have the privilege of purchasing, is equivalent to an agreement to convey, and will entitle him to a conveyance at least of all the estate the other party had at the time of the contract. Hawralty *v.* Warren, 3 C. E. Green 124.
>
> "Covenants for title are not a necessary part of the conveyance, but are distinct from, and collateral to, the transfer of title. A deed of bargain and sale, in legal form, will operate to effect a complete transfer of the title to the grantee. If covenants be added, they will not enlarge the estate, or pass any greater estate than is expressly

conveyed by the granting part of the deed. Adams *v.* Ross, 1 Vroom 505.

It would follow, as a logical conclusion, from the fact that covenants for title are not essential to the conveyance, that, in a court of law, a deed of bargain and sale, without covenants, would be performance of a contract to convey in cases where covenants are not stipulated for. Nixon *v.* Hyserott, 5 J. R. 58; Van Eps *v.* Schenectady, 12 J. R. 436; Dodd *v.* Seymour, 21 Conn. 476; Potter *v.* Tuttle, 22 Conn. 512; Kyle *v.* Kavanagh, 103 Mass. 356."

See also *Sergeant* v. *Realty Traders, et al.* (Err. & App.), 82 N. J. E. 331; 88 Atl. 1043, and *Stengel* v. *Sergeant, et al.* (Ch. Ct.), 74 N. J. E. 20, 68 Atl. 1106; *Thayer* v. *Torrey,* 37 Law 339, pg. 345.

POINT III.

The third, fourth and fifth reasons in the opinion of Vice-Chancellor Foster for the dismissal of the bill, relate to the provision of the receipt requiring the additional deposit on November 7, 1924, and the contract is declared to be unenforceable because no place or hour is fixed for the payment of the additional deposit, and the amount of the same is not fixed in the memorandum agreement.

The bill does not ask for the specific performance of the memorandum agreement in that respect. The provision for the payment of the additional deposit is made for the benefit of the vendor, who was the complainant below, and the appellant here; the provision for the execution of formal agreement was made for the benefit of the vendee, the defendant below, and the appellee here. By it the vendee was entitled to

require an agreement drawn and executed in such form that he could record it in the Register's Office of Essex County, and thus secure the property to himself. Both of these provisions could have been waived by the parties for whose benefits they were made. The complainant, by asking for specific performance of the memorandum contract, has waived the provision for his benefit for an additional deposit, and the vendee, by not appearing on November 7, 1924, and not appearing in response to the complainant's letter of November 8, 1924, fixing November 12, 1924, as the date for the execution of the formal agreement, has waived the provision for his benefit, requiring the execution of formal agreement. But the bill further recites that on November 7, 1924, Davis, an attorney at law, representing that he was the attorney for the assignee of the contract, insisted upon paying an additionl deposit of $1.00, and obtaining a formal agreement providing for a purchase money mortgage for twenty-five years, bearing interest at 4 per cent., and on the complainant's refusal to comply with that demand, a suit was brought in the Second District Court of the City of Newark, for the return of the deposit of Two Hundred Fifty Dollars, which suit was decided in favor of the complainant. As there was no answer filed in this case, the presumptions arising from the allegations of the bill are that the said Davis was the attorney of the assignee of the contract, and by his demand on November 7, 1924, for a formal agreement requiring that the purchase money mortgage should be for twenty-five years and bear interest at 4 per cent., he certainly waived whatever rights he might have had to such a formal agreement. Nor is it necessary that a formal agreement should be

executed in order to enable the complainant to file and sustain his bill. Such a situation developed in the case of *Wharton* v. *Stoutenburgh,* reported in 35 N. J. E. 273, where Mr. Justice Depue, speaking for this Court, adopting the language of Lord Westbury, in *Chinnock* v. *Marchioness of Ely,* 4 De G. J. & S. 645-6, held:

> "I entirely accept the doctrine that if there had been a final agreement, and the terms of it are evidenced in a manner to satisfy the statute of frauds, the agreement shall be binding, although the parties may have declared that the writing is to serve only as instruction for a formal agreement, or although it may be an express term that a formal agreement shall be prepared and signed by the parties. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged, or his agent lawfully authorized, there exist all the materials which this Court requires to make a legally binding contract. But if to a proposal or offer an assent be given, subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."

We respectfully submit for the reasons above set forth, and on the authority of the above decision of this Court, third, fourth and fifth, the reasons were not sufficient to dismiss the bill.

POINT IV.

The sixth and seventh reasons in the opinion of Vice-Chancellor Foster for the dismissal of the bill are that the contract does not fix a term for the mortgage or the rate of interest, and that it fails to set the time for the closing of title.

In a long line of cases in this State, it has been established that where a contract for the sale of land fails to provide for the term of the purchase money mortgage, or the rate of interest, that it will be presumed that it was the intention of the parties that the mortgage should be payable on demand, and that the interest should be at the rate of six per cent. The leading case on that point in this State is that of *Greene* v. *Richards,* 23 N. J. E. 32. That was a suit for the specific performance of a contract for the sale of land, the contract consisting of a memorandum somewhat similar to the receipt in the case at bar, and therein it was provided that the vendor would take back a mortgage of Two Thousand Dollars. No time was fixed for the payment of the mortgage, nor was the rate of interest fixed, and the Chancellor held:

> "In such case the mortgage should be made payable on demand; and it is the duty of a Court of Equity, in order to prevent a fair and just agreement from being defeated by a mere technical objection, to presume that such was the intention of the parties, and to give the agreement that construction. This makes the written agreement certain in all its parts."

And on appeal to the Court of Errors and Appeals, the decree of the Chancery Court was affirmed, and Chief Justice Beasley, speaking for the Court of Errors and Appeals, held:

> "With respect to the objection that the agreement is imperfect, inasmuch as it does not appear when the mortgage which is to be given for the balance of the consideration money is to be payable, I concur with the opinion expressed in the Court of Chancery. Where nothing is said about a credit to be given, and there are no circumstances from which an inference can be made that it was

> the intention of the parties that the time of payment should be postponed, the money is payable immediately.'' Greene *v.* Richards, 23 N. J. E. 540.

This case has been cited with approval in *Patterson* v. *J. D. Loiseaux Lumber Company,* 114 Atl. 339, wherein an informal contract for the sale of property provided that Three Thousand Dollars of the purchase price should be by way of mortgage. Nothing was said as to the term of the mortgage or the rate of interest. Vice-Chancellor Buchanan held:

> ''The contract does not specify the term or interest rate of the $3,000 bond and mortgage to be given, nor that payment shall be postponed. It will, therefore, be payable on demand, and with legal, or 6 per cent. interest.''

In the case of *Luczak* v. *Mariove,* 112 Atl. 495, 92 N. J. E. 377, affirmed in 93 N. J. E. 501, the contract provided for a first mortgage of $12,000, but did not state the term or the rate of interest. Vice-Chancellor Foster held:

> ''The next objection is that the provisions of the contract respecting the mortgages, which are quoted above, are inadequate and incomplete. It is apparent from the contract and the quotations made from it that the terms of the second mortgage are clearly set forth, and that the provision that this mortgage is payable at any time within two years of its date is neither uncertain nor incomplete, but definitely leaves it optional with complainants to allow the mortgage to stand for two years, or to pay it at any earlier date; and with respect to the first mortgage, while the contract does not state the term for which it should run, nor what rate of interest it should bear, the proofs show that these matters were purposely and necessarily left indefinite, as none of the parties knew, when the contract was made,

> for what time or at what rate of interest the first mortgage loan could be obtained, and by acquiescence they made the terms of this loan on which it could be obtained part of their contract, and in the absence of definite terms in the contract a Court of Equity will, if necessary, presume it to have been the intention of the parties that the mortgage should be made payable on demand (Greene *v.* Richards, 23 N. J. E. 32), and will also presume, in the absence of a specified rate of interest, that the mortgage carries the legal rate of interest after demand. And if the omission of these terms from the contract be attributed to the negligence of the parties, such negligence on the part of the defendants will not be permitted to defeat specific performance. Krah *v.* Wassmer, 75 N. J. E. 109, 71 Atl. 404; affirmed, Same *v.* Radcliffe, 78 N. J. E. 305, 81 Atl. 1133."

And in the case of *Cavanna* v. *Brooks,* decided by this Court on January 19, 1925, and reported in Volume 3 of the N. J. Advance Report, page 173, the Court held:

> "So, here, the failure of the parties to fix either an interest rate or a due date in the purchase money mortgages, or one of them, may be said to make the price both uncertain in amount and in the time for the payment thereof. In respect to these particular provisions, however, the courts are able to supply the defects by reference to the ordinary conduct of reasonable men. Thus, when a rate of interest is not stated, the parties will be presumed to have intended the legal rate, that being the one to whose reasonableness the Legislature has given its sanction. Bownes *v.* Ritter, 26 N. J. E. 457. Similarly, when no date for the maturity of the mortgage is expressed therein, a natural presumption is that the parties intended the creditor-mortgagee to

> have his money when he asks for it, *i. e.*, on demand."

Lastly, the Court holds that the bill should be dismissed because no time or place was fixed for the closing of title. Such was the objection made in the case of *Reynolds* v. *O'Neil,* 26 N. J. E. 224, where again there was a contract in the form of a receipt similar to the one in the present case, and Chancellor Runyon, brushed aside this objection, allowed specific performance, and held:

> "In support of the objection, based on alleged want of certainty in the contract, reliance is placed on the omission to fix a time for the payment of the balance of the purchase money and the delivery of the deed. The Court will construe this contract as providing for a delivery of the deed on demand, within a reasonable time, accompanied by a tender of the balance of the purchase money. The objection made on the face of the contract cannot prevail."

But in this case the contract does fix a time, and that is, "as soon as the searches are made." The contract was dated October 28, 1924, and provided for a formal agreement on November 7, 1924. The bill of complaint was filed on December 11, 1924. There surely was ample and reasonable time for the vendee to have made the examination of the title during the period between October 28, 1924, and the date of the filing of the bill. If the Chancellor deemed it necessary that the vendee should be entitled to more time, he could retain the bill and allow more time for the vendee to complete his examination of the title. Manifestly this was not a sufficient ground to dismiss the bill.

Conclusion.

We respectfully submit that on the face of the bill and on the contract therein stated, the complainant was entitled, according to the well-established rules of equity adopted by the courts of this State, to the relief prayed for, and that the Court's decree in dismissing the bill was erroneous and should be reversed.

Respectfully submitted,

KRAEMER & SIEGLER,
Of Counsel for Complainant-Appellant.

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

New Jersey Court of Errors and Appeals

Between

MICHAEL J. TANSEY,
Complainant-Appellant,

and

HEIME SUKONECK,
Defendant-Respondent.

On Appeal from Court of Chancery.

BRIEF FOR RESPONDENT.

The bill in this case was filed by a vendor of land asking for specific performance. The prayer of the bill is not included in the printed case. The defendant gave notice of a motion to dismiss the bill, upon the following grounds:

1. It does not disclose a cause of action.

2. Because it appears by said bill that the alleged contract is uncertain and incomplete, and as to material incidents is left to be ascertained by subsequent negotiations.

3. Because the alleged contract is with reference to lands, tenements or hereditaments, or some interest in or concerning them, and it does not appear that the parties have concluded their alleged agreement in all its particulars, sufficiently to warrant this Court in decreeing specific performance.

4. Because the Statute of Frauds requires every agreement for the sale of lands, tenements or hereditaments, or any interest in or concerning them, to be in writing, and the alleged agreement set out in the bill of complaint does not comply with the provisions of the statute.

The bill alleges that the complainant is the owner in fee of a tract of land (p. 1), and describes the land by metes and bounds, and it appears that three of the lines are 100 feet more or less.

The bill alleges on page 2 that the parties entered into an agreement in writing for the sale of said land as being 100 feet in depth by 100 feet in front, on the southwest corner of Avenue C and Miller street, in Newark, N. J., for the sum of $10,000, $5,000 being in cash and $5,000 being in a mortgage.

On page 3 of the bill, the alleged written agreement is set forth. It is apparent from a mere inspection of the document that it is very defective. It does not state that any land is to be sold; it merely states "100x100 s. w. corner Miller St. and Avenue C, Newark." It does not state that the 100 is 100 feet or inches or yards. It does not state whether the 100 feet is to be on four sides of a lot, or only on two sides, so that the depth on each street might be as little as 25 feet. It does not state what additional amount is to be paid on November 7, 1924, leaving that matter to subsequent agreement. It does not state for what period of time credit is to be given by the mortgage, and at what rate of interest. It does not state whether the property is in Newark, N. J., or in Newark of some other State.

The Vice-Chancellor pointed out what appeared to him to be the defects in the alleged agreement (see Opinion, p. 13), but in concluding his statement (at p. 15) he said: "The other omissions in this receipt cannot be so supplied by assumptions, because the parties by the terms of this receipt stipulated and apparently con-

templated that they should be set forth in the formal agreement which they were to execute. It is clear from these omissions that the parties had not completed their negotiations and concluded a contract definite and complete in all its terms, and which they intended should be binding, and it is equally clear that they intended by the execution of the formal agreement to supply the deficiencies in or these omissions of this receipt."

The appellant in his brief has discussed merely the specific items referred to by the Vice-Chancellor in his opinion, but has made no comment upon the general statement of the opinion.

The respondent will take up the several points made by the appellant.

POINT I.

It is true that a bill will lie in this State for specific performance of a contract for the sale of land located in another State, and that the decree is *in personam* and not *in rem.*

In a recent case, *McVoy* v. *Bauman,* 94 Eq. 360, affirmed 95 Eq. 335, it was held that a suit by a vendee for the specific performance of a contract for the sale of lands in this State is, by reason of existing statutory provisions, a suit *quasi in rem.* It is difficult to perceive in what manner a decree directing that a conveyance of land located in another State could be enforced in this State. But it is not necessary to pursue the subject since the Vice-Chancellor in the instant case no doubt had in mind that the receipt was defective in not describing the land with more certainty, and that the parties contem-

plated making the description more certain in a formal agreement to be afterwards executed.

POINT II.

This point may be disposed of in the same manner as the former one. The Vice-Chancellor was not considering what proof could be made at final hearing, but whether there was an omission in the receipt which the parties contemplated supplying in a formal agreement.

POINT III.

Under this point, the appellant discusses the third, fourth and fifth items of defects stated by the Vice-Chancellor. Here, again, the Vice-Chancellor merely had in mind that the matters referred to by him were defects in the receipt which the parties contemplated curing a formal agreement.

POINT IV.

Under this point, the appellant discussed items six and seven stated in the Vice-Chancellor's opinion. The Vice-Chancellor said (p. 14, l. 30), that the omissions in the receipt relating to the rate of interest and to the maturity of the mortgage, might be supplied by assuming that the legal rate of interest was intended, and that the mortgage was payable on demand in the absence of anything to the contrary.

It is contended, however, on behalf of the respondent, that the receipt is fatally defective, in that it does not state the length of time of the credit to be given to the vendee. This defect could

not be remedied by parol evidence at the hearing. *The receipt indicates plainly that a part of the purchase price was to be paid in cash, and that credit was to be given for the other part. The vendor cannot waive this provision.* If the vendee had filed the bill and alleged willingness to perform notwithstanding the credit, he could waive the provision for credit.

Moore v. *Galupo,* 65 N. J. Eq. 195;
Binns v. *Smith,* 93 N. J. Eq. 33, at p. 36.

For this reason alone the bill should have been dismissed.

POINT V.

The parties to the receipt undoubtedly contemplated further negotiations and the incorporation of the result of the same in a formal agreement, which formal agreement should remedy the omissions and defects in the receipt and which would be in such a document as could be recorded.

In *Korflage* v. *Kahrs,* 94 N. J. Eq. 440, Justice Bergen has stated the rule, as follows: "If to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term as to the assent, and there is no agreement independent of the stipulation." Citing *Wharton* v. *Stoutenburgh,* 35 N. J. Eq. 266. He further states, quoting from *Domestic Telegraph Co.* v. *Metropolitan Telephone Co.,* 39 N. J. Eq. 160: "Specific performance will not be decreed unless it is shown that the contract has been concluded. The bargain must be found completely determined between the parties, and its terms definitely ascertained." At page 444, he further states, quoting from *Potter* v. *Hollister,* 45 N. J. Eq. 508:

"Equity will always decline to interfere when the evidence leaves the terms of the contract in uncertainty, or if it be reasonably doubtful whether the contract was finally closed." In *Korflage* v. *Kahrs,* the oral contract provided that the unpaid purchase price should be secured by a chattel mortgage, without stating what chattels it should embrace, or any of its terms, and it was held it was too indefinite to justify specific performance.

In *Bettcher* v. *Knapp,* 94 N. J. Eq. 433, contracts for the conveyance of land were signed in duplicate, and there was a refusal by the vendors to deliver the contract to the vendee. It was held that where the parties to a contract for the sale of lands make it an essential part of their agreement that shall be embodied in a formal written instrument, the matter remains *in fieri* until the written instrument has been delivered.

In the instant case, the parties contemplated the execution of a formal agreement, which as the appellant says in his brief, the vendee was entitled to have for the purpose of recording it.

Repeating the language of the Vice-Chancellor, at page 15, it is clear that the parties had not completed their negotiations, and that they intended to have a formal agreement executed.

It is, therefore, respectfully submitted that the decree dismissing the bill should be affirmed.

SAMUEL ROESSLER,
Of Counsel with Respondent.