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*Bill of Complaint.*

**BILL OF COMPLAINT.**

Filed February 21, 1920.

**In Chancery of New Jersey**

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

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The complainant, Charles C. Randolph, of the City of Plainfield, in the County of Union and State of New Jersey, respectfully shows that:

1. On or about the third day of March, 1900, John Rafferty, during his lifetime, became seized in fee simple by deed of Charles A. Reed, one of the Special Masters in Chancery of New Jersey, which deed bears the date aforesaid, and was recorded in the Register's Office of the County of Union on March 9, 1900, in Book 364 of Deeds for said County, on pages 129, etc., in and to said lands and premises known and designated as Nos. 401, 405, 415, 419 and 515 Grant avenue, in the City of Plainfield, in the County of Union and State of New Jersey, which land is more particularly described as follows:

20

BEGINNING at a stake, being the intersection of the center lines of West Fourth street and Grant avenue, as now laid out and opened thence running along the center of said Grant avenue in a magnetic course of South forty-five degrees East a distance of 715.3 feet to a stake and corner of Samuel Q. Lawson's land; thence along said Lawson's land North forty-six degrees thirty minutes East a distance of 226.74 feet to a point in line of lands of E. P. Williams; thence along said Williams' land North forty-five degrees West a distance of 705.30 feet to a stake in the center of Fourth street aforesaid; thence along the center of said Fourth street South forty-nine degrees West a distance of 226.95 feet to a stake and place of beginning.

30

2. On or about the 1st day of November, 1909, John Rafferty departed this life leaving his last Will and Testament, dated September 17, 1902, wherein and whereby he nominated and constituted his wife, Bridget Rafferty and his daughter, Mary E. Rafferty, executrices of his last will and testament, which will was duly probated in the Surrogate's Office of the County of Union on the 12th day of November, 1909, and recorded in Book

40

*Bill of Complaint.*

Y of Wills on pages, 12, etc., and the said Bridget Rafferty and Mary E. Rafferty qualified as executrices of the said estate and have been and now are acting as such.

10 3. That the sixth paragraph of the said will contained the following power of sale, to wit, "I give, to my executrices hereinafter named, and to the survivor of them, full power and authority to grant, bargain, sell and convey any or all of my real estate which may be owned by me at the time of my decease, to any person or persons, in fee simple, or otherwise, at public or private sale, at such times and upon such terms as they shall think fit."

20 4. On the 23rd day of December, 1919, Bridget Rafferty and Mary E. Rafferty, executrices of the estate of John Rafferty, deceased, by a certain indenture of agreement bearing date as aforesaid, under the power of sale contained in the said will, for and in consideration of the sum of \$35,000.00, agreed to convey to Charles C. Randolph, the complainant, the lands above described on or before the 1st day of February, 1920, upon the terms and conditions therein set forth, copy of which agreement is hereunto annexed and made part hereof, which agreement was duly executed and delivered, and in accordance with the terms thereof the complainant paid unto the said Bridget Rafferty and Mary E. Rafferty, executrices aforesaid, the sum of \$1,000.00 specified to be paid upon the signing of the agreement.

30 5. After the delivery of the said agreement, the complainant caused proper searches to be made against the premises so to be acquired, and on the 1st day of February, 1920, in accordance with the terms of the said agreement, tendered to the said Bridget Rafferty and Mary E. Rafferty, executrices aforesaid, the sum of \$14,000.00 required to be paid upon that day, and offered to execute five mortgages for the sum of \$4,000.00 each in accordance with the terms of the said contract, which offer, on the part of the complainant, was refused by the said executrices, the only reason being assigned for said refusal upon the part of the said executrices was that they thought they ought to have more  
40 money, and unless they so received an additional amount, which amount was not specified, they would not make the conveyance in accordance with the terms of the agreement.

6. Complainant, in anticipation of becoming the owner in fee simple of the premises purchased by the agreement aforesaid,

*Bill of Complaint.*

and relying upon the covenants and warranty therein contained and the good faith of the executrices of the estate of John Rafferty, deceased, to carry out the terms of the contract to be performed by them, has made arrangements to dispose of a portion of the premises purchased as aforesaid, and since the 1st day of February, 1920, has asked in a friendly way the defendants to complete their part of the contract and deliver a good and sufficient warranty deed as in the contract provided, unto the complainant, which reasonable request has been refused, and defendants refuse and decline to execute the said deed, as in duty bound they ought to, all of which acts and refusals of the said defendants are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of the complainant in the premises.

10

Complainant is desirous of taking title to the property and is without adequate remedy in the courts of law, and therefore prays:

20

1. That the defendants, and each of them may answer this bill of complaint without oath, and each statement therein made.

2. That it may be decreed by this Honorable Court that the defendants, Bridget Rafferty and Mary E. Rafferty, in all things specifically perform the said articles of agreement and that the said defendants by the decree of this Honorable Court do make, execute and acknowledge in due form of law and deliver to the complainant a good and sufficient warranty deed for the said premises and that the said defendants deliver at the same time to the said complainant possession of the said premises and account to him for the rents, issues and profits of the same since the 1st day of February, last, and for such other relief as may seem equitable and just.

30

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

WILLIAM NEWCORN,  
*Solicitor for and of Counsel with Complainant.*

40

*Bill of Complaint.*

STATE OF NEW JERSEY, }  
 COUNTY OF UNION. } ss.

CHARLES C. RANDOLPH, being duly sworn according to law, upon his oath deposes and says that he has read the above bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes them to be true.

CHARLES C. RANDOLPH.

Sworn and subscribed to before me this  
 twenty-first day of February, A. D. 1920.

MARTIN B. STUTSMAN,  
*Master in Chancery of New Jersey.*

ARTICLES OF AGREEMENT, made the twenty-third day of December, in the year of our Lord one thousand nine hundred and nineteen, between the estate of John Rafferty, of the City of Plainfield, in the County of Union and State of New Jersey, of the first part, and Charles C. Randolph, of the City of Plainfield, in the County of Union and State of New Jersey, of the second part.

WITNESSETH, that the said party of the first part, for and in consideration of the sum of thirty-five thousand dollars (\$35,000.00) 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 the said party of the first part will well and sufficiently convey to the said party of the second part, heirs and assigns, by deed of warranty free from all encumbrance, except and subject to leases on properties designated by the street numbers: 401, 405, 415, 419 and 515; on or before the first day of February next ensuing the date hereof, all those lots, tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the City of Plainfield, in the County of Union and State of New Jersey, being known and designated as Street Nos. 401 to 605 Grant avenue, Plainfield, N. J., being about 680 feet in front on the East side thereof.

*Bill of Complaint.*

And the said Charles C. Randolph for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that he, 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 thirty-five thousand (\$35,000.00) dollars, as and for the purchase money of the foregoing described lands and premises, in the following manner, that is to say: 10

\$1,000.00 upon the signing of this agreement, the receipt whereof is hereby acknowledged;

\$14,000 in cash to be paid upon the day of passing title, and the balance of

\$20,000 to be paid in five mortgages of \$4,000 each at 5% for 3 years, being stipulated in the mortgages that \$500 in cash is to be paid on the principal of each and every mortgage at the expiration of the second year. 20

Taxes and insurance to be apportioned on day of passing title.

The vacant land known as street numbers 421 to 511 and 517 to 605 to be excluded for the mortgages.

AND IT IS FURTHER AGREED by the parties to these present, that the said party of the second part, his heirs and assigns, may enter into and upon the said lands and premises on the first day of February next ensuing the date hereof, and from thence take the rents, issues and profits to his and their use. 30

AND IT IS FURTHER AGREED, by the parties hereto, that the said deed shall be delivered and received at the office of William V. Rafferty, National State Bank Building, Newark, N. J., in the afternoon on the said first day of February next ensuing the date hereof.

And for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of \_\_\_\_\_, which they hereby fix and settle as liquidated damages therefor. 40

*Bill of Complaint.*

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

BRIDGET RAFFERTY,  
 MARY E. RAFFERTY,  
*Executrices of the Estate of  
 John Rafferty.*

10

CHARLES C. RANDOLPH.

Signed, sealed and delivered  
 in the presence of

WILLIAM V. RAFFERTY,  
 CLIFFORD D. MANNING.

20

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

BE IT REMEMBERED, that on this twelfth day of January in the year of our Lord one thousand nine hundred and twenty, before me, a Notary Public of New Jersey, personally appeared Charles C. Randolph, who, I am satisfied, is one of the persons in the within agreement named, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

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CLIFFORD D. MANNING,  
*Notary Public.*

A true copy.

JESSE R. SALMON,  
*Clerk.*

40

*Answer.*

**ANSWER.**

Filed April 3, 1920.

The answer of the defendants, Bridget Rafferty and Mary E. Rafferty, executrices of the estate of John Rafferty, deceased.

These defendants, answering the bill of complaint, say that:

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1. Paragraphs 1-3, inclusive, are admitted.

2. Paragraph 4 is denied, but defendants admit that they signed the paper, a copy of which is annexed to the bill of complaint, and that \$1,000 was paid to them by the complainant, but say that said paper is without any legal force or effect.

3. Paragraph 5 is denied.

4. Paragraph 6 is denied, but defendants say that they have not executed any deed for said lands.

5. After defendants signed said paper some of the beneficiaries of said estate and who are daughters of the defendant Bridget Rafferty and sisters of the defendant Mary E. Rafferty, and who, as such beneficiaries, were and are interested in said lands and in the proceeds to be derived from the sale thereof, very strongly objected to the sale of said lands on the ground that the price named in said paper was grossly inadequate and that said paper was not fair, just and equitable, but had been rashly and improvidently made and was unconscionable, and, for these reasons, called upon defendants to rescind their signatures to said paper and to refuse to proceed further with the matter; whereupon, and within a few days after the signing of said paper and before complainant had taken any action under it defendants rescinded their signatures to it and so notified complainant and his agent, John G. McLaughlin, and offered to return said \$1,000 to complainant, but which offer was refused; and said offer was several times renewed, and each time was refused.

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6. If defendants had signed and delivered a warranty deed to said lands to complainant it would have caused defendants great unpleasantness and been productive of much hard feeling against them on the part of said beneficiaries, and might, and probably would, have resulted in considerable family litigation.

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7. A decree of specific performance would work hardship and injustice and would operate oppressively upon defendants and

*Answer.*

the beneficiaries of said estate and would be inequitable under the circumstances.

8. Before signing said paper defendants stated to complainant and to his said agent that for personal reasons they would have no business dealings with one Clifford L. Manning, and asked if said Clifford L. Manning were at all interested in the matter, as they thought he might be, and they said that if he were they would refuse to have anything to do with it, and they were assured by complainant and his said agent that said Clifford L. Manning had nothing whatever to do with the matter and was not at all interested in it.

9. Defendants subsequently learned that said Clifford L. Manning was very much interested in the matter.

10. Defendants were deceived by complainant and his said agent in regard to said Clifford L. Manning's connection with the matter, and had they known that said Clifford L. Manning was interested in it they would have refused to have had anything to do with it, and would have refused to sign the paper.

11. Complainant has not been injured.

12. Complainant has an adequate remedy at law.

W. S. ANGLEMAN,  
*Solicitor and Counsel for Defendants.*

Consent is hereby given that the within answer be filed as within time.

April 3, 1920.

*Solicitor for Complainant.*

*Replication.*

**REPLICATION.**

Filed April 6, 1920.

The replication of the complainant, Charles C. Randolph, to the answer of the defendants, Bridget Rafferty and Mary E. Rafferty, executrices of the estate of John Rafferty, deceased.

10

The complainant, replying to the answer of the defendants in the bill of complaint, says:

1. He joins issue with the defendants on paragraphs 1 to 4, inclusive, of the said answer.

2. Replying to the allegations contained in the fifth paragraph, the complainant denies the allegation contained therein and says that the truth of the matter is that John G. McLaughlin was a broker authorized by the defendants to make the sale of the property; that the said John G. McLaughlin endeavored to dispose of the property for \$42,325.00, but failed to consummate any sale upon these figures; subsequently the said broker tried to interest the complainant, and the complainant made a proposition to purchase the property for the consideration of \$35,000.00, to wit, the sum of \$10,000.00 cash and \$25,000.00 by the execution of five (5) purchase money mortgages for \$5,000.00 each, which proposition was submitted to the defendants and accepted by them, resulting in the execution of the agreement set forth in the bill of complaint; that no effort was made to rescind the said contract upon the part of the defendants until the 27th day of December, 1919, which rescission was refused by the complainant; that at no time was the said John G. McLaughlin the agent of the complainant, but in this entire transaction was acting as the broker of the defendants to make the aforesaid sale, the defendants agreeing to pay the said broker his commissions for effectuating the said sale, and that the complainant in good faith entered into the said contract without any fraud or collusion upon his part and after the defendants had ample time to consider the said proposition and had acted upon independent advice of their attorney learned in the law, and after the signing of said contract, had made arrangements to dispose of several parcels of the said land, and was prevented from so doing by reason of the unlawful conduct of the said defendants.

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3. The complainant has not sufficient knowledge of the allegations contained in the sixth paragraph to either affirm or deny

*Replication.*

the said allegations, but says, however, that notwithstanding the said allegation, William V. Rafferty, the attorney of the said estate, advised the attorney of complainant upon two different occasions that the defendants were going to carry out the terms of the contract since the institution of this suit, and designated 10 March 31st, 1920, at the office of William Newcorn, in the City of Plainfield, N. J., as the time and place for the deliverance of the deed and the execution of said bonds and mortgages, at which time and place the complainant was ready to perform all that was to be performed upon his part, and after waiting several hours, left. Subsequent to his leaving the office of his attorney, the said William V. Rafferty appeared at the said office, and stated that although the deed was all drawn, he had been unable to secure the execution of the same by reason of the refusal of the defendants to carry out the terms of the con- 20 tract.

4. Complainant denies the allegation contained in the seventh paragraph.

5. Complainant denies the allegation contained in the eighth paragraph and further says that the representative of the de- 30 fendants knew that the said Clifford L. Manning was the brother-in-law of the complainant who looked after all the real estate transactions of the complainant and that no personal feeling was manifested until some time after the signing of the contract when the said Clifford L. Manning, acting as agent for the complainant, requested the estate to furnish him with the notices to be served upon the tenants, which the attorney of the defendants had agreed to prepare and deliver to him for service.

6. Complainant denies the allegation contained in the 9th, 10th and 11th paragraphs and joins issue on the same.

7. Complainant denies that he has an adequate remedy at law to obtain possession of the premises and has selected the right of specific performance in lieu of an action for damages for any money loss he may sustain, as the premises were pur- 40 chased for an investment and is entitled to receive the same in accordance with the terms of the contract entered into between the defendants and the complainant.

WILLIAM NEWCORN,  
*Solicitor for and of Counsel with Complainant.*

*Order of Reference.*

**ORDER OF REFERENCE.**

Filed April 13, 1920.

This matter being opened to the Court by William Newcorn, of counsel with complainant, it is on this 13th day of April, A. D. 1920,

10

ORDERED that the above-entitled cause be referred to Hon. M. G. Buchanan, one of the Vice-Chancellors of this Court, to hear the same for the Chancellor and to report thereon to him and advise what further order or decree should be made therein.

E. R. WALKER,

C.

We hereby consent to the entry of the foregoing order.

WILLIAM NEWCORN,  
*Solicitor of Complainant.*

20

W. S. ANGLEMAN,  
*Solicitor of Defendants.*

30

40

*John G. McLaughlin, direct.*

47-658.

IN CHANCERY OF NEW JERSEY.

*Between*

10

CHARLES C. RANDOLPH,

*Complainant,*

*On Bill, &c.*

*and*

*Testimony.*

BRIDGET RAFFERTY, *et al.*,

*Defendants.*

20

Testimony taken in the above-entitled cause, at the State House, Trenton, New Jersey, on Wednesday, the nineteenth day of May, 1920, at 10:30 A. M.

Before HON. MALCOLM G. BUCHANAN, *Vice-Chancellor.*

Appearances:

William Newcorn, Esq., for complainant.

W. S. Angleman, Esq., for defendants.

JOHN G. McLAUGHLIN, a witness produced on behalf of the complainant, being duly sworn, testified as follows:

30

*Direct examination* by Mr. Newcorn.

Q Mr. McLaughlin, where do you live? A Plainfield, New Jersey.

Q What is your business? A Real estate and insurance.

Q Where are you located? A 149 North avenue, Plainfield, New Jersey.

40

Q Prior to November, 1919, did you have any business relations with the Rafferty estate, and if so, state the date? A I think that the first time I had any negotiations relative to this matter was probably in the latter part of October or the early part of November, with Mr. William V. Rafferty.

Q What year? A 1919.

Q Who is William V. Rafferty? A He is the son of Mrs.—one of the executors of the will.

*John G. McLaughlin, direct.*

Q And where were you in contact with him? A By 'phone and at his office.

Q And his office is located where? A It is in Newark, on Broad street, Newark; I forget the number now; it is right near the Central Roalroad station.

Q Was it as a result of the 'phone communication that you went to Newark? A As a result of the 'phone communication. 10

Q Did you see him at his office? A I did.

Q What about? A The sale of the Rafferty property on the corner of West Fourth street and Grant avenue.

Q What was the nature of the conversation? A It was simply a question of getting to a final consideration for the property.

Q Well, what did he say and what did you say? A I think, if I recall the case correctly, most of the work was done by 'phone. I then went to the office and the price was agreed upon at \$35,000. 20

*By the Court.*

Q Not what was agreed; what was said? A First, I submitted an offer, which was \$35,000 for the property, \$10,000 to be paid in cash and the balance by the purchasers giving to the estate five mortgages of \$5,000 each; that seemed to be acceptable—

Q No. What did he say? A He said he would submit it, and he thought that would be acceptable. A few days later he called me and asked if it was possible to reduce the mortgages to \$4,000 each. I said I would take it up with the purchaser, which I did. Then I notified Mr. Rafferty that that was agreeable, which changed the terms from \$10,000 in cash to \$15,000 in cash, and bonds and mortgages of \$4,000 each. I then went to Mr. Rafferty's office, and he had a contract prepared which did not quite cover the situation, and we agreed then upon the terms of the contract, which were as stated; and Mr. Rafferty prepared the contracts himself and brought them to Plainfield subsequently; had them signed by his mother and sister, and left them in my office. I then had Mr. Randolph to sign the contracts and forward one to Mr. Rafferty with my check for \$1,000 to cover the initial payment. 30 40

*John G. McLaughlin, direct.*

Q I presume you mean duplicate copies of the one contract? A Yes, sir. At the time I was in Mr. Rafferty's office, it was agreed between us that he would leave at my office before the 31st day of December, notices to be served on the tenants to vacate on April 1st, 1920. That he failed to do.

10

Q Now, I show you a contract dated the 23rd day of December, 1919, between the estate of John Rafferty and Charles C. Randolph, and I ask you whether that is one of the copies that were delivered to you to secure Mr. Randolph's signature? A It is.

Q And the time when it was delivered were the signatures of Bridget Rafferty and Mary E. Rafferty on both copies? A They were.

20

Q Witnessed by William V. Rafferty? A Yes.

Q And you are familiar with the signature of Mr. Randolph? A Yes.

Q That is his signature? (Showing witness the paper.) A Yes, sir.

Q And after it was signed by Mr. Randolph you sent— A A copy to Mr. Rafferty with a check for \$1,000.

Q Is this the check you refer to? (Handing witness paper.) A Yes.

Q The check is made out to "William V. Rafferty, attorney," signed "J. G. McLaughlin, check No. 350, dated December 23, 1919," and indorsed "William V. Rafferty, Attorney, William V. Rafferty," individually? A Yes.

30

*Mr. Newcorn.* I offer the contract and check in evidence. Said contract and check are marked Exhibits C. 1 and C. 2, respectively.

*The Court.* These signatures are admitted.

*Mr. Angleman.* Yes, sir.

40

Q Before this visit to the Newark office of Mr. Rafferty, had there been any negotiations between you and the estate? A Yes, sir.

Q I show you a letter under date of November 11, 1919, signed "William V. Rafferty," and ask you whether that is a communication you received from him? A It is.

*John G. McLaughlin, direct.*

Q Was that the beginning of your negotiations for the sale of the property? A No, we commenced a few days before this by 'phone communication.

Q What is the price of the property in that? A \$42,325.00.

Q Did you try to make a sale of the property at those figures?  
A I did. 10

Q Did you succeed? A No.

Q What was the best offer you received? A \$33,000.

Q From whom did you receive that? A Mr. Morris Abrams.

Q Who is he? A A real estate operator in the City of Plainfield.

Q And at whose request did you submit the Randolph proposition? A I think it was Mr. Abrams or Mr. Nathanson, I forget which.

Q And the Randolph proposition resulted into what you have testified? A Yes. 20

*Mr. Newcorn.* I offer the letter in evidence.

*Mr. Angleman.* No objection.

Said letter is marked Exhibit C. 3.

Q At the time you were negotiating for the sale of the property to Mr. Randolph, did you have any conversation with the executrices of the estate? A I did not.

Q Was there anything said to you in regard to the interest of Clifford Manning in the property? A Prior to the execution of the contract? 30

Q Prior to the execution of the contract. A No, sir.

Q You refer to a modification of the original proposition before the execution of the contract? A Yes.

Q I show you a letter dated December 17, and signed "William V. Rafferty," addressed to you, and ask you whether this letter contains the change after you had made the original offer?  
A Yes, sir.

*Mr. Newcorn.* I offer the letter in evidence.

*Mr. Angleman.* No objection.

Said letter is marked Exhibit C. 4. 40

Q When was it you first found out that the Raffertys were dissatisfied? A It was subsequent to the execution and delivery of the agreement; it seems that Mr. Manning called upon Miss Rafferty for some data concerning the occupancy of the

*John G. McLaughlin, direct.*

houses, and it was after that request had been made by Mr. Manning that it was stated to me that the Raffertys were very much opposed to Mr. Manning having anything to do with this transaction.

*By the Court.*

10 Q By whom was it stated to you? A Mr. William V. Rafferty.

Q And had anything been said by anybody before that time about Mr. Manning? A No, sir.

Q I show you a letter, dated January 23, 1920, received from William V. Rafferty, and ask you whether you received that from him? A Yes, sir.

20 Q In this letter I notice Mr. Rafferty said, "As I have already stated to you, the estate of John Rafferty is desirous of withdrawing from the contract of the sale of the property on Grant Avenue in the City of Plainfield, New Jersey, and I am enclosing check for \$1,000, returning deposit given to me by you in the matter. (Signed) Yours very truly, William V. Rafferty." What did you do with that check? A I immediately returned it to Mr. Rafferty.

Q Why? A Mr. Rafferty declined to withdraw from the contract in which he had entered with the sellers.

*Mr. Newcorn.* I offer the letter in evidence.

Said letter is marked Exhibit C. 5.

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Q I show you an envelope marked "115,913"; is that the envelope in which that letter came? A Yes, the letter you just referred to.

*Mr. Newcorn.* I offer that also.

Said envelope is marked Exhibit C. 5½.

Q You returned the check to him, did you not? A I did.

Q Is this the receipt for your registry? A It is.

40

*Mr. Newcorn.* I offer that in evidence.

Said registry receipt, No. 12291, is marked Exhibit C. 6.

*The Court.* You admit that the check was returned and received by you?

*Mr. Angleman.* Yes, sir.

*John G. McLaughlin, direct.*

Q Had you tried to sell this property to other people than Mr. Randolph before entering into negotiations with Mr. Randolph? A Yes, sir.

Q Did you meet with any success? A I did not; I had an offer of \$33,000, which was submitted through Mr. Rafferty and declined.

Q From whom were you to receive your commission for the sale of this property? 10

*Mr. Angleman.* That is objected to.

*Mr. Newcorn.* I will withdraw the question.

Q At the time when you submitted your terms to Mr. Rafferty, was there any conversation in reference to compensation for your services as broker? A Yes.

Q With whom? A Mr. William V. Rafferty.

Q What was it? A That in the event of the sale being made, I was to receive the usual commissions of 3½%. That question of commission was subsequently modified; just about the time the contracts were about ready to be delivered, Mr. Rafferty said there was one thing to be straightened out, and that was the matter of commissions, and if I would agree to accept the Newark scale, which was 3½% on the first \$20,000 and 2½% on the amount above that, the matter could be closed. I said, "If that's all there is to it, that closes it," and it was closed; and that was the agreement, 3½% on \$20,000 and 2½% on fifteen. 20

Q After you returned this check to Mr. Rafferty, did you have any conversation with either Mary or Bridget Rafferty? A I had a conversation, I think, with Miss Mary Rafferty prior to the return of the check. 30

Q What was the conversation about? A I had talked with Mr. William Rafferty, and he said his folks were very much provoked to think that the tenants had been disturbed.

Q Disturbed by whom? A By Mr. Clifford Manning. It seems he had asked for information, and I think this conversation was subsequent to December 31, 1919; I can't place the time exactly. Yes, I am quite positive now it was subsequent to December 31, because I think Miss Rafferty stated those notices had been served on the 31st of December, and it caused them a great deal of trouble because of the tenants calling them up that night, or coming to see them, I forget which, and it made it very unpleasant for them. 40

*John G. McLaughlin, cross.*

*Mr. Newcorn.* Have you the letter dated January 12, 1920?

*Mr. Angleman.* Here it is (producing it).

10 Q As a result of that conversation, did you write this letter to Mr. Rafferty? A I wrote that letter; whether it was a result of the conversation which is referred to, I can't state; I think it had something to do with it.

*Mr. Newcorn.* I offer that in evidence.

Said letter is marked Exhibit C. 7.

Q Were you present on February 1st, at the time set for the closing? A No.

*Cross examination by Mr. Angleman.*

20 Q Prior to the conversation you had with Mr. William Rafferty as to commission, had anything been said between you and the Raffertys as to commission? A From the very beginning the commission was taken up; before the Rafferty matter came up at all in the former negotiations, Mr. Rafferty understood I was to receive 3½% commission if a sale was made.

Q What was said? A He stated I would be paid 3½% commission.

Q Why did you take it up afterwards? A It is quite customary; I wanted to be positive.

30 Q Did the Raffertys come to you or did you go to them? A I think I took it up with Mr. William V. Rafferty first.

Q They never signed any paper authorizing you to sell? A None at all.

Q Or saying they would give you a commission; no paper was ever signed? A No; I trusted entirely upon Mr. William V. Rafferty for the fulfillment of that contract.

40 Q Did Mr. Randolph come to you with the proposition, or did you go to him? A Indirectly, I think, Mr. Randolph came to me. Mr. Nathanson understood I had been in negotiation for this property on behalf of other clients, and he said, "I have a client who will buy the property." Then I immediately took it up.

Q Have you an agreement to divide commissions with Mr. Nathanson? A Yes.

*Mr. Newcorn.* That is objected to.

*The Court.* It has been answered.

*John G. McLaughlin, cross.*

Q When was the first conversation had after the contract was signed, in which you became aware that they wished to rescind the contract? A I can't give the date; it was some time subsequent; whether it was the following week or two afterwards, I can't tell you.

Q After the contract was signed? A After the contract was signed. 10

Q At the time you said you had a client who wished to buy the property, did you tell the Raffertys the name of the client? A No, I don't think I did; that is not the practice, you know.

Q When did you first tell them who it was? A At the time that the contracts were agreed to between Mr. Rafferty and myself; then I disclosed the name of the purchaser.

Q That was prior to the contract being drawn or signed? A It would have to be. 20

Q At that time were you aware that Mr. Clifford Manning had any interest in the matter? A I am not aware of it today.

Q Don't you know he does? A I do not.

Q How did he come to notice the tenant to move? A I take it Mr. Manning is a real estate agent and I assume that he was representing Mr. Randolph, who had another business.

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

Q Didn't you think it strange that an independent agent should come to you and ask for these notices? A He didn't come to me. 30

Q Not first? A I think not.

Q When did the Raffertys first say anything to you as to their not being willing to have any dealings with Mr. Manning? A I can't give you the date, but subsequent to the execution and delivery of the agreement.

Q You state positively that you had no knowledge of Mr. Clifford Manning's being connected with the matter, either then or later on? A How do you mean?

Q By business association with Mr. Randolph in regard to the property? A And did you say then or later on? 40

Q Yes. A No. I did know later on that Mr. Manning was representing—

Q Did you know at that time? A No, I don't think I did.

*Charles C. Randolph, direct.*

Q What was the highest offer you had made on this property?

A The highest offer for this property was an offer of \$35,000, this offer.

Q What was the other offer? A Thirty-three.

10 Q You are assessor for the City of Plainfield in the ward where this property is? A I am.

Q What is your official valuation for assessment on this property? A I don't know.

Q I show you seven tax bills on the estate of John Rafferty, covering these properties on Grant avenue, and as I ask you if the valuation as put on those tax bills is not the official valuation which you, in your capacity as assessor, had placed on them? A I might assume they are correct.

Q And also these years? A I will assume they are correct.

20 Q What portion of the actual valuation was the assessment made in your ward?

*Mr. Newcorn.* That is objected to as not cross examination. I have no objection to his making him his witness.

*The Court.* The objection is well taken; he is not testifying as an expert. You may make him your own witness; it is not cross examination. There is no completed question pending, I think.

30 CHARLES C. RANDOLPH, the above-named complainant, being duly sworn in his own behalf, testified as follows:

*Direct examination* by Mr. Newcorn.

Q You are the complainant? A Yes, sir.

Q What is your business? A Sales agent of the Barrett Company, New York City.

Q You reside in the City of Plainfield? A Yes.

Q And you signed that contract which is in evidence, marked "C. 1"? A I did.

40 Q Did you take any part in the negotiations that led up to the signing of the contract, with either Mr. Rafferty or his mother or sister? A No.

Q And through whom did you do business? A Mr. Manning.

Q As what? A He acted as my agent.

*Charles C. Randolph, direct.*

Q You executed that contract December 23rd. Had you heard at that time that there was any objection to Mr. Manning or his having any interest in the matter? A None whatever.

Q Did he have any interest in the matter? A No, sir.

Q After you signed the contract, when was it you were first advised that the Raffertys were not satisfied with the transaction? A On the day that I tendered the payment to Mr. Rafferty in Newark. 10

Q What day was that? A The first day of February, 1920.

Q Did you receive any intimation before then that they wanted to rescind the contract? A I might possibly have heard so through Mr. Manning. I'm not sure as to that.

Q Did you have any talk with Mr. McLaughlin on or about the 12th day of January in which he advised you that the Raffertys desired to have you surrender your contract? A There was a conference at Mr. McLaughlin's office, but I am not sure as to the dates. 20

Q Was it before or after serving the notice on the tenants? A After serving notice on the tenants.

Q And were notices served? A They were.

Q Under whose directions? A Under my directions.

Q By whom? A Mr. Manning.

Q Had there been any such agreement between the Raffertys and yourself that notices ought to be served? A The agreement was with Mr. Manning, and as I understood it that they were to furnish the data upon which the notices were to be served. 30

Q You say the first intimation you had that they desired to rescind the contract was when you tendered the money at Mr. Rafferty's office in Newark? A Yes.

Q What did Mr. Rafferty say to you? A He refused to accept the money, stating he had been unable to have the papers prepared because he knew he couldn't have the signatures attached to them.

Q Whose signatures was he referring to? A To the executors.

Q And did you have the money? A I did. 40

Q How much? A \$14,000 in cash.

Q And what did you do with that \$14,000? A I tendered it to Mr. Rafferty according to the agreement.

Q Did you offer to do anything else at that time when you made the tender? A Not that I recall.

*Charles C. Randolph, direct.*

Q Was there anything said at all about the delivery of the deed or the execution of the mortgages that the contract provided for? A Yes, that was gone into in detail, in a general way only.

Q Who was to draw those mortgages? A To prepare them?

Q Yes. A Mr. Rafferty.

10 Q And were they prepared for your signature? A They were not.

Q You didn't receive the deed? A No, sir.

Q What reason did Mr. Rafferty assign to you why he was unable to secure his mother's and sister's signatures? A I don't recall, Judge, just the exact conversation, but the inference was to me that they had been offered more money for the property.

*Mr. Angleman.* I move to strike that out. He should say exactly what was said.

20 *Mr. Newcorn.* That is true.

Q Will you tell us if you recollect, the reason that he assigned, not what your inference was, but the reason he assigned why he couldn't secure his mother's and sister's signatures to the deed? A Well, the direct answer when I asked Mr. Rafferty was, that he couldn't secure their signatures, and he didn't say as to why. They simply objected to it, that was all, they wouldn't sign it.

30 Q Was there anything that was said to you before your visit to the office in Newark that apprised you of the reason why he would be unable to secure the signatures, I mean the Raffertys? A No, there was nothing said to me, that I recall now. I expected, in fact, that the deeds would be ready for me to sign when I tendered the payment.

Q Mr. McLaughlin, however, had advised you, had he not, that the Raffertys desired to cancel the contract? A He had, if that conference at Mr. Rafferty's office was previous to February 1st; I don't recall the date.

Q You knew that the \$1,000 deposit had been forwarded by Rafferty to Mr. McLaughlin? A I knew it had been returned.

40 Q By Mr. Rafferty? A Yes.

Q Did you know that Mr. McLaughlin returned it? A I know he did.

Q Under whose instructions? A The instructions of Mr. Manning.

Q At whose request? A At my request.

*Charles C. Randolph, direct.*

Q Have you received the deed since? A No, sir; I have not.

Q Have you made any other efforts to obtain the deed since the first day of February? A Yes, there was to be a conference at your office, and I understood the deeds were to be prepared and the mortgages and I had the payment ready at that time, and waited three or four hours for Mr. Rafferty and he didn't put in an appearance. 10

*By the Court.*

Q When was that? A I don't recall the exact date, however, but I think it was some time in March or April; I forget just exactly what the date was.

Q Some time in March or April of which year? A This year.

Q Before or after this suit had been instituted? A I really couldn't say, I am at a loss on that.

Q Since the institution of this suit, have you received a communication from Miss Mary Rafferty? A I have. 20

Q Is this the communication? (Handing witness a paper.) A It is.

Q Have you ever heard since you entered into the negotiations for the purchase of this property, either Bridget Rafferty, Mary Rafferty, or William V. Rafferty, mention that they had any objection to Mr. Manning being represented in this transaction? A At the conference at Mr. McLaughlin's office, after the notices had been served, I understood there was some objection to Mr. Manning in the case. 30

Q In which way? A On account, I take it, of him serving the notices.

Q Those notices he served at your request? A And signed by me.

*By the Court.*

Q The objection was that he had served the notices? A For me.

Q Was the objection that he had served them or that the notices had been served? A I take it the objection was that he had served them. 40

Q It would have been all right if somebody else had served them, but it wasn't all right because he had served them? A I presume so.

*Charles C. Randolph, cross.*

Q Is that what was said? A He said he had served the notices and the executors had taken exception to it in the manner in which it was done and that the notices should not have been served.

Q Who told you this? A Mr. Manning.

10

Q That is all you know about it?

*Mr. Newcorn.* I offer this letter in evidence.

*Mr. Angleman.* No objection.

*Mr. Newcorn.* And also the envelope.

Said letter, dated March 18, 1920, is marked Exhibit C. 8. And said envelope is marked Exhibit C. 8½.

Q I show you a copy of the notice addressed to William J. R. Thiers and I ask you whether that is your signature? A It is.

Q That is one of the notices served? A Yes.

20

Q I show you a communication signed "C. D. Manning," and ask you—also addressed to Thiers—and ask you whether or not this communication accompanied the notice? A Yes.

Q That is the communication that accompanied the notice? A Yes.

*Mr. Newcorn.* I offer them together.

Said papers, dated December 31, 1919, are marked Exhibit C. 9.

30

Q You are ready to execute those mortgages today? A Yes, sir.

Q And take title to the property? A Yes.

Q And pay the balance of the consideration? A Yes, sir.

*Cross examination by Mr. Angleman.*

Q Before Mr. McLaughlin returned the check for \$1,000, did he submit the letter and the check to you? A No, sir.

Q How long afterward did you learn that the check had been returned? A How long after it had been returned?

40

Q Yes. A Why, I couldn't say exactly as to that, Mr. Angleman.

Q Did you not have any conversation at all with Mr. McLaughlin in reference to the matter? A No, I had my conversations with Mr. Manning.

Q How did you learn Mr. McLaughlin had this check? A Mr. Manning told me.

*Charles C. Randolph, cross.*

Q Did you try to get into touch with McLaughlin? A No, sir.

Q Was the return made after that? A It was made after that, as I recollect.

Q You told Manning to tell him to return it? A Yes.

Q You say Mr. Manning has no interest in the property? A 10  
None whatever.

Q Can you explain then, why Mr. McLaughlin should take up the check with Mr. Manning? A Because Mr. Manning acted as my agent.

Q You said Mr. McLaughlin had acted as your agent? A No, sir.

Q I think so? A No, sir.

Q When did you first have any conversation with Mr. McLaughlin relative to this property? A At the conference with Mr. Rafferty at Mr. McLaughlin's office. 20

Q You had nothing to do with Mr. McLaughlin prior to that time? A Nothing whatever.

Q How did you happen to go to Mr. McLaughlin's office for the conference? A At the request of Mr. Manning. Mr. Manning said that Mr. McLaughlin had told him Mr. Rafferty would be there and wanted to have a talk about the transaction.

Q You said Manning was your agent throughout the whole transaction? A Yes.

Q Is Mr. Manning interested in the financial outcome of the sale of the property? A No, sir. 30

Q He has no interest in the property? A No, absolutely.

Q No one has any interest in the property beside yourself? A No one, absolutely no.

Q Nobody? A No.

Q When was the first time you had any conversation or communication with Mr. William Rafferty with regard to the matter? A I think it was at the conference at Mr. McLaughlin's office.

Q Can you fix that date? A I can't, Mr. Angleman, not exactly. I think it was some time in January.

Q The title was to be passed the first of February? A Yes. 40

Q This conference was before the title was to be passed? A I think so.

Q At that time you understood from Mr. William Rafferty that the heirs objected to the executors giving the deed? A I did.

*Clifford L. Manning, direct.*

Q At that time you understood that the objection was to Mr. Manning having anything to do with the matter, too, as I understand it? A I think there was something said about their taking exception to the notices being served by Mr. Manning. I asked Mr. Rafferty if I could talk to the sister and mother and he said  
10 he would try to arrange a conference, but he never was able to arrange.

Q You knew Mrs. Rafferty was ill in bed at the time, didn't you? A I did. That is why I asked to go up to the house.

CLIFFORD L. MANNING, a witness produced on behalf of the complainant, being duly sworn, testifies as follows:

*Direct examination by Mr. Newcorn.*

Q Mr. Manning, you are located in the City of Plainfield? A  
20 Yes.

Q What is your business? A Real estate and insurance.

Q And were you connected with this transaction between the Raffertys and Randolph? A I was.

Q Who first saw Mr. McLaughlin in regard to making a proposition in Mr. Randolph's behalf? A I think Mr. Nathanson came to my office and wanted to know if I had someone who might purchase this property. He thought it was reasonable and might be all right to buy. I immediately thought of Mr. Randolph, knowing he had some money and was interested in such things and I took it up with him.  
30

Q Were you the first one to approach Mr. McLaughlin? A Yes, I took it up with him.

Q You submitted the proposition to Mr. McLaughlin? A I made an offer for Mr. Randolph of \$35,000 for the property.

Q As a result of the negotiations, did you take any part in the closing at the time of the signing of the contract? A Absolutely none.

Q Weren't you at the office of Mr. McLaughlin when the contract was delivered? A Not when it was delivered, no.

Q You were not there when Rafferty brought it? A No, I wasn't there.  
40

Q Were you apprised of the change in the original offer? A I don't know what you mean.

Q In behalf of Mr. Randolph, you made a proposition for the purchase of this property? A Yes.

*Clifford L. Manning, direct.*

Q What was the proposition? A That property, I think, subject to a \$5,000 mortgage and the lots free and clear, each house subject to the mortgage.

Q And the title to be paid— A \$35,000 was the original price.

Q Were those contracts changed? A They were changed; 10  
the mortgages were changed to \$4,000 and the cash to \$15,000, and it was five and ten thousand dollars before.

Q They were the contracts finally signed? A Yes.

Q You are a witness to Mr. Randolph's signature on the contract? A Yes.

Q At the time that you submitted those contracts to Mr. Rafferty to sign, do you know whether or not Mrs. Rafferty and Mary Rafferty had signed the contract? A I think they had.

Q Don't you know? A Not positive. 20

Q Possibly an inspection of the instrument may refresh your memory? Look at the instrument and tell me whether or not the contracts had all been signed, if you can recollect? A I think they had.

Q That means nothing. I want to know if you can recollect? A I cannot.

*The Court.* I think the thing is obvious. You need not press it.

Q After the signing of the contracts in Mr. Randolph's behalf, were you authorized to do anything? A In advising Mr. Randolph to buy the property— 30

Q After the signing of the contract in Mr. Randolph's behalf, were you instructed to do anything? A Yes.

Q What? A To get Mr. Rafferty to carry out his agreement to give us notices to get possession of the properties.

Q Was that understood that Mr. Rafferty was to furnish you with the notices? A Yes, sir.

Q Did he do so? A He did not.

Q What did you do then? A I called up Miss Rafferty. 40

Q When? A I think the first time was about a week before the first of the year, I asked her if she would let me see those leases in order that I might have the dates of them and know how to serve the notices and who to serve them on and the conversation was very unsatisfactory.

*Clifford L. Manning, direct.*

Q What did she say? A She didn't say anything; she wouldn't see me, that's all.

Q Then you called up again when? A A day or two before the first of the year, and someone answered the 'phone and I told them who it was and the word came that Mrs. Rafferty  
10 would not talk to me.

Q Did you try to get in touch with Will Rafferty? A I did call him up once or twice.

Q Did you get the data from him? A No, he said he couldn't obtain it and I think he said he would come out and get them for me, but never did.

Q Did he furnish you the data? A No, he did not.

Q You served the notices, however? A I did.

Q And Exhibit C.9, which I show you, is one of the notices  
20 that was served? A Yes, sir.

Q And the letter underneath, is that the original letter that accompanied the notice attached? A It is.

Q How many others did you serve? A Three others.

Q Prior to the time you called Mr. Rafferty up on the 'phone, had you heard anything about the Raffertys being dissatisfied with the contract or having no objection to you taking part in the transaction? A No, my relations with the Raffertys have always been most friendly.

Q When did you first hear that the Raffertys desired to  
30 rescind the contract? A Why, I think it was at the conference that we had with Mr. Rafferty at Mr. McLaughlin's office.

Q What month was that in? A Some time in January.

Q Was there any reason assigned then why they wanted to rescind? A No real reason.

Q What reason did they assign? A None at all; simply that they wouldn't sign the deeds. That was all the reason given to me.

Q You knew about his returning the check to Mr. McLaughlin?  
A I do.

Q And you also knew about Mr. McLaughlin returning it to  
40 him? A Yes.

Q Were you present on December 31st at his office when Mr. Randolph went there to close? A I was.

Q Tell us what Mr. Randolph did? A Went in and spoke to Mr. Randolph and tendered the money and Mr. Randolph said

*Clifford L. Manning, cross.*

he was sorry he hadn't been able to get the deed signed by his people.

Q During the month of March, were you at my office? A Yes, sir.

Q What was your object in being there? A Why, I think Mr. McLaughlin or you informed me that the Raffertys were going to close the title and I was to get Mr. Randolph and come up. 10

Q Did you give that message to Mr. Randolph? A I did.

Q Have you any financial interest in this transaction other than that of agent? A I have not.

Q Are there other properties you have charge of for Mr. Randolph? A Yes, one.

*Cross examination by Mr. Angleman.*

Q Are you interested with Mr. Randolph, you are, aren't you, you are interested with Mr. Randolph in other properties? A I have been, one or two, and others I have bought for him and had no interest in. 20

Q He and you operated together? A No.

Q You have? A In one or two instances, but not in whole.

Q And how did you first learn that this Rafferty property could be purchased? A Through Mr. Nathanson.

Q Then what did you do when you learned that? A I communicated with Mr. Randolph and got an offer from him for it.

Q Then what did you do? A Submitted the offer. 30

Q Through whom? A Mr. Nathanson, I think.

Q When did you first see Mr. McLaughlin in regard to the matter? A Within a day or so.

Q You were present at the conference in McLaughlin's office when it was learned you couldn't get the deed, were you? A I was present at a conference at Mr. McLaughlin's office when Mr. Rafferty and Mr.—

Q Mr. Rafferty said he couldn't get the deed? A Yes.

Q What reason did he give? A Nothing, except his mother wouldn't sign it. 40

Q Wasn't he asked for a reason? A Yes.

Q What answer did he give? A He couldn't get them to sign them.

Q Your relations with the Raffertys have been pleasant? A Yes.

*William V. Rafferty, direct.*

Q Don't you remember trouble as to insurance? A Yes, I went to a good deal of trouble in that matter and I collected some thirty-five or forty dollars that they were not entitled to and—

Q Did you have some dispute with them at the time? A The policies were all wrong and it was only through the courtesy of our agent or me that they got any money, and they got all the money that was coming to them.

Q They say you hadn't attended to the matter properly? A No, they continued that insurance.

Q You have had no new insurance? A No, I had renewals paid me since the argument about that little loss they had.

COMPLAINANT RESTS.

PAUL R. COLLIER, a witness produced on behalf of the defendant, was duly sworn.

*Mr. Angleman.* I offer in evidence a panoramic view of the properties in question made by Paul R. Collier, a photographer of Plainfield.

Said picture is marked Exhibit D. 1.

*Mr. Angleman.* I offer in evidence five separate pictures of the houses, one of each house.

Said pictures are marked Exhibits D. 2, D. 3, D. 4, D. 5 and D. 6.

WILLIAM V. RAFFERTY, a witness produced on behalf of the defendants, being duly sworn, testifies as follows:

*Direct examination* by Mr. Angleman.

Q Mr. Rafferty, how old are you? A Thirty-one.

Q And a member of the Bar of this State? A Yes, sir.

Q You are a son of Mrs. Rafferty, one of the executors of this estate? A Yes, sir.

Q Will you state what took place in the beginning of this transaction and how you came to be interested in it? A I forget the date, I don't remember. It was the latter part of October or the first of November I received a telephone call from Mr. McLaughlin in my office at Newark. He spoke to me about the property on Grant avenue, in Plainfield, asking me whether the folks wanted to sell it. I said, "I don't know positively, I haven't seen them lately. I live in Newark. I haven't spoken to them

*William V. Rafferty, direct.*

about the property." "Well," he said, "will you get in touch with them or find out whether they do want to sell?" I said, "Well, I'll see whether they do or not." So, I believe, a few days later I was in communication with Mr. McLaughlin again about it and he asked me to give them a price on the property and I told them I didn't know just exactly what figure to give them and I believe then he made an offer, I think the offer was around \$33,000, and I said, "No, I don't believe that would be satisfactory at all." Then I did write to him a letter, the letter which was here, setting forth the consideration as being \$42,300. I believe it was, and subsequent to that, he called me up and spoke about having a man who was willing to pay \$35,000. I said, "Well, I'll see what I can do," and of course, there was a few other conversations. I believe he did come to my office; I don't know whether it was once or twice. I remember distinctly one night quite late, I think about half-past five or quarter of six he did come to my office and we talked about the situation and, of course, the result was this agreement. 10

Q What followed after the signing of the agreement? A After the signing of the agreement in the afternoon, the very afternoon the agreement was signed, I received a telephone message from Mr. Manning and he was asking me about these different notices and I said, "Who is this?" I didn't know it was Mr. Manning first. He said, "This is Mr. Manning." "Well," I said, "I don't know you in this matter at all, Mr. Manning." I said, "I never heard of you at all in this transaction." I think those were the very words I used. He said, "Oh, well, I am very much interested in this." I said, "I didn't know that, it is news to me, absolutely." "Yes," he said, "I am very much interested in it." I said, "Very well," and that was all that was stated that day to me. That very night I got into communication with Mr. McLaughlin and asked him about Mr. Manning's interest in the matter and he told me at that time, he said, "I don't know of anything Mr. Manning has to do with the situation at all." He told me that. I said, "Well, he called me up." He said, "I don't know why he did, but I don't know anything about it." I said, "He told me he was very much interested in the matter and I will assure you that my folks, if they knew that, would not have entered into these negotiations at all." I told him that, I think, first to his brother and then he called me back and I told him absolutely what I am saying now. If I had known 30 40

*William V. Rafferty, direct.*

it I would have had nothing to do with the transaction as far as Mr. Manning was concerned. He said, "I don't know that he is connected with it." I said, "He told me he was; he told me this afternoon absolutely that he was," and I believe I did ask him whether he was financially interested. I think I used those very words, if I am not mistaken. It may be I didn't, but I feel certain I did, and he said, "Yes." And then afterwards I immediately got in touch with Mr. McLaughlin and told him as far as I was concerned the deal was off. He said, "I'll tell you what I can do. I'll see Mr. Randolph and I don't believe Mr. Randolph will want to get into any suit. I think he would withdraw all right. I don't think there will be any trouble about it." I said, "I hope not. I don't want to go into court and I know positively my folks don't." He said, "No, I don't believe they will have any trouble." "Of course," he said, "I can't say," but, he said, "I don't believe we will have any trouble about it." I said, "I hope not. I don't want to get into any trouble." He said, "Neither do I." I said to him at that time, that was four o'clock a couple of days—

Q After the contract was signed? A After the contract was signed, yes. At that time I offered him the check and he said, "No." That was a day or so—he said, "Well, I'll take it up with Mr. Randolph and see if we can't get it fixed up." So probably a day or so elapsed and I heard nothing from him, then I sent him the check and, of course, he wrote the letter that Mr. Randolph would not withdraw from the contract.

Q What took place after that? A Well, after that I don't believe there were any further negotiations with Mr. McLaughlin. Oh, yes, there was; this conference they spoke about. Mr. McLaughlin said, "Well, see if you can't possibly get the deed signed." Well, I made an endeavor to and I said, "No, I can't do it, that's all. The sisters are objecting absolutely to the sale going through and they are objecting, of course, to Mr. Manning, I can't do it." I said, "I'll try." Then later Mr. Newcorn came in the case and Mr. Newcorn called me up and wrote me a letter and stated he didn't want to go into the Court of Chancery on the matter but would see if we couldn't get it settled. I said, "I don't know, they are absolutely objecting, they say the price is not sufficient and they will not sign the deed."

Q What took place after the conference? A Then there was this subsequent conversation, with Mr. Newcorn.

*William V. Rafferty, cross.*

Q After that what took place? A After that I saw Mr. Newcorn, I think, once or twice and tried, if possible, to get the thing settled, but there was the objection absolutely on the part of my sisters, who, of course, are the beneficiaries, as far as this contract is concerned. They absolutely said it wasn't a sufficient sum of money. Of course, they objected to Mr. Manning in the proposition at all. 10

Q Do you know what their objection was to Mr. Manning? A Except this proposition of insurance some years ago. I believe Mr. Manning, as I understand it, negotiated this policy of insurance and the number was wrong, I believe it was in the policy and so it didn't cover the property in question and they refused to pay. Of course, Mr. Manning was the broker and, of course, they felt that it was rather a technicality to stand upon when the question of loss came on.

Q Did they get any settlement of the loss as Mr. Manning said? A Hardly commensurate with the loss, though. There was some small settlement. 20

*Cross examination by Mr. Newcorn.*

Q Mr. Rafferty, you have been doing business for your mother and sister in their representative capacity—any business there was to be done there? A Well, yes.

Q You have no other attorney in the estate? A No.

Q What little legal business you have you have always attended to it? A Yes. 30

Q When you entered into negotiations with Mr. McLaughlin or when Mr. McLaughlin approached you, whatever you did was with the full knowledge of your mother and sister? A Well, I hadn't seen them every time.

Q Whatever you did was with her knowledge, you communicated to her the offer made? A Yes, they had knowledge of that.

Q And the counter-proposition that you made about reducing the mortgages from five thousand dollars to four, who suggested that in order to get more money for the estate? A I don't know whether that was my suggestion or the suggestion of the executors. 40

Q At the time when you placed the proposition up to your mother and sister, who else was present? A I can't state that.

*William V. Rafferty, cross.*

Q How many children or heirs-at-law lived at home, Mr. Rafferty? A There are six, I think it is.

Q Six out of how many? A Out of eight.

Q And you are one of the eight who do not live at home? A No, I don't.

10 Q The actual contract was not signed at all until December 23, 1919? A I believe it was probably around the first of November, maybe the fifth of November, that day.

Q Well, from November 5th until the contract was finally signed, December 23rd? A Yes.

Q And that contract was signed at your mother's home? A Yes.

Q By your mother and sister, both? A Yes, sir.

Q You were present and witnessed their signatures? A Yes.

20 Q Neither Mr. McLaughlin, Mr. Manning nor Mr. Randolph was present? A No.

Q You brought these contracts to Mr. McLaughlin's office and left them there for him to procure Mr. Randolph's signature? A Yes.

Q And up to that time everything was perfectly satisfied? A Well, as far as I know, I don't know what went on at home as far as the talking over the proposition was concerned, I know they were not entirely satisfied.

30 Q You had offered to sell this property to other agents at \$35,000, hadn't you? A No, I hadn't made any offer to any other agent at all. There were other agents that had spoken to me about it, but I had never spoken about it.

Q Mr. Abrams made you an offer of \$35,000 prior to Mr. McLaughlin? A Yes, a year and a half ago, probably.

Q As late as that? A Yes, because I think it was before I went into the service.

Q You were not very much concerned about Manning up to the time of the signing of the contract, were you? A I didn't know about him being in the transaction.

40 Q And you don't know now he is in it? A Except from his own statement.

Q He said he wasn't very much interested? A I think he said financially interested.

Q The time when you asked him this question was when you called him up to give him data from which he was to draw the notices to serve upon the tenants? A That was the occasion.

*William V. Rafferty, cross.*

Q You knew the notices were to be served on the tenants when the contract was delivered? A I had spoken about that to Mr. McLaughlin.

Q And you had— A I hadn't said anything to my folks as to that.

Q That had been arranged between you and Mr. McLaughlin? 10  
A Yes, it had been arranged.

Q Then when Mr. Manning called you up about that you became very much indignant? A I did, yes.

Q And you didn't furnish him with the material? A No, I didn't furnish him with the material.

Q Now, it wasn't until January 12th that you took up with Mr. McLaughlin the question of having Mr. Randolph rescind the contract? A No, I believe it was prior to that.

Q How much prior? A I think probably a week before that I had spoken to him. I went to New York on two or three occasions and saw him at the New York Life, I believe it is, and spoke to him about it. 20

Q But it was after you spoke to him that he advised you on January 12th that Mr. Randolph would not accept any rescision of the contract? A Beg your pardon?

Q It was after you spoke to him that you wrote to him on January 12th? A Yes.

Q And it was not until January 23rd that you returned the check for \$1,000? A That is true. The reason why—

Q That is all. I am trying to get the fact, Mr. Rafferty. And he returned that back to you? A Yes. 30

Q When you received that deposit of \$1,000 or Mr. McLaughlin's check, did you turn that over to your mother? A No, I kept it.

Q Under any instructions from anyone? A No, no positive instructions from anyone.

Q Your mother knew you had received— A Oh, yes; she knew I had received it.

Q —the deposit. And you retained her copy of the contract? A Yes. 40

Q You were to draw the deeds, were you not? A I believe that was the arrangement.

Q You were to draw the deeds? A Yes.

Q You were also to draw the mortgages? A Yes.

Q On account of the division of the property? A Yes.

*William V. Rafferty, cross.*

Q I presume you admit the tender of the money by Mr. Randolph in your office on— A Well, they came to my office on the first day of February and Mr. Randolph came in, and he had an envelope a white envelope, and he said, "Here is the \$14,000." I didn't see the actual currency. He simply said, "Here is the \$14,000." He didn't open the envelope at all.

10

Q You had no doubt that the money was there? A I didn't, of course, look in the envelope; I didn't know whether it was or not.

Q Did you have your deed ready? A No.

Q And when he said, "Here is the \$14,000," what did you tell him? A I told him my folks were objecting to it—my sisters, I think I told him, they didn't want to go through with it.

Q Your folks wouldn't go through with it? A My folks wouldn't go through with it.

20

Q You had some negotiations with me about some equitable adjustment of the matter? A Yes, sir.

Q As a result of the communication of February 7, 1920? A Well, I don't remember the date.

Q Well, did you make any effort to secure from your mother and sister the deeds? A Well, I, of course, went to see them about it but they simply stated that the sisters were objecting to it.

Q But you finally succeeded in getting them to consent to execute the deed, did you not? A No, I hadn't any positive consent, no, to the execution of it.

30

Q Did you request me to arrange to have Mr. Randolph at my office ready to close on or about March 20? A I believe I did.

Q Do you know what time that was fixed for? A I believe it was set for eleven o'clock, if I am not mistaken.

Q What time did you come to the office? A I believe it was around half-past twelve or quarter to one, probably a little earlier or a little later.

40

Q A little later, wasn't it? A I don't know, I couldn't say for sure. I know it was after twelve.

Q You had drawn the deed at that time, the deed was already drawn at your office? A I had a deed.

Q And you had the mortgages prepared? A I didn't have them quite ready.

Q You had drafted them? A Yes.

*William V. Rafferty, cross.*

Q And there were certain changes to be made? A Yes, there would probably have to be.

Q Neither your mother nor sister came to the office? A To my office?

Q To your office. A No.

Q And your final message when you called was what? A As I told you, I said my sisters are objecting and my mother and sisters, the executrices, will not sign the deed. 10

Q Had you advised your mother or sister to sign the deed? A I had left it entirely to them.

Q You still had the \$1,000? A Yes.

Q Who has that \$1,000? A I have it.

Q Still in your account? A Yes.

*By the Court.*

Q Mr. Rafferty, between the time that the contract was signed, or rather, between the time it was originally fixed for the closing of this matter, this settlement, and the time of the appointment in Judge Newcorn's office, you have had conversations with your mother and sisters and the rest of the family in regard to it? A I have been out to the home and spoken to them; yes, sir. 20

Q When you arranged with Judge Newcorn to have a time and place fixed at which his client should attend and the settlement should be made, you did so upon some idea that the deal would go through, did you not? A Well, I felt that perhaps that the executrices would sign after a conversation with them. 30

Q You were fairly certain, were you not? A I can't say. I was positively sure of it, although I did tell Mr. Newcorn that I would do my very best.

Q If you hadn't felt reasonably sure of it, you would not have had his client and himself stay there for that purpose, would you? A Perhaps you could say I was reasonably sure to a certain extent; yes.

Q What made you feel reasonably sure? A These talks was with mother and sister mostly. My mother is not very well and doesn't take a great deal of interest in the situation on account of her being sick. There always was this objection on the part of my sisters, always, and what I wanted to eliminate was any suit as far as the court 40

*William V. Rafferty, cross.*

was concerned. My sisters weren't well, either, and at that time even when the contract was signed my mother was quite ill at that time—

10 Q I am asking you about what happened between these two appointments? A I had two or three conversations and thought that perhaps it might be best to get them to sign, although I will say that it was not any positive assurance from them that they would sign.

20 Q What made you feel reasonably certain? A Well, I can't say positively what it was. I have had a few telephone conversations and been out there and talked it over. Of course, my sisters weren't there when I talked it over, and I didn't hear much what they had to say, but, of course, my sister said to me, "I don't want to get into trouble on this; I don't want to go in court, although I do feel we are not getting enough for it. I can't understand why Mr. Manning is in this proposition." I said, "I don't know." I said, "If you don't think you are getting enough that is a difficult question." I said, "Judge Newcorn has written me"—

Q This conversation went to the point where your mother and sister indicated to you that probably the best thing would be to go through with it? A They probably at one time had come to that point.

30 Q And at the time you made the appointment with Judge Newcorn, did you have these drafts of mortgages drawn? A Yes.

Q And you had drawn them after conversation with your sister and mother as to what they would cover? A Not in detail.

Q As to which houses they would cover? A Yes.

40 Q They relied upon your knowledge and ability as to what houses should be covered by them and the broad general propositions that had been discussed by you and agreed upon when you made this appointment with Judge Newcorn? A Yes, sir.

Q And you had drawn the deed at that time? A Yes, sir.

Q Have you the draft of the deed, and the bonds and mortgages? A Here?

Q Yes. A No, I haven't.

*William V. Rafferty, re-direct—re-cross.*

Q You don't recall what dates were on them, if any? A I don't recall I put any date in them at all. I think I left the dates out. I feel quite sure I left the dates out.

Q You have those drafts in your papers at the office? A Yes, they are in the office.

*Mr. Angleman.* The date of the conference in Judge Newcorn's office, was two or three days before we filed the answer. 10

*Mr. Newcorn.* That is right; the conference when the thing was being adjusted; that is, the later conference was on the day when the answer was due, and I extended the time for filing the answer, and endorsed upon the answer a consent to the filing of the answer within time.

*The Court.* Which was after the suit had been commenced? 20

*Mr. Newcorn.* Yes.

*Re-direct examination* by Mr. Angleman.

Q Why did you not return the \$1,000 check at the time you informed Mr. McLaughlin that your sisters objected to carrying out the contract?

*The Court.* Is that important?

*Re-cross examination* by Mr. Newcorn.

Q This is your letter (handing witness a paper)? A Yes, sir, that is my letter. 30

Q And that was after we had been in conference several times? A Yes, sir.

Q In reference to the settlement? A Yes, sir.

*Mr. Newcorn.* I offer it in evidence.

Said letter, from Rafferty to Newcorn, dated Feb. 20, 1920, is marked Exhibit C. 10.

*By the Court.*

Q The defendants, your mother and your sister, as I understand it, would be entirely willing today to execute the deed and receive back the bonds and mortgages which you drafted, if the price was satisfactory, and if Mr. Manning had nothing to do with the proposition? A Well, I 40

*Mary E. Rafferty, direct.*

assume they would; I wouldn't want to say positively; I assume they would.

Q You have stated those as the only objections they had? A Yes; I assume they would.

Q Don't you know they would? A Yes; I assume they would.

10

MARY E. RAFFERTY, one of the above-named defendants, being duly sworn on behalf of the defendants, testifies as follows:

*Direct examination by Mr. Angleman.*

Q You are one of the executrices of the estate of John Rafferty, your father? A Yes, sir.

Q Your mother is the other one? A Yes, sir.

Q Your mother is ill in bed? A She is.

20 Q And not able to be here? A No.

Q Will you please state what the objection was to the following out of this contract and giving the deed to the property?

A The objection?

Q Yes. A Well, the principal reason is the price. My sisters object very strenuously to the price that we got for the property.

Q Was it on account of this objection that you refused to carry out the contract? A It was.

*The Court.* You are very leading.

30 Q Was there any other objection? A Oh, well, Mr. Manning—the day the agreement was signed—Mr. Manning called me up and said he would like the leases, and I said, "Who are you?" He said, "I am Mr. Manning, and I am very much interested in this affair; I would like you to give me the leases; in about a half an hour I will be up after them." I said, "Nobody has spoken to me about you; why would I give you the leases?" "Well," he said, "I'll be up tomorrow morning for them." Then I called my brother up and asked him if he knew about Mr. Manning being interested in the property, and he said, "No."

40 I believe then he got in communication with Mr. McLaughlin, and Mr. McLaughlin said he knew nothing about Mr. Manning being interested in the property. But between Christmas and New Year's, my sisters were home on a vacation, and we talked the proposition over, of course, and they very strongly objected

*Mary E. Rafferty, direct.*

to the price. I hadn't told them previous to that that we had sold the property.

Q Had you told them the price? A Of course, there was a couple of sisters home, and those sisters knew it, but the others did not know it.

Q Those others were not home? A Not home at the time.

Q How many sisters have you that are interested? A Seven sisters. 10

Q What did the other sisters say when they learned what you had done and the price at which you were to sell the property?

*Mr. Newcorn.* That is objected to.

*The Court.* I will permit it.

A Well, they were very much incensed that I should have done such a thing without their knowledge.

Q What did they say to you as to whether or not they would carry out the contract? A They objected very strongly to carrying out the contract. 20

Q Have you been able to get them to consent to your doing it? A I have not been able to get them to consent up to the present time.

Q What would have been your attitude in regard to signing the contract if you had known Mr. Manning had anything to do with it?

*Mr. Newcorn.* I object to that question.

*The Court.* Objection sustained. 30

Q Did you say anything to Mr. McLaughlin in regard to any objection to Mr. Manning? A I only had one conversation with Mr. Manning myself, and I spoke to him about it at that time.

*By the Court.*

Q That is the one you have just spoken about? A Yes; at the time I signed the contract I will admit that I probably wasn't in the condition to look into the matter seriously, my mother having been at the point of death six or seven weeks. 40

*The Court.* Strike that out. You must simply answer the question.

*Mr. Newcorn.* No cross examination.

RECESS UNTIL 2 o'CLOCK.

*Sarah M. Rafferty, direct.*

AFTER RECESS.

*Mr. Angleman.* How about these tax bills?

*Mr. Newcorn.* I will admit them for what they are worth.

10 *Mr. Angleman.* There are seven tax bills for the years 1918, 1919, 1920. I offer them in evidence.

Said bundles of tax bills, seven for each year, are marked Exhibits D. 7, D. 8, D. 9, respectively.

FRANCES TREADWELL, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

*Direct examination* by Mr. Angleman.

Q You are one of the daughters of the late John Rafferty?

20 A I am.

Q When did you first learn that the executors of the estate had made this contract? A Between Christmas and New Year's, when I came home on a visit.

Q You are one of the heirs? A Yes.

Q What did you say to them when you learned of it? A I told them I objected on account of the price, and didn't think they got enough money for the property; I objected very strongly.

Q What else did you say to them? A I asked my sister if she was crazy.

30 Q What was done in response to—what was done? A I suppose they considered the matter; I went home, of course; I don't know what they did; I suppose they started proceedings right after, I suppose.

Q Are you the oldest child? A I am the oldest child.

Q And you never receded from the position you took in the beginning? A No, I haven't, and don't intend to.

No cross examination.

40 SARAH M. RAFFERTY, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

*Direct examination* by Mr. Angleman.

Q You are one of the daughters of the late John Rafferty, and one of the heirs in this case? A Yes.

*Charles A. Hand, direct.*

Q When did you learn of this contract? A I heard of it from the beginning; I was one of those at home.

Q Did you know of it before the contract was signed? A Yes.

Q What did you say then? A I objected to it.

Q After the contract was signed, what did you say? A The same. We felt it wasn't enough money. 10

Q Have you ever changed your mind in regard to it? A I never have.

No cross examination.

CHARLES A. HAND, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

*Direct examination by Mr. Angleman.*

*Mr. Angleman.* We will admit the witness' qualifications. 20

*Mr. Newcorn.* His qualification as a real estate expert is admitted.

Q Have you inspected these properties belonging to the Rafferty estate on Grant avenue? A I have.

Q And have you made an estimate as to their value? A All of them and the lands, yes; all the houses and the vacant land.

Q Take the first one—

*The Court.* Does this contract comprise all the property of the Rafferty estate at Fourth street and Grant avenue? 30

*Mr. Angleman.* Yes, sir.

Q No. 401, what is your estimate? A \$6,500 is what that is worth to the average buyer, but for some certain purposes it is worth more.

Q What purposes? A Dr. Yood could afford to pay more than any other man, but in the average market \$5,500.

Q The next is 405 Grant avenue? A Yes, sir; \$8,000.

Q The next is a vacant lot between 405 and 415? A No, I don't understand that to be a vacant lot; I understand that half goes with each house. 40

Q That is in your estimate? A Yes.

Q The next is 415? A That is \$8,500.

*Charles A. Hand, cross.*

Q The next is 417? A \$8,500. All of them three is worth about the same money.

Q And the last one is 515? A The same price, \$8,500.

Q Do those properties all take in the vacant lot? A No, that one takes the house and lot; there is some lots in between; one piece of ground has got 165 feet and one 100 feet.

10 Q What is the land worth there? A \$40 a running foot, 196 feet deep.

Q What is your estimate of the value of the entire tract? A I can't tell; I didn't figure it.

Q The land is worth \$40 a foot? A Yes.

Q How many feet? A 265 in one plot and 100 in the other; there is one lot cut in half with the two houses. That's what I think today, that's not what I would have thought a year ago.

Q What, in your estimate, would have been the value at the time this contract was signed last December? A It would not have been quite as high.

Q How much difference? A There would have been \$500 on each house less, on each house and lot.

Q Was the land worth any less then? A No, the land ain't worth any higher today than three years ago.

Q You base that upon the sales you know of? A No, I base that on what I have heard others holds it at out there, and what I have done down that way in years gone by.

Q You think that is a fair price? A Yes.

30 *Cross examination by Mr. Newcorn.*

Q You have not been engaged in the real estate business for a number of years, have you? A The last year I have been, but not for some years before that.

Q Have you made any sales in that vicinity there yourself? A No, I haven't made any in four or five years.

Q Have you made any sales or do you know of any sales made by anyone else in that vicinity? A No, I don't know of any.

40 Q Is there anyone owns any real estate on Grant avenue from West Fourth street up to the end of this lot? A Anyone else?

Q Yes. A Yes, there is houses opposite that.

Q Do you know the value of the land on the other side? A Only what I have heard.

Q Did you examine these buildings? A No.

*Charles A. Hand, re-direct—re-cross.*

Q What did you do? A I looked on the outside only.

Q Would you say that the last house in December would still be worth \$8,000 if you had examined it and found it would require \$3,000 to repair it, by placing a new roof on and making the other repairs? A I didn't go inside, but what I could see outside is what I judged by.

10

Q Just the external appearance? A Yes, I didn't go through that.

Q You have no knowledge of a sale in the vicinity, or the value of the land? A All I know is what has been done all over town, and what I have done in the east end.

Q You don't know what the rental is? A No, I know what they ought to be, but not what they are.

*Re-direct examination by Mr. Angleman.*

Q What had they ought to be? A \$50 and \$60 and up. A house like one of those, in order, would rent for \$80 per month; I don't know what they bring at all.

20

*Re-cross examination by Mr. Newcorn.*

Q You were not advised that Dr. Yood only paid \$40? A I don't know.

Q If you were advised of the fact that the land there was \$40 a foot, would you still make the same appraisalment? A Yes.

Q And if you were advised of the fact that the rent was \$40 a month for each house, would you still make the same appraisalment? A Yes; houses don't bring half what they are worth sometimes; he has got a lease on it, I presume.

30

Q Isn't the value of the house what it will bring in the open market? A No, not in rental.

Q But the value? A Oh, yes; it is what it will bring in the open market.

Q Not what the owner places upon it? A No, what you can get for it.

Q You don't know of any property in the vicinity that has been sold recently, by which you can measure the value? A No, not there, but I have around town.

40

Q You value the adjoining property at \$8,000, and would you say it was still worth \$8,000 if you were informed that it brought

*Charles A. Hand, re-direct—re-cross.*

\$5 a month rent less than the corner house? A Yes, I wouldn't figure the rent; it isn't what it rents for.

Q You understood I was talking before about the corner house renting for \$40? A Oh, yes.

Q You didn't examine these houses? A Not on the inside.  
10 I assumed the houses were in order.

Q You assumed they were in order? A Inside, yes.

Q You knew they belonged to the Rafferty estate? A Yes, sir.

Q And you still assumed they were in order? A Yes; when the old man was alive his houses were all in order.

Q How long has he been dead? A Eight or ten years.

Q No longer than that? A I don't know.

*Re-direct examination by Mr. Angleman.*

20 Q The houses that have a lot with them, that would increase their value? A Yes.

Q That would increase their value? A It would for me.

Q You are a builder yourself? A I have handled a few.

Q How many have you built? A 480 houses and owned them all.

Q Have you sold your own property? A Within the last six months I have sold nine houses and eight lots of my own, and three houses of other people's.

30 Q You are well informed about the value all over town? A I don't know it all, but I know as much as the average man.

*Re-cross examination by Mr. Newcorn.*

Q You are still willing to sell all the properties in the City of Plainfield at their appraised value? A Yes.

Q At the assessed value? A No, because real estate there ain't assessed for over 80% of what it is worth, except where they get a little enmity against a man.

40 Q Did you or did you not offer to sell all the property you owned in the City of Plainfield at its assessed value? A No, sir.

*By the Court.*

Q I understood you to say you had. A Not at the assessed value.

*Albert Lederer, direct—cross.*

Q At what value? A At what three real estate men would say it was worth.

*Re-direct examination by Mr. Angleman.*

Q The appraised value? A Yes.

Q You were assessor of the City of Plainfield at one time? 10

A Yes.

Q When did your term expire? A Six or eight years ago.

*Re-cross examination by Mr. Newcorn.*

Q That was assessor of the Second Ward? A Yes, sir.

Q Not this ward? A No.

ALBERT LEDERER, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

*Direct examination by Mr. Angleman.*

20

(The witness' qualifications as an expert are admitted.)

Q You have looked over this Rafferty property at Grant avenue? A I have.

Q And formed an estimate of the valuation? A I think so, yes.

Q Please give them, what values you have got or made. A Number 401 Grant avenue, that is the corner of Fourth street, \$4,700; No. 405, \$6,500; No. 415, \$6,500; No. 419, \$7,000. There is a lot there, 423 to 511, 265 feet, \$9,275; and house, 513 Grant 30 avenue, \$7,000; a lot, 517 Grant avenue, 100 feet by 196 feet, \$3,900.

Q Did you total your entire appraisal of the property? A \$42,275.

Q Does that take in all the vacant lots? A Yes, sir.

*Cross examination by Mr. Newcorn.*

Q Mr. Lederer, have you sold any property in the vicinity of Grant avenue and Fourth street? A Not lately.

Q How long ago since you have made a sale there? A Oh, 40 I should think five or six years ago, on Grant avenue.

Q Your specialty is mainly the sale of business properties? A Yes.

Q And this is a mile from the center of the business town? A Yes, sir.

*Albert Lederer, cross.*

Q You don't know any values in the vicinity of Grant avenue or sales, so as to get at the value of the land? A No.

Q You didn't examine the buildings? A The exterior.

Q But you didn't go inside? A No, I didn't think it was necessary to do that.

10 Q You did not, in forming your estimate, take into consideration the condition of the buildings themselves, as to whether they would require any repairs or not? A No.

Q You attempted to sell this property, did you not? A I did.

Q And you offered this property for \$35,000, did you not, Mr. Lederer? A I offered \$35,000 for it.

Q Didn't you offer it for sale? A I did offer it for sale.

Q For \$35,000? A No, I had no authority to offer it for \$35,000.

20 Q You did offer it for sale, did you not? A Well, I asked the Rafferty people whether they would be willing to sell it.

Q For \$35,000? A I tried to buy it for less than that.

Q How much? A \$34,000.

Q Didn't you say you had a bona fide customer for \$33,000? A Yes.

Q You offered them \$33,000? A Yes, I offered them \$34,000; I had authority to offer more.

Q And they refused to accept those offers? A They didn't feel like selling at all.

30 Q How long ago was that? A If I remember correctly, it's the first week in the month of December, 1919.

Q Well, they were negotiating with Randolph at that time; you knew they were negotiating with Randolph in December, 1919? A They were negotiating with someone; I didn't know who it was.

Q They didn't want to sell at all? A Well, I couldn't get any satisfactory reply, and I gave them up; I wouldn't be bothered with them.

Q The highest you went was \$34,000? A Yes; I had authority to go a little higher.

40 *By the Court.*

Q What did you mean by saying you did offer these properties for sale, although you had no authority to do it? A I approached them about the property, Miss Mary Rafferty, and then I was referred to the brother,

*Albert Lederer, re-direct—re-cross.*

and we talked about it and tried to get down to figures, but there was nothing definite.

Q You said you had offered this property for sale without authority? A Well, that is, they seemed to be willing to sell it.

Q Are you referring to this same proposition, \$33,000 or \$34,000? A Yes, sir. 10

*Re-direct examination by Mr. Angleman.*

Q Did they state any price to you at the time? A Nothing definite; they wouldn't get down to anything definite, Mr. Angleman, so I didn't negotiate any further.

Q How near is this property to the Grant avenue station on the railroad? A Three blocks away.

Q What would you say as to the value of the property there now, and the value of the property in December? A I don't think it has increased any; I don't see why it should since December. 20

*Re-cross examination by Mr. Newcorn.*

Q Do you mean to say that prices have not increased between December and today? A No, because there is nothing selling there in that particular neighborhood.

Q You mean in that particular neighborhood? A No.

Q Nothing selling? A Nothing selling, only houses for three or four thousand dollars.

Q And hasn't been for a number of years? A There are houses selling in that— 30

Q Not in that neighborhood? A No, I think the last sale made in the neighborhood is Dr. Cregar, across the way.

Q That is about ten years ago? A Yes, sir.

Q And that is in the factory district of the city? A When you get down to Second street.

Q You get a line of factories there? A Yes.

*Re-direct examination by Mr. Angleman.*

Q That district is a residential district? A Yes, it is. 40

Q That is the reason there have been no sales? A Only three or four sales.

DEFENDANTS REST.

*Morris Abrams, direct.*

MORRIS ABRAMS, a witness produced on behalf of the complainant, being duly sworn, testified as follows:

*Direct examination by Mr. Newcorn.*

Q Mr. Abrams, you live in the City of Plainfield? A Yes, sir.

10 Q How much real estate have you sold within the last four months in the City of Plainfield? A About a million dollars.

Q You are familiar with the properties on Grant avenue? A Yes, sir.

Q You know the Rafferty houses? A Yes, sir; I tried to sell it for two years' time. I approached Dr. Yood to buy that, and he offered me \$4,500 for the corner.

Q Did you have any negotiations for the two properties with the Raffertys? A Yes.

20 Q Which one? A The corner and the lot and the house next door; I offered him \$9,500 for the two, and he wanted \$11,000 for the two.

Q And that includes the lot of 50 feet? A Yes, I wanted the 50-foot vacant lot, and he wouldn't give me.

Q What is the condition of those houses? A In bad order; they need \$1,000 apiece to fix it up.

Q How about the last one? A The last one needs a new roof, next to seven, they are near Charlie Sebring's.

30 Q What is the value of the land in that vicinity? A The best offer is \$20 a foot for this same ground; I told Rafferty I would offer him the price he wanted, twenty-five.

Q What was this place worth on the lots? A The corner one now, after December 1st, the market is higher now, is worth \$500 apiece more, now when everybody is looking to buy a house, he is willing to pay \$500 apiece more; the corner house is forty-eight or five thousand dollars. I can get a better one than that.

Q Is that the value of the building and land? A Yes.

Q What price did you put on the adjacent one? A The second one is worth about \$5,500.

40 Q Are you considering the extra 25 feet? A No, the ground is separate; about 60 foot front, and the building is worth \$5,500.

Q What value do you put upon the remaining three buildings? A The third one is worth at present conditions \$5,000.

Q I am speaking of December. A \$5,000 apiece, the three, except the last one; the last one is worth \$4,500.

*Morris Abrams, cross.*

Q Then, as I understand it, the corner one you fix the value of forty-eight to five, the next three at five and the last one at forty-five? A Yes.

Q That is based upon the condition of the buildings? A And the ground, too; the ground is worth \$20 a foot; he got 50 foot between one house and between the corner lot and next door, and the next door 261 or 265 feet is worth \$20 a foot, and the 100 feet, near Seventh street, that is worth about \$17 a foot, to the end; that is the worth of the lot; the ground has been filled; the trouble—every real estate man, he don't know that valuation; what I claim the valuation, what I can sell it, that's what I claim the valuation; that must be filled. 10

Q That has to be filled up? A Yes, sir.

Q According to your figures, the total is \$31,221. Have you taken into consideration everything that should be taken into consideration in appraising the value of the land and the property? A Worth about \$33,000, no more, all included, the highest. 20

Q Have you ever had any dealings with the Raffertys in connection with the purchase of this particular property? A Yes, sir, and I come and I try to sell for Mr. Rafferty the two houses.

Q You said that; I mean about the entire tract? A Yes; I offered Mr. McLaughlin, I had a customer for \$33,000, and then after that I said I got another party may be interested, he told me he can buy through every agent in town for \$35,000. I asked Mr.—and my party wouldn't pay more than \$33,000. 30

Q Did you make that as an offer? A Yes, I made that offer to Mr. McLaughlin, \$33,000 bona fide, for \$8,000 cash and the balance mortgage.

Q Did you see Mr. William Rafferty about that? A No, not this time.

*Cross examination by Mr. Angleman.*

Q You are in the shoe business, aren't you? A No more.

Q When did you sell out? A I turned over to my children about three years ago. 40

Q You are not further interested in it? A Yes, I am interested in lots of things.

Q You formerly had a shoe business? A Yes, sir.

Q You have a real estate office? A Yes.

*Morris Abrams, cross.*

Q Where? A Upstairs; I got separate office, real estate office.

Q Most of your transactions have been in the sale of business properties? A No, I sell more of houses.

Q Have you sold any property in this neighborhood? A Yes.

10 Q Where? A And I got one for sale—

Q Have you sold any? A I sold one corner of Fourth street, the third from the corner.

Q Fourth and what? A Grant avenue.

Q Where? A Between Grant avenue and Lee place.

Q Fourth street? A Yes.

Q When did you sell that? A About four months ago.

Q What did you get for that? A \$4,800.

20 Q Isn't it as large as these houses? A Bigger yet; I got across the street from the other corner for sale—one house and three lots—Manning's estate.

Q Do you mean to say that house on Fourth street was larger than that house? A A bigger one.

Q What is the number? A It is face to Fourth street.

Q What is the number? A I can't remember the number.

Q Larger than that one? A Larger.

Q Well? A Larger than these; I sold the house larger than that for \$4,800.

30 Q Do you say that this complainant, in giving \$35,000 for this house, was stuck? A I would not give it; I am a speculator; I would buy it myself if it was worth the money.

Q Are the figures you give figures you offer for it for speculation or for investment? A For investment I wouldn't buy that at all, that is no good for investment; it good for—

Q You would buy this for speculative purposes? A Yes.

Q The price you put on is a speculative price? A No, a speculative price, that is worth \$30,000.

Q Did you think the same last December? A Yes, I told Mr. McLaughlin.

40 Q You went to him and got a big percentage? A No, that's not enough to make 10%, I am satisfied.

Q Did you include the vacant lots in your estimate? A Yes, I will sell you better vacant lot in better location for \$20 a foot.

Q On what facts did you base your estimate as to the vacant lots being \$20 a foot? A Whatever you can get.

*Joseph Nathanson, direct.*

Q On what do you base that statement? A I tried to sell it, and the best offer I had for 50-foot lot was \$1,000.

Q That's what you base it on? A Yes, that is the market price.

Q When did you get that offer? A I couldn't get the offer; that is worth less now; the material is high; that is when Mr. McLaughlin— 10

Q Do you mean to say because material for houses is high the value of land decreases? A Yes.

Q This is a good residence neighborhood? A If somebody wants to live there.

Q It is right near Seventh street? A No, sir; that is worth there in the corner—Sebring made that three-family house there, and that is low ground there next.

JOSEPH NATHANSON, a witness produced on behalf of the complainant, being duly sworn, testified as follows: 20

*Direct examination* by Mr. Newcorn.

Q Mr. Nathanson, you are in the real estate business in the City of Plainfield? A Yes.

Q How long? A Twelve or thirteen years.

Q In that business? A Yes, building and real estate.

Q Also in the building business? A Yes.

Q Are you familiar with the Rafferty property? A Yes, sir.

Q Did you examine the same? A Yes. 30

Q And you examined the exterior and interior of the buildings? A I have been in one of the properties; a party moved out in April or May 1st.

Q Of this year? A Of this year.

Q You were not in them in December? A No.

Q As a result of your examination, what have you to say as to the value of those buildings? A Well, the way I figure them, they are worth \$25,000, the five buildings besides the lots.

Q That is the average for the buildings; what about an average price on them? A That is. 40

Q That is an average price you put on them? A Yes, all of them.

Q For the buildings and the lots on which they stand? A Yes.

Q What is the value of the vacant land? A \$20 a foot.

*Joseph Nathanson, direct.*

Q What is the total vacant land worth? A \$35,000 for all of it.

Q That is for the whole thing? A Yes.

Q What is the condition of the buildings? A Everyone except the last one, is about \$1,000 repair, needs all decorating inside through and through, and outside needs painting and some of the carpenter work needs repairing, and the balusters need repairing, and some of the weatherboards, they were not painted in nine or ten years; and the last house needs a new roof. If you go in the attic you find the rafters all rotten, because I remember about four years ago a friend of mine used to live there who was in the carpenter business, and I went in that house and he talked about buying that house and putting it to the two-family house, and that time was very cheap, and he put on a new roof and rafters, and all down to the attic floor.

20 Q Have you had any dealings in connection with this very identical property? A Yes, I came in one afternoon.

Q With whom? A You mean about the conversation—

Q Have you had any dealings with regard to the sale of this particular property? A Yes.

Q With whom? A Mr. McLaughlin.

Q What was the nature of those dealings? A I came down to him one day about some other business, and he talked to me on that property; I said I wouldn't buy it, but I got a party that is interested, because they told me they got some money to buy property with. He said, "What have I," and I said, "I don't know"; he said, "Go and see what offer you can make." I went to Mr. Manning's office and he told me he got a party with money, and I asked him if he got his party and got money he might buy a good piece of property; he said, "Yes"; I told him what the property was; he said, "What do you think we could get it for?" He said, "What do you think it's worth?" I said, "\$35,000 to make a few hundred dollars on each one"; he said, "All right, I will talk to my parties," and after awhile he come in with Mr. Randolph and they came and made me an offer of \$35,000. We made the offer to Mr. McLaughlin, and Mr. Randolph told me Mr. Manning does more with Mr. Randolph—

40 Q Well, you didn't have any independent transaction with the Raffertys themselves? A No, I didn't.

*Joseph Nathanson, cross.*

Q You consider the sum of \$35,000 a fair and adequate consideration for the value of that land and building? A That's what I say.

*Mr. Angleman.* That is objected to.

Q In your judgment, from your knowledge of the property, and the examination you have made, Mr. Nathanson, would you say that \$35,000 is a fair market value for the property? A That is all it is worth; it is not worth a cent more. 10

*Cross examination by Mr. Angleman.*

Q Have you sold any properties in that neighborhood recently? A About a block away.

Q Which? A The corner of Lee place and Fort street; just as nice as where you live or Mr. Yood.

Q That is two block further? A No, it is one block. 20

Q Isn't Darrow the next block? A No, it's the next block.

Q You mean further from town, west of Grant avenue? A Yes, sir.

Q Further out? A Further out; just as nice as Grant avenue.

Q What did you sell that for? A \$4,600.00—ten-room house, all improvements.

Q How does that compare with these houses? A Just as good house, and better condition.

Q That is on Fourth street? A Yes. 30

Q What other sales have you had? A Further up on Monroe avenue.

Q That is some distance away? A Well, it is nice.

Q What did you sell for there? A Forty-eight and five thousand dollars.

Q How long ago was this? A Six or seven weeks ago I sold one there, \$4,800.00.

Q Did you make an estimate of the individual values of these houses or all together? A No, I figured them all together, what is the worth to fix them up and everything, and it would be \$35,000. 40

Q They need fixing up? A Yes.

Q What would you consider the values then? A If they fixed up the way I think, I would think they could be fixed up and spend about a thousand dollars, they would be \$15,000 more.

*Charles E. Randolph, direct—cross.*

CHARLES E. RANDOLPH, the above-named complainant, being recalled in his own behalf, testified as follows:

*Direct examination by Mr. Newcorn.*

10 Q Mr. Randolph, have you purchased land in the vicinity of this property within the last year? A I purchased a year ago last February vacant land on Seventh street, just within about three blocks of this property; it is on a very desirable street as compared with this.

Q What did you pay a front foot? A \$25.00 per front foot, with the land 325 feet deep, paved, curbed and sewered.

Q What kind of a house? A The houses built on that property cost eighteen to twenty thousand dollars to the house, and that cost anywhere from eight to twelve thousand dollars.

20 Q Is Seventh street a very desirable residential portion of the city? A Very desirable; I can buy all the land I want there for \$25.00 a front foot, with all improvements.

*By the Court.*

Q I didn't quite understand you. Did you say land on Seventh street has all improvements, paved, curbed and sewered? A Yes.

Q How as to Grant avenue? A The same.

*Cross examination by Mr. Angleman.*

30 Q Grant avenue is nearer the railroad station and nearer the trolley? A No nearer the trolley, but nearer the railroad station.

Q Why not nearer the trolley? A Well, it is, generally speaking, but the trolley turns and goes up to Seventh street.

Q And there is less vacant ground in this neighborhood than on Seventh street? A No; I would say it is about the same; two or three new houses built in there recently. The Harris house and the Boice house.

40 Q Don't you consider the price of land has gone up since then? A No, I wouldn't consider it; I can buy it at \$27.50 a front foot, adjoining houses, just put up, costing \$27,000 to build, and just completed.

*Mr. Newcorn.* I offer in evidence an exemplified copy of the will of John Rafferty.

Said copy of will is marked Exhibit C. 11.

*Offer of Documentary Evidence.*

*Mr. Newcorn.* I offer the bond and mortgages in evidence.

I offer in evidence an undated deed (year 1920), from Bridget Rafferty to Charles C. Randolph, conveying land at the intersection of Grant avenue and West Fourth street, Plainfield, Union County, New Jersey, 715.03 feet and 226.95 feet. 10

Said deed is marked Exhibit C. 12.

*Mr. Newcorn.* I offer in evidence a mortgage made by Charles C. Randolph, *et ux.*, to Bridget Rafferty, *et al.*, executors, dated March 31, 1920, in the sum of \$4,000 for three years, at 5% per annum, covering premises at intersection of Grant avenue and West Fourth street, Plainfield, Union County, New Jersey, 58 60/100 feet by 196 32/100 feet. 20

Said mortgage is marked Exhibit C. 13.

*Mr. Newcorn.* I offer in evidence the bond accompanying the same, between the same parties, of \$8,000.

Said bond is marked Exhibit C. 14.

*Mr. Newcorn.* I offer in evidence mortgage (between the same parties, same date and same amount) covering land on Grant avenue, Plainfield, Union County, New Jersey, 23 47/100 feet distant from Port avenue, covering premises 57.43 feet by 96.49 feet.

Said mortgage is marked Exhibit C. 15. 30

*Mr. Newcorn.* I offer in evidence bond accompanying same.

Said bond is marked Exhibit C. 16.

*Mr. Newcorn.* I offer in evidence mortgage (same parties, same date, same amount, etc.), covering premises on Grant avenue, Plainfield, Union County, New Jersey, 58.61 feet distant from Fourth street, 50 feet by 196.34 feet.

Said mortgage is marked Exhibit C. 17.

*Mr. Newcorn.* I offer in evidence the bond accompanying the same. 40

Said bond is marked Exhibit C. 18.

*Mr. Newcorn.* I offer in evidence mortgage, same parties, same date, same amount, etc., covering premises on

*Oral Conclusions of Vice-Chancellor.*

Grant avenue, Plainfield, Union County, New Jersey, 158.61 feet from Fourth street, 50 feet by 196.37 feet.

Said mortgage is marked Exhibit C. 19.

*Mr. Newcorn.* I offer in evidence bond accompanying same.

10 Said bond is marked Exhibit C. 20.

*Mr. Newcorn.* I offer in evidence mortgage, same parties, same date, same amount, etc., covering premises 280.61 feet from West Fourth street, Plainfield, Union County, New Jersey, 50 feet by 196.39 feet.

Said mortgage is marked Exhibit C. 21.

*Mr. Newcorn.* I offer in evidence bond accompanying same.

Said bond is marked Exhibit C. 22.

20 *The Court.* (After argument.)

The two defenses were, that there was in some way a misrepresentation or deceit, and, second, an inadequacy of purchase price.

The proofs were absolutely barren of testimony to support the allegation of deceit and misrepresentation. Taking it at its fullest value, the only thing testified to touching upon the defenses thus raised was the testimony of William V. Rafferty and one of the daughters, that they, after the contract was signed, found out that Mr. Manning was in some wise interested in the matter, and that they then made objection. There was absolutely no testimony of any representation, either expressed or implied, by the purchaser here, or anyone in his behalf, that Mr. Manning was not interested or had no connection with the deal in any way.

30 As to the question of purchase price, that is not a ground for rescission of the contract; that is, the fact of inadequacy of price. It would be a reason why this Court, as a court of equity, if it should deem it inequitable to enforce this agreement for the inadequacy of price—it would be a reason why a decree should not be made compelling a conveyance, but it would be no means of destroying the contract. The inadequacy must be brought to the Court as a fact, and that has not been done, to my mind.

40 The valuation placed upon the property by Mr. Hand was about \$46,000 or \$47,000. That was upon a basis of \$40.00 a

*Oral Conclusions of Vice-Chancellor.*

front foot for the vacant land. He testified, it is true, that the assessed valuation in this municipality was about 80% of the actual valuation. That, of course, is a matter of opinion, and he qualified that by saying it was not so where assessors had enmity against the owners. There is no testimony to show to which category this property belongs. To my mind, the entire testimony of all these men who have testified as to the value of this property are reconcilable within reasonable limits. The witnesses who testified in that behalf for the defense admitted they had not taken into consideration the fact that the properties were in need of repairs. The fact that the properties were in need of repair was testified to and not denied; so I may assume the property is in need of repair, as stated by the witnesses for the complainant, and those repairs were fixed, I think, at about \$1,000 a house, outside of the roof on the fifth house (the one No. 513 Grant avenue), which was about \$1,000 more. Then the testimony of the witnesses for the defense—both witnesses for the defense testified they knew of no sales in the immediate locality of vacant land or of other property. Their valuations of vacant land were based upon the general values in the municipality. One witness for the complainant testified that he had, within the past year, bought land 125 feet deeper than these lots, and in a locality which was equally as good—a residence locality—and which has not been denied, for \$25.00 a front foot, and that he is able to buy it there today for \$27.50 a front foot.

Now, that is the testimony which has the greatest basis of fact to support it. It is all opinion testimony, of course, and its value depends upon the facts which these witnesses have within their knowledge to base these opinions on. Taking those things into consideration, the values are reconcilable within reasonable limits.

I am of the opinion, therefore, that this property is worth—it may be worth, thirty-five, thirty-six or thirty-eight thousand dollars. Oh, there is another fact that the witnesses for the defense did not take into consideration, and that was the fact that there might reasonably be a reduction in the aggregate price on a sale of this kind in bulk. Assuming that the actual market value of this property ran from \$34,000 to \$38,000—in my mind the fact that the properties taken individually might amount to an aggregate of \$38,000—would be no reason for saying this

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*Oral Conclusions of Vice-Chancellor.*

price, in bulk, is inadequate; certainly, not so inadequate as to shock the conscience of the Court.

10 There has been some intimation in the argument that the price was a price forced upon these defendants. The testimony is completely the other way. The testimony shows the price was talked over by the defendants and by Mr. William V. Rafferty, and by at least some of the other children for some time before the contract was actually signed. There were discussions and conferences about it, so that it was not a hasty and ill-considered proposition. It was a thing which had been in the process of consideration for several months, and it is very obvious that the family had the benefit of, and acted on, the advice and instruction of Mr. Rafferty during these negotiations—he was a member of the bar and as such has knowledge of real estate transactions—it is obvious to me that there was no rushing of these  
20 defendants off their feet.

There is nothing to indicate anything to cause the Court to withhold a decree of specific performance, if the complainant is otherwise entitled to it. The only question in the case, to my mind, is the legal question—the question of the legal effect of the interpretation of the clause in the will. Counsel ought to be able to submit authorities upon that within a week.

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*Complainant's Exhibits.*

**EXHIBIT C. 3.**

10 Law Offices of  
WILLIAM V. RAFFERTY  
National State Bank Building  
Newark, New Jersey

Telephone Market 1196

Newark, N. J., Nov. 11, 1919.

John J. McLaughlin, Esq.,  
149 North Ave.,  
Plainfield, N. J.

Dear Sir:—

20 Pursuant to your inquiry of recent date I herewith quote the  
selling price of property situate on the east side of Grant Avenue  
and running from the corner of 4th to the east side of Grant  
Avenue to the line of property owned by Charles Sebring. The  
total selling price for the whole property, including the lots and  
houses, is \$42,325. If you desire a further statement as to each  
individual house and lots I will be glad to furnish the same to you  
at once.

Trusting that we may be able to come to some understanding  
I beg to remain,

Yours very respectfully,

30

WILLIAM V. RAFFERTY.

40

*Complainant's Exhibits.***EXHIBIT C. 4.**

Law Offices of  
 WILLIAM V. RAFFERTY  
 National State Bank Building  
 Newark, New Jersey

10

—  
 Telephone Market 1196

Newark, N. J., Dec. 17, 1919.

John G. McLaughlin, Esq.,  
 149 North Ave.,  
 Plainfield, N. J.

Dear Sir:—

Pursuant to our telephone conversation this morning I am further confirming the acceptance of your client's offer of \$35,000. for the sale of premises on Grant Ave. Plainfield, N. J., on the following terms and conditions:

20

\$1000. upon the signing of the agreement, \$14,000. in cash upon the day of closing title, the balance of \$20,000. to be in mortgages of \$4000. on each individual house together with the privilege of paying off \$500. on each mortgage at the expiration of two years of the aforesaid mortgages. Title to be passed on the First day of February, 1920, at the office of William V. Rafferty, National State Bank Building, Newark, N. J.

Yours very truly,

30

WILLIAM V. RAFFERTY.

40

*Complainant's Exhibits.*

**EXHIBIT C. 5.**

Law Offices of  
WILLIAM V. RAFFERTY  
National State Bank Building  
Newark, New Jersey

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Telephone Market 1196

Newark, N. J., Jan. 23, 1920.

John G. McLaughlin, Esq.,  
149 North Avenue,  
Plainfield, N. J.

Dear Sir:—

20

As I have already stated to you the Estate of John Rafferty is desirous of withdrawing from the contract of the sale of the property on Grant Avenue in the City of Plainfield, N. J., and I am enclosing check for \$1000. Returning deposit given to me by you in this matter.

Yours very truly,

WILLIAM V. RAFFERTY.

WVR/EMN

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*Complainant's Exhibits.*

**EXHIBIT C. 5½.**

WILLIAM V. RAFFERTY  
National State Bank Building  
Newark, New Jersey

Registered 10  
115913

John G. McLaughlin, Esq.,  
149 North Avenue,  
Plainfield, N. J.

Stamps

Return receipt demanded  
Return receipt requested 15522 20  
Envelope stamped on reverse side:  
Newark, N. J., Jan. 23, 1920. Registered.  
Plainfield, N. J., Jan. 24, 1920. Registered.

**EXHIBIT C. 6.**

Receipt for Registered Article No. 12291  
Registered at the Post Office Indicated in Postmark  
Class postage..... 30

Complete record of registered mail is kept at the post office, but the sender should write the name of the addressee on back hereof as an identification. Preserve and submit this receipt in case of inquiry.

Postmark clearly,  
showing  
date and office.

Form 3806. Postmaster,  
Reverse side: Per..... 05—6852

Mr. Wm. V. Rafferty 40  
Atty  
Nat. State Bank Bldg  
Newark N J

*Complainant's Exhibits.*

**EXHIBIT C. 7.**

January 26, 1920.

Mr. Wm. V. Rafferty, Attorney,  
National State Bank Bldg.,  
Newark, N. J.

10

Dear Sir:—

Your letter of January 23rd enclosing check for \$1000.00 duly received. I am returning herewith the said check.

Mr. Randolph declines to waive his rights in the contract of sale between your Mother and Sister and himself. I trust you may arrange so that the matter may be closed without further trouble. If I can in any way assist you in this matter kindly advise me.

20

Yours very truly,

JOHN G. McLAUGHLIN.

**EXHIBIT C. 8.**

22 Sandford Avenue  
Plainfield, N. J.

30

Mr. Chas. C. Randolph,

Dear Sir:—

I am taking the liberty of writing you to apologize if you think I have treated you unfair or mean. and to ask you to listen to me and consider my proposition.

I will not dwell on the way Mr. Manning called me on the telephone to demand the leases, or the notices that were sent on New Year's day regardless of the expiration of the leases.

40

What I wish to speak about, is the price I am receiving for the property. When I signed that agreement my mother had been seriously sick for three months and has never fully recovered, and I should not have considered selling the property, as I did not have the time to give it careful attention. The members of my family consider that I am selling at a sacrifice and although my mother and I have full power to sell, still it worries my mother to do an injustice to her family.

*Complainant's Exhibits.*

I have consulted Real Estate people and men who know the value of property and they agree that I am not getting a fair price, considering the value of real estate to-day, and I think I should receive a few thousand more.

Trusting you will give this your consideration, and apologizing again for any inconvenience I may have caused you, in this matter, I am, 10

Yours truly

MARY E. RAFFERTY.

March 18, 1920

**EXHIBIT C. 8½.**

Mr. Chas. C. Randolph,  
1040 West 7th Street  
Plainfield  
New Jersey.

Stamps 20

S. A. G.

P. O. Stamp  
Plainfield Mar 13 5-P M 1920

**EXHIBIT C. 9.**

30

Landlord's Notice to Tenant to Quit.

Where tenancy has expired.

To Mr. William J. R. Thiers

You are hereby notified and required to quit and deliver up the premises rented by you of The Estate of John Rafferty, and now occupied by you, consisting of dwelling and lot known and designated as Nos. 411, 413 and 415 Grant Avenue in the City of Plainfield County of Union and State of New Jersey on the First day of April 1920 next, and to deliver possession thereof to Charles C. Randolph on that day. 40

Dated December 31, 1919.

CHARLES C. RANDOLPH

*Complainant's Exhibits.*

MANNING & CURTIS  
 Real Estate, Insurance and Mortgages  
 Office: 106 Depot Ave.  
 Telephone Call 3

Plainfield, N. J., Dec. 31, 1919

10 Mr. Wm. J. R. Thiers,  
 415 Grant Avenue, City.

Dear Sir:—

In explanation of the within notice would state that this entire property has been purchased by Mr. Chas. C. Randolph who desires possession of same in order that he may fix it up and put it on a paying basis. If you desire any further information regarding the matter you can communicate with me as I have entire charge of the properties.

20 Very truly yours,

C. J. MANNING.

**EXHIBIT C. 10.**

Law Offices of  
 WILLIAM V. RAFFERTY  
 National State Bank Building  
 Newark, New Jersey

30

Telephone Market 1196

Newark, N. J., Feb. 20, 1920.

Hon. William N. Newcorn,  
 220 Park Ave.,  
 Plainfield, N. J.

Dear Judge:—

40 I hope you will pardon me for not getting in touch with you last evening, but by the time I was able to get my party on the wire and by the time we finished our conversation it was so late I felt that you would not be at the office, consequently did not call.

The result of the conversation with my clients last evening

*Complainant's Exhibits.*

was that there is one matter they wished me to look into and I have endeavored to get this proposition straightened out, and if able I feel positively sure that we will be able to go through with the deal. So if you will bear with me until tomorrow morning, I feel that I will be able to give you some definite word by noon time tomorrow, that is Saturday.

10

Thanking you for your extreme courtesies in this matter, I beg to remain,

Yours sincerely,

WILLIAM V. RAFFERTY.

WVR/EMN

**EXHIBIT C. 11.**

20

UNION COUNTY SURROGATE'S OFFICE.

Probate copy of the Last Will and Testament etc.

of

John Rafferty,

Deceased.

I, JOHN RAFFERTY, of the City of Plainfield, County of Union and State of New Jersey, do make this my last will and testament in manner following, to wit:

30

First—I direct my executors, hereinafter named to pay all my just debts and funeral expenses as soon as may be reasonable after my decease, and to expend the sum of One Thousand Dollars in the purchase of a plot of land in a Cemetery, and erecting a suitable monument thereon.

Second—I give and bequeath to my son John J. Rafferty the sum of Fifty Dollars, to be paid to him by my executors together with interest thereon ten years after my decease. I make this bequest small because I am satisfied he would only squander in a very short time any amount he might have, and also, because of his ill treatment of me.

40

Third—I give and bequeath to my son Thomas A. Rafferty, the sum of Fifty Dollars in cash. I make this bequest small because I am satisfied he would only squander in a very short time any amount he might have.

*Complainant's Exhibits.*

Fourth—I give devise and bequeath unto my wife Bridget Rafferty all my remaining estate, both real and personal, in whatever it may consist, or wherever situate, to have, hold, receive, use and enjoy the rents, interest, issues and profits thereof, during the term of her natural life, if she so long  
 10 remains my widow; and from and after her decease, or her again marrying, I give devise and bequeath my said estate to my following named children Frances A. Rafferty, Mary E. Rafferty, Sara M. Rafferty, Elizabeth M. Rafferty, Helen G. Rafferty, Margaret E. Rafferty, Anna H. Rafferty, William V. Rafferty, and Grace Rafferty, to be equally divided between them share and share alike.

Fifth—I hereby request my executors hereinafter named not to sell the premises known as No. 213 Park Avenue, in the City of Plainfield, New Jersey for the period of fifty years from the  
 20 date of my decease.

Sixth—I do give to my executors hereinafter named and to the survivor of them, full power and authority to grant, bargain, sell and convey any or all of my real estate which may be owned by me at the time of my decease to any person or persons in fee simple or otherwise, at public or private sale, at such times and upon such terms, as they shall think fit.

Seventh—I do hereby constitute my wife Bridget Rafferty, and my daughter Mary E. Rafferty, executors of this my last will and testament.

30 In witness whereof I have hereunto set my hand and seal the Seventeenth day of September, in the year of our Lord One Thousand Nine Hundred and Two.

Signed, acknowledged and declared :  
 by the said John Rafferty as and :  
 for his last will and testament, in :  
 the presence of us (both being pre :  
 sent at the same time), who at his : John Rafferty (Seal)  
 request, in his presence, and in :  
 the presence of each other, have :  
 40 hereunto subscribed our names as :  
 witnesses. :

Wm. N. Runyon, Plainfield, N. J.

Charles L Moffett, Plainfield New Jersey

*Complainant's Exhibits.*

State of New Jersey  
UNION COUNTY SURROGATE'S OFFICE.

I, GEORGE T. PARROT, Surrogate of the County of Union, do certify the annexed to be a true copy of the last Will and Testament of JOHN RAFFERTY late of the County of Union, deceased, and that Bridget Rafferty and Mary E. Rafferty the executrices herein named, proved the same before me, and are duly authorized to take upon themselves the administration of the estate of the Testator agreeably to the said will. 10

(SEAL) WITNESS my hand and seal of office, this twelfth day of November in the year of our Lord one thousand nine hundred and nine.

GEO. T. PARROT,  
Surrogate.

The following duties are prescribed by the Orphans' Court Act, as Revised, P. L. 1898. Page 715, &c. 20

*Inventory.* Sec. 58 requires every executor and administrator to file an inventory with the Surrogate within three months from his appointment; if he fails to do so, and the Orphans' Court so directs, it becomes the duty of the Surrogate to issue citation compelling the filing of such inventory; and in case of continued default the court shall revoke the letters issued.

*Account.* Secs. 114 and 116 direct the filing of an account by every executor and administrator within one year after appointment. 30

Sec. 117. If any executor or administrator neglects to render an account for the space of two years it becomes the duty of the Surrogate, under the direction of the Orphans' Court, to issue citation compelling an accounting; and in case of continued default the court shall remove such executor or administrator from office, and he shall pay the costs out of his private estate and forfeit his commission. 40

Endorsed:

UNION COUNTY SURROGATE'S OFFICE.

Estate of  
John Rafferty,  
Deceased.

LETTERS TESTAMENTARY.

*Complainant's Exhibits.***EXHIBIT C. 12.**

10 N. J. Executors' Deed—Bridget Rafferty and Mary E. Rafferty, Executrices of the Last Will and Testament of John Rafferty dec'd., to Charles C. Randolph, conveying same premises as described in the bill of complaint, consideration \$35,000, unexecuted.

**EXHIBIT C. 13.**

20 Mortgage (N. J. Mortgage., int., ins. tax & Ass't, condition printed) dated March 31, 1920, Charles C. Randolph and his wife to Bridget Rafferty and Mary E. Rafferty, Executrices of the Last Will and Testament of John Rafferty, deceased, in the sum of \$4000. with interest at 5% payable semi-annually, with stipulation that party of the first part pay \$500. in cash on the principal of the mortgage at the expiration of the second year being a purchase money mortgage payable March 31, 1923, covering part of the same premises conveyed in above deed, unexecuted.

**EXHIBIT C. 14.**

30 N. J. Bond (int. tax & Ass't—condition printed) bearing even date with above mortgage drawn in the penal sum of \$8000. for the payment of \$4000. in three years at 5%, unexecuted.

**EXHIBIT C. 15.**

40 N. J. mortgage (int., ins. tax & Ass't—condition printed) dated March 31, 1920, Charles C. Randolph and to Bridget Rafferty and Mary E. Rafferty Executrices of the Last Will and Testament of John Rafferty, deceased, in the sum of \$4000. with interest at 5% payable semi-annually, with stipulation that party of the first part pay \$500. in cash on the principal of the mortgage at the expiration of the second year, being a purchase money mortgage payable March 31, 1923, covering part of the same premises conveyed in above deed, unexecuted.

**EXHIBIT C. 16.**

N. J. Bond (int. tax & Ass't—condition printed) bearing even date with above mortgage, drawn in the penal sum of \$8000 for the payment of \$4000. in three years at 5% unexecuted.

*Complainant's Exhibits.***EXHIBIT C. 17.**

Mortgage (N. J. mortgage, ins. tax & Ass't—condition printed) dated March 31, 1920, Charles C. Randolph to Bridget Rafferty and Mary E. Rafferty, Executrices of the Last Will and Testament of John Rafferty, deceased, in the sum of \$4000. with interest at 5% payable semi-annually, with stipulation that party of the first part pay \$500. in cash on the principal of the mortgage at the expiration of the second year, being a purchase money mortgage payable March 31, 1923, covering part of the same premises conveyed in above deed, unexecuted.

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**EXHIBIT C. 18.**

N. J. Bond (int. tax & Ass't—condition printed) bearing even date with above mortgage drawn in the penal sum of \$8000. for the payment of \$4000. in three years at 5%, unexecuted.

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**EXHIBIT C. 19.**

Mortgage (N. J. Mortgage, int. ins. tax & Ass't, condition printed) dated March 31, 1920 Charles C. Randolph and to Bridget Rafferty and Mary E. Rafferty, Executrices of the last will and testament of John Rafferty, deceased, in the sum of \$4000. with interest at 5% payable semi-annually, with stipulation that party of the first part pay \$500. in cash on the principal of the mortgage at the expiration of the second year, being a purchase money mortgage payable March 31, 1923, covering part of the same premises conveyed in above deed, unexecuted.

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**EXHIBIT C. 20.**

N. J. Bond (int. tax & Ass't—condition printed) bearing even date with above mortgage drawn in the penal sum of \$8000. for the payment of \$4000. in three years at 5%, unexecuted.

**EXHIBIT C. 21.**

N. J. mortgage (N. J. mortgage int. ins. tax & Ass't—condition printed) dated March 31, 1920, Charles C. Randolph to Bridget Rafferty and Mary E. Rafferty, Executrices of the Last Will and Testament of John Rafferty, deceased, in the sum of \$4000. with interest at 5% payable semi-annually with stipula-

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*Defendants' Exhibits.*

tion that party of the first part pay \$500. in cash on the principal of the mortgage at the expiration of the second year, being a purchase money mortgage payable March 31, 1923, covering part of the same premises conveyed in above deed, unexecuted.

10

**EXHIBIT C. 22.**

N. J. Bond (int. tax & Ass't—condition printed) bearing even date with above mortgage drawn in the penal sum of \$8000. for the payment of \$4000. in three years at 5%, unexecuted.

**EXHIBIT D. 1.**

Panoramic picture of properties.

**EXHIBITS D. 2 TO 6.**

20

Pictures of one of houses.

**EXHIBIT D. 7.**

Tax bill for 1918, showing assessed value of property as follows:

**EXHIBIT D. 8.**

Tax bill for 1919, showing assessed value of property as follows:

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**EXHIBIT D. 9.**

Tax bill for 1920, showing assessed value of property as follows:

Property	1918	1919	1920
517-605 Grant Ave.	\$2450.	\$2450.	\$2500.
513-515 Grant Ave.	4875.	4875.	4900.
421-511 Grant Ave.	6475.	6475.	6600.
401-403 Grant Ave.	4625.	4625.	5000.
405-409 Grant Ave.	5075.	5075.	5300.
40 411-415 Grant Ave.	5075.	5075.	5300.
417-419 Grant Ave.	4725.	4725.	4750.

*Conclusions of Vice-Chancellor.*

**CONCLUSIONS OF VICE CHANCELLOR.**

Filed June 24, 1920.

IN CHANCERY OF NEW JERSEY.

10

*Between*

CHARLES C. RANDOLPH,

*Complainant,*

*Conclusions.*

*and*

*(Not for Print.)*

BRIDGET RAFFERTY, *et als,*

*Defendants.*

On final hearing.

20

Mr. William Newcorn, for complainant.

Mr. W. S. Angleman, for defendants.

BUCHANAN, *V. C.*

The bill in this case seeks the specific performance, by defendants, as vendors, of a contract for the sale and conveyance to complainant of certain lands in Plainfield, N. J., of which defendants' testator, John Rafferty, was seized at the time of his death. The defendants were the executrices named in the will of John Rafferty; they duly qualified and acted as such; in that capacity executed the written contract of sale in question (under a clause in the will apparently clothing them with power in that behalf), and in that capacity are made defendants to the bill.

30

Three defenses were relied upon by defendants, to wit: Misrepresentation by complainant entering into the inducement of the contract; inadequacy of purchase price, and lack of power and authority in defendants to make such sale and conveyance. As indicated by me at the conclusion of the hearing, the case is entirely barren of any evidence to support the charge of misrepresentation; and consideration of the testimony of the several witnesses who were called as to the value of the property, having regard to their respective qualifications and the factors which were and were not considered by them in arriving at their

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*Conclusions of Vice-Chancellor.*

estimate of value, showed that there was but little real divergence of opinion amongst them all, and satisfied me that there was no inadequacy in the contract price. It would indeed be remarkable if there were not some slight difference of opinion among divers witnesses testifying as to real estate value. Furthermore, even if I believed, or complainant admitted, that the contract price was in fact somewhat less than the actual value of the premises, it would not benefit the defendants. Inadequacy of price, alone, must be of considerable degree, to lead to a denial of specific performance. *Ketcham v. Owen*, 36 Atl. 1095; *Shaddle v. Disborough*, 30 N. J. Eq. 370, at 384.

Mention may also be made, before passing on to the question of the power and authority of defendants to make the sale, of the allegation in the answer, supported by the proofs, and seriously urged by defendants' counsel, that six or seven of the beneficial owners of the premises (other than the defendants as individuals) were dissatisfied with the sale and unwilling to have defendants perform. While it is true that specific performance is always a matter of discretion, at least in the sense that it will not be decreed where the circumstances are such as would lead the mind of the Court to the conclusion that such a result would be inequitable; nevertheless, it seems so clear as to need no argument, that a mere disagreement as to adequacy of price, between the beneficiaries and the fiduciaries clothed with the power of sale (assuming the existence of the power and its valid and honest exercise) create no such situation. The probable differences of opinion between a number of interested parties constitute the very reason for placing the power in the hands of one or two fiduciaries.

There was no evidence to show that the contract had been made improvidently or without due consideration. On the contrary, it appears that it was the result of a period of negotiations lasting some weeks, in which the defendants had the benefit and advice and experience of testator's son, Mr. William V. Rafferty, a member of the bar of this State and one of the beneficial owners. The latter concurred in the sale, drafted the agreement and attended to its execution by defendants, and drafted the conveyances to be executed in performance of its terms.

The final question requires an examination of testator's will.

*Conclusions of Vice-Chancellor.*

The pertinent portions thereof are as follows (after providing for the payment of debts and funeral expenses and two small money bequests):

“Fourth—I give, devise and bequeath unto my wife, Bridget Rafferty, all my remaining estate, both real and personal, in whatever it may consist, or wherever situate, to have, hold, receive, use and enjoy the rents, interest, issues and profits thereof, during the term of her natural life, if she so long remains my widow; and from and after her decease, or her again marrying, I give devise and bequeath my said estate to my following named children, Frances A. Rafferty, Mary E. Rafferty, Sara M. Rafferty, Elizabeth M. Rafferty, Helen G. Rafferty, Margaret E. Rafferty, Anna H. Rafferty, William V. Rafferty, and Grace Rafferty, to be equally divided between them share and share alike.

Fifth—I hereby request my executors hereinafter named not to sell the premises known as No. 213 Park Avenue, in the City of Plainfield, New Jersey, for the period of fifty years from the date of my decease.

Sixth—I do give to my executors hereinafter named and to the survivor of them, full power and authority to grant, bargain, sell and convey any or all of my real estate which may be owned by me at the time of my decease to any person or persons in fee simple or otherwise, at public or private sale, at such times and upon such terms, as they shall think fit.

Seventh—I do hereby constitute my wife Bridget Rafferty, and my daughter Mary E. Rafferty, executors of this my last will and testament.”

The language used is clear and explicit. By the fourth item an estate for life or widowhood in testator's residuary estate (of which the premises contracted to be sold are conceded to have been a part—indeed, the major part) is given to the widow, and the estate in remainder therein, subject to the said estate for life or widowhood, is devised to the named children. The estates so devised are legal—there is no interposition of any trustee. By the sixth item a complete and definite power of sale is given to the two executrices (and the survivor) to sell and convey, in their discretion as to time, terms and method, “any

*Conclusions of Vice-Chancellor.*

or all" of testator's real estate hence including the real estate devised by the fourth section.

10 Defendants contend first, that the gift of the power of sale to the executrices is utterly repugnant to and incompatible with the previous devise of the life estate and remainder, whereby testator vested the devisees with the complete legal title and right to enjoyment and disposition thereof, and that the will is therefore to be construed as though the sixth item thereof had never been inserted by testator. Secondly, they say that irrespective of whatever function or validity the gift of the power of sale might have had at testator's death, it is, at any rate, exhausted and invalid at the present time, because the will is silent as to the purpose for which the power was to be used; such purpose must be expressed in or ascertainable from the will; no purpose other than to pay debts can be ascertained from the present will; and 20 the debts of this estate have all been paid and the administration of the duties of the executrices terminated.

As to the first contention, defendants' counsel obviously overlooks the rule that where two absolutely repugnant clauses actually exist in a will, it is the *later* in local position, not the *earlier*, which is deemed to be the true expression of testator's intent. *Rogers v. Rogers*, 49 N. J. Eq. 98, at 100.

30 But resort is had to that rule only in case of necessity. Every effort is to be made to give effect to the entire will, and all the provisions thereof, the entirety being testator's expression of his testamentary intentions. *Rogers v. Rogers, supra*.

In the present case there seems to me no difficulty whatever in giving effect to both clauses. It may be unusual for a testator after devising lands direct to a beneficiary, to give to an executor a power of sale over them, which may divest the devisee of his title, but it is neither impossible, unheard of, nor illegal. It was done by the will under consideration in *Bacot v. Wetmore*, 17 N. J. Eq., 250, and upheld by Chancellor Green, who says (p. 254): "The fact that the land was previously devised, constitutes no valid objection to the power of sale." The 40 same question, on the same will, was before this Court again in *Wetmore v. Midmer*, 21 N. J. Eq., 242, and the language of the opinion in that case (at p. 245) is just as applicable to the case at bar as the case in which it was written:

"The subsequent power in the will to the executors, to sell all or any of the lands devised is in broad, decided

*Conclusions of Vice-Chancellor.*

language, without exception, and must therefore prevail over the prior devises, which must be taken as subject to this power and its execution.”

See also *Hatt v. Rich*, 59 N. J. Eq. 492; *Cruikshank v. Parker*, 52 N. J. Eq. 310.

Whether or not it be the law that the validity of such a power of sale depends upon the ascertainability of the objects, or some of them, for which testator intended the power to be exercised, it seems to me is equally immaterial here as in *Hatt v. Rich*, *supra*, for those objects seem clear from a consideration of the provisions of the will, and the facts in regard to the estate of which he was disposing and the beneficiaries named by him. 10

The estate in question comprised at least five dwelling houses, and several parcels of vacant land. His devisees were his wife and his nine named children. He naturally contemplated the probability, or least the possibility, that his wife might survive him a considerable number of years, during which time divers changes might occur in regard to the property. The character of the neighborhood might change, rents become low, taxes increase, special assessments be levied, temporary booms occur to enhance for the time the value of the houses or the lands, or for various reasons, it might result, at one time or another, that it would be advantageous and desirable, if not in fact necessary, to sell part or all of the real estate in question for the benefit of all of the objects of his bounty—namely, his family—his wife and children. 20

These ten devisees were of various ages and temperaments; a wife, a son, and eight daughters. When the will was executed in 1902 (probably also at testator's death in 1909), some were minors. The probability would be that it would be difficult or impossible that all would agree upon such sales as might be advisable and for the best interests of all. In order therefore that the advantage thereof might not be lost through such failure to agree, control is given by the power of sale to the two upon whose judgment and discretion he relied—the two whom he had named executrices. (The son was not admitted to the bar until several years after his father's death.) 30

Another reason for the creation of this power of sale, and a purpose which testator doubtless had in mind, is its efficacy in aid of the final distribution of the estate, that is, its reduction to enjoyment in severalty by the remainder-men after the death or 40

*Conclusions of Vice-Chancellor.*

marriage of the life tenant. The property was not susceptible of equal division amongst the nine, and the power of sale would serve to obviate the expense of proceedings and sale in partition.

10 The ability of the power of sale to function in aid of these purposes had not become exhausted or terminated. The fact that eleven years have elapsed since testator's death is not of itself of any significance. Mere delay in the exercise of an unlimited power of sale does not alone deprive the donee of the power or the right to exercise it. *Morse v. Hackensack Bank*, 47 N. J. Eq., 287; *Hatt v. Rich*, *supra*. There are no added circumstances here to lead to a determination that the power should now be deemed invalid. The very diversity of opinion and inability to agree which testator presumably contemplated is the actual situation now existing.

20 The fact that the will gives the power to the donees under the name of executors does afford the basis for an argument that an intention is thereby indicated on the part of testator that the power was given for the purpose, and the sole purpose of aiding in the administration of the executorship, by enabling them to sell for the payment of debts, if necessary; and that the administration of the executorship having been completed without recourse to the power, the power cannot now be exercised.

30 Omitting from consideration the fifth item of will, such a contention would be by no means unworthy of consideration, but not, to me, convincing. It is an argument by inference, the result of which would be to cut down that which the testator has expressed in the broadest possible terms, and the inference is neither a necessary one, nor to my mind probable. As a matter of common experience, powers in trust are given by will to donees under the name of "executors" as frequently, if not more frequently, than otherwise. If the power be one in trust, the name given the donee does not signify; he is in fact none the less a trustee because he is called an executor. *Cf. Casselman v. McCooley*, 73 N. J. Eq. 253, at 254. In the present will there is no statement of the purposes of the power, or of any purpose thereof.

40 On the other hand, there is no expressed limitation of the purposes of the power, nor any implied, unless the grant to the executors *eo nomine* necessitates that implication. The will was witnessed by, and innately evidences its drafting by, counsel learned in the law. Having the benefit of such counsel, testator presumably would have expressed a limitation of purpose, had he so

*Conclusions of Vice-Chancellor.*

intended. Not only has he failed so to do, but he has made the power as broad and unlimited as it was possible for him to do.

The attendant circumstances hereinbefore discussed make it seem quite certain that the unlimited character of the power is the significant thing—not the name by which he designated the donees.

When, however, one regards the request, in the fifth item, that the executors should not sell for fifty years after testator's death, the portion of the estate known as No. 213 Park avenue, Plainfield, N. J., the conclusion is certain that testator intended no such limitation as defendants contend. The fact that he contemplated the exercise of the power by the donees fifty years after his death is absolutely incompatible with any idea that its exercise was to be limited to the mere purposes of administration.

I conclude, therefore, that the power was held by the defendants in trust for the benefit of all the devisees, and that its exercise by them was valid as to the sale and will be valid as to the conveyance.

I will advise a decree for specific performance of the contract.

The particulars as to the mortgages to be given as part of the purchase price might have been more fully provided for in the contract; but the difficulty, if any, in this behalf is obviated by the fact, appearing by the proofs, that the drafts of the bonds and mortgages had been made and were acceptable to both parties—the refusal to consummate the transaction being caused solely by dissatisfaction as to the total consideration.

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*Final Decree.*

**FINAL DECREE.**

Filed June 29, 1920.

This cause coming on to be heard upon the bill, answer, replication and proofs, in the presence of William Newcorn, of counsel with the complainant, and of Winfield S. Angelman, of counsel with the defendants, Bridget Rafferty and Mary Rafferty, executrices of the estate of John Rafferty, deceased, and the pleadings and proofs having been read and the arguments of counsel heard and considered, and it satisfactorily appearing to the Court that by virtue of an agreement in writing duly made and executed between Charles C. Randolph, the complainant, and Bridget Rafferty and Mary E. Rafferty, executrices of the estate of John Rafferty, deceased, on the 23rd day of December, 1919, the said Charles C. Randolph agreed to purchase from the said defendants the lands and premises known and designated as Nos. 401, 405, 415, 419 and 515 Grant avenue, in the City of Plainfield, in the County of Union and State of New Jersey, which land is more particularly described as follows:

BEGINNING at a stake, being the intersection of the center lines of West Fourth street and Grant avenue, as now laid out and opened; thence running along the center of said Grant avenue in a magnetic course of South forty-five degrees East a distance of 715.5 feet to a stake and corner of Samuel Q. Lawson's land; thence along said Lawson's land North forty-six degrees thirty minutes East a distance of 226.74 feet to a point in line of lands of E. P. Williams; thence along said Williams' land North forty-five degrees West a distance of 705.30 feet to a stake in the center of Fourth street aforesaid; thence along the center of said Fourth street South forty-nine degrees West a distance of 226.95 feet to a stake and place of beginning.

Being the same lands and premises which John Rafferty during his lifetime became seized in fee simple by deed of Charles A. Reed, one of the Special Masters in Chancery of New Jersey, which deed bears date the 3rd day of March, 1900, and was recorded in the Register's Office of the County of Union on March 9, 1900, in Book 364 of Deeds for said County, on pages 129, etc. and to pay to the said defendants therefor the sum of \$35,000 in the manner following, that is to say, \$1,000 upon the signing of the agreement, the further sum of \$14,000 in cash to be paid upon the passing of the title, and the balance of \$20,000 to be

*Final Decree.*

paid in five mortgages of \$4,000 each at five (5%) per cent. for three (3) years, said mortgages to contain a stipulation that \$500 is to be paid in cash on the principal of each and every mortgage at the expiration of the second year;

And it further appearing to the Court that the said Charles C. Randolph, the complainant, has always been and still is ready and willing in all things to comply with the stipulations of the said articles of agreement on his part to be performed, and has prayed the order or decree of this Court directing the defendant to comply with and fulfill the same in all things on their part to be performed, and the Court being satisfied that there was no misrepresentation upon the part of the complainant in inducing the defendants to enter into the contract, and that the consideration therefor is a fair and adequate purchase price for the premises, and that the defendants as executrices, etc., have power and authority under the will of John Rafferty, deceased, to make a good and valid conveyance in law, and that the complainant is entitled to the specific performance of the said articles of agreement on the part of the said defendants as executrices in his said bill he has prayed;

It is thereupon on this twenty-ninth day of June, One thousand nine hundred and twenty, ORDERED, ADJUDGED and DECREED, that the said articles of agreement be in all things specifically performed by the said defendants and that the said defendants do within ten days from the date of this decree make, execute and acknowledge in due form of law and deliver to the said complainant a good and sufficient warranty deed for the said premises subject to leases on property on December 23rd, 1919, and that they deliver at the same time to the said complainant possession of the said premises and account to him for the rents, issues and profits of the same since the first day of February last, as of the date aforesaid, and that thereupon the said complainant do pay or cause to be paid to the said defendants the sum of \$14,000 with interest thereon from the first day of February last past and execute five (5) mortgages of \$4,000 each for a term of three (3) years bearing interest at the rate of five (5%) per cent. payable semi-annually and containing a stipulation that the sum of \$500 be paid on the principal of each mortgage at the expiration of the second year, which mortgage shall be a lien on the said premises, as provided in the said agreement until the same shall be paid and satisfied.

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*Notice of Appeal.*

It is further ordered that the said defendants do pay the cost of this suit, together with a counsel fee of two hundred and fifty dollars to be paid to the solicitor of the complainant to be taxed in the said costs, and to be paid out of the estate of John Rafferty, deceased.

10 And it is further ordered that the complainant is to serve a copy of this decree upon the defendants or their solicitors within ten days from the date hereof, and that either party is to be at liberty to apply to this Court for further directions or relief in the premises if the occasion should require.

E. R. WALKER,

C.

Respectfully advised:

20 MALCOLM G. BUCHANAN,  
V. C.

A true copy.

JESSE R. SALMON,  
*Clerk.*

**NOTICE OF APPEAL.**

30 Filed July 7, 1920.

Bridget Rafferty and Mary E. Rafferty, as executrices of the estate of John Rafferty, deceased, the defendants herein, hereby appeal from the whole and every part of the final decree made in the above-entitled case.

Dated, July 6, 1920.

W. S. ANGLEMAN,  
*Solicitor for Defendants.*

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

W. S. ANGLEMAN,  
*Of Counsel with Defendants.*

*Petition of Appeal.*

**PETITION OF APPEAL.**

Filed July 26, 1920.

**New Jersey Court of Errors and Appeals**

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*Between*

CHARLES C. RANDOLPH,

*Complainant-Respondent,*

*and*

BRIDGET RAFFERTY and MARY E. RAFFERTY,  
executrices of the estate of John Rafferty, deceased,

*Defendants-Appellants.*

*On Bill for  
Specific  
Performance.*

*On Appeal of  
Defendant.*

*Petition of  
Appeal.*

20

*To the Honorable the Court of Errors and Appeals in the last resort in all causes:*

The petition of Bridget Rafferty and Mary E. Rafferty, as executrices of the estate of John Rafferty, deceased, the appellants in the above-stated cause, respectfully show that your petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of New Jersey, bearing date the twenty-ninth day of June, nineteen hundred and twenty, wherein the said Charles C. Randolph was complainant and the said Bridget Rafferty and Mary E. Rafferty, executrices of the estate of John Rafferty, deceased, were defendants, in this respect, to wit: That the said decree adjudges that "the said articles of agreement be in all things specifically performed by the said defendants and that the said defendants do within ten days from the date of this decree make, execute and acknowledge in due form of law and deliver to the said complainant a good and sufficient warranty deed for the said premises subject to leases on property on December 23rd, 1919, and that they deliver at the same time to the said complainant possession of the said premises and account to him for the rents, issues and profits of the same since the first day of February last past, as of the date aforesaid, and that thereupon the said complainant do pay or cause to be paid to the said defendants the sum of \$14,000, with interest thereon

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*Petition of Appeal.*

from the 1st day of February last past, and execute five (5) mortgages of \$4,000 each for a term of three (3) years, bearing interest at the rate of five (5%) per cent., payable semi-annually, and containing a stipulation that the sum of \$500.00 be paid on the principal of each mortgage at the expiration of the second year, which mortgage shall be a lien on the said premises, as provided in the said agreement until the same shall be paid and satisfied," and that "the said defendants do pay the cost of this suit, together with a counsel fee of two hundred and fifty dollars to be paid to the solicitor of the complainant, to be taxed in the said costs, and to be paid out of the estate of John Rafferty, deceased."

And your petitioners appeal from the said decree of the Chancellor which decrees adversely to the defendants as aforesaid upon the ground that the same is erroneous for that the said executrices did not have any valid authority to make the agreement, specific performance of which was sought in and by the said bill of complaint, and for that the said executrices did not have any valid authority to agree in and by the said agreement to give a warranty deed, and for that the relief granted the said complainant in and by said decree does not conform to the said agreement, and for that costs should not have been awarded to complainant, and for that counsel fees should not have been awarded to complainant's solicitor, and for that the said bill of complaint filed by the said complainant should have been dismissed and the relief therein prayed by the said complainant should have been denied and the decree in this case should have been made accordingly.

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

W. S. ANGLEMAN,  
*Solicitor for Defendants-Appellants.*

*Substitution of Solicitors.***ANSWER TO PETITION OF APPEAL.**

Filed July , 1920.

The answer of the above-named complainant-respondent to the petition of Bridget Rafferty and Mary E. Rafferty, executrices of the estate of John Rafferty, deceased, defendants-appellants. 10

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits that a final decree was, on the twenty-ninth day of June last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And 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 adjudged to this respondent. 20

WILLIAM NEWCORN,  
*Solicitor of and Counsel with Complainant-Respondent.*

**SUBSTITUTION.**

Filed September 7, 1920. 30

I hereby consent to the substitution of Lum, Tamblyn & Colyer in my place and stead as solicitors for defendants-appellants in the above-entitled cause.

Dated, August 11, 1920.

W. S. ANGLEMAN.

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ALASKA TO SECTION OF ALASKA

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## New Jersey Court of Errors and Appeals

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Between

CHARLES C. RANDOLPH,  
Complainant-Respondent,  
and

BRIDGET RAFFERTY AND  
MARY E. RAFFERTY, execu-  
trices of the estate of John  
Rafferty, deceased,  
Defendants-Appellants.

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On Bill for Speci-  
fic Performance.  
On Appeal from  
Chancery.

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### BRIEF FOR RESPONDENT.

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#### STATEMENT OF THE CASE.

The appellants appealed from a decree of the Court of Chancery (case p.82) wherein, on the 29th day of June, 1920, the Court ordered, adjudged and decreed that said Articles of Agreement for the conveyance of land to the respondent be in all things specifically performed by the appellants, and that the appellants, within ten days from the date of the said decree, make, execute and acknowledge in due form of law, and deliver to the respondent a good and sufficient warranty deed for the premises in the said agreement described, subject to the leases on the property on December 23, 1919, and that they deliver at the same time to the said respondent possession of the said premises and account to him for the rents, issues and profits of the same since the first day of February last, and that the respondent do pay or cause to be paid to the said defendants the sum of \$14,000.00 with interest thereon from the first day of February, and execute five (5) mortgages of \$4,000.00 each for a

term of three years, bearing interest at the rate of five (5%) per cent. payable semi-annually, and containing a stipulation that the sum of \$500.00 be paid on the principal of each mortgage at the expiration of the second year, which mortgage shall be a lien on the said premises, as provided in the said agreement, until the same shall have been paid and satisfied.

The petition of appeal from the said decree contains the following specifications of error, to wit: (case p.6)

- a. "That the same is erroneous for that the said executrices did not have any valid authority to make the agreement, specific performance of which was sought in and by the said bill of complaint;
- b. "and for that the said executrices did not have any valid authority to agree in and by the said agreement to give a warranty deed;
- c. "and for that the relief granted the said complainant in and by said decree does not conform to the said agreement;
- d. "and for that costs should not have been awarded to complainant, and for that the counsel fees should not have been awarded to complainant's solicitor;
- e. "and for that the said bill of complaint filed by the said complainant should have been dismissed and the relief therein prayed by the said complainant should have been denied."

The bill of complaint (case p.1-3) recites that on the third day of March, 1900, John Rafferty during his lifetime acquired certain premises in fee simple, which premises were known and designated as Nos. 401, 405, 415, 419 and 515 Grant Ave., and particularly described therein; that said John Rafferty died leav-

ing his last will and testament, wherein he nominated the appellants as his executrices, which will was probated in the Surrogate's Court of Union County on November 12, 1909. Power of sale was conferred upon the executrices in the sixth paragraph of the will (case p.2).

On the twenty-third day of December, 1919, Bridget Rafferty and Mary E. Rafferty, executrices of the estate of John Rafferty, deceased, by a certain indenture of agreement, under the power of sale contained in the said will, agreed in consideration of the sum of Thirty-five Thousand Dollars to convey to Charles C. Randolph the lands above described, on or about the first day of February, 1920, which agreement provided for the payment of the consideration in the manner following, to wit: (case p.5) One thousand dollars upon the signing of the agreement, the receipt whereof was acknowledged; fourteen thousand dollars in cash to be paid upon the passing of the title; and twenty thousand dollars to be paid in five mortgages of four thousand dollars each at five (5%) per cent. for three years, it being stipulated in the mortgages that \$500.00 in cash is to be paid on the principal of each and every mortgage at the expiration of the second year. The agreement was signed by Bridget Rafferty and Mary E. Rafferty, executrices of the estate of John Rafferty, and Charles C. Randolph, and duly acknowledged by the said Charles C. Randolph and delivered.

The bill further recites that after the delivery of the agreement, the complainant caused proper searches to be made against the premises, and on the first day of February, 1920, tendered to the said Bridget Rafferty and Mary E. Rafferty the sum of Fourteen thousand dollars required to be paid on that day, and offered to execute five mortgages for the sum of four thousand dollars each in accordance with the terms of the said contract, which offer was refused, the only reason being assigned for said refusal being that they ought to have more money, and unless they so re-

ceived an additional amount, they would not make the conveyance.

The bill prays for an answer, and that the defendants may be decreed to perform the articles of agreement, and make execute and acknowledge in due form of law and deliver to the complainant a good and sufficient deed for the premises, and that the defendants deliver to complainant possession thereof and account to him for the rents since February 1st.

To the bill of complaint the defendants filed an answer in which they admit the execution of the agreement and set up the defense (case p.7) that some of the beneficiaries interested in said land very strenuously objected to the sale of the said land on the ground that the price named in said paper was grossly inadequate and that said paper was not fair, just and equitable, but had been rashly and improvidently made and was unconscionable, and for these reasons had called upon the defendant to rescind their signature to said paper and to refuse to proceed further with the matter, whereupon they rescinded their signatures, notifying the complainant and his agent, and offered to return the \$1000.00, which offer was refused; the second defense being that if the defendants had signed and delivered a warranty deed it would have caused defendants great unpleasantness and been productive of much hard feeling against them on the part of the said beneficiaries; third, in paragraphs 8, 9 and 10 of the answer the defendants contended that they were deceived by complainant in regard to Clifford L. Manning's connection with the matter, and had they known that said Clifford L. Manning was interested in it, they would have refused to have anything to do with it, and would have refused to sign the paper.

Replication was filed to the answer and thereafter the cause came up for hearing before the Court in regular form, on the 19th day of May, 1920.

John G. McLaughlin, a witness produced on behalf of the complainant, being sworn, testified that he was

a real estate broker, and in the latter part of October, or the early part of November, 1919, interviewed William V. Rafferty, the son of Bridget Rafferty, and one of the devisees of John Rafferty, deceased, who was an attorney, in relation to the sale of the property in question (case pgs. 12 and 13), in which he submitted an offer of \$35,000.00 for the property, \$10,000.00 in cash and the balance by the purchaser giving the estate five mortgages of \$5,000.00 each, which proposition Mr. Rafferty agreed to submit to his mother and sister, and a few days later called the witness up and asked if it was possible to reduce the mortgages to \$4,000.00, which the witness agreed to take up with the purchaser, and then notified Mr. Rafferty that the prospective purchaser would agree to pay \$15,000.00 in cash and execute the bonds and mortgages of \$1,000.00 each; Mr. Rafferty prepared the contracts himself and brought them from his law office in Newark to Plainfield, had them signed by his mother and sister and left them at the office of the witness for the purpose of securing the signature of the purchaser (case p.13). The witness had Mr. Randolph sign the contracts and forwarded one to Mr. Rafferty with a check for \$1,000.00 to cover the initial payment. The contract was offered in evidence and marked "Exhibit C.1" (case p. 14, li.35). Subsequent to the execution and delivery of the agreement, after Mr. Manning had called upon Mrs. Rafferty for some data concerning the occupancy of the houses, it was stated to him that the Raffertys were very much opposed to Mr. Manning having anything to do with this transaction (case p.16) and on the twenty-third day of January, 1920, the witness received a letter from William V. Rafferty, "Exhibit C.5" (case p. 16 li.30) in which he was notified that the estate was desirous of withdrawing from the contract and enclosing a check for \$1,000.00, which check was returned under instructions of the purchaser.

The complainant being sworn in his own behalf testified to the execution of the agreement (case p.20-

21) the tender of the \$14,000.00 on the first day of February, and the refusal of William V. Rafferty to accept the money, stating he had been unable to have the papers prepared because he knew he could not have the signatures attached; that he had no knowledge of any objection to Mr. Manning until the visit to Mr. Rafferty's office, and no knowledge of the desire to rescind the contract until they had a conference at the office of Mr. McLaughlin on the 12th day of January, 1920 (case p.22); after the refusal to accept the balance of the purchase price, efforts were made to adjust the matter, and an appointment made after the institution of the suit by Mr. Rafferty at the office of William Newcorn for the purpose of closing the deal, and after waiting several hours Mr. Rafferty finally came in and showed that he had the deed and bonds and mortgages prepared, but that he had been unsuccessful in obtaining the signature of his mother and sister to the deed, and therefor stated that he could do nothing further (case p.23); this witness further testified that the only communication he had seen direct from Mary E. Rafferty, one of the executrices, was a letter received from her (case p.24) "Exhibit C.8" (p.66), in which communication the only exception taken to conveying the property, after the institution of the suit, was the inadequacy of price and the objection of certain members of the family to selling the property for the price set forth in the contract (case pgs. 66-67).

Clifford L. Manning, was a witness produced on behalf of the complainant, who testified to the making of the contract, the prior negotiations and the proposition for the purchase of the property subject to mortgages of \$5,000.00 and the lots free and clear, each house subject to the mortgage; and the counter-proposition made by the Raffertys for \$15,000.00 cash and mortgages of \$4,000.00 each on each house (case p.27); that he served the notices on the tenants requiring them to vacate the premises on the first day of April, under the instructions of Mr. Randolph, and

at no time was there any objection raised to his activities in the transaction until after he called up the Raffertys for the data for the purpose of serving the notices on the tenants; during the month of March he was instructed to convey a message to Mr. Randolph, as a result of a message received from William V. Rafferty that the Raffertys were going to close the title and for him to arrange to have Mr. Randolph present. As a result thereof he was at the office and waited for a while without any result, Mr. Rafferty failing to show up.

William V. Rafferty was produced in behalf of the defendants, who testified (case p.30) that he is a member of the bar of the State, thirty-one years old, a son of one of the executrices, and one of the devisees under the will of his father, John Rafferty, deceased. He testified that he received from Mr. McLaughlin a proposition for the sale of the premises in question, and as a result of various conferences with McLaughlin, was advised that he had a prospective purchaser willing to pay Thirty-five Thousand Dollars (case p. 31 li.16); and as a result of the negotiations the agreement was finally entered into; subsequently he offered to return the check and rescind the contract and refused to accept the balance of the purchase price when tendered by Mr. Randolph at his office; that Mr. Newcorn then appeared in the case and after communicating with him, he had several conferences with him, endeavoring to get the matter settled, but was unable to do so by reason "there was the objection absolutely on the part of my sisters, who, of course, are the beneficiaries, as far as this contract is concerned. They absolutely said it wasn't a sufficient sum of money. Of course they objected to Mr. Manning in the proposition at all; "that the feeling against Mr. Manning was due to some trouble over some insurance a number of years ago in regards to the settlement of a fire loss (case p.33 li. 3-10). Under cross examination the witness testified that he was the attorney of the estate, always attended to the legal business of the estate;

and his mother and sister were fully advised of every step in the transaction and that the counter-proposition for the payment of Five (\$5,000.00) Thousand Dollars cash additional and mortgages of \$4,000.00 instead of \$5,000.00 was either his suggestion or the suggestion of the executrices (case p.33 li. 41-42); that there are six children living at home out of eight, and that the negotiations had been going on from the fifth day of November until the twenty-third day of December, 1919, when the contract was signed, neither Mr. McLaughlin, Mr. Manning or Mr. Randolph being present at the time of the execution of the same; the contracts after having been signed by his mother and sister, were brought to Mr. McLaughlin's office and left there to procure Mr. Randolph's signature (case p.34 li. 21-22); he had knowledge that the notices were to be served before they were actually served (case p.35 li.10); when he returned the deposit of \$1,000.00 on January 23rd, a month after the signing of the contract, and received it back again, the agreement was he was to draw the deed and the mortgages (case p.35); \$14,000.00 was tendered at his office (case p.36) which he refused, stating: "I told him my folks were objecting to it—my sisters, I think I told him, they didn't want to go through with it" (case p.36). The witness further testified that about March 20th he requested Mr. Newcorn to arrange to have Mr. Randolph ready to close the deal, the hour being set for eleven o'clock, but he did not arrive there until after eleven-thirty or a quarter to twelve, and had the deed and four mortgages drafted. In answer to various questions of the court, the witness testified that at the time when he made the appointment with Mr. Randolph to meet him at Mr. Newcorn's office on March 20, 1920, he was reasonably sure that the deal would go through as the result of his talks with his mother and sister (case p.37 li. 20-40) this was the result of a number of telephone messages, calling from Newark to Plainfield, to talk the matter over with his mother and sister, and that as a result

of the conversation, the case had reached the point where the mother and sister indicated that it probably would be best to go through with it, whereupon he made the appointment and had drawn the drafts of the mortgages, after having conversed with his mother and sister as to which houses they were to cover, they relying upon his knowledge and ability. In further answer to the questions of the court, the witness stated that his mother and sister would be entirely willing to execute the deed and receive back the bonds and mortgages which he had drafted, if the price was satisfactory and if Mr. Manning had nothing to do with the proposition (case p.39 l. 40-45 and p.40 li. 1-2).

Mary E. Rafferty, one of the executrices being sworn in behalf of the defendants testified that she was one of the executrices of the estate of her father, together with her mother; that the principal objection to carrying out the contract and giving the deed was the price (case p.40 l. 24-25) her sisters objecting very strenuously to the price they got for the property.

Frances Treadwell, a sister of the preceding witness, and one of the heirs, testified that she objected on account of the price and did not think they got enough for the property. (Case p.42 l. 18-30).

Sarah E. Rafferty was also offered as a witness in behalf of the defendants; she is a daughter of the testator and testified that she objected to the sale on account of the price.

The defendant then offered two experts, Charles A. Hand and Albert Lederer, who fixed their valuations upon the property and the extent of their investigation, and at the conclusion of the defendants' case, the complainant produced Morris Abrams, Joseph Nathanson and Charles E. Randolph as experts on the value of land and the buildings as the result of an examination of the premises and their contention.

At the conclusion of the testimony and the argument of counsel the court orally disposed of the two defenses interposed in the pleadings, to wit, the inade-

quacy of the purchase price and a misrepresentation or deceit, in the following language (case pgs. 58, 59 and 60, li.20):

“The proofs were absolutely barren of testimony to support the allegation of deceit and misrepresentation. Taking it at its fullest value, the only thing testified to touching upon the defenses thus raised was the testimony of William V. Rafferty and one of the daughters, that they, after the contract was signed, found out that Mr. Manning was in some wise interested in the matter, and that they then made objection. There was absolutely no testimony of any representation, either expressed or implied, by the purchaser here, or anyone in his behalf, that Mr. Manning was not interested or had no connection with the deal in any way.

“As to the question of purchase price, that is not a ground for rescission of the contract; that is, the fact of inadequacy of price. It would be a reason why this Court, as a court of equity, if it should deem it inequitable to enforce this agreement for the inadequacy of price—it would be a reason why a decree should not be made compelling a conveyance, but it would be no means of destroying the contract. The inadequacy must be brought to the Court as a fact, and that has not been done, to my mind.

“The valuation placed upon the property by Mr. Hand was about \$46,000 or \$47,000. That was upon a basis of \$40.00 a front foot for the vacant land. He testified, it is true, that the assessed valuation in this municipality was about 80 per cent. of the actual valuation. That, of course, is a matter of opinion, and he qualified that by saying it was not so where assessors had enmity against the owners. There is no testimony to show to which category this property belongs. To my mind, the entire testimony of all these men who have testified as to the value of this property are reconcilable within reasonable limits. The witnesses who testified in that behalf for the defense admitted they had not taken into consideration the fact

that the properties were in need of repairs. The fact that the properties were in need of repair was testified to and not denied; so I may assume the property is in need of repair, as stated by the witnesses for the complainant, and those repairs were fixed, I think, at about \$1,000 a house, outside of the roof on the fifth house (the one No. 513 Grant Avenue), which was about \$1,000 more. Then the testimony of the witnesses for the defense—both witnesses for the defense testified they knew of no sales in the immediate locality of vacant land or of other property. Their valuations of vacant land were based upon the general values in the municipality. One witness for the complainant testified that he had, within the past year, bought land 125 feet deeper than these lots, and in a locality which was equally as good—a residence locality—and which has not been denied, for \$25.00 a front foot, and that he is able to buy it there today for \$27.50 a front foot.

“Now, that is the testimony which has the greater basis of fact to support it. It is all opinion testimony, of course, and its value depends upon the facts which these witnesses have within their knowledge to base these opinions on. Taking those things into consideration, the values are reconcilable within reasonable limits.

“I am of the opinion, therefore, that this property is worth—it may be worth, thirty-five, thirty-six or thirty-eight thousand dollars. Oh, there is another fact that the witnesses for the defense did not take into consideration, and that was the fact that there might reasonably be a reduction in the aggregate price on a sale of this kind in bulk. Assuming that the actual market value of this property ran from \$34,000 to \$38,000—in my mind the fact that the properties taken individually might amount to an aggregate of \$38,000—would be no reason for saying this price, in bulk, is inadequate; certainly, not so inadequate as to shock the conscience of the Court.

“There has been some intimation in the argument

that the price was a price forced upon these defendants. The testimony is completely the other way. The testimony shows the price was talked over by the defendants and by Mr. William Rafferty, and by at least some of the other children for some time before the contract was actually signed. There were discussions and conferences about it, so that it was not a hasty and ill-considered proposition. It was a thing which had been in the process of consideration for several months, and it is very obvious that the family had the benefit of, and acted on, the advice and instruction of Mr. Rafferty during these negotiations—he was a member of the bar and as such has knowledge of real estate transactions—it is obvious to me that there was no rushing of these defendants off their feet.

“There is nothing to indicate anything to cause the Court to withhold a decree of specific performance, if the complainant is otherwise entitled to it. The only question in the case, to my mind, is the legal question—the question of the legal effect of the interpretation of the clause in the will. Counsel ought to be able to submit authorities upon that within a week.”

The legal question was determined in favor of the complainant's contention upon the conclusions filed by the court (case p.75) and a Final Decree was made and filed on the twenty-ninth day of June, 1920, which decree is set forth on pages 82-84 inclusive.

### **BRIEF OF ARGUMENT.**

#### **I.**

#### **NEW MATTER WILL NOT BE CONSIDERED ON APPEAL. CONTRACT IS CERTAIN.**

Counsel in his brief, under point one, argues the question that the contract upon which the bill of complaint in this cause is grounded is indefinite and uncertain as to the parties there to and as to the terms thereof.

This is the first time the question has been raised by the appellant—it neither appears in the pleadings or in the testimony, as disclosed in the record, and cannot be considered by this court when raised for the first time.

The rule is well settled in this court that the appellant court can consider nothing that is not contained in the record, and will not pass on a question not raised by the record. **Loose vs. Alpaugh, 23 N. J. L. 165; Boswell vs. Green, 25 N. J. L. 390.**

In the case of **Parker vs. Traverse, 74 N. J. E. 812**, the Court of Errors and Appeals held: "That it was unnecessary to consider a question which was raised upon the appeal since the complainant did not appeal from that part of the decree."

The contract upon the face of it is certain and definite. It is an agreement entered into by the Estate of John Rafferty, and Charles A. Randolph to sell the premises in question; it is signed by Bridget Rafferty and Mary E. Rafferty as executrices of the estate of John Rafferty; the sum of One Thousand Dollars cash was to be paid at the time of the signing, as set forth in the stipulation with respect to the payment of the consideration, the remaining \$14,000.00 was to be paid in cash upon the delivery of the deed, and the balance of \$20,000.00 was to be paid in five mortgages of \$4,000.00 each at five per cent. for three years, being stipulated in the mortgages that \$500.00 in cash is to be paid on the principal of each and every mortgage at the expiration of the second year. While it is true that the provisions for the mortgages does not designate what particular property each of the mortgages are to cover, the fact that the entire sum of \$20,000.00 is divided into five mortgages and the contract refers to five dwelling houses and the vacant land to be clear of the mortgages, and the numbers of the dwelling houses being therein set forth, it is easy enough to ascertain the intention of the parties, but the difficulty, if any, in this behalf is obviated by the fact as appearing by the proofs that the attorney of the estate

and one of the legatees had prepared the drafts of the bonds and mortgages upon the lines contemplated by the appellant and that the deed, bonds and mortgages (Exhibits C. 12-22, inclusive, case p.72-74) so drafted were acceptable to both parties, the refusal to carry out the transaction being caused solely by dissatisfaction as to the inadequacy of the consideration, and that each of these mortgages covered a separate dwelling house, provided for the payment of \$4,000.00 within three years with interest at the rate of five per cent. and stipulated that the sum of \$500.00 in cash was to be paid on the principal of each said mortgage at the expiration of the second year.

The case of Worth vs. Guthrie 81 N. J. E. 271 does not apply as that case involved the omission to include in the original agreement a tract of land. The complainant attempted to establish this by proving a parol contract and the defendant denied the contracts as alleged, but admitted in his answer an agreement which he offered to perform.

## II.

### **THE EXECUTRICES HAD POWER TO DELIVER A WARRANTY DEED.**

The second assignment argued by counsel for the appellant likewise is raised in this court for the first time as disclosed by the record, to wit: the executrices had no power to deliver a warranty deed and therefore will not be considered by this court at this time. Even if the court should consider the question, there is no merit in the contention raised by the appellant, as the deed prepared by the draftsman of the estate was an executor's deed containing the usual warranties, and the contract sought to be specifically performed obligated the executrices by deed of warranty, free from all encumbrances, except and subject to leases on properties designated by the street numbers 401, 405, 415, 419 and 515, on or before the first day of February next ensuing the date hereof to convey all those lots, etc.

(case p.4 lis. 36-40, inc.). Therefor, when the decree provided that they shall deliver as executrices a warranty deed for the premises, it referred to the deed and the obligation assumed by the executrices of the estate under their power of sale, as set forth in the sixth paragraph of the will (case p.7).

A careful inspection of that paragraph discloses the intent of the testator to invest his trustees with full power and authority to sell any or all of this real estate owned by him to any person or persons in fee simple or otherwise, at such times and upon such terms as they think fit.

It is true that the rule is that "a power of sale given by the will does not authorize an executor to bind the estate by covenants of general warranty, but if he makes such covenants they operate as a personal obligation, unless the terms of the covenant indicate that he did not intend to bind himself personally." 11 A & E Cyc p.1053 and cases cited.

In this case they assumed the obligation and the court was correct in making the decree conform to the agreement.

### III.

#### **THE DECREE CONFORMS TO THE AGREEMENT.**

Counsel in his brief raises the question that the decree of the court below does not conform to the agreement found on pages 82, 83 and 84 of the printed State of the case, and it is respectfully submitted that the final decree enforces the terms of the agreement as agreed upon between the parties.

The deed is to be delivered subject to the leases on the property on December 23, 1919, the date of the execution of the agreement, and to account to the complainant for the rents, issues and profits of the same since the first day of February, which was the date when the complainant offered to perform the agreement, and that the complainant pay the balance of the purchase money with interest from the first

day of February last past, and execute the five mortgages prepared by the counsel of the estate, which provided for semi-annual payments, and which mortgages were in the possession of the court below, as exhibits at the time of the signing of the decree.

Even if this were not sufficient, it is too late now for the appellant to raise this question, as the decree was submitted to the solicitor and counsel of record, who tried the cause, and approved by him as to form and sufficiency before being presented to the court, with the exception of that part of the decree which provided for the allowance of counsel fee.

#### IV.

#### **THE EXECUTRICES POSSESSED THE POWER AND AUTHORITY TO MAKE THE PROPOSED SALE AND CONVEYANCE.**

The principal contention of the appellants in their brief is that the power of sale contained in the will has been exhausted and that a title attempted to be made by the exercise thereof would be nugatory. It is contended upon the part of the appellee that there is no merit in this contention and that the construction of the will by the court below, wherein the court found that the power of sale still existed and decreed the specific performance of the contract and the reasons therefor and the authorities cited in support of such findings, were right and proper.

The question raised before the Court below by counsel at the conclusion of the final hearing of the cause, after the court had disposed of the questions submitted by the pleadings of the parties, was "that the sixth paragraph of the will of John Rafferty, deceased, by which power was conferred upon the executrices to sell, was restricted by the provisions of the fourth paragraph of the will, whereby the testator, after providing for the payment of debts and bequests, devised and bequeathed unto his wife, Bridget Rafferty, all the remainder of the property to use and enjoy the

income therefrom during her life, or as long as she remained his widow, and upon her death or marrying, that the estate be divided among the children equally.”

While this question had not been interposed as a defense in the answer of the appellants and apparently was an after-thought of counsel for the appellants, the court nevertheless construed the will in order to ascertain whether there were any merit in the question thus raised.

The pertinent portions of the will, after providing for the payment of debts and funeral expenses, and two small money bequests which were construed by the court, reads as follows:

“Fourth—I give devisee and bequeath unto my wife, Bridget Rafferty, all my remaining estate, both real and personal, in whatever it may consist, or wherever situate, to have, hold, receive, use and enjoy the rents, interest, issues and profits thereof, during the term of her natural life, if she so long remains my widow; and from and after her decease, on her again marrying, I give devise and bequeath my said estate to my following named children, Frances A. Rafferty, Mary E. Rafferty, Sara M. Rafferty, Elizabeth M. Rafferty, Helen G. Rafferty, Margaret E. Rafferty, Anna H. Rafferty, William V. Rafferty, and Grace Rafferty, to be equally divided between them share and share alike.

Fifth—I hereby request my executors hereinafter named not to sell the premises known as No. 213 Park Avenue, in the City of Plainfield, New Jersey, for the period of fifty years from the date of my decease.

Sixth—I do give to my executors hereinafter named and to the survivor of them, full power and authority to grant, bargain, sell and convey any or all of my real estate which may be owned by me at the time of my decease to any person

or persons in fee simple or otherwise, at public or private sale, at such times and upon such terms, as they shall think fit.

Seventh—I do hereby constitute my wife, Bridget Rafferty, and my daughter, Mary E. Rafferty, executors of this my last will and testament.”

By the sixth item “full power and authority to bargain, grant, sell and convey any or all of my real estate, which may be owned by me at the time of my decease to any person or persons, in fee simple or otherwise, at public or private sale, at such time and upon such terms as they shall think fit.

In the fourth item he devises all his real estate which includes the premises in question, to his wife, whatever it may consist of, wherever situate, “to have, hold, receive, use and enjoy the rents, interest issues and profits thereof during the term of her natural life, if she so long remains my widow, and from and after her decease or her again marrying, I give, devise and bequeath my said estate to my following named children,” naming them, etc., “to be equally divided between them, share and share alike.

The cardinal rule in the construction and interpretation of wills is that the intention of the testator must be ascertained, if possible, and if it is not in contravention of some established rule of law or public safety, must be given effect, and by this is meant the actual personal individual intention, and not a mere presumptive intention inferred from the use of a set phrase or a particular form of words.

“The intention which controls in the construction of a will, is that which is manifest, either expressly or by necessary implication from the language of the will, as viewed, in case of ambiguity, in the light of the situation of the testator and the circumstances surrounding him at the time it is executed.” **40 Cyc. 1388.**

“Where the will affords no satisfactory clue to the real intention of the testator, technical rules for the

construction of wills are to be followed, so far as they aid in determining that intention, but where the testator's intention is clearly manifest from the whole will and violates no public policy or positive law, technical rules, if it would tend to defeat such intention, must yield to a practical construction of the will." 40 Cyc. 1394. **Stout vs. Cook 77 N. J. E. 153.**

In the latter case Vice Chancellor Howell construing the will of John W. Stout and the term of "what the testator meant by surviving children," cited Lord Halsbury in *Indwich vs. Tatchell*, 72 L. J. Ch. 393 by quoting the following language: "I confess I approached the interpretation of the will with the greatest possible hesitation as to adopting any supposed fixed rule for its construction. If I can read the language of the instrument in its ordinary and natural sense, I do not want any rule of construction, and if I cannot, then I think one must read the whole instrument as well as one can and conclude what really its effect is intended to be by looking at the instrument as a whole." The Vice Chancellor himself in deciding this case said: "notwithstanding the fact that each will in the matter of construction must stand upon its own footing, many attempts have been made by the courts and the text-writers to formulate a rule which should have a more or less general application touching the construction of the words in question. **It must be admitted that generally these words must be given their common ordinary meaning, unless there is something in the text requires that a different meaning should be given to them.**"

There is, however, no irreconcilable clauses in this will. In the fourth paragraph the testator shows his intent of devising and bequeathing to his wife the entire remaining estate for her use and enjoyment during her natural life or upon her not marrying again, and in case of either of these contingencies arising, then directing the estate to be divided amongst his children, as enumerated in the fourth paragraph, share and share alike. His heirs at law did not become vest-

ed with the property until after the occurrence of either of these contingencies. The estate in question, comprised both real and personal property. He had under consideration that his wife might survive him a number of years, during which period it might be advisable for the property to be sold, the reasons of which contemplation is well expressed by the court below as follows: "the character of the neighborhood might change, rents become low, taxes increase, special assessments be levied, temporary booms occur to enhance for the time the value of the houses or the lands, or for various reasons, it might result, at one time or another, that it would be advantageous and desirable, if not in fact necessary, to sell part or all of the real estate in question for the benefit of all of the objects of his bounty—namely his family,—his wife and children."

"These ten devisees were of various ages and temperaments; a wife, a son, and eight daughters. When the will was executed in 1902,—(probably also at testator's death in 1909), some were minors. The probability would be that it would be difficult or impossible that all would agree upon such sales as might be advisable and for the best interests of all. In order therefore that the advantage thereof might not be lost through such failure to agree, control is given by the power of sale to the two upon whose judgment and discretion he relied,—the two whom he had named executrices. (The son was not admitted to the bar until several years after his father's death)."

"Another reason for the creation of this power of sale, and a purpose which testator doubtless had in mind, is its efficacy in aid of the final distribution of the estate, that is, its reduction to enjoyment in severalty by the remaindermen after the death or marriage of the life tenant. The property was not susceptible of equal division amongst the nine, and the power of sale would serve to obviate the expense of proceedings and sale in partition."

That the testator intended to give more than a mere

naked power of sale is evidenced by the fifth paragraph of the will, whereby he requests his executors not to sell the premises known as No. 213 Park Avenue, in the City of Plainfield, for the period of fifty years from the date of his death. One conclusion only can be drawn,—that the testator did not intend to limit the power of sale as to the other properties until either of the contingencies arose in the fourth paragraph, and that its exercise was not to be limited, as contended by the appellant, just for the mere purposes of administration. The mere fact that the will gives the power to the appellants under the names of executrices does not in any wise alter the reasoning as above stated. It is a matter of common occurrence that powers in trust are given in wills under the name of “executors,” as frequently, if not more frequently than otherwise, and in the case of *Castleman vs. McCoolley*, 73 N. J. E. p.353, Vice Chancellor Leaming, construing the will of Mathilda C. Yarrow, wherein the trustee had been named as executor on a bill for specific performance which involved the question “whether the executor named in the will is given a power of sale,” said: “as already stated, the legal title to the property in question was vested in the person named in the will as executor, and was to be held by him upon the trust declared. The sale of the real estate the court by implication held was necessary to be made by the person named as executor in his capacity as trustee holding the real estate as devisee in trust, and not in his capacity as an executor. The trust duties imposed are essentially those of a trustee and should be administered as such and **it is wholly immaterial that the devisee in trust is defined in the will as an executor.**”

An inspection of the will discloses that it was drafted by counsel learned in the law (case pgs. 69 and 70) and was witnessed by William N. Runyon and Charles L. Moffett, both practising attorneys and counsellors. The circumstances surrounding the drafting of the will and the character of the beneficiaries under the

will discloses the unlimited power vested in the executrices as trustees, and it is immaterial as to the term in which they are designated in the body of the will.

There are no circumstances in the case to cause a person to come to a conclusion that the power of sale confirmed in the sixth paragraph of the will should now be deemed invalid or exhausted. The testator, no doubt, had in mind the very diversity of opinion and inability to agree in regard to the consideration, as evidenced in this transaction, and the fact that eleven years have elapsed since testator's death, does not signify as the ability of the power of sale to function in aid of the purposes and intention of the testator had not become exhausted or terminated.

In the case of *Morse vs. Hackensack Bank*, 47 N. J. E. p.279, the court held: "mere delay in the exercise of a unlimited power of sale does not alone deprive the donee of the power or right to exercise it."

The mere fact that a devise is made of the land in the fourth item of the will, does not in itself imply that the executrices have no power of sale under the sixth item of the will.

Vice Chancellor Van Fleet, in the case of the *Executors of John S. Rogers, Deceased vs. Adeline B. Rogers*, 49 N. J. E., p.98, laid down the principal to be pursued in cases of that description as follows: "the rule is well settled that where two clauses of a will are irreconcilable so that they cannot possibly stand together, the clause which is last in local position shall prevail. The subsequent words being construed to denote a subsequent intention. 'Citing 2 Jarm. Wills R & T's Ed. 44,' but it is equally well settled that this rule is never to be applied, except on the failure of every attempt to give the whole will such a construction as will render every part of it effective."

The court below found no difficulty in giving effect to both clauses, following the precedent established in *Bacot vs. Wetmore*, 17 N. J. E. 250; *Wetmore vs. Midmer*, 21 N. J. E. 242; *Hatt vs. Rich*, 59 N. J. E. 402; *Cruickshank vs. Parker*, 52 N. J. E. 310.

In *Bacot vs. Wetmore*, 17 N. J. E. p.250, this contention was upheld by Chancellor Greene who said (p.254): "the fact that the land was previously devised constitutes no valid objection to the power of sale." Subsequently the same question arose upon a construction of the same will in *Wetmore vs. Midmer*, supra, and at p.245 the Court said: "the subsequent power in the will to the executors to sell all or any of the lands devised, is in broad decided language without exception, and must therefor prevail over the prior devises, which must be taken as subject to this power and its execution."

In the case of *Hatt, et als., Executors of William King vs. Elisha C. Rich, et. als., and Edmund P. Backes vs. Henrietta Hatt*, supra, Vice Chancellor Gray, in disposing of the questions involved in the case under a construction of the will of the testator, and which will, and the question arising being similar to the case at bar, said: "each of the numerous cases cited against the exercise of the power (of same) stands upon the expressions of the will in the particular case, and if they were ambiguous, then upon the circumstances of the testator's property and his family, etc., or beneficiary. They afford but little aid as precedents because each case varies in essential particulars of its facts from that under consideration. The cases most clearly resembling that under consideration are *Bacot vs. Wetmore*, 2 C. E. Green, 250; and on the same will, *Wetmore vs. Midmer*, 6 C. E. Greene, 245." He also stated in the same case: "in the case at hand the donation of the power to the executors is expressed in the plainest term without any ambiguity, and the application of the more modern rule 'that the courts have decided that powers, although framed in general terms, are limited by the nature of the limitations contained in the will is needed to justify any further discussion of its extent.' This doctrine is entirely acceptable where the will in terms, or by necessary implication, indicates the purposes to which the testator intended

the use of the powers to be limited, but where the will creates an unlimited power in unquestionable terms yet exhibits no objects, save a desire for the exercise of the discretion of donee, there is some danger that in holding that the powers may not be enforceable, some unexpressed purposes of the testator may be defeated." He held there: "the power given to the executors is, by the expressed term of Mr. King's will, exercisable at their discretion without limit of time or circumstances, save as to the homestead property."

The power given in the will under consideration is as broad as the will construed in the latter case, and the power of the executrices to exercise this right of sale is unlimited, with the exception of the sale of the property on Park Avenue in the City of Plainfield, and the proper exercise of this power is not invalid under the terms of the said will.

Counsel for the appellants has endeavored to analyze the various cases set forth in the conclusions of the court below, with an attempt to prove that they were not controlling authorities for the question dealt with and disposed of by the Court. His reasoning, however, overlooks the fact that under the construction placed upon the will and the intent of the donor that the estate shall not be divided until either the widow dies or re-marries, the heirs at law would not become vested with the estate,—in other words, that the executrices named were not named simply for the purpose of administering the estate, for the payment of debts only, but it was the intent of the testator to have his wife and daughter take charge of the property during the lifetime of the widow and sell the same, if in their judgment and discretion they deemed it advisable.

In furtherance of his contention, he relies upon the case of *Mattack vs. Progressive Investment Co.*, 79 N. J. E. p.139. In that case a bill for the specific performance of a contract for the sale of real estate, the defendant refused to take the title rendered by the complainant for the expressed reason that the com-

plainant, as personal representative of the deceased, could not make title. The testator died in 1904 leaving a will by which he gave his residuary estate to his grandchildren, Edmund F. Heath and Marjory Heath and to his nieces named Heath and Haddon. He provided that the shares of the said Edmund F. Heath and Marjory Heath be paid to them when they shall have arrived at the age of twenty-one years. He also created a power of sale in these words: "I hereby authorize my executrix to sell and dispose of any or all of the property that I die possessed of at such times and upon such terms and in such manner as to her shall seem judicious, and make the necessary conveyances and transfers thereof."

In 1905 all the residuary devisees attained their majority and on July 26, 1906, the persons mentioned in the will as the nieces named Heath and Haddon, made a conveyance of their interest in the residuary estate, including the lands to Edmund F. Heath and Marjory Heath. At the time of that conveyance the said Edmund Heath was the personal representative of the testator, appointed as substitute for the widow who was then dead. He subsequently died and the complainant was substituted under the statute. In 1910 the substituted personal representative made a contract to sell the lands in question, and the case rested upon the question whether the substituted administrator can give title. Under the will the widow was named as the executrix, and by reason of the legatees under the estate having arrived at their majority the court decided that all of the duties of the personal representative had been performed and there remained nothing further for him to do; that the title to the land vested in the residuary legatees. In that case, the entire question hinged as to whether the devisees of the residuary estate had a right to elect to take the land instead of the proceeds of sale thereof, and if they had that right, whether they had exercised it. The court held that they had the right to make such election (the contingency created by the will having

arisen), and that they have elected in pursuance of such right to take the land, as evidenced by the deed of 1906, all the residuary legatees being parties to the instrument, either as grantors or grantees. The case was decided by Vice Chancellor Howell adversely for the reason that after the election to take the land instead of specie, and at the time the residuary estate was conveyed to Edmund F. Heath and Marjory, the said Edmund F. Heath was the substituted administrator with the will annexed, or in other words, the personal representative of the testator. He stood as the personal representative accepting the deed of conveyance which treats the conveyance of the property in question as land, instead of insisting upon an equitable conveyance and treating it as personalty. Not only was this a recognition of the real nature of the property in dispute, but an absolute abandonment of any idea that it might be personalty or have any of the incidents of personalty.

The conclusion of the court in the above case does not apply, for in the case at bar the devisees have no right of election. The income from the estate was taken and used by the widow, who was one of the parties to the agreement to sell,—part of the property to be sold was vacant land from which no income was derived. For a period of more than eleven years the devisees had permitted the executrices to take charge of the estate, collect the issues, rents and profits therefrom, pay them to the widow, and pay the debts incurred for and in behalf of the estate in maintaining the property, such as the taxes, insurance, repairs, etc. The time within which the latter portion of the fourth paragraph of the will would become operative has not as yet arrived, and therefor they could not at the time of the signing of the agreement, or even now, elect whether they will take the land or specie.

Throughout the whole case there has been no objection raised by any of the devisees to the sale of the property. The only question in their mind being that the executrices were not obtaining a sufficient amount

and that more money ought to be paid. On the contrary, the evidence would indicate, if this was pertinent and the rule could be applied, that they had elected to take the money, providing it was sufficient and enough. The question of the inadequacy of the consideration was disposed of by the court after hearing the testimony of the parties and the expert witnesses produced upon both sides and the inadequacy of price in itself would not be sufficient to defeat the appellee from the relief sought by him.

## V.

### **THE COURT WAS JUSTIFIED IN MAKING THE DECREE APPEALED FROM.**

The appellee in good faith, after negotiations of several months, entered into the agreement with the executrices of the estate of John Rafferty, deceased. He paid the deposit and offered to carry out the terms of the agreement. One month after entering into the contract an attempt to rescind is made by the appellants under the excuse that the heirs-at-law are not satisfied with the consideration and that they had no knowledge that Mr. Manning had anything at all to do with the transaction. After the filing of the bill to compel specific performance, negotiations still continued between the parties, and finally an appointment made to close the transaction upon the request of the attorney of the estate, who was one of the donees under the will of his father; the deed was drawn and mortgages drafted agreeable to the appellants, and an appointment made with the appellee to be prepared to carry out the terms of the agreement. The contract was a valid one and possessed in substance and in external form the qualities and authority of a valid contract. The terms were complete between the parties and the complainant was justified in applying to the exercise of the extraordinary jurisdiction of the court resting in sound discretion to secure the enforcement of the specific performance of the contract.

The question is not what the court must do, but what, in view of all the circumstances of the case under consideration it should do to further justice.

When the contract has been fairly procured, and when its enforcement will work no injustice or hardship, it is enforced almost as a matter of course. **Plummer vs. Keppler, 26 N. J. E. p.481.**

In the case of **Connelly vs. Haggerty, 56 Alt. Rep. p.371**, Vice Chancellor Grey advised a decree for specific performance where the complainant sought to obtain from Haggerty, the trustee, the fulfillment of an agreement to convey certain premises. Vice Chancellor Grey stating: "It is, I think, an entirely well established principle that, when a party undertakes to execute a power, equity will interpose to carry his intention into effect in aid of those persons who are within the proper consideration. Equity will extend this remedy to creditors, purchasers for valuable consideration, and wives and children of the donee of the power."

## VI.

### **THE DEVISEES ARE ESTOPPED, AND BY THEIR CONDUCT HAVE ACQUIESCED IN THE AGREEMENT.**

As pointed out on page 26 of this brief, the children of the testator have permitted the widow and their sister for a period of eleven years to take charge of and manage the estate, paying the net income to the widow, and throughout the entire negotiations for the sale of the property to the complainant, which lasted several months, were familiar with the transaction, a brother, the attorney of the estate, having talked over the sale and terms thereof with different members of the family, permitting the executrices to enter into the contract, and as shown through the entire testimony, the only objection being raised by any of them after the signing of the contract of sale was that they considered the consideration inadequate.

They are not parties to this suit, having failed to intervene and ask the court to protect their rights, if any. By their conduct they have established "an estoppel in pais," as by their conduct they have induced the complainant to enter into the agreement so that he will be injured if the executrices are permitted to repudiate their act.

It is often laid down as a general proposition that to constitute an estoppel "it must be shown that the person sought to be estopped has made an admission or done an act with the intention of influencing the conduct, or which he had reason to believe would influence his conduct inconsistent with the evidence he proposes to give, or the title he proposes to set up. It appears, however, to be the prevailing rule that it is not essential that the conduct creating the estoppel should be characterized by an actual intention to mislead and deceive. If whatever a man's real intention might be, he so conducts himself that a reasonable man would take the act or representation to be true and believe that he was meant to act upon it and he did act upon it as true, the party making the representation will be precluded from contesting its truth." 11 A & E Cyc p431. Kuhl vs. Mayor and Collector of Jersey City, 23 N. J. E. p.84 and cases cited in the opinion of the Chancellor.

Irrespective of any agreement, there are cases where the law affixes certain consequences to the acts of parties when clearly and indisputably proved. The rule is that a waiver may be shown by a course of conduct signifying a purpose not to stand on a right and leading, by a reasonable inference, to the conclusion that the right in question will not be insisted upon. Williamson vs. New Jersey Southern Railway Co., 29 N. J. E. p.311.

A common illustration of waiver in action is where the right to rescind a contract is lost by a failure to proceed opportunately. A person who with knowledge of a fraud or other ground of revocation in his favor permits the other party to the contract to proceed

with the performance, is considered to have waived his rights and insistence on specific objections to the performance and violation as to others is a waiver of the objection not urged.

In the case of *Johnson vs. Oppenheim*, 55 N. Y. 291, Justice Allan said: "when some formal act or acts are to be performed by a party as a condition precedent to some right or to perfect a right of action or property, and the act as performed is defective or imperfect and the adverse party whose right it is to object and insist upon a more perfect compliance with the condition takes no objection to the manner of its performance, by accepting the performance as proved places his objection to the claim and right assigned upon another distinct and independent ground, he is held to have waived all objections to the formal or technical defects, or when a single objection to the performance is taken and the party is silent to all others, they are deemed to be waived. The rule lies upon the ground that the party by his silence has misled his adversary and not having spoken when he ought, shall not be permitted to speak when he would."

As shown throughout this brief, the only testimony as to the objection of either the contracting parties or the others who claim an interest in the property is the inadequacy of consideration. Nowhere throughout the trial is there any testimony to indicate that the contract was repudiated for lack of power of sale, and it is therefor respectfully submitted that the appellants are estopped from setting up any legal right which they might claim, and if they do possess such a right that by their conduct and actions they have waived the right to prevent the specific performance of the contract.

It is therefor insisted upon the part of the appellee that the contract was certain and fair in all its parts and for an adequate consideration; that the appellee has held himself ready to perform it according to its terms without default on his part; has been prompt in applying to this court for relief; that the appellants

and those under them are estopped from interposing a legal defense under the construction of the will to ask a construction of the will depriving the executors of the power of sale, and that the court was justified in making the decree of specific performance of the contract.

#### VII.

THE DECREE OF THE COURT OF CHANCERY SHOULD BE AFFIRMED AND THE APPEAL DISMISSED WITH COSTS.

Respectfully submitted,

WILLIAM NEWCORN,  
Solicitor for and of Counsel with  
Complainant-Respondent.

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## New Jersey Court of Errors and Appeals

*Between*

CHARLES C. RANDOLPH,

*Complainant-Respondent,*

*and*

BRIDGET RAFFERTY and MARY E. RAFFERTY,

executrices of the estate of John Rafferty, deceased,

*Defendants-Appellants.*

*On Appeal  
from Chancery.*

### BRIEF FOR APPELLANTS.

#### Statement of the Case.

This is an action brought to enforce the specific performance of a contract for the sale of lands. In the bill of complaint (Case, p. 1) complainant alleges that on March 3, 1900, John Rafferty in his lifetime became seized in fee simple of certain premises in the City of Plainfield which are particularly described; and that on November 1, 1909, said Rafferty departed this life leaving his last will and testament wherein he nominated the defendants as his executrices thereof, which will was duly probated in the Union County Surrogate's office on November 12, 1909, and that said defendants qualified as such executrices and are now acting as such.

It is further alleged that the will of the testator conferred a power of sale upon the executrices (Case, p. 2).

Furthermore, the bill sets forth that on December 23, 1919, the defendants as executrices entered into an agreement dated on said last mentioned day, under the power of sale contained in the will, to convey to complainant in consideration of Thirty-five Thousand Dollars (\$35,000) the lands described on or before February 1, 1920, upon the terms and conditions of the agreement, a copy of which is annexed to the bill of complaint (Case, p. 4); and it further appears that the sum of One Thousand Dollars (\$1,000) as specified in the agreement had been paid upon the signing thereof.

The bill further alleges that complainant after the delivery of the agreement caused searches to be made and on February 1,

1920, tendered to the defendants as executrices the sum of \$14,000 required to be paid on that day and offered to execute five mortgages for the sum of Four Thousand Dollars (\$4,000) in accordance with the terms of the contract, which offer, it is alleged, was refused by said executrices, the only reason being assigned being that they thought they ought to have more money and unless they received an additional amount, which was not specified, they would not make conveyance. The bill concludes with a general allegation of refusal on the part of the defendants to execute a deed of conveyance. The complainant prays for answer and that the defendants may be decreed to perform the articles of agreement and to make, execute and acknowledge in due form of law and deliver to complainant a good and sufficient warranty deed for the said premises, and that defendants deliver to complainant possession thereof and account to him for the rents of the same since February 1st last and for general relief. Annexed to the bill is a copy of the agreement to which reference is made therein.

The defendants to this action filed their answer which is set forth at length in the printed case, pp. 7 and 8. In their answer defendants deny the allegations of the fourth paragraph of the complaint relative to the effect of the alleged contract but admit that they signed the paper, a copy of which was annexed to the bill of complaint, and that \$1,000 was paid to them by the complainant, but they insist that "said paper is without any legal force or effect." The answer also denies the allegations of the bill that on February 1, 1920, complainant tendered to the defendants the sum of \$14,000 and offered to execute the five mortgages for the sum of \$4,000 and the other allegations of the fifth paragraph of the bill. The allegations of the sixth paragraph of the bill relative to the alleged arrangements to sell the property were also denied, though the defendants admit that they have not executed any deed for the lands. The allegations in the first three paragraphs of the bill are admitted.

The answer further alleges that after the defendants had signed the paper writing some of the beneficiaries of the estate who were daughters of the defendant Bridget and sisters of the defendant Mary and who were interested in the lands and in the proceeds to be derived from the sale thereof, very strongly objected to the sale on the ground that the price named was grossly inadequate and that the said alleged agreement was not fair, just and equitable, but had been rashly and improvidently made

and for these reasons called upon the defendants hereto to rescind their signatures and to refuse to further proceed with the matter; that thereupon and within a few days after signing of the papers and before any action had been taken under it by complainant defendants rescinded their signatures to it and notified complainant and his agent and offered to return the said thousand dollars to the complainant, which offer was refused.

The answer further sets forth that if the defendants had signed and delivered a warranty deed to said lands to complainant it would have caused defendants great unpleasantness and been productive of hard feeling between them on the part of the beneficiaries and might have provoked litigation. The answer further alleges that a decree of specific performance would work a hardship and injustice upon the defendants and the beneficiaries of the estate and would be inequitable under the circumstances.

In the answer it is further alleged that before signing the paper the defendants were assured that one Clifford L. Manning was in no way interested in the matter and subsequently learned that he was so interested and alleged that they were deceived thereby.

The complainant filed replication to the answer in which he joined issue on paragraphs one to four of the answer. Furthermore, the replication denies the allegations in the fifth paragraph of the answer and proceeds to set up the circumstances leading to the making of the alleged contract. The replication further sets forth certain alleged matters relative to the attempts on the part of the parties to effect a settlement of the matter in controversy; and further proceeds to state the relation of the said Clifford L. Manning to the transaction.

At this point it should be observed that the replication in this cause seems to be special in its character and does not comply with the rules of the Court of Chancery in that special matters are set up in replication without leave of the Court for that purpose and no order or leave appears in the record in this case.

Thereafter the cause came up for hearing before the Court of Chancery in regular course. The complainant offered in evidence the alleged contract between the parties which is marked Exhibit C. 1 (Case, p. 14, l. 35). This alleged contract is found on page 4 of the printed case.

The complainant being sworn as a witness on his own behalf stated that the first intimation he had that the defendants de-

sired to rescind the contract was when he tendered the money at Mr. Rafferty's office in Newark and that at that time Mr. Rafferty stated that he had been unable to have the papers prepared because he knew he couldn't have the signatures attached to them, referring to the signatures of the executrices (Case, p. 21). At this time, also, the complainant admits that Mr. Rafferty informed him that he couldn't secure the signatures of his mother and sister to the deed, that they simply objected to it and wouldn't sign (Case, p. 22, l. 25). The complainant also acknowledged receipt of the communication from the defendant, Mary E. Rafferty, which was marked Exhibit C. 8 (Case, p. 24). This letter is set out in full on page 66 of the printed case. The other witnesses presented by the complainant presented no testimony of any vital interest or bearing on the points at issue. When complainant rested his case William V. Rafferty was offered as a witness for the defendants. He is a beneficiary under the will and acted as counsel for his mother and sister in connection with their business. In his direct and cross examination he refers to the negotiations leading up to the alleged agreement. The witness recounts his interviews with complainant in his endeavor to have the complainant accept a rescission of the contract (Case, p. 35). The witness also refers to subsequent efforts made by the parties to the transaction to effect a settlement and recounts the failure thereof (Case, p. 36).

The defendant Mary E. Rafferty was offered as a witness on her own behalf and she stated clearly that the objection to the alleged agreement was because her sisters very strenuously objected to the price they were to get for the property and that it was on account of this objection that she refused to carry out the contract (Case, p. 40, ll. 10-30).

Frances Treadwell also appeared as a witness on behalf of the defendants. She is a daughter of the testator and one of the beneficiaries under his will and states that she objected to the proposed sale and conveyance (Case, p. 42, ll. 15 to 40).

Sarah M. Rafferty was also offered as a witness on behalf of the defendants. She is a daughter of the testator and one of the beneficiaries under his will and testified that she objected to the sale because of the insufficiency of the consideration (Case, pp. 42 and 43). The defendant offered two other witnesses who qualified as experts in real estate valuation and testified that the property was worth in their judgment more than had been offered by the complainant.

When defendants rested their case the complainant offered expert testimony with respect to the value of the property and thereupon the case closed.

In the first instance the Court below considered the two defenses that had been set up, that there was in some way misrepresentation or deceit, and the inadequacy of the price. After determining these questions in favor of the complainant the Court below held that the only question in the case was a legal question—"the question of the legal effect of the interpretation of the clause in the will." The opinion of the Court on these matters is set forth in the printed case, pages 58 to 60 inclusive.

After argument by counsel the Court rendered its conclusions which are set forth in the printed case on pages 75 to 81 inclusive, and after determining the legal question in favor of the complainant's contention the Court advised a decree for specific performance of the contract.

Thereupon a final decree was made herein and filed on June 29, 1920, which is set forth at length on pages 82 to 84 inclusive of the printed case. Reference will be made to the terms of the decree in the following argument.

Notice of appeal from the decree was filed in this cause on July 7, 1920 (Case, p. 84), and petition of appeal was filed in this Court on July 26, 1920. The petition of appeal is set forth at length on pages 85 and 86 of the printed case. Answer to the petition of appeal was filed by the respondent (Case, p. 87).

Referring to the power of sale conferred upon the defendants as executrices by the will of the testator, the Court below held "that the power was held by the defendants in trust for the benefit of all the devisees and that its exercise by them was valid as to the sale and will be valid as to the conveyance."

In the decree made in the cause it is recited that the defendants as executrices have power and authority under the will of the testator to make a good and valid conveyance in the law and that the complainant is entitled to specific performance of the agreement on the part of the defendants. After these recitals it is decreed that the articles of agreement be in all things specifically performed by the said defendants.

### Specifications of Error.

The appellants respectfully insist that the decree is erroneous in the following respects:

1. That the Court below should have held that the executrices did not have any valid authority to make the agreement, specific performance of which was sought in and by the bill of complaint.
2. Because the Court should have held that the said executrices did not have any valid authority to agree to deliver a warranty deed.
3. Because the relief granted the complainant in and by said decree does not conform to the said agreement.
4. Because costs and counsel fees should not have been awarded to complainant.
5. Because the Court below should have dismissed the bill of complaint and denied the complainant the relief prayed for therein.

### BRIEF OF ARGUMENT.

#### I.

**The alleged contract is indefinite and uncertain.**

The contract upon which the bill of complaint in this cause is grounded is indefinite as to the parties thereto and as to the terms thereof.

In the first place it should be noted that the contract purports to be made between "the estate of John Rafferty" and the complainant (Case, p. 4). It is signed as follows:

"Bridget Rafferty,  
Mary E. Rafferty,  
Executrices of the Estate of  
John Rafferty."

(Case, p. 6.)

By reference to the will of the testator (Case, pp. 69-70) it appears that the testator made disposition of all his residuary real and personal estate as set forth in the fourth item thereof and appointed his wife and one of his daughters the executrices of the will. Under such circumstances the expression "the Estate of John Rafferty" might refer equally as well to the beneficiaries collectively as the parties vested with the title thereof as to the executors under the will.

In Black's Law Dictionary, Second Edition, we find the word "estate" defined as follows:

"The word is also used to denote the aggregate of a man's financial concerns personified \* \* \* In this sense it is a fictitious or juridical person, the idea being that a man's business status continues his existence, for its special purposes, until its final settlement and dissolution."

It is very apparent, then, that this contract as drawn is indefinite as to the parties thereto. See *Jason v. Johnson*, 74 N. J. L. 529.

In the second place it should be noted that the contract is uncertain as to its terms.

We refer particularly to the stipulations therein with respect to the payment of the consideration money (Case, p. 5). After providing for the payment of the sum of \$15,000 which was to be paid in cash, the balance of \$20,000 is to be paid in the manner indicated therein as follows:

"\$20,000 to be paid in five mortgages of \$4,000 each at 5% for 3 years, being stipulated in the mortgages that \$500 in cash is to be paid on the principal of each and every mortgage at the expiration of the second year."

This provision is certainly very indefinite and uncertain. There is no indication whatsoever as to the property upon which the mortgages were to be a lien. It is not stated anywhere that the mortgages are to be a lien on the property to be conveyed. The only intimation that the lands conveyed are to be mortgaged back is possibly found in the expression that the vacant land known as certain street numbers is "to be excluded for the mortgages."

Furthermore, it does not appear whether these mortgages are each to cover the whole property or whether they are each to cover different portions thereof, or whether they are to be concurrent or otherwise.

It is also uncertain whether the interest rate is 5% for three years or whether the mortgages are to be payable in three years.

There is no definite direction with respect to the date of the instruments or the time from which interest is to be computed, nor is the time for the payment of interest clearly indicated.

In view of the absence of these essential features the contract as drawn is too indefinite and uncertain for specific performance.

In *Moore v. Galupo*, 65 N. J. Eq. 194, the Court considered a contract somewhat deficient in the respects above mentioned. The defects in the instrument were pointed out by the Court of Chancery in these words at p. 199:

“The objection is based on the clause which declares the manner in which payment of the purchase price shall be made. The agreement is dated May 29, 1901. By it the whole purchase money is declared to be \$54,000 which it is provided shall be paid by the defendant in the following manner: \$250 on the day of the date of the agreement—May 20th, 1901; \$250 on June 3d, (then) next; \$9,500 on the delivery of the deed to the defendant on or before April 1st (then) next; and ‘the remaining sum of \$44,000 to be secured by mortgage or mortgages on said premises bearing six per cent. per annum interest.’ ”

In the course of the opinion of the Court of Chancery Vice-Chancellor Gray says at page 199:

“The defendant insists that this contract is lacking in certainty and definiteness in respect to the terms of the purchase price which is one of the essential features of the contract; and that the terms of the contract make it plainly manifest that the parties intended only part of the purchase money to be paid in cash and do not show in what mode the residue should be paid.”

“In the case of *McKibben vs. Brown*, 1 McCart. 17, Chancellor Green said that no specific performance of a contract can be decreed in equity unless it be actually concluded and be certain in all its parts. If the matter still rests in treaty, or if the agreement in any particular be uncertain or undefined, equity will not interfere.”

Further proceeding at page 204 the Vice-Chancellor says:

“But the omissions of the complainant’s contract to fix time of payment is not the only element of uncertainty which prevents its specific performance. That contract provides that the sum of \$44,000 should be secured by a mortgage or mortgages. This phrasing leaves it uncertain whether one mortgage should be made or what number of mortgages more than one. It does not prescribe whether if more than one mortgage should be given they were to be concurrent or successive liens, nor whether or not they should precede all other mortgages, nor what should be their precedence between themselves.”

“It is plainly to be seen that these omitted matters were intended to be arranged between the parties when the mortgage or mortgages were to be given.”

“These elements of uncertainty affect incidents of the contract which are of the essence of its obligation. This

appears at once that it is attempted to formulate a decree for its specific performance."

See also:

*Domestic T. & T. Co. v. Metropolitan T. & T. Co.*, 39 N. J. Eq. 160.

*Myers v. Metzger*, 63 N. J. Eq. 779.

The contract under consideration, it will be observed, is not only deficient in the features mentioned in the opinion above, but is deficient in all other essential features of a contract.

In the conclusions filed by the Vice-Chancellor in this cause (Case, p. 81), he indicates that the particulars as to the mortgages to be given as part of the purchase price might have been more fully provided for in the contract. However, it was held that the difficulty is obviated by the facts that the drafts of the bonds and mortgages had been made and were acceptable to both parties.

We respectfully insist that this can have no direct bearing on the question here involved as to the rights of the complainant to the aid of the Court in enforcing specific performance of the contract when it is a fixed and settled rule of the Court that the contract sought to be enforced must be definite and certain. Furthermore, this is a contract for the sale of lands and under the Statute of Frauds all the essential elements thereof must be in writing and essential elements lacking cannot be supplied by parol testimony. See *Wirtz v. Guthrie*, 81 N. J. Eq. 271.

We would further observe that the testimony shows that the mortgages were not complete. We refer to testimony under cross examination of William V. Rafferty at the foot of page 36 and top of page 37 of the printed case. His testimony there appears as follows:

"Q And you had the mortgages prepared? A I didn't have them quite ready.

"Q You had drafted them? A Yes.

"Q And there were certain changes to be made? A Yes, there would probably have to be."

## II.

**The executrices had no power to deliver a warranty deed.**

The power of sale conferred upon the executrices is found in the sixth paragraph of the will (Case, p. 70). We quote the same as follows:

“I do give to my executors hereinafter named and to the survivor of them, full power and authority to grant, bargain, sell and convey any or all of my real estate which may be owned by me at the time of my decease to any person or persons in fee simple or otherwise, at public or private sale, at such times and upon such terms, as they think fit.”

The power, then, is limited to a simple conveyance of real property. There is no express power conferred upon the executrices to enter into any covenants for title. A simple grant of lands in this State carries with it no implied covenants for title and it is fair to presume that the power was conferred with knowledge of this principle. Certainly the testator has not indicated any desire to have his executors create an obligation. That the executrices have no greater power under this provision than is specifically granted is too well established to need any citation of authorities. Despite the entire absence of any authority granted to the executrices to enter into covenants for title, the decree made in this cause directs the defendants to make, execute and deliver to the complainant a good and sufficient warranty deed for the premises (Case, p. 83, l. 30).

## III.

**The decree of the Court below does not conform to the agreement.**

The final decree is found on pages 82, 83 and 84 of the printed case. By the terms of the decree the defendants are directed to make, execute and acknowledge in due form of law and deliver to the complainant a good and sufficient warranty deed for the said premises subject to leases on property on December 23, 1919, and to deliver at the same time to the said complainant possession of the said premises and account to him for the rents, issues and profits of the same since the first day of February last as of the date aforesaid. The decree further proceeds as follows:

“That thereupon the said complainant do pay or cause to be paid to the said defendants the sum of \$14,000 with

interest thereon from the first day of February last past and execute five (5) mortgages of \$4,000 each for a term of three (3) years bearing interest at the rate of five (5%) per cent. payable semi-annually and containing a stipulation that the sum of \$500 be paid on the principal of each mortgage at the expiration of the second year, which mortgage shall be a lien on the said premises, as provided in the said agreement until the same shall be paid and satisfied."

In the first place, the defendants are directed to account to the complainant apparently for the rents from December 23, 1919.

And further the decree directs the execution of five mortgages of \$4,000 each for a term of three years bearing interest at the rate of five per cent. per annum, payable semi-annually. There is no provision in the contract for the semi-annual payment of interest. Furthermore, it is very questionable whether the five per cent. mentioned in the contract represents an annual interest rate for the period of three years or whether the period of three years mentioned has reference to the maturity of the debt.

Furthermore, the agreement nowhere directs that the mortgage or mortgages shall be a lien on the premises conveyed.

#### IV.

**The executrices do not possess the power and authority to make the proposed sale and conveyance.**

The principal contention of the appellants is that the power of sale contained in the will has been exhausted and that a title attempted to be made by the exercise thereof would be nugatory.

Despite the fact that the administration of the executorship had been completed without recourse to the power the Court below nevertheless held that the power of sale was still effective.

By reference to the will (Case, p. 69) it appears that the testator after directing the payment of his debts and funeral expenses and the payment of two small legacies and the expenditure of certain money for a cemetery plot and the erection of a monument thereon, thereupon made disposition of his residuary estate as follows:

"Fourth—I give, devise and bequeath unto my wife Bridget Rafferty all my remaining estate, both real and personal, in whatever it may consist, or wherever situate, to have, hold, receive, use and enjoy the rents, interest, issues and profits thereof, during the term of her natural life,

if she so long remains my widow; and from and after her decease, or her again marrying, I give, devise and bequeath my said estate to my following named children Frances A. Rafferty, Mary E. Rafferty, Sara M. Rafferty, Elizabeth M. Rafferty, Helen G. Rafferty, Margaret E. Rafferty, Anna H. Rafferty, William V. Rafferty, and Grace Rafferty, to be equally divided between them share and share alike.

“Fifth—I hereby request my executors hereinafter named not to sell the premises known as No. 213 Park Avenue, in the City of Plainfield, New Jersey, for the period of fifty years from the date of my decease.

“Sixth—I do give to my executors hereinafter named and to the survivor of them, full power and authority to grant, bargain, sell and convey any or all of my real estate which may be owned by me at the time of my decease to any person or persons in fee simple or otherwise, at public or private sale, at such times and upon such terms, as they shall think fit.

“Seventh—I do hereby constitute my wife, Bridget Rafferty, and my daughter, Mary E. Rafferty, executors of this my last will and testament.”

The Court below concedes that by the fourth item of the will an estate for life or widowhood was created in the testator's residuary estate and that an estate in remainder, subject to said estate for life or widowhood, is devised to the named children and in the opinion says (Case, p. 77, l. 41): “The estates so devised are legal—there is no interposition of any trustee.”

The residuary clause is followed by a request to the executors not to sell a certain parcel of land for the period of fifty years from the date of the testator's decease. This request or limitation is ineffective for the reason that the power of alienation is attempted to be suspended beyond the period allowed by the rule concerning perpetuities. This request has no vitality whatever and can have no possible bearing upon the ultimate construction of the power of sale.

In the sixth paragraph of the will above quoted the testator gives to his executors named, and to the survivor of them, power and authority to grant, bargain, sell and convey any or all of his real estate.

In the seventh paragraph he appoints his wife and one of his daughters executors of the will.

The defendants below insisted that the gift of the power of sale to the executrices was utterly repugnant to and incompatible with the previous devise of the life estate and the remainder.

It should be pointed out that it is evidently conceded that legal estates were vested in the beneficiaries named in the residuary clause. The power of sale is granted to the executors. Whatever power was created passed to the executors as such. In fact, nothing more than a mere naked power could have passed under the will. No special duty was imposed upon the executors with respect to the real property of the testator and under the circumstances the only interest that the executors could have had would have been in their official capacity as such. There is no pretense in this case that any of the executors' duties remained to be performed, and after a lapse of eleven years from the death of the testator it must be presumed that their functions as such have been discharged.

The Court below attempted to harmonize the two repugnant clauses and referred to the rule requiring every effort to be made to give effect to the entire will. We respectfully insist that effect is given to the entire will by considering the power of sale vested in the executors for the purpose of facilitating them in the performance of their duties as such. Surely such a view does not treat the power of sale as a nullity, but recognizes it as valid for the purpose of aiding the executors in the administration of the estate in so far as that burden is cast upon them.

The fact that the power of sale follows the residuary devise in the will cannot give it any greater efficacy. Effect can be given to the power of sale as above stated without extending it so far as to practically deprive the devisees of the beneficiary ownership of their property.

In the case of *Rogers v. Rogers*, 49 N. J. Eq. 98, to which reference is made in the opinion of the Court below, the Court was considering the interest of parties in the same identical property. In the case before the Court the executors are given no interest in the property whatsoever and take no estate therein. After their duties are performed as executors this power of sale would in effect deprive the devisee of the beneficial interest in the property especially devised to them and take from them one of the most valuable rights in property, to wit: the right of alienation.

It is therefore respectfully insisted that the power of sale to the executrices now that all their functions have been performed is utterly repugnant to and incompatible with the legal estates devised.

The Court below evidently found no other purpose for which the power was to be used than to pay debts of the decedent and also that the debts of the estate have all been paid and the administration of the duties of the executrices as such have terminated. Nevertheless, it was held that the power of sale is still effective to enable the executrices to sell the lands in question and to make conveyance thereof. In support of the view taken by the Court of Chancery the following cases were cited as authority therefor:

*Bacot v. Wetmore*, 17 N. J. Eq. 250;

*Wetmore v. Midmer*, 21 N. J. Eq. 242;

*Cruikshank v. Parker*, 52 N. J. Eq. 310;

*Hatt v. Rich*, 59 N. J. Eq. 492;

*Morse v. The Hackensack Bank*, 47 N. J. Eq. 279.

In the first place, a critical examination of these cases will show that they do not stand as authority for the rule as laid down by the Court below in this case. Let us consider these cases in the order above set forth.

In *Bacot v. Wetmore*, 17 N. J. Eq. 250, a bill was filed for the specific performance of a contract. Complainant claimed title under deed from the executors of John Tonnele, deceased, who died seized of the premises in fee. By his will he gave and devised to his wife portions of his real and personal estate for her life in lieu of dower. He devised to his son John a life estate in his mansion house and part of the grounds belonging thereto subject to the life estate of the widow. The residue of his estate he gave to his children equally, share and share alike, in such manner that each child should receive only the income of his share during life and at the death of each child his share should go to his lawful issue. By a clause in his will testator provided as follows:

“And in order more fully to carry out the objects of this my will, I do hereby appoint and declare my executors hereinafter named to be trustees of all my property, estate and interests, herein given or devised to any of my children, or that any of my children may be entitled to by virtue of any provision in this my last will, during the life of such child (excepting the life estate in the mansion house devised to my son) with full power to retain all such property in their hands unsold and undivided until after the year 1867 and I do authorize my said executors to sell and convey all or any part of my real estate and all real estate that may be purchased by them and to invest my per-

sonal estate and the proceeds of the sale of such real estate at interest \* \* \*.”

It was objected in this proceeding that the executors had no power to convey the mansion house and premises devised to the testator's son, John L. Tonnele, for life.

In this case the Court of Chancery simply held that the power of sale granted to the executors extended over the life estate which had been granted to the son, John L. Tonnele.

On this subject the Court says:

“There is nothing in the terms of the will that would justify the Court in assuming that the testator designed to limit the power to the trust estate or to exclude the life estate of the testator's son in the mansion house from the operation of the power.”

It should be noted, however, that in connection with the grant of the power to the executors as aforesaid, they are directed to invest the proceeds of the sale of such real estate at interest in certain ways indicated, “for the interest and advantage of my children and for the improvement of my estate, and to change such investments as they shall judge best from time to time.”

This would necessitate the holding of the value of this life estate for the benefit of the life tenant in order to secure the same for the benefit of the remainder-men until the time of ultimate distribution. In other words, in order to carry out the intention of the testator it was necessary for the executors as trustees to hold all the proceeds derived from the sale.

In *Wetmore v. Midmer*, 21 N. J. Eq. 242, the will of the same testator was before the Court for consideration. The decision in this case was grounded upon the decision made in the case above set forth.

Further, the case of *Cruikshank v. Parker*, 52 N. J. Eq. 310, is cited by the Vice-Chancellor in support of his opinion.

In this case the bill prayed for the specific performance of contract for sale. Demurrer had been filed thereto which had been sustained by the Chancellor.

Thereupon appeal was taken to this Court. It appears from the opinion of this Court that one Rufus Story died seized of the lands in question with other property, leaving a will and codicils. He was survived by his widow, who died before the filing of the bill, and four children, his devisees and heirs-at-law. A partition or division of a large part of the lands of the testator had

been made and confirmed by the decree of the Court of Chancery. Thereafter, the trustees, who were the executors under the will, sold two lots to the defendant, who refused to take the lots on the ground that the trustees had no power to sell the same. The demurrer in Chancery was sustained upon the ground that the complainants had no power to sell any real estate set apart in partition as the share of Emily L. Paret. The will of the testator devises his residuary estate, real and personal, to the executors and the survivors of them in trust to and for certain uses and purposes therein stated. Among others there is power of sale given to the trustees and further they are directed to divide the real and personal estate into four parts, one for each of testator's daughters. They are to convey the shares to three of the daughters absolutely. They are given specific direction with respect to the share of Mrs. Paret. After making certain deductions therefrom this share is to be held and invested during her life by the executors and trustees and upon her death to make over the same to her issue.

The only question involved here was whether or not the power of sale which was granted to the trustees continued so as to enable them to convey the property set off to Mrs. Paret. In the course of the opinion of this Court at page 314, it is said:

“There is nothing in the will or codicils which is inconsistent with the continuance, after such division, of the power of sale which is expressly given to the trustees in the fifth paragraph of the will.”

At page 315 it is said:

“The super-added power of sale did not render the devise of the fee to the trustees invalid; the legal estate remained in fee simple in the trustees, liable to be extinguished only by the trustees under the power of sale or by their conveyance thereof under the terms of the trust.”

It is very apparent, therefore, that this Court did not have before it the question presented in the case at bar because in the case above quoted, the power of sale inhered in the executors as trustees.

The case of *Hatt v. Rich*, 59 N. J. Eq. 492, is also referred to in the opinion of the Court below. In this cause a bill was filed also for the specific performance of the contract by executors in which they sought to compel the performance of a contract made by them with the defendant to convey the homestead property of William King in East Orange under power of sale in his will. The suit was defended on the ground that the executors' power

of sale was not sufficient to convey a good title. Under the terms of the will this homestead property sank into and became a part of the residuary estate. Testator gave his residuary estate to his seven children by name in fee.

He also appointed certain persons executors and authorized them and the survivors, "to sell and convey all my real estate in their discretion at public or private sale." By codicil he directed the executors to hold the share of his daughter Elizabeth upon certain trusts which he indicated, and nominated and appointed as trustee thereof the executors named in his will.

In the course of the opinion of the Court of Chancery, the Vice-Chancellor proceeds to consider the claim made that the executors' power had become void. Finally the Court sustained the power more particularly by reason of the direct provision made for the daughter Elizabeth. At page 506 the opinion proceeds:

"The testator plainly left the severance and setting apart of Elizabeth's share to be done by his executors. There is no way by which the trust fund for her could, under the scheme of the will and codicil, be set apart for her out of the undivided interests save by executing the power of sale."

"If therefore reasons for the exercise of power of sale for other than payment of debts and legacies must be found to justify its execution (notwithstanding the words of the will disclose a clear intent of the testator to give an unlimited discretion) they are, I think, apparent upon the face of the will and codicil, not only in the purposes which may fairly be ascribed to the testator, but also in those which the scheme of the testamentary dispositions force into recognition."

It is therefore apparent that the Court of Chancery in this case endeavored to find some reason for the exercise of this power of sale and grounded the rights of the executors upon their active trustee duties under the will and codicil of the testator.

The Court below also sustained the exercise of the power in the case now before the Court, although a period of eleven years has elapsed since the testator's death. It was held apparently that mere delay is no bar. In support of this contention reference is made to the case of *Morse v. The Hackensack Bank*, 47 N. J. Eq. 279. This case came before the Court of Errors and Appeals on appeal from Chancery. In the course of the opinion of this Court, at page 283, rendered by Mr. Justice Depue, he says:

"The testator by his will made disposition of his entire estate to be wrought out by the intervention of the power

conferred upon his executor. He directed that his whole estate, real and personal, should be converted into money, and after making provision for debts, funeral and testamentary expenses and an annuity to his widow, he gave the residue of the proceeds of his estate in equal shares to his two children. The will containing no actual devise of lands, the title and usufruct of the lands descended to his heirs-at-law, subject nevertheless to the power of sale and the trusts declared thereon contained in the will. The estate which the heirs took at the testator's death was an actual estate which was alienable, devisable and descendible, and liable to be seized and sold as lands; but when the power of sale was exercised, the estate of the heir or his alienee was determined, and the purchaser under the power became seized under the devisor by a title paramount to the title of the heir by descent." (Cases cited.)

From the very words above quoted, it appears that the executors had active trustee duties to perform in the conversion of the testator's property into money and the division thereof. In this respect then it is distinguished from the case now before this Court.

From the examination of the above cases it appears that the executors had some active duty to perform with respect to the lands in question. In none of these cases do we have a mere naked power of sale in the executors and nothing more as in the case now before this Court.

The Court below evidently did not consider the ruling of the Court of Chancery in the case of *Maddock v. The Progressive Investment Co.*, 79 N. J. Eq. 139, where the situation was more nearly similar to the situation existing in the case now before this Court.

In this last mentioned case the bill was filed for the specific performance of a contract for the sale of lands. Defendant refused to take title tendered by complainant for the expressed reason that complainant as personal representative of the deceased could not make title. The testator died in 1904, leaving a will by which he gave his residuary estate to two grandchildren and certain nieces. He also created a power of sale in these words:

"I hereby authorize my executrix to sell and dispose of any or all of the property that I die possessed of at such times and upon such terms and in such manner as to her shall seem judicious and make the necessary conveyances and transfers thereof."

On January 26, 1906, the nieces named in the will made a conveyance of their interest in the residuary estate including the

lands to the two grandchildren. At this time one of the grandchildren was the personal representative of the testator appointed as substitute for the widow who was then dead. Subsequently this grandson died and complainant was appointed substituted administrator with the will annexed under the statute. On July 6, 1910, the complainant as such substituted administrator made a contract to sell the lands to the defendant.

In the course of the opinion Vice-Chancellor Howell says:

“The decision of the case depends upon the question whether the substituted administrator can give title. It appears that all the duties of the personal representative have been performed, all the debts and legacies have been paid and there remains nothing for him to do. The title to the lands in question is vested in the residuary legatees. There is no trust or other duty devolving upon the complainant, and it is for this reason that the defendant says that the power of sale contained in the will has been exhausted and that a title attempted to be made by the complainant would be nugatory.”

The Court thereupon considers the question as to whether the devisees had the right to elect to take the land instead of the proceeds of sale thereof, and if they had that right, whether they had exercised it, and comes to the conclusion that they had the right and had exercised it.

In conclusion the Court says as follows:

“Again if the lands in question are permitted to be sold and conveyed by the complainant, the purchase money would have to be paid to the present owners of the fee and it is well settled that a power of sale will not be made effectual in any case in which the proceeds of the sale would have to be paid to the terra-tenants, if the terra-tenants object.”

While the Court in this case held that there had been an election on the part of the beneficiaries to take the land as such, yet the Court clearly indicated in the course of the opinion as above quoted that if the lands were permitted to be sold by the legal representative the purchase money would have to be paid to the owners of the fee and that it is well settled that a power of sale will not be made effectual in a case in which the proceeds of sale would have to be so paid.

The situation in the case now before the Court is identical with the situation indicated in the opinion above quoted. If the executrices here are permitted to sell the real estate of the testator

the purchase money would have to be paid to the present owners of the fee, that is, the devisees of the lands under the will of the testator. Abundant evidence has been produced in the cause to show that the owners of the fee objected to the proposed action of the executrices.

Furthermore, the equities of the situation are certainly with the appellants in this case. The testator has vested the beneficiaries under the residuary clause of his will with absolute legal estates. The executors of his will have performed their duties as such and nothing remains for them to do. There is no trust or other duties of any kind which devolve upon the executors and for that reason the power of sale has become exhausted. In fact, more than eleven years have elapsed since the death of the testator and now after the lapse of such a period of time it would be inequitable and unjust to allow the executrices to exercise a power of sale which would simply deprive the devisees of their title to the lands in question. It appears throughout the case that the other eight persons holding title to this property object to the proposed sale of their property by the executrices, yet if this power is sustained these two executrices will be enabled to sell this property whether the other eight devisees are willing or not, and at a price which is unsatisfactory to them. After the exercise of the power by the executrices the purchase money would have to be paid to the devisees immediately. The result is that the beneficial interest of the devisees in their property would be taken from them by arbitrary and capricious action on the part of the executrices.

Finally, we respectfully insist that under the circumstances existing in this case before the Court the power of sale under the will of the testator is exhausted and invalid at the present time and that any title attempted to be made in this way would be nugatory.

## V.

**The decree of the Court of Chancery should be reversed.**

Respectfully submitted,

LUM, TAMBLYN & COLYER,  
*Solicitors for and of Counsel with Appellants.*

RALPH E. LUM,  
EGBERT J. TAMBLYN,  
*Of Counsel.*

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