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Notice of Appeal.

In Chancery of New Jersey

61-212.

Between
BERNARD M. DEGHERI,
Complainant,
and
THOMAS R. CAROBINE, *et als.*,
Defendants.
} On Bill, &c.

The defendants, Thomas R. Carobine and Fruit and Produce Acceptance Corporation, hereby appeal from the Final Decree and from the whole and every part thereof, except that part which orders the complainant to pay unto the solicitor for defendant, Michael Starace, the sum of $150.00 as and for a counsel fee, together with the costs of said defendant, Michael Starace, to be taxed, made in this Court in the above-entitled cause, to the Court of Errors and Appeals.

Dated, May 24, 1927.

JOHN W. OCKFORD,
Solicitor for and of Counsel with Defendants, Thomas R. Carobine and Fruit and Produce Acceptance Corporation.

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

JOHN W. OCKFORD,
Of Counsel with Defendants, Thomas R. Carobine and Fruit and Produce Acceptance Corp.

Amended Notice of Appeal.

IN CHANCERY OF NEW JERSEY.

61-212.

Between

BERNARD M. DEGHERI,
Complainant,

and

THOMAS R. CAROBINE, *et als.*,
Defendants.

On Bill, &c. Appeal from a Decree made by the Chancellor and advised by Vice Chancellor John Bentley.

The defendants, Thomas R. Carobine and Fruit and Produce Acceptance Corporation, hereby appeal from the Final Decree and from the whole and every part thereof, except that part which orders the complainant to pay unto the solicitor for defendant, Michael Starace, the sum of $150.00 as and for a counsel fee, together with the costs of said defendant, Michael Starace, to be taxed, made in this Court in the above-entitled cause, to the Court of Errors and Appeals.

Dated: July 6th, 1927.

JOHN W. OCKFORD,
Solicitor for and of Counsel with Defendants, Thomas R. Carobine and Fruit and Produce Acceptance Corporation.

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

JOHN W. OCKFORD,
Of Counsel with Defendants, Thomas R. Carobine and Fruit and Produce Acceptance Corp.

Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

BERNARD M. DEGHERI,
Complainant-Appellee,

and

THOMAS R. CAROBINE, *et als.*,
Defendants-Appellants.

On Appeal from the Court of Chancery.

To the New Jersey Court of Errors and Appeals:

The petition of appeal of Thomas R. Carobine and Fruit and Produce Acceptance Corporation, defendants-appellants in the above-stated cause, respectfully shows:

That your petitioners find themselves aggrieved by the Final Decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, advised by the Honorable John Bentley, Vice-Chancellor, in a cause wherein the said Bernard M. Degheri was complainant and said Thomas R. Carobine, Fruit and Produce Acceptance Corporation, Michael Starace and Sidney J. Goodman were defendants, to wit:

That the said decree directs the defendant Thomas R. Carobine to specifically perform a contract between himself and complainant, and convey certain premises described in the Bill of Complaint;

That the said decree directs the defendant Fruit and Produce Acceptance Corporation to execute a release, releasing from the operation of two certain mortgages the aforesaid premises;

That the said decree directs certain payments to be made out of the purchase price not provided by the contract of sale;

That the said decree restrains defendant Fruit and Produce Acceptance Corporation from selling in foreclosure any part of the premises aforesaid;

That the said decree provides that the defendant Fruit and Produce Acceptance Corporation execute a release upon the payment to it of the sum of $2300 instead of upon the sum of $3600;

That the said decree recites and provides for the specific performance of an agreement between complainant and defendant Fruit and Produce Acceptance Corporation, whereas no such agreement had been had between the said parties;

That the said decree provides for the payment out of the purchase money the sum of $858 to the defendant Michael Starace, whereas if the defendant Fruit and Produce Acceptance Corporation should have been decreed to specifically perform an agreement of release, it would thereupon become entitled to receive such sum of $858 and all of the remaining purchase money;

That the said decree provides for the payment out of the purchase money of certain taxes to be apportioned, whereas the Fruit and Produce Acceptance Corporation would be entitled to receive all of the purchase money in exchange for its release without deduction for such taxes.

And your petitioners appeal from the said decree as aforesaid upon the ground that the same is erroneous for the following reasons:

1. There should have been no decree of specific performance against the defendant Thomas R. Carobine, for the reason that it was proven that performance of the agreement in accordance with its terms was impossible, and specific performance

being discretionary, and not a matter of right, should have been denied.

2. The contract between complainant and defendant Carobine was entered into by the defendant Carobine without independent legal advice and was unwise and improvident, and should not have been specifically enforced.

3. The agreement for the release by the defendant Fruit and Produce Acceptance Corporation should not have been specifically enforced for the reason that the same was not in writing; was indefinite; was made with Carobine and not with complainant; was conditional upon the payment of $3600, partly in cash and partly by assignment of a purchase money mortgage; because of the impossibility of performing such agreement according to its terms, its specific performance should have been denied; because the court erroneously applied terms and conditions of a prospective purchase money mortgage to the agreement for release, and thereby changed the terms agreed upon by the parties, and decreed specific performance of an agreement which the parties had never made.

4. The proofs established that the complainant was not entitled to the relief prayed for, and the decree should have been for the defendants-appellants.

Your petitioners, therefore, pray that the decree should be reversed, and a decree be directed to be entered dismissing the Bill of Complaint, with costs to defendants-appellants.

That your petitioners have such other and further relief in the premises as to this Honorable Court shall be deemed just and proper.

JOHN W. OCKFORD,
Solicitor for and of Counsel with
Defendants-Appellants.

Amended Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between BERNARD M. DEGHERI, Complainant-Appellee, and THOMAS R. CAROBINE, *et als.*, Defendants-Appellants.	On Appeal from the Court of Chancery.

To the New Jersey Court of Errors and Appeals:

The amended petition of appeal of Thomas R. Carobine and Fruit and Produce Acceptance Corporation, defendants-appellants in the above-stated cause, respectfully shows:

That your petitioners find themselves aggrieved by the Final Decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, advised by the Honorable John Bentley, Vice-Chancellor, in a cause wherein the said Bernard M. Degheri was complainant, and said Thomas R. Carobine, Fruit and Produce Acceptance Corporation, Michael Starace and Sidney J. Goodman were defendants, to wit:

That the said decree directs the defendant Thomas R. Carobine to specifically perform a contract between himself and complainant, and convey certain premises described in the Bill of Complaint;

That the said decree directs the defendant Fruit and Produce Acceptance Corporation to execute a release, releasing from the operation of two certain mortgages the aforesaid premises;

That the said decree directs certain payments to be made out of the purchase price not provided by the contract of sale;

That the said decree restrains defendant Fruit and Produce Acceptance Corporation from selling in foreclosure any part of the premises aforesaid;

That the said decree provides that the defendant Fruit and Produce Acceptance Corporation execute a release upon the payment to it of the sum of $2300 instead of upon the sum of $3600;

That the said decree recites and provides for the specific performance of an agreement between complainant and defendant Fruit and Produce Acceptance Corporation, whereas no such agreement had been had between the said parties;

That the said decree provides for the payment out of the purchase money the sum of $858 to the defendant Michael Starace, whereas if the defendant Fruit and Produce Acceptance Corporation should have been decreed to specifically perform an agreement of release, it would thereupon become entitled to receive such sum of $858 and all of the remaining purchase money;

That the said decree provides for the payment out of the purchase money of certain taxes to be apportioned, whereas the Fruit and Produce Acceptance Corporation would be entitled to receive all of the purchase money in exchange for its release without deduction for such taxes;

That your petitioners have duly filed in the Court of Chancery of New Jersey a Notice of Appeal and also an Amended Notice of Appeal.

And your petitioners appeal from the said decree as aforesaid, upon the ground that the same is erroneous for the following reasons:

1. There should have been no decree of specific performance against the defendant Thomas R.

Carobine for the reason that it was proven that performance of the agreement in accordance with its terms was impossible, and specific performance being discretionary, and not a matter of right, should have been denied.

2. The contract between complainant and defendant Carobine was entered into by the defendant Carobine without independent legal advice and was unwise and improvident and should not have been specifically enforced.

3. The agreement for the release by the defendant Fruit and Produce Acceptance Corporation should not have been specifically enforced for the reason that the same was not in writing; was indefinite; was made with Carobine and not with complainant; was conditional upon the payment of $3600, partly in cash and partly by assignment of a purchase money mortgage; because of the impossibility of performing such agreement according to its terms, its specific performance should have been denied; because the court erroneously applied terms and conditions of a prospective purchase money mortgage to the agreement for release, and thereby changed the terms agreed upon by the parties, and decreed specific performance of an agreement which the parties had never made.

4. The proofs established that the complainant was not entitled to the relief prayed for, and the decree should have been for the defendants-appellants.

Your petitioners, therefore, pray that the decree should be reversed, and a decree be directed to be entered dismissing the Bill of Complaint, with costs to defendants-appellants.

That your petitioners have such other and further relief in the premises as to this Honorable Court shall be deemed just and proper.

JOHN W. OCKFORD,
Solicitor for and of Counsel with
Defendants-Appellants.

Bill of Complaint.

IN CHANCERY OF NEW JERSEY.

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

The complainant, Bernard M. Degheri, of the City of Jersey City, in the County of Hudson and State of New Jersey, respectfully shows that:

1. On March 12th, 1926, Thomas R. Carobine entered into a contract in writing, a true copy of which is hereto annexed and made a part hereof, whereby he agreed to convey to complainant for the sum of $4,000.00, by deed of warranty, on or before April 15th, 1926, all those certain lands and premises described as follows:

All those lots, tract, or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Cresskill, in the County of Bergen and State of New Jersey, known and designated on a certain map filed in the office of the Clerk of the County of Bergen, entitled, "Hitchcock Land Improvement Company's Map of Cresskill Park, Bergen County, New Jersey," as and by lots numbers 661, 662, 663, 664, 665, 666, 675, 676, 677, 679, 680, 681, 682, 684, 685, 686 in

Block 48; and also lots numbers 627, 628, 629, 630, 631, 632, 633 in Block 49.

The said contract having been duly acknowledged, was, on May 7th, 1926, recorded in the office of the County Clerk of said County of Bergen, in Book 1404 of Deeds for said County, at page 234, etc.

2. $400.00 of the consideration for said lands, as mentioned in Paragraph 1 hereof, was duly paid by complainant to the said Thomas R. Carobine, upon the execution and delivery of said contract.

3. On April 15th, 1926, Thomas R. Carobine stipulated and agreed with complainant to extend the time for closing to April 30th, 1926, at the same time and place as mentioned in said contract, as will appear by written endorsement upon the said contract.

4. The said Thomas R. Carobine is unmarried and of full age.

5. Complainant has always been and is still ready, able and willing to perform the said agreement on his part. Complainant was present at his office, #921 Bergen Avenue, Jersey City, N. J., between the hours of 10 in the forenoon and 3 o'clock in the afternoon, on the said 30th day of April, 1926, ready and willing to pay to the said Thomas R. Carobine the balance of the purchase price in the manner and form as provided for in the agreement between him and the said Thomas R. Carobine, upon the performance by the said Thomas R. Carobine of his part of said agreement and of the delivery by him to the complainant of a deed of conveyance for said premises in accordance with

said agreement as aforesaid; and that the said Thomas R. Carobine did not appear at the time and place fixed for the conveyance of title as aforesaid and has refused and still refuses to convey to complainant the said lands and premises contracted to be conveyed by him and has refused and still refuses to comply with said agreement in accordance with its terms and provisions.

6. On May 7th, 1926, complainant made written demand upon the said Thomas R. Carobine to fulfill and carry out the terms and conditions of the aforementioned contract, on a day therein fixed, to wit, May 10th, 1926, at the office of Bernard M. Degheri, and said written demand further made known to the said Thomas R. Carobine that complainant was prepared to take title at the time and place therein mentioned. That the said Thomas R. Carobine failed to appear at the time and place therein specified, although said written notice and demand was mailed to the said Thomas R. Carobine by registered mail, and which notice and demand was duly received by the said Thomas R. Carobine, as appears from the registered receipt demanded.

7. The lands and premises above described are 23 of 107 lots of land which said Thomas R. Carobine mortgaged by two mortgages, the first being dated September 22nd, 1925, made to Fruit and Produce Acceptance Corporation, a corporation of New York, which mortgage covers 7 of the 23 lots set out in said contract of sale and which mortgage is recorded in Book 772 of Mortgages for Bergen County, N. J., on pages 372 and of record is for the sum of $15,000.00, but complainant has been informed and believes that there is in fact due on this mortgage the sum of $13,000.00; the

other mortgage is made by the said Thomas R. Carobine, single, to the Fruit and Produce Acceptance Corporation and is dated March 1st, 1926, the amount of record due on this mortgage being $3,000.00, said mortgage is recorded in Book 810 of Mortgages for Bergen County, N. J., on page 353. The first of the said two mortgages is due on demand and bears no interest, the second mortgage is due on demand and bears interest at the rate of 6% per annum, payable quarterly. Complainant charges and insists that the second mortgage of $3,000.00 is without consideration and void as against the 16 lots of the 23 agreed by complainant to be purchased from said Thomas R. Carobine.

8. After the execution of the contract set out in paragraph 1 hereof, the said Fruit and Produce Acceptance Corporation did enter into an agreement with complainant whereby it agreed to release the lots described in complainant's said contract from the operation of said mortgage of $15,000.00 (of record), and to cancel of record said mortgage of $3,000.00, at the time of the passing of title to complainant; for all of which the consideration was to be paid out of the said purchase money to be paid by complainant to the said Fruit and Produce Acceptance Corporation, in accordance with an arrangement made by and between said Thomas R. Carobine and said Fruit and Produce Acceptance Corporation.

9. On or about August 29th, 1925, a Writ of Attachment issued out of the Bergen County Circuit Court at the suit of The Armour Fertilizer Works against Teresina Carobine, from whom the said Thomas R. Carobine acquired the premises described in paragraph 1 hereof and other property, through two deeds of conveyance dated respectively September 22nd, 1925, and January 26th, 1926, in which action judgment was entered against said Teresina Carobine on or about April 28th, 1926. The amount due on said judgment with costs being $3428.64, besides interest.

10. Thereafter, complainant was informed that on or about May 11th, 1926, the said Thomas R. Carobine did pay the amount due on said attachment judgment as set out in paragraph 8 hereof to said The Armour Fertilizer Works; and complainant charges that for the purpose of embarrassment, harassing and obstructing complainant in his efforts to obtain title to said lands and premises in his said contract described, the said Thomas R. Carobine did enter into an agreement and understanding with one Michael Starace of Brooklyn, N. Y., to have an assignment of said attachment judgment taken in the name of said Michael Starace for the purpose of keeping said judgment open of record and to harass and embarrass complainant aforesaid, which assignment of judgment was recorded in the office of the Clerk of Bergen County Circuit Court on May 20th, 1926. Complainant charges and insists that said Michael Starace has no interest in said judgment and that the same is held open of record in his name to defeat and defraud complainant of the lands and premises in said contract described. Complainant has been informed and believes and charges that upon the filing of a bill for the specific performance of said contract, the said Michael Starace will cause an execution to issue in said cause and have said lands and premises sold at a Sheriff's sale.

11. On or about February 23rd, 1926, one Sidney J. Goodman caused a Writ of Attachment for

$200.00 to issue out of the said Bergen County Circuit Court against Teresina Carobine and Thomas R. Carobine, this Writ of Attachment also affects the lands and premises agreed to be purchased by complainant as set forth in paragraph 1 hereof; this action has, however, not yet been prosecuted to judgment.

12. On May 11th, 1926, a Writ of Attachment was issued out of the Bergen County Circuit Court at the suit of Bernard M. Degheri, the complainant herein, for the sum of $500.00 against said Thomas R. Carobine and affects the same lands and premises agreed to be purchased by complainant and other property; complainant stands ready, willing and able to release the lands and premises affected by the contract set out in paragraph 1 hereof, from the operation of said attachment suit.

13. Complainant further says that in the event it is found by this Court that the assignment of attachment judgment to said Michael Starace is, in fact, a bona fide transaction, then complainant stands ready, willing and able to pay unto the said Michael Starace the sum due thereon, or to be found due thereon, or any balance thereof, upon the execution and delivery by said Michael Starace of an assignment of said attachment judgment to complainant.

Complainant is without adequate remedy in the courts of law and therefore prays:

1. That Thomas R. Carobine, Fruit and Produce Acceptance Corporation, a corporation of the State of New York, Michael Starace and Sidney J. Goodman, who are the defendants in this suit, may

answer this Bill of Complaint without oath, and each statement therein made.

2. That the said Thomas R. Carobine may be decreed specifically to perform the said agreement entered into by him with complainant, the complainant tendering himself ready and willing and hereby offering specifically to perform the said agreement on his part.

3. That the damages of the complainant relating to the failure to perform said agreement according to its terms be assessed against the defendant in addition to the decree of specific performance of said agreement.

4. That defendant Fruit and Produce Acceptance Corporation may be ordered and decreed to set forth and discover the true amount due it upon its said mortgages and that it may be decreed to specifically perform its agreement to release the lands and premises purchased by complainant from the operation of its $15,000.00 mortgage, and to cancel of record its $3,000.00 mortgage.

5. That defendant Michael Starace may be ordered and decreed to set forth and discover the true amount due on the attachment judgment assigned to him and whether the amount paid by said Michael Starace, if any, was paid for and on behalf of himself, or the said Thomas R. Carobine, or any other person or corporation, and if there is nothing due on said attachment judgment or the same is held for the said Thomas R. Carobine, then that said Michael Starace may be ordered and decreed to cancel said attachment judgment of record; and if it shall be ascertained by this Court

that the assignment of said attachment judgment was a bona fide transaction then, upon payment by complainant of the amount found to be due thereon to said Michael Starace, the said Michael Starace may be ordered and decreed to execute and deliver unto complainant an assignment of said attachment judgment, which sum complainant stands ready, willing and able to pay and hereby tenders unto said Michael Starace.

6. That defendant Sidney J. Goodman may be ordered and decreed to set forth and discover the true amount due on the attachment issued by him, and in default thereof, that he may be decreed to have no lien, incumbrance or claim against the lands and premises described in paragraph 1 hereof.

7. That defendant Michael Starace may, by the order of this Court, be enjoined and restrained from taking any proceedings for the collection and enforcement of the attachment judgment assigned to him so far as the same will affect the lands and premises herein described.

8. That defendant Fruit and Produce Acceptance Corporation may, by the order of this Court, be enjoined and restrained from foreclosing their said mortgages or either of them, or from taking any proceeding for the collection of the said mortgages or either of them, so far as they affect the lands and premises herein described and from assigning said mortgages or either of them to any person or corporation.

9. That the complainant may have such other and further relief as the nature of the case may require.

10. That a Writ of Subpoena may issue commanding said defendants to answer this Bill of Complaint and to abide by such decree as this Court may make in the premises.

JULIUS A. KEPSEL,
Solicitor for and of Counsel
with Complainant.

EXHIBIT.

ARTICLES OF AGREEMENT, made the 12th day of March, in the year of Our Lord One Thousand Nine Hundred and Twenty-six, BETWEEN THOMAS R. CAROBINE, single, of the City of New York, in the County of New York and State of New York, party of the first part; AND BERNARD M. DEGHERI, of the City of Jersey City, in the County of Hudson and State of New Jersey, party of the second part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Four Thousand ($4000.00) Dollars, to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that he the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of full covenant and warranty free from all encumbrance except as hereinafter stated, on or before the 15th day of April next ensuing the date hereof, all those lots, tract, or parcel, of land and premises, hereinafter par-

ticularly described situate, lying and being in the Borough of Cresskill, in the County of Bergen and State of New Jersey.

More particularly described, situate, lying and being in the Borough of Cresskill, in the County of Bergen and State of New Jersey, known and designated on a certain map filed in the Office of the Clerk of the County of Bergen, entitled, "Hitchcock Land Improvement Company's Map of Cresskill Park, Bergen County, New Jersey," as and by lots numbers 661, 662, 663, 664, 665, 666, 675, 676, 677, 679, 680, 681, 682, 684, 685, 686 in Block 48; and also lots numbers 627, 628, 629, 630, 631, 632, 633 in Block 49.

Lots numbers 675, 676, 677, 679, 680, 681, 682, 684, 685, 686 front and face on the easterly side of 6th Street. Lots numbers 661 to 666 inclusive front and face on the westerly side of 5th Street. Lots numbers 627 to 633 inclusive front and face on the easterly side of 5th Street.

The party of the second part is to pay all assessments at present a lien on the aforementioned lots.

AND the said BERNARD M. DEGHERI, for his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, his 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 Four Thousand ($4000.00) Dollars, as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On Execution of this agreement for which this is also a receipt..... $ 400.00

On delivery of deed, cash..... $2100.00

On Bond and Mortgage, same containing usual interest, tax, assessment, insurance and installment default clauses, and an agreement not to claim credit on the interest payable on bond and mortgage, by reason of any tax assessed, or to be assessed against the premises, with interest at 6% payable quarterly for two years..... $1500.00

And the said party of the first part hereby agrees to pay to Christopher S. Degheri, a commission of 5% on the purchase price aforesaid, said commission to be paid in consideration of services rendered in consummating this sale; said commission to become due and payable upon the execution of this agreement.

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

The above Mortgage to contain a release clause by which the party of the first part or his assigns will release each and any of the aforementioned lots on the payment of $100.00. Said sum so paid to be in reduction of the principal of said mortgage.

Taxes shall be adjusted, apportioned and allowed as of the date of delivery of said deed.

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

AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed of warranty shall be delivered and received at the office of Bernard M. Degheri, #921 Bergen Avenue, Jersey City, N. J., between the hours of ten in the forenoon and three o'clock in the afternoon on the said 15th day of April next ensuing the date hereof.

It is hereby understood and agreed that the time of closing is of the essence of this contract.

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

THOMAS R. CAROBINE L. S.
BERNARD M. DEGHERI L. S.

Signed, Sealed and Delivered
in the presence of

NATHAN SCHULMAN

It is hereby stipulated and agreed between the respective parties to the above contract that the time for closing be and the same is hereby extended to April 30th, 1926 at the same time and place as mentioned therein.

April 15th, 1926.

THOS R. CAROBINE
BERNARD M. DEGHERI

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } SS.:

BE IT REMEMBERED, That on this 12th day of March, in the year of Our Lord One Thousand Nine Hundred and Twenty-six, before me, the subscriber, a Notary Public of New Jersey, personally appeared THOMAS R. CAROBINE, single, who I am satisfied is the grantor mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon he acknowledged that, he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

NATHAN SCHULMAN,
Notary Public of New Jersey.

Affidavit of Bernard M. Degheri.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON, } SS.:

BERNARD M. DEGHERI, being duly sworn according to law, upon his oath deposes and says that:

1. On March 12th, 1926, Thomas R. Carobine, entered into a contract in writing, a true copy of which is hereto annexed and made a part hereof, whereby he agreed to convey to me for the sum of $4,000.00, by Deed of warranty, on or before April 15th, 1926, all those certain lands and premises described as follows:

All those lots, tract, or parcel of land and premises, hereinafter particularly described, situate, ly-

ing and being, in the Borough of Cresskill, in the County of Bergen and State of New Jersey, known and designated on a certain map filed in the Office of the Clerk of the County of Bergen, entitled, "Hitchcock Land Improvement Company's Map of Cresskill Park, Bergen County, New Jersey," as and by lots numbers 661, 662, 663, 664, 665, 666, 675, 676, 677, 679, 680, 681, 682, 684, 685, 686 in Block 48; and also lots numbers 627, 628, 629, 630, 631, 632, 633 in Block 49.

The said contract having been duly acknowledged, was, on May 7th, 1926, recorded in the Office of the County Clerk of said County of Bergen, in Book 1404 of Deeds for said County, at page 234, etc.

2. $400.00 of the consideration for said lands, as mentioned in Paragraph 1 hereof, was duly paid by me to the said Thomas R. Carobine, upon the execution and delivery of said contract.

3. On April 15th, 1926, Thomas R. Carobine stipulated and agreed with me to extend the time for closing to April 30th, 1926, at the same time and place as mentioned in said contract, as will appear by written endorsement upon the said contract.

4. That said Thomas R. Carobine is unmarried and of full age.

5. I have always been and am still ready, able and willing to perform the said agreement on my part. I was present at my office, #921 Bergen Avenue, Jersey City, N. J., between the hours of 10 in the forenoon and 3 o'clock in the afternoon, on the said 30th day of April, 1926, ready and

willing to pay to the said Thomas R. Carobine, the balance of the purchase price in the manner and form as provided for in the agreement between me and the said Thomas R. Carobine, upon the performance by the said Thomas R. Carobine of his part of said agreement and of the delivery by him to me of a deed of conveyance for said premises in accordance with said agreement as aforesaid; and that the said Thomas R. Carobine did not appear at the time and place fixed for the conveyance of title as aforesaid and has refused and still refuses to convey to me, the said lands and premises contracted to be conveyed by him and has refused and still refuses to comply with said agreement in accordance with its terms and provisions.

6. On May 7th, 1926, I made written demand upon the said Thomas R. Carobine to fulfill and carry out the terms and conditions of the aforementioned contract, on a day therein fixed, to wit, May 10th, 1926, at my office, and said written demand further made known to the said Thomas R. Carobine, that I was prepared to take title at the time and place therein mentioned. That the said Thomas R. Carobine failed to appear at the time and place therein specified, although said written notice and demand was mailed to the said Thomas R. Carobine by registered mail, and which notice and demand was duly received by the said Thomas R. Carobine, as appears from the registered receipt demanded.

7. The lands and premises above described are 23 of 107 lots of land which said Thomas R. Carobine mortgaged by two mortgages, the first being dated September 22nd, 1925, made to Fruit and Produce Acceptance Corporation, a corporation of

New York, which mortgage covers 7 of the 23 lots set out in said contract of sale and which mortgage is recorded in Book 772 of Mortgages for Bergen County, N. J., on page 372 and of record is for the sum of $15,000.00, but I have been informed and believe that there is in fact due on this mortgage the sum of $13,000.00; the other mortgage is made by the said Thomas R. Carobine, single, to the Fruit and Produce Acceptance Corporation and is dated March 1st, 1926, the amount of record due on this mortgage being $3,000.00, said mortgage is recorded in Book 810 of Mortgages for Bergen County, N. J., on page 353. The first of the said two mortgages is due on demand and bears no interest, the second mortgage is due on demand and bears interest at the rate of 6% per annum, payable quarterly. I charge and insist that the second mortgage of $3,000.00 is without consideration and void as against the 16 lots of the 23 agreed by me to be purchased from said Thomas R. Carobine.

8. After the execution of the contract set out in paragraph 1 hereof, the said Fruit and Produce Acceptance Corporation did enter into an agreement with me whereby it agreed to release the lots described in my said contract from the operation of said mortgage of $15,000.00 (of record), and to cancel of record said mortgage of $3,000.00, at the time of the passing of title to me; for all of which the consideration was to be paid out of the purchase money to be paid by me to the said Fruit and Produce Acceptance Corporation, in accordance with an arrangement made by and between the said Thomas R. Carobine and said Fruit and Produce Acceptance Corporation.

9. On or about August 29th, 1925, a Writ of Attachment issued out of the Bergen County Circuit Court at the suit of The Armour Fertilizer Works against Teresina Carobine, from whom the said Thomas R. Carobine acquired the premises described in paragraph 1 hereof and other property, through two deeds of conveyance dated respectively September 22nd, 1925, and January 26th, 1926, in which action judgment was entered against said Teresina Carobine on or about April 28th, 1926. The amount due on said judgment with costs being $3428.64, besides interest.

10. Thereafter, I was informed that on or about May 11th, 1926, the said Thomas R. Carobine did pay the amount due on said attachment judgment as set out in paragraph 8 hereof to said The Armour Fertilizer Works; and I charge that for the purpose of embarrassing, harassing and obstructing me in my efforts to obtain title to said lands and premises in my said contract described, the said Thomas R. Carobine did enter into an agreement and understanding with one Michael Starace of Brooklyn, N. Y., to have an assignment of said attachment judgment taken in the name of said Michael Starace for the purpose of keeping said judgment open of record and to harass and embarrass me as aforesaid set out, which assignment of judgment was recorded in the Office of the Clerk of the Bergen County Circuit Court on May 20th, 1926. I charge and insist that said Michael Starace has no interest in said judgment and that the same is held open of record in his name to defeat and defraud me of the lands and premises in said contract described. I have been informed and believe and charge that upon the filing of a bill for the specific performance of said contract, the said Michael Starace will cause an execution to issue in said cause and have said lands and premises sold at a Sheriff's sale.

11. On or about February 23rd, 1926, one Sidney J. Goodman caused a Writ of Attachment for $200.00 to issue out of the said Bergen County Circuit Court against Teresina Carobine and Thomas R. Carobine, this Writ of Attachment also affects the lands and premises agreed to be purchased by me as set forth in paragraph 1 hereof; this action has, however, not yet been prosecuted to judgment.

12. On May 11th, 1926, a Writ of Attachment was issued out of the Bergen County Circuit Court at my suit, for the sum of $500.00 against said Thomas R. Carobine and affects the same lands and premises agreed to be purchased by me and other property; I stand ready, willing and able to release the lands and premises affected by the contract set out in paragraph 1 hereof, from the operation of said attachment suit.

13. I further say that in the event it is found, by this Court, that the assignment of attachment judgment to said Michael Starace is, in fact, a bona fide transaction, then I stand ready, willing and able to pay unto the said Michael Starace the sum due thereon, or to be found due thereon, or any balance thereof, upon the execution and delivery by said Michael Starace of an assignment of said attachment judgment to me.

BERNARD M. DEGHERI.

Subscribed and sworn to before me
this 25th day of June, 1926.

ALEXANDER F. ORMSBY,
Master in Chancery
of New Jersey.

Answer of Defendant Thomas R. Carobine.

IN CHANCERY OF NEW JERSEY.

Between
BERNARD M. DEGHERI,
Complainant,
and
THOMAS R. CAROBINE, *et als.*,
Defendants.
} On Bill etc.

The answer of the defendant Thomas R. Carobine, of the City, County and State of New York.

Said defendant, answering the Bill of Complaint, says that:

1. Paragraphs 1, 2, 3 and 4 are admitted.

2. Paragraph 5 is denied.

3. Paragraph 6 is denied.

4. Paragraph 7 is denied, except that this defendant admits the execution of the two mortgages set forth in said paragraph, and alleges that he received good and valuable consideration for the aforesaid mortgages.

5. Paragraph 8 is denied.

6. Paragraph 9 is admitted upon information and belief.

7. Paragraph 10 is denied, and this defendant further denies that he paid the amount due on the judgment referred to in such paragraph, and fur-

ther alleges that he has been unable to pay such judgment, and this defendant denies making an agreement with Michael Starace whereby the judgment was assigned to said Starace, and upon information and belief this defendant alleges that Starace purchased the aforesaid judgment to protect the interest of the Alps Realty Co., Inc.

8. Paragraph 11 is admitted upon information and belief.

9. Paragraph 12 is admitted upon information and belief, and this defendant further alleges that he believes that he has a good and valid defense to the attachment suit described in paragraph 12.

10. This defendant further says that on March 12, 1926, and prior thereto, complainant was the attorney of this defendant in connection with the matters arising out of and in connection with the ownership of the lands in question, and that the agreement of March 12th was entered into by this defendant while complainant was still acting as his attorney, and this defendant says that he did not have independent advice in connection with such contract, and he is now informed and believes that such contract is unfair, inequitable and unwise, and that the consideration provided for by such contract is entirely inadequate, and this defendant alleges that it would be inequitable to enforce such contract specifically, and this defendant has offered to rescind same and return the deposit received by him from complainant, and now offers so to do, but complainant has refused to cancel such contract and accept the payment of the amount of such deposit.

11. This defendant further says that it would be inequitable to enforce such contract because of the liens against the property which would have to be discharged by this defendant as a condition of performance, because this defendant is unable to discharge such liens and is unable to obtain releases of the liens against the premises in question, and this defendant further says that he is unable to perform such contract by reason of the existence of such liens, and that complainant well knew of the existence of the liens and of this defendant's inability to discharge the same at the time of the making of such contract.

12. This defendant further says that at the time of the making of the agreement and prior thereto, complainant represented to him that he was buying the property for one O'Toole, and further represented that it was an advantageous contract to this defendant, and in making the contract this defendant relied upon the complainant's advice given to this defendant as his attorney, but subsequently this defendant has ascertained that the contract is unwise and disadvantageous, and as to the interest of the said O'Toole, this defendant has been unable to ascertain the truth of such representation.

JOHN W. OCKFORD,
Solicitor for Defendant Thomas
R. Carobine.

Answer of Defendant Fruit and Produce Acceptance Corporation.

IN CHANCERY OF NEW JERSEY.

Between

BERNARD M. DEGHERI,
Complainant,

and

THOMAS R. CAROBINE, *et als.*,
Defendants.

On Bill, etc.

The answer of the defendant Fruit and Produce Acceptance Corporation, a corporation of the State of New York, with its principal place of business in the City of New York, in the County and State of New York.

Said defendant, answering the Bill of Complaint, says that:

1. This defendant has no knowledge or information sufficient to form a belief as to the allegations contained in paragraphs 1, 2, 3, 5, 6, 9, 10, 11, 12 and 13, and, therefore, leaves complainant to his proof with respect to such allegations.

2. This defendant admits the execution of the two mortgages described in paragraph 7 of the Bill of Complaint, and alleges that there is now due upon such mortgages the sum of $13,056.41, with interest thereon at six per cent. from June 1st, 1926. This defendant denies that either of said mortgages is without consideration, and alleges the fact to be that both of such mortgages were given to this defendant for a good and valuable consideration, and that there is now actually due

thereon the sum aforesaid. Except as herein expressly admitted, the allegations of paragraph 7 are denied.

3. Paragraph 8 is denied, and this defendant further says that it did not enter into any agreement with complainant as alleged in paragraph 8, and that any agreement made by this defendant with the defendant Carobine was informal and without consideration, and was conditional upon this defendant's mortgages being a first lien on the premises, and that subsequent to the informal arrangement, this defendant ascertained that its mortgages were not a first lien on the premises, and that such informal arrangement was also made upon other conditions which were not fulfilled, and, therefore, this defendant has been entirely relieved from even a moral obligation to perform such arrangement, and this defendant further says that at no time did it agree by any legal agreement, to release any of the lots in question, and this defendant stands upon its legal right to refuse so to do. This defendant further says that its security has been reduced, and it has been placed in jeopardy because of the existence of a prior lien, and that it would be inequitable to require this defendant to perform its informal arrangement because of all of the matters hereinbefore set forth.

4. This defendant further says that taxes for the year 1925 and for the first half of the year 1926 are past due and have not been paid, and that its security has been further impaired by reason thereof.

5. This defendant further says that complainant had actual and constructive knowledge of this de-

fendant's mortgages at the time he made his contract with the defendant Carobine on or about March 12th, 1926.

6. This defendant further says that in or about the month of September, 1925, and at the time this defendant accepted its mortgage of September 22nd, 1925, it was advised through its officers by complainant that the said mortgage which it was about to accept, would be a valid first lien on the premises therein described, and this defendant believed such representation to be true, and relied upon such representation in accepting such mortgage and in giving the consideration therefor, and thereafter and in or about the month of October, 1925, this defendant received a written certificate to the same effect, signed by Christopher S. Degheri, an attorney at law of New Jersey, an associate in practice with complainant, the said Degheris being brothers, all of which was well known to complainant at the time, and this defendant relied upon such representation and such certificate in entering into the informal arrangement above referred to. Thereafter this defendant was informed by the said Degheris that its mortgage was not a first lien, but was subject to the lien of a prior judgment in the sum of $3428.64, being the judgment referred to in paragraph 9 of the Bill of Complaint. The informal arrangement above referred to was made after the contract referred to in paragraph 1 of the Bill of Complaint and prior to this defendant being informed as to the judgment just referred to, and this defendant says that it would be most inequitable and unjust to allow the complainant to claim a right as against this defendant to compel it to release the lots covered by complainant's contract, even though this defendant receive the consideration to be given by the complainant under his contract, particularly because of the great impairment of its general security.

7. Paragraph 8 of the Bill of Complaint, as amended, is denied.

8. This defendant is about to commence an action to foreclose its mortgages, and inasmuch as the complainant may assert any rights which he may have in such foreclosure action, this defendant prays that it be dismissed from this present suit.

9. This defendant further says that on June 26, 1926, by an order of this Court obtained by complainant, it was restrained from assigning or transferring its aforesaid mortgages, and that on July 6, 1926, upon this defendant's application, such restraint was vacated by order advised by Vice-Chancellor James F. Fielder, and this defendant says that complainant was not entitled to such restraint upon the merits of the case, and that this defendant was damaged because of such restraint between June 26 and July 6th, 1926, and was prevented from assigning its mortgages and receiving its money, whereas except for such restraint, it could have done so.

This defendant, therefore, prays that its damages be ascertained and that any amount found to be due, be decreed to be paid to this defendant by complainant.

JOHN W. OCKFORD,
Solicitor for Defendant Fruit and
Produce Acceptance Corporation.

Final Decree Appealed From.

IN CHANCERY OF NEW JERSEY.

Between

BERNARD M. DEGHERI,
Complainant,

and

THOMAS R. CAROBINE, *et als.*,
Defendants.

On Bill etc.

This cause coming on to be heard in the presence of Julius A. Kepsel, solicitor of complainant; John W. Ockford, Esquire, solicitor of the defendants Thomas R. Carobine and Fruit and Produce Acceptance Corporation; and Carlo D. Cella, Esquire, solicitor of defendant Michael Starace; the Bill of Complaint in this cause having been heretofore taken as confessed against Sidney J. Goodman, the other defendant herein; and the Court having examined the pleadings and having taken proofs orally and in open Court and heard and considered the arguments of counsel thereon; and it appearing to the satisfaction of the Court that the defendant Thomas R. Carobine was on the 12th day of March, 1926, seized in fee simple of all those lots, tracts or parcels of land and premises, to wit: All those lots, tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being, in the Borough of Cresskill, in the County of Bergen and State of New Jersey, known and designated on a certain map filed in the Office of the Clerk of the County of Bergen, entitled, "Hitchcock Land Improvement Company's Map of Cresskill Park, Bergen County, New Jersey," as and by lots numbers 661, 662, 663, 664, 665, 666,

675, 676, 677, 679, 680, 681, 682, 684, 685, 686 in Block 48; and also lots numbers 627, 628, 629, 630, 631, 632, 633 in Block 49; that on said 12th day of March, 1926, the said defendant Thomas R. Carobine and the complainant entered into an agreement, in writing, wherein and whereby said defendant Thomas R. Carobine agreed to convey the said lands and premises above described, by deed of warranty, on or before the 30th day of April, 1926, to complainant; and the said complainant agreed to pay therefor the sum of $4,000.00, by the payment of $400.00, which was paid at the execution of said agreement and by the payment of the remainder of the purchase price upon the delivery of said deed by the payment of $2100.00, in cash, and the execution of a purchase money mortgage in the sum of $1500.00; complainant having since the institution of this action consented to pay the amount of said purchase money mortgage, to wit: $1500.00, in cash:

And it further appearing to the satisfaction of the Court that the said defendant Thomas R. Carobine has refused and failed to perform the said agreement on his part, and that the said complainant has always been and still is ready and willing in all things to comply with the terms of the said agreement on his part:

And it further appearing to the satisfaction of the Court that at the time of the making of said contract of March 12th, 1926, the defendant Fruit and Produce Acceptance Corporation held two mortgages aggregating of record the sum of $18,000.00, and covering a large tract of land of which the above-described twenty-three lots are part:

And it further appearing to the satisfaction of the Court that the defendant Fruit and Produce

Acceptance Corporation did enter into an agreement with complainant to release from the operation of its two mortgages the aforesaid lands and premises agreed to be conveyed by the defendant Thomas R. Carobine unto complainant, upon the payment of the sum of $100.00 per lot or $2300.00 for the 23 lots, to it, said defendant Fruit and Produce Acceptance Corporation out of the aforesaid purchase price mentioned in said agreement of March 12th, 1926.

And it further appearing to the satisfaction of the Court that the defendant Michael Starace is the holder, by assignment, of a judgment recovered in an attachment action brought by Armour Fertilizer Works in the Bergen County Circuit Court against Teresina Carobine, he having become the holder thereof after the making of said contract of March 12th, 1926, and that said judgment affects 107 lots, of which the 23 lots above described are part:

And it further appearing to the satisfaction of the Court that the defendant Michael Starace, the holder of the judgment aforesaid, has agreed to release the aforesaid 23 lots to be conveyed to complainant upon the payment to him out of the aforesaid purchase money, of a sum of money that will bear the same proportion to the amount of the judgment that the value of complainant's lots bears to the value of the entire tract of which they are a part:

And it further appearing to the satisfaction of the Court that the defendant Michael Starace has since the filing of the opinion in this cause, agreed to accept the sum of $858.00, as the consideration for the release of the aforesaid 23 lots to be conveyed to complainant by the defendant Thomas R. Carobine, instead of an amount to be ascertained in accordance with the opinion filed herein.

And it further appearing to the satisfaction of the Court, on the representation of John W. Ockford, Esq., solicitor of defendant Fruit and Produce Acceptance Corporation, that said Fruit and Produce Acceptance Corporation did on the 12th day of November, 1926, pay the sum of $153.53 for taxes and the sum of $129.46 for assessment installments due on the aforesaid 23 lots.

And it further appearing to the satisfaction of the Court that the complainant has agreed to pay one-half of the taxes due on said 23 lots since May 10th, 1926, the other one-half thereof to be borne by the defendant Thomas R. Carobine.

And the Court being of the opinion that the complainant is entitled to the specific performance of the aforesaid agreement of March 12th, 1926, made with the defendant Thomas R. Carobine and of the agreement made by said defendant Fruit and Produce Acceptance Corporation to release the 23 lots to be conveyed to complainant under said agreement of March 12th, 1926, and to the release and discharge of the aforesaid 23 lots from the operation of said judgment lien held by the defendant Michael Starace, as prayed for by complainant in his Bill of Complaint filed herein:

It is, on the 20th day of January, 1927, ORDERED, ADJUDGED AND DECREED, that the said agreement of March 12th, 1926, be in all things specifically performed by the said defendant Thomas R. Carobine, and that the said defendant Thomas R. Carobine do make, execute and acknowledge in due form of law and deliver to the complainant, Bernard M. Degheri, on the 25th day of January, 1927, between the hours of and o'clock in the noon, at the office of Bernard M. Degheri, at 921 Bergen Avenue, Jersey City, New Jersey, a good and suf-

ficient deed of conveyance for all those certain lands and premises, to wit: ALL those lots, tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Cresskill, in the County of Bergen and State of New Jersey, known and designated on a certain map filed in the office of the Clerk of the County of Bergen, entitled, "Hitchcock Land Improvement Company's Map of Cresskill Park, Bergen County, New Jersey," as and by lots numbers 661, 662, 663, 664, 665, 666, 675, 676, 677, 679, 680, 681, 682, 684, 685, 686 in Block 48; and also lots numbers 627, 628, 629, 630, 631, 632, 633 in Block 49; and to deliver at the same time to the said Bernard M. Degheri, possession of the said lands and premises:

And it is further ORDERED, ADJUDGED AND DECREED, that the defendant Fruit and Produce Acceptance Corporation do make, execute and acknowledge in due form of law and upon the payment to it of the sum of $2300.00 in cash, out of the purchase money mentioned in said contract of March 12th, 1926, and deliver unto complainant, Bernard M. Degheri, a good and sufficient release, releasing from the operation of its two mortgages aforesaid, the aforesaid 23 lots of land; said defendant Fruit and Produce Acceptance Corporation to deliver said release at the time and place aforesaid and then and there receive the aforesaid sum of $2300.00:

And it is further ORDERED, ADJUDGED AND DECREED, that the defendant Michael Starace upon the payment to him out of the aforesaid purchase money, of the sum of $858.00, in cash, do make, execute and acknowledge, in due form of law and deliver to complainant, Bernard M. Degheri, a good and sufficient release, releasing from the operation of his said judgment lien, the aforesaid 23 lots; said Michael Starace to deliver said release at the time and place aforesaid and then and there receive the sum of money above set forth.

And it is further ORDERED, ADJUDGED AND DECREED, that there be paid to the Fruit and Produce Acceptance Corporation, such sums of money as have been paid by it for taxes, levied against said 23 lots, up to and including May 10th, 1926, which sums shall be paid by the defendant Thomas R. Carobine out of the purchase price; and that the complainant and the defendant Thomas R. Carobine shall bear in equal proportion the taxes levied against said 23 lots between May 10th, 1926, and the date of passing title, the said Fruit and Produce Acceptance Corporation to be reimbursed for the taxes it has paid from May 10th, 1926; and that complainant pay to the defendant Fruit and Produce Acceptance Corporation such sums of money as it has paid for and on account of the assessments levied against the said 23 lots:

And it is further ORDERED, ADJUDGED AND DECREED, that the said complainant, Bernard M. Degheri, do pay unto defendant Thomas R. Carobine such sum or sums as may remain of the balance of the purchase money, to wit, $3600.00, after deducting therefrom the aforesaid payments to be made to the defendants Fruit and Produce Acceptance Corporation and Michael Starace and the taxes to be paid by said Thomas R. Carobine on said 23 lots in the manner hereinabove set forth, and the taxed costs of this cause together with a counsel fee of $300.00, which are hereby allowed to complainant's solicitor:

And it is further ORDERED, ADJUDGED AND DECREED, that complainant, Bernard M. Degheri, pay unto Carlo D. Cella, solicitor of defendant Michael Starace the sum of $150.00 as and for a counsel fee, together with the costs of said defendant Michael Starace to be taxed:

And it is further ORDERED, ADJUDGED AND DECREED, that the defendant Fruit and Produce Acceptance Corporation, its officers, agents and servants, be and it and they and each of them are hereby restrained and enjoined from selling or causing to be sold, any of the said 23 lots above described and contracted to be sold to complainant, under any decree or execution in the suit brought to foreclose its said two mortgages, now held by it on the lands and premises formerly in the name of Thomas R. Carobine, of which lands and premises, the said 23 lots are a part:

And it is further ORDERED, ADJUDGED AND DECREED, that the defendant Sidney J. Goodman has no estate or interest in, or encumbrance upon the aforesaid 23 lots of land above described or any part thereof.

E. R. WALKER,
C.

Respectfully advised.

JOHN BENTLEY,
V. C.

Testimony.

IN CHANCERY OF NEW JERSEY.

Between
BERNARD M. DEGHERI,
Complainant,
and
THOS. R. CAROBINE, *et al.*,
Defendants.
} On Bill etc.

Transcript of the testimony taken in the above-stated cause, on final hearing, at the Chancery Chambers in Jersey City, on Wednesday, December 15, 1926, at 10 o'clock in the forenoon, before His Honor JOHN BENTLEY, Vice-Chancellor.

APPEARANCES:

JULIUS A. KEPSEL, Esq. solicitor; BERNARD M. DEGHERI, Esq., pro se, for the complainant.

JOHN W. OCKFORD, Esq., for Defendant Carobine et al.

CARLO D. CELLA, Esq., for Defendant Starace.

Mr. Kepsel: I offer in evidence contract for the sale of property, dated March 12, 1926, between Thomas R. Carobine and Bernard M. Degheri, for the sale of lands in Cresskill, Bergen County, New Jersey. Any objection to this copy?

Mr. Cella: I have no interest in that contract at all; I have no objection.

Mr. Kepsel: Does your client deny having received this?

Mr. Ockford: No. I don't just happen to have it here. I will let you put the copy in instead of the original.

(Admitted and marked "Exhibit C-1.")

BERNARD M. DEGHERI, the complainant, sworn in his own behalf, testified as follows:

Direct examination by Mr. Kepsel.

I am the complainant in this cause, and on the 7th day of May, 1926, I dispatched a letter, addressed to——

Mr. Ockford: Why this testimony? I consent that the letter go in evidence.

Mr. Kepsel: I offer in evidence copy of letter, dated May 7, 1926, to Thomas R. Carobine, 1983 First Avenue, New York City, together with the return receipt by the postal authorities from Mr. Carobine, and I ask that they go in as one exhibit.

(Admitted and marked "Exhibit C-2.")

I also offer in evidence a check, dated March 12, 1926, on the Trust Company of New Jersey, to the order of Thomas R. Carobine, for $400.

(Admitted and marked "Exhibit C-3.")

Q. Mr. Degheri, you are the complainant in this case? A. I am.

Q. On March 12, 1926, at the time of the execution of this contract C-1, did you have any discussion with Carobine as to the encumbrances that were on this property? A. Yes; I asked Carobine what encumbrances were on the property, and he told me that there were two mortgages, one of $15,000 which was on ninety-one of the lots held by the Fruit & Produce Acceptance Corporation, and another mortgage of $3,000 on sixteen lots, also held by the same corporation. He said that—

Mr. Ockford: This was prior to the execution of the contract?

The Court: Yes, at the time, as I understand it.

A. (Continuing) This was on the day before the contract was executed, prior to the execution of the contract, at my office, on Journal Square, Jersey City, on March the 12th, 1926. I asked Mr. Carobine whether he had made any arrangements with the holders of those mortgages for releasing, in the event of a sale to me, and he said, not only had he made such an arrangement with Mr. Robinson, who was president of that corporation, but also that my brother Christopher had been delegated by Mr. Carobine to make such arrangement. I told Mr. Carobine that I deemed it wise to get the word of Mr. Robinson personally, and he suggested that he would telephone to him right then. I thought that was the proper thing to do. And, thereupon, Mr. Carobine got Mr. Robinson on the telephone and told him—as I heard Mr. Carobine's part of the conversation—that he was at my office in Jersey City and was about to enter into a contract for the sale of twenty-three of the lots at Cresskill. And, after some discussion back and

forth, I heard Mr. Carobine ask him again whether it would be agreeable to Mr. Robinson and the Fruit & Produce Acceptance Corporation to release those lots from the lien of these two mortgages. I thought it would be wise for me to talk with Mr. Robinson myself and to check up on what conversation was had between Mr. Carobine and Mr. Robinson, and Mr. Carobine thereupon asked Mr. Robinson to hold the wire, that Mr. Degheri —Bernard Degheri—wanted to speak to him. I then told Mr. Robinson exactly what Mr. Carobine had told me; that I was about to purchase twenty-three of these lots, and I wanted to be sure before I entered into the contract that the Fruit & Produce Acceptance Corporation would be agreeable to release these lots from the lien of those two mortgages. Mr. Robinson said if I would tell him the complete details of the transaction he would then tell me whether that would be agreeable to him. I then explained that we had practically agreed upon the terms; that the purchase price was to be $4,000, and I was to pay all the assessments that were on those lots. I then further told him that the cash involved would be about $2500, of which I was going to pay $400 as a deposit under the contract; and I then further told him that, for the balance, I was to give Mr. Carobine a purchase-money mortgage of $1500. He listened quite attentively, and his objection first was as to the mortgage. He wanted to know why I could not pay all cash. I told him that those were the best terms that I could give; and he then said, "Well, if you will assign or see to it that the Fruit & Produce Acceptance Corporation gets this mortgage of $1500 which you are going to give to Carobine we will be agreeable to release the twenty-

three lots." He went on to admit, even before I questioned him, as to this $3,000 mortgage; he said that the $3,000 mortgage was merely procured from Mr. Carobine for the purpose of giving some additional security; that, in reality, the money for that mortgage never passed. I subsequently checked up with Mr. Carobine that that was the true fact, and he said those were the true facts. It was then, upon Mr. Robinson's agreement to release the mortgages, that we went on to complete the contract; but before I left Mr. Robinson on the telephone we got into a discussion as to what amount would be put in this $1500 mortgage for release of individual lots, should I sell any thereafter. He held out for $150; that is, he wanted me to put into this purchase-money mortgage the sum of $150 that I would have to pay if I required a release of any of the individual lots. I told him that that was unreasonable and too high, the amount of the mortgage itself being $1500, and being security for twenty-three lots it was out of all proportion. I held out for $75 and Mr. Robinson agreed that $100 would be pretty near the right figure, and it was that figure that was put in the contract. That about ended the conversation with Mr. Robinson, except that Mr. Carobine went back on the telephone and, after a minute or two, the conversation ended. That, in substance, is the telephone conversation of March 12, 1926, prior to the time the contract was executed.

Q. And the contract was executed? A. The contract was then executed, upon the terms that were agreed upon between Mr. Carobine and myself, and the releasing of individual lots for the payment of $100.

Q. And that appears in the contract? A. Yes, it does; it appears typewritten in here.

Mr. Ockford: Well, in which agreement?
Mr. Kepsel: In contract marked C-1.

Q. Mr. Degheri, when was the first time you met Mr. Thomas R. Carobine? A. It was the day of the contract. I never saw Mr. Carobine before that time, and on that day he was introduced to me by my brother at my office in Journal Square, Jersey City.

Q. Now, did Mr. Carobine say anything to you prior to or at the time of the execution of the contract, about any Armour Fertilizer Works judgment? A. Never mentioned a word about that.

Q. When did you first learn of this Armour Fertilizer judgment, or this attachment? A. Some time after the contract was executed. I personally made an examination of the records in Bergen County, and it was upon that examination of the records that I came across this judgment—it wasn't a judgment then, only a writ of attachment that issued by Armour against Teresina Carobine, who I understood was Mr. Carobine's mother.

Q. Upon discovering that did you communicate with Mr. Carobine? A. Oh, yes; I telephoned Mr. Carobine immediately. That was two or three days prior to the 15th. The contract stipulated that it was to be closed on the 15th of April, and I told him of that—I told him I thought it was strange he didn't advise me of that. He said he would come over and talk to me about it, and he did come over on the 15th, the day that the title was to pass, and I then explained what I found of record. He at first pleaded ignorance of the whole thing, and when I told him that an attorney had been engaged in 1925 to defend his mother, he then admitted to me that he did know; and I censured him for not

advising me sooner. We went on at that time to give him an opportunity of——

Mr. Ockford: I object to the statement, unless something was said between them.

A. (Continuing) Well, that is about the meat of that; the result of things don't matter at this time.

Q. As the result of what you told Mr. Carobine relating to this attachment suit, did he say anything, that he would do anything about it? A. Oh, yes; he said he would like me to advise him what could be done. I told him the only thing that I thought could be done was to pay it. Of course, he pleaded poverty and said he didn't have anything with which to pay it, and wanted my advice. I told him I was interested in getting the property and not to act as his counsel in the matter; and he then suggested—pleaded with me—and said if something wasn't done for him, perhaps the holder of holder of the mortgage, the Fruit & Produce Acceptance Corporation, would ascertain it and want their money, and he wasn't able to pay it. I then, upon his pleading, said that I would see what I could do toward helping him out; but I told him that I couldn't promise him anything. I did try several ways; I went to see Mr. Brand, who was attorney for his mother in that attachment proceeding—Brand, of Pierson & Schroeder, of Hoboken—and I talked the matter over with Mr. Brand. Mr. Brand said that he didn't think that he could have any defense to the action; that he had filed an answer in which he had admitted, practically, the debt due from Teresina Carobine to the Armour Fertilizer Works, but that he had filed a counterclaim, and that counterclaim, by the way, appeared

of record. When I examined the records of Bergen County, I discovered it as having been filed for Mrs. Carobine in the attachment suit, and that was for some $28,000. And I asked Mr. Carobine, "What about that counterclaim?" He says, "I think we will get a judgment on it; I don't think we need worry about that; just bear with me a little while, help me out." And so, after pleading as he did, I thought it might be well to postpone the closing of title, and he signed a stipulation to close the title on April 30th, 1926.

Q. Between that time and April 30th did you see Mr. Carobine? A. Oh, he called up several times and wanted to know what I could do and what I did do, and each time when he called up I told him he ought to make a clean breast of this thing and see that it was paid in some manner so that this deal could go through. But he kept putting it off, and, on April 29th, he telephoned and said that he didn't see any way out of it; and I said, "The way I see out of it is to go to Mr. Robinson and tell him about it." But, apparently, he didn't do that. So, on April 30th, the day set for closing the title, he did not appear at my office to close the title, nor did he telephone on that day.

Q. There was a judgment entered in the attachment suit? A. Subsequently, upon my examination of the records in order to bring my title down to April 30th, I went to Hackensack and I found a judgment on that attachment was entered April 28th, 1926.

Q. Approximately for what amount? A. Approximately for $3400—33 and something.

Q. Then, when Mr. Carobine didn't appear on April 30th, what did you do? A. I waited several days to see what might develop with him, what he might do, and on May 7th I dispatched a letter—

the letter which has just been offered in evidence—to Mr. Carobine, registered, informing him that I would demand that he close the title to the lots which he had contracted to sell me, on May 10th, and on May the 10th he failed to appear.

Q. Did you, prior to May 10th and after the signing of this contract, do any legal work for Mr. Carobine? A. Prior to May 10th, you say?

Q. Yes. A. No—oh, prior to May 10th, you say?

Q. Prior to May 10th, after the signing of the contract—between March 12 and May 10, did you do any work for him?

The Court: He just described the work that he did between those days—his conferring with Mr. Brand.

Mr. Kepsel: There is something else I want to bring out.

Q. Between the date of the contract and May 7th? A. Oh, yes, yes, about April 24th; I am quite sure of that date; I believe it was on a Saturday. Mr. Carobine telephoned me, or else I telephoned him, which it was I don't know, but we had a telephone conversation in which he said he was about to sell the remainder of his lots—eighty-four lots. He said that there was a man there and he was about to sign the contract. I asked him who was there, and he told me a man by the name of Siegmund Orbach and a man by the name of Hermann. I suggested that possibly he might have somebody present, and he said he was going to draw the contract, and the conversation ended very abruptly; he seemed to be angry about something.

Mr. Ockford: I move to strike that out. It doesn't make any difference.

The Court: It may be stricken out. It is a conclusion.

Mr. Kepsel: With my consent.

A. (Continuing) On April 26th, which was a Monday, Mr. Carobine telephoned to me, and said, "I told you Saturday I would sign a contract for the sale of eighty-four lots." He said, "I told the men to meet at your office this afternoon for the purpose of drawing a contract." I asked him why he had done that, and he said, "I told you to represent me in this matter." I said, "I don't know why you should pick me out to represent you, but, in view of the fact that you sent the men over, I will see what I can do to assist." He says, "I don't want to go through with the contract; I have just got a better offer of $21,000 for those lots, and I would like to see you before those men get there.

By the Court.

Q. Those were lots in which you had no interest? A. No interest whatever. And he said, "I will tell you what you had better do; you had better meet me in the hall." I did meet him in the hall, together with my brother Christopher.

Mr. Ockford: Just one moment. So far as this case is concerned, the details of this other matter, it seems to me, are entirely immaterial.

Mr. Kepsel: The purpose of bringing this out at this time is to show when this deal terminated he told Carobine that he wanted it, and Carobine said there was nothing doing; and he says, "All right, I will sue you for it."

Mr. Ockford: The objection is as to the details of this matter, wherein Mr. Bernard Degheri represented Mr. Carobine. The details of that are immaterial, so far as this case is concerned.

The Court: I'm not so sure of that.

Mr. Ockford: I mean just what was done in connection with that matter. He performed services, rendered a bill, and so forth; I'm not objecting to that, but I mean the details as to what he did.

The Court: If you are afraid of the color of the atmosphere, your fears are groundless.

Mr. Ockford: No, but I don't want to waste any time on that.

The Court: Well, I can't tell, Mr. Ockford, what he is going to say. You can reserve the right to strike it out.

A. (Continuing) I met him in the hall and we went to another office, and he told me that he had signed this agreement to sell to Orbach, but that he had since regretted it, and he would like to have me see what I could do to get him out of it. I asked him to show me the paper that he had signed; and it is the paper which I have on the desk there.

Q. Is this the paper that he gave you? A. This is the paper which Mr. Carobine gave me.

Mr. Kepsel: I would like to have it marked for identification.

The Court: Do you object to its being marked in evidence, Mr. Ockford?

Mr. Ockford: I offer no objection.

(The same is marked Exhibit C-4.)

A. (Continuing) I read the paper which he showed to me, which is this paper I hold in my hand, marked Exhibit C-4, and I told him by its very terms it was not a complete agreement; that it called for the execution of a formal contract. I said, "However, there may be developments; you may be engaged in some sort of litigation, but I will see what I can do." We then adjourned to my office where there was waiting a lawyer from Newark, his name was Fisher, and Mr. Hermann, the representative of Mr. Orbach. And I then explained to these gentlemen just what the situation of Carobine's title was and what I had found when I had made the search myself; and I told them, under those circumstances, that Mr. Carobine now did not care to enter into a formal contract, and he rested on his legal rights not to do that, on the strength of this paper. I am just a little ahead of my story. While we were upstairs, I suggested to Mr. Carobine that I wanted to be sure I would be paid for what I did in the matter, and, after discussing it back and forth, he finally agreed to pay $500. He said he could very well afford to pay me that because he was going to get $21,000 for the lots.

Q. Was that agreeable to you? A. Yes, it was. Following that, I returned to Mr. Orbach by registered letter the check which Mr. Orbach had given to Mr. Carobine as a deposit and which Mr. Carobine had, in turn, given to me to return to Mr. Orbach.

Q. (By Mr. Ockford) Wasn't Orbach present at the time? Didn't you say so? A. No, I said a representative of Mr. Orbach, a Mr. Hermann was there.

Q. I show you copy of letter dated May 4, 1926, to Mr. Sidney Orbach, 334 Park Place, Brooklyn,

N. Y., and ask you if that is a copy of a letter that was sent out to him? A. Yes, this is the letter that I sent to Mr. Orbach, enclosing the check that I had given to Mr. Carobine of $200 as a deposit under that agreement, which letter I registered, and, if you care to see it, Mr. Ockford, that is the return card (witness handing card to counsel).

Mr. Kepsel: Any objection to offering it?

Mr. Ockford: I would like to reserve the right to strike it out if it later appears irrelevant.

(The same is marked Exhibit C-5.)

Q. The check was returned to Mr. Orbach? A. Yes.

Q. The formal contract was not executed? A. No, sir.

Q. He paid you $500? A. No, he did not.

Q. Did you have any discussion thereafter with Mr. Carobine about your $500? A. Well, I spoke to him several times about it, and subsequent to that I called it to his mind regarding the agreement, and he kept putting it off, until I mailed him a bill about the same day, or thereabouts; I think it was May 7th that I sent Mr. Carobine a bill. I think it was that date.

Q. And did you see him after May 7th? A. I don't recall that I saw Mr. Carobine after that time.

Q. Did you have any discussion with him—talk with him about the bill? A. No, we didn't discuss the bill; didn't have occasion to.

Q. Did you at any time tell Mr. Carobine you would bring suit if it wasn't paid? A. I did in my letter of May 7th tell him that I would bring suit if it wasn't paid.

Q. And did you subsequently bring suit? A. I started a suit by attachment, Mr. Carobine being a non-resident, on the 11th day of May, issuing out of the Bergen County Circuit Court for the $500.

Q. About the 10th or 11th your attachment issued? A. May 11th.

Q. Did you, at any time after that, examine the records in Bergen County as to the condition of the title? A. Oh, yes. My notes will show the dates there, if you will hand them to me, which notes are in my handwriting. (Witness refers to notes.) On June the 11th, and days subsequent to that, I examined the records, and found that this Orbach contract had been recorded about the 28th day of April, the same day that the Armour judgment had been entered; and I also found that my contract had been recorded, which I recorded on May the 7th; and I also found that on May 12 there had been recorded a deed to the Alps Realty Company from Thomas R. Carobine for the remainder of his lots, namely, the eighty-four.

Q. Does that disclose the date? A. The record disclosed that the Alps Realty Company was a corporation of the State of New York; that its principal office was 38 West 9th Street, New York City, and it was a deed in which the consideration was $1, and it was acknowledged before Mr. Cella, attorney at law of New Jersey.

Mr. Ockford: If it is here we will save time by producing it; if it isn't, I have no objection to your stating the abstract of the deed.

Q. What else did you find, Mr. Degheri? A. The date of the deed was May 10, 1926, and was recorded May 12, 1926.

Mr. Ockford: The date of the acknowledgment?

A. (Continuing) The date of the acknowledgment was May 10, 1926. The only other thing I found was an assignment of judgment, which was dated May 11, 1926, between the Armour Fertilizer Works and Michael Starace or Staracey, I don't know how to pronounce it, of Brooklyn. That assignment of judgment was recorded May 20, 1926, and recited: "That whereas, the party of the first part recovered judgment on April 28, 1926, in the Circuit Court of the County of Bergen and State of New Jersey, against Theresa Carobine, also known as Teresina Carobine, in the amount of $3367.07 and $53.20 taxed costs and accrued interest of $8.37," and it went on to assign the judgment to Michael Starace. It was duly acknowledged and the County Clerk's certificate duly attached thereto.

Mr. Ockford: Where was that executed?

The Witness: It was executed, apparently, in Illinois. There is an Illinois County Clerk's certificate attached.

Q. So that when this deed of the Alps Realty Company was put on record there was no other encumbrance? A. Oh, yes; the Alps deed was put on record May 12th and there were the two mortgages of the Fruit & Produce Acceptance Corporation, Siegmund Orbach, and another attachment which I failed to point out, of one Sidney Goodman. The writ was issued March 2d, 1926—no, that was the return day; it was some time in February—February 23, 1926, for $200, and an assignment of the Armour Fertilizer Works judgment to

Mr. Starace. That was the record condition when I found the Alps deed on record.

Q. And did you then check up who Michael Starace was? A. I did at that time, but I think the pleadings admit that Mr. Starace was an officer of the Alps Realty Company?

The Court: How does that judgment against this man enter into this?

The Witness: My record discloses that Thomas R. Carobine got title to 107 lots by two deeds. The first deed was dated September 22, 1925, and that deed conveyed ninety-one lots in all. The second deed by Teresina Carobine to Thomas R. Carobine was dated January 26, 1926, and conveyed the remainder, to wit, sixteen, making a total of 107 lots. But before those deeds, there had issued this writ of attachment of August 29th, against Teresina Carobine out of the Bergen County Circuit Court at the suit of the fertilizer works.

Mr. Cella: I think you are in error. The assignment was not on record at the time the Alps deed was on record.

The Witness: I didn't say that. I said it was recorded May 20, 1926.

The Court: Go ahead.

The Witness (continuing): With respect to the first mortgage of $15,000 made by Thomas R. Carobine to the Fruit & Produce Acceptance Corporation, the record disclosed—I think there was a notice to produce that mortgage and that is better than the record.

Mr. Kepsel: Have you that original mortgage here, Mr. Ockford?

Mr. Ockford: There isn't any question about it; I think we can agree on that.

Mr. Kepsel: That that mortgage was a demand mortgage that bears no interest? Where is the original mortgage that we asked you to produce to-day?

Mr. Ockford: Here is the original of the $15,000 mortgage.

Mr. Kepsel: Payable on demand without interest?

Mr. Ockford: That is correct.

Q. Now, what about the $3,000 mortgage? A. The $3,000 mortgage calls for interest at 6 per cent., payable quarterly, due on demand.

Q. I understand it was admitted that no money passed on that? A. Yes, both admitted that to me.

Mr. Ockford: I move to strike out that answer. He has already testified as to what the conversation was, and now he is stating what was admitted. That is his conclusion.

The Court: I understood it was merely to identify this mortgage.

Mr. Ockford: He says it is admitted by both parties that there was no consideration. That is not a question of fact.

The Court: Suppose we say this: Is the $3,000 mortgage, Mr. Kepsel has just mentioned, the one concerning which you say Carobine and Robinson told you something in regard to the consideration?

The Witness: Yes, sir.

The Court: That is what you wanted?

Mr. Ockford: Yes.

The Witness: I think I have covered everything.

Q. Mr. Degheri, are you willing to pay to Michael Starace the amount due on his judgment? A. Yes, sir; I made such an offer in my—I believe in the bill of complaint and in my subsequent affidavits on the motion to strike out the answer.

Q. Are you willing to release to the Alps Company the eighty-four lots on the payment of 84-100ths of the judgment?

Mr. Ockford: I don't think the matter is in the pleadings and I object to it.

Mr. Kepsel: Paragraph 13 of the bill of complaint refers to it.

Mr. Ockford: On behalf of Carobine, I object to the question and answer, and move to strike out both, on the ground that it could not possibly be binding on the defendant Carobine as to what Mr. Degheri wishes and desires.

Mr. Kepsel: I don't know why my opponent should object if we want to carry out this contract.

The Court: Well, practically, I don't know. It is a matter I will deal with at the time I decide the case. I will overrule the objection. Anything further, Mr. Kepsel? If you find you have overlooked anything I will give you an opportunity to put it in.

Mr. Kepsel: All right; I will rest now. Take the witness.

Cross-examination by Mr. Ockford.

Q. At the time the contract of March 12th was signed your brother, Christopher Degheri, was present? A. Oh, yes; he was the broker in the transaction; he was in the office at the same time.

Q. Your brother was paid the amount of his commission, according to the contract? A. Oh, yes, I gave Mr. Carobine my check for $400 and he, in turn, made his personal check to the order of Christopher Degheri for the commission mentioned in the contract.

Q. Who besides yourself, and your brother, and Mr. Carobine were present? A. At that time, no one else.

Q. At that time, didn't you hear any talk between Mr. Carobine and your brother, as between attorney and client, as to the terms of this contract—as to the legal effect? A. I don't get your question.

Q. At the time of the discussion between you three was there any discussion as between attorney and client as to the legal effect about this contract? A. No, there wasn't any discussion of any kind. My brother was there as a broker of Mr. Carobine, who had talked to Mr. Carobine about conveying the lots, and I asked him and Mr. Carobine to come to my office for the purpose of drawing this contract.

Q. You were present during the entire time when the contract was drawn and executed? A. Oh, yes, I was there.

Q. And your brother's connection with the deal at that time was entirely as broker? A. Entirely as broker.

Q. There wasn't any professional advice given? A. No, sir.

Q. And, of course, you were representing yourself entirely and did not advise Mr. Carobine one way or the other? A. No, sir; I was the purchaser.

Q. At that time, or previous thereto, had your brother spoken with you with regard to the title?

A. No, sir; the only thing my brother mentioned to me before March 12th, in order to straighten it out, was that he had a man named Carobine who owned some Cresskill property and he thought it might be a good buy to buy some, because he was the broker for Mr. Carobine. I then went over the property and asked my brother what Mr. Carobine was asking for it. I then made my brother an offer which I told him to convey to Mr. Carobine.

Q. Just a moment— A. I am giving you what happened just prior.

Q. The only thing I ask you at one time is an answer. You never discussed with your brother the title? A. No, sir.

Q. At that time did you know that your brother had represented Mr. Carobine as his attorney in any matters? A. Not directly. I didn't know the full situation at all until quite a time thereafter when there began to be some difficulties, and then I made an examination of what had happened prior to that time.

Q. Had you ever seen Mr. Carobine in your office on visits to your brother? A. I never did; I never saw Mr. Carobine prior to the 12th day of March, 1926. That was the first time that I knew him, aside from my brother telling me that he had some lots there in Cresskill.

Q. How long had you and your brother practiced law together? A. We don't practice together.

Q. Well, occupy offices together? A. My brother and I occupy two offices and he has the smaller one.

Q. How long had you been associated together in that way prior to the date of the contract? A. Well, my brother occupied a room since the time of the dissolution of my partnership with Mr. Kepsel, which was April, 1925. At that time my brother

had merely a desk room, and since the dissolution he took Mr. Kepsel's room and he has paid me rent ever since.

Q. Had you ever spoken to Mr. Robinson prior to the day that the contract was made? A. I didn't know Mr. Robinson and therefore I didn't speak to him prior to March 12th.

Q. Did your brother say anything about Mr. Robinson? A. No, sir; had no occasion to.

Q. But he didn't do it? A. No, sir.

Q. Had there ever been any correspondence between Mr. Robinson and yourself prior to March 12th? A. Prior to March 12th? I don't recall it, sir.

Q. What, if anything, was said at the time this contract was being prepared, as to putting some condition in the contract with respect to this real estate to be secured from the Fruit Company? A. As I said before, Mr. Carobine told me that the two mortgages were held by the Fruit & Produce Company, and I asked him whether he had taken that matter up with the Fruit & Produce Company for the purpose of getting a release——

Q. I am asking you whether there was anything said about incorporating in the contract some reference to the release to be procured between you? A. Between Mr. Carobine and myself?

Q. Yes. A. No, there was nothing said at that time, whatsoever.

Q. (By the Court) There was something said about getting releases? A. Oh, yes.

Q. Was there anything said about mentioning that in the contract? A. If the Fruit & Produce were paid?

Q. No; Mr. Ockford's question was whether there was anything said about putting it in the

contract? A. No, there was nothing said about that.

Q. This conversation with Mr. Robinson was your first conversation with him? A. Yes, the first conversation I had with him.

Q. Did he say that his company would require, besides, an assignment of the $1500 purchase-money mortgage? A. He said that that would be arranged with Mr. Carobine; that he would probably take all the cash. In other words, Mr. Carobine was to turn over all the cash that he was to get out of that transaction.

Q. And he said that could be arranged between Mr. Carobine and himself? A. Yes, but that he would have a representative at the closing of title, to see that that was carried out.

Q. No definite figure was arrived at? A. The only definite figure that I can remember is, that he was to get the balance over the mortgage, the $2100 cash and the $1500 mortgage.

Q. Mr. Robinson didn't state that that would be what would be required for his company? A. No, no; he didn't state that. He said it would be agreeable to him. By his conversation he told me that he was going to get the balance of the money. In other words, Carobine wouldn't get anything except the $400 deposit.

Q. Did you and Mr. Carobine discuss the matter as to how much of the purchase price would be turned over to the Fruit & Produce Company for the real estate? A. Oh, he readily admitted to me that he wouldn't get any money out of this. He said he would be glad if all the lots could be sold to pay off the Fruit & Produce indebtedness.

Q. What I am getting at is, after you spoke to Mr. Robinson did you call Mr. Carobine's attention to Mr. Robinson's expectation about the cash? A. No, Mr. Carobine verified that by going back on the telephone and speaking to Mr. Robinson.

Q. You heard him say that? A. Yes, and he verified my understanding with the understanding he had with Mr. Robinson.

Q. What, if anything, was said in reference to reducing that release to written form? A. Nothing was said. I thought I was dealing with gentlemen. The only thing that entered into my mind was to get the amount put into the release for the individual lots and release them from the mortgage, which was $100, as I said before.

Q. Was there anything said by you or Carobine that would make it necessary to reduce that agreement to some written form? A. No. As I told you before, Mr. Ockford, it didn't enter my mind at all and I didn't mention it that it should be reduced to some written form. I took his word over the telephone that he would do just as he agreed.

Q. Of course, at that time you had no knowledge as to what arrangement existed between Mr. Carobine and Mr. Robinson in respect to a release of this property? A. Except that before I telephoned Mr. Robinson, as I said before, Mr. Carobine told me that he ought to do that, make arrangement to release the lots to be sold.

Q. You weren't informed as to the terms and conditions? A. No, sir; I was not.

Q. You might reasonably suppose that there were terms and conditions attached to the execution of this release?

Mr. Kepsel: I object to the question, if your Honor please, what this witness might suppose. That doesn't enter into this case at all.

The Court: This is cross-examination, Mr. Kepsel, and a much wider latitude is allowed than on direct examination. I overrule the objection.

A. I didn't know, Mr. Ockford, what I might suppose.

Q. Didn't you thoroughly understand what he told you at that time, that the $15,000 and the $3,000 mortgage were the only encumbrances against the property? A. That is all Mr. Carobine told me.

Q. And you understood that the $15,000 mortgage was a first mortgage? A. Yes, sir; he told me to that effect.

Q. And you believed at that time, and Mr. Robinson believed also, that the mortgage was a first mortgage?

Mr. Kepsel: I object to what Mr. Robinson believed from this witness. Certainly, he is not a mind reader.

The Court: I am inclined to sustain the objection, subject to what you might say.

Mr. Ockford: I want to thoroughly understand at this time whether Mr. Degheri believed that they were both acting upon the belief that this mortgage was a first lien upon the premises.

The Court: I understand him to testify that he was so informed.

Q. Now, from what was said by both parties was there anything that led you to believe that Mr. Robinson understood it was a first lien?

The Court: I will permit him to answer that "yes" or "no." Was there anything said, Mr. Degheri?

A. I don't recall anything being said as to whether it was a first, second or third mortgage by Mr. Carobine.

Q. I understand, after the contract was signed, you personally made examination of the title. A. Yes, sir; I did.

Q. Did you, subsequently to the execution of the contract, discuss at any time with your brother Christopher the total encumbrances that you discovered in your search?

Mr. Kepsel: That question has already been answered, your Honor.

The Court: I understand him to say "after."

Q. After the examination of the title, did you then talk with your brother Christopher in respect to what you had discovered? A. Can I object to that as immaterial?

The Court: No, you are represented by counsel; you have surrendered your license to practice law for the time being.

Mr. Kepsel: Then I want to object to that as immaterial as to what discussion Mr. Degheri had with his brother after this contract was executed.

The Court: It is certainly harmless to answer that "yes" or "no." I will overrule the objection.

A. (Continuing) I did have a discussion, yes.

Q. What was the general subject of your talk at that time after the contract was executed, as to the title?

Mr. Kepsel: I think I ought to object to that, on the ground as immaterial, what he

said to his brother about the title. I don't know what it has to do with this.

The Court: I don't, either. It might be an admission against interests. There is no jury here and I will allow it.

A. Talk with my brother?

Q. Yes. A. When I finished my title examination, I called my brother into the office and told him what I had found. I asked him if he had ever made a search of this property, and he said he did. And I asked him whether his search had ever shown up a couple of attachment suits, and he said, "No, I don't recall that my search disclosed that." "Well," I said, "for your information now, my search shows that on August 29, 1926, this writ of attachment issued at the suit of Armour Fertilizer Works," and I says, "in February of this year, 1926, there was an attachment by Goodman." "Well," he says, "I knew about the Goodman attachment, but I didn't know about the Armour Fertilizer attachment," and it wasn't until I called his attention to it there that he knew about it.

Q. And I understand you to say that your brother at that time told you that he had made a search for Mr. Carobine, or for the mortgage company? A. I don't recall that he said for him; he said he made a title examination for somebody, either of the two.

Q. Or both? A. It might have been both; I don't know.

Q. But from what he said you understood— A. That he had made an examination of the title some time before.

Q. And had made it without disclosing the Armour attachment? A. I didn't know it at that time; I saw it subsequently. The first time I talked

with my brother he didn't know anything about it, but afterwards he found out that that was so—after going into it.

Q. And then after you discovered the existence of this prior judgment or prior attachment lien did you then talk to Mr. Robinson? A. No, I didn't talk with Mr. Robinson until—oh, I should say it was—well, he called up several times—he called up several times in the month of April and wanted to know how the title was coming along. That is what I recall—called up several times in the month of April before the 30th, two days before the time set for closing.

Q. You say he called up on April 30th? A. I had a conversation with him on April 30th. He may have called the day before; I don't know.

Q. On any of those occasions you talked with Mr. Robinson did you tell him it was discovered that this attachment existed prior to his mortgage? A. I did not, sir.

Q. Did you ask Mr. Robinson to assist you in getting Carobine to go through with his contract? A. Yes, I did.

Q. Do you remember what he said to you? A. It was shortly after the 30th of April, when Mr. Carobine did not put in an appearance, that I went to see Mr. Robinson personally. I had told Carobine that it was his duty to tell Mr. Robinson the record condition as I found it, and Carobine was just afraid to do so. I told him several times, and said if he didn't do it I was going to do it. He said, "Don't do that now; you will get me in bad." He said, "Be a good fellow; you know what kind of a man Robinson is; he has got a club over my head and he will sell me out." And I threatened Carobine several times, and told him, "You ought to make a clean breast of this thing and tell Mr.

Robinson as I have stated." And so I told him the latter part of April if he didn't do it I would do it; and in the early part of May I did see Mr. Robinson, but before that time Mr. Carobine had seen him and told him.

Q. How do you know that? A. Robinson said Carobine was in and told him about it just previous thereto, I think it was a day or so. Probably he beat me over there by a day.

Q. Your brother hadn't requested him not to tell Mr. Robinson? A. Oh, no. As soon as I found out the situation, that my brother had certified the title, I immediately naturally became interested in the welfare of my brother to see what could be done to assist him, as well as to assist me, but it was principally for the interest of my brother that I went over to see Mr. Robinson.

Q. And in doing so, did you talk to Mr. Robinson at your brother's request? A. Well, not exactly at his request, but on my own initiative, if that is what you mean.

Q. You had not only a desire, not only because you wanted to get your own contract through, but you wanted to assist your brother as far as you could? A. There wasn't any anxiety; I didn't know as I had any fear.

Q. Did you and your brother go together? A. I don't recall.

Q. You are quite sure that the conversations back and forth with Mr. Robinson alone about the existence of the lien was toward the latter part of April? A. No, I didn't say that; the early part of May.

Q. The last date fixed for closing? A. No, not the last day fixed for closing; the early part of May. The last day fixed for closing, Mr. Robinson knew about it.

Q. But you understood he knew about it the day before you told him? A. Yes.

Q. That would be the early part of May? A. Yes, as near as I can recall.

Q. Did you at any time give to Mr. Carobine any suggestions with respect to bonding this lien? A. As I was about to say before, Mr. Carobine came over on the 15th of April and pleaded with me to help him.

Q. Won't you please confine your testimony to answering my questions? A. Well, I should think you would want the facts. I can't answer that question "yes" or "no."

Q. Did you talk with him, yes or no, about giving a bond? A. He requested me to see what I could do with such a proposition.

Q. All right; go on. A. Well, I have answered your question, I think.

Q. In connection with that, did you say anything about bonding the lien? A. No, it was his suggestion that I mention something that could be done, and I told him the only two things that could be done was to pay it off, or if somebody would be foolish enough to do so, to put up a bond; that those were the only two things that could be done.

Q. Did you tell Mr. Carobine that you could probably procure such a bond? A. I told him I would try and help him out.

Q. This Orbach matter is the first matter wherein you represented Mr. Carobine as his attorney? A. Yes, the first and only matter.

Q. And, so far as you knew, at that time your brother had never represented him as attorney? A. I mean later he hadn't represented him—up to the 15th of April, when we had this talk about what

the record disclosed, Mr. Carobine told me everything that he had been represented in by my brother; that he had represented him several times in the closing of contracts.

Q. Your connection with this Orbach matter was rather against your desire? A. Yes, as I said before, it was only when Mr. Carobine pleaded to help him out that I did anything to help him.

Q. This $500 fee that you spoke about, I understand was fixed as your fee before you represented him? A. I didn't exactly fix it; we agreed to it. He asked me what I would want for my services, and I told him, in view of what he would get, that is, $21,000, my fee would be $500; and he said that would be satisfactory to him.

Q. That was for your services in the Orbach matter? A. Yes.

Q. Suit or no suit, no matter what? A. That's the idea; I had to take that chance.

Q. Do you remember the name of the man who came over to represent Mr. Orbach? A. A Newark lawyer by the name of Fisher.

Q. And did you tell that attorney that the memorandum being informal and calling for a formal contract the matter was called off because your client didn't want to go ahead with it? A. That was one of the reasons.

Q. And you would send back the deposit check? A. Yes.

Q. That was all that was necessary to rescind? A. Yes, that was all.

Q. Did you notify Mr. Robinson of the respective dates as you went along? A. Mr. Robinson communicated with me prior to April 15th and after April 15th, and he was notified that the closing date was adjourned to April 30th.

Q. What did he say? A. He didn't say anything except that he was going to be represented, that's all.

Q. You didn't call upon him for the execution of any formal release of any kind? A. Well, I had engaged, in the meantime, my brother Christopher to draw up the necessary papers to release the mortgages; and Carobine had told my brother to make up a deed and give it to me, and that, I think, was done; and those papers are in the file.

Q. Executed? A. Not executed; drawn.

Q. You never went to Mr. Robinson about this matter or made any appointment? A. He was to come to my office or to have some representative be there about it.

Q. You know nothing about that? A. Oh, yes, the 30th.

Q. Subsequent to April 30th. A. Subsequent to April the 30th he knew that matter was set down for May 10th. I saw Mr. Robinson personally prior to May 10th and told him that I had written Mr. Carobine calling upon him to be present May 10th.

Q. Well, prior to that time Mr. Robinson had already informed you, had he not, that he didn't think he was called upon to execute any releases, in view of the discovery that the mortgage was in jeopardy by reason of prior liens? A. No, he wasn't at all worried about that. He says, "I have $18,000 in mortgages here and all that is due me is $13,000"; he wasn't alarmed at that at all.

Q. He told you that that would have to be straightened out before releases were given? A. No, he didn't mention anything like that.

Q. Did you see Mr. Robinson after May 10th? A. I don't recall that I saw Mr. Robinson after that time. No, I think the last time I saw Mr.

Robinson was at his office in New York when I went over, prior to May 10th; and I told him that I had sent Mr. Carobine that letter, calling upon him May 10th to close the title.

Q. Did you talk with him on behalf of your brother? A. I may have; I am not sure. I wouldn't want to tie myself down to that.

Q. You don't know what transpired between Mr. Robinson and your brother as to making out this prior lien? A. No, I don't know what happened to that. I know my brother brought in for me to see several letters that Mr. Robinson had sent to him, and I naturally was very much interested in what had happened so as to assist my brother in any way if he had made a mistake. That is all I was interested in.

Q. Going back for a moment: At the time this contract was made what was said by anyone present as to the amount of assessments and taxes you agreed to pay? A. Mr. Carobine said that he had received from O'Brien, the tax collector, a list of assessments some time previous thereto, and I think we all agreed to something like $600, or $594, or something like that—around $600.

Q. And there wasn't any reason for omitting from your contract a statement of what the maximum of those taxes were to be? A. Not the taxes; just the assessments. I didn't see that it made any difference.

Q. It made a difference if it was over $600? A. I was willing to take his word and my brother's word.

Q. But it was understood at that time it was only $600? A. I understood it to be about $600.

Q. And your brother understood it? A. I presume so.

Q. He was present when that was brought up? A. Yes.

Q. And do I understand that you and Mr. Carobine at that time agreed that the purchase price was approximately $4600 and was made $4,000 because of the assessments you were to pay? A. No, that wasn't the agreement, Mr. Ockford. We were not concerned with any assessments in the purchase price. I was to pay $4,000 and to pay whatever assessments there were on the property. That was our agreement and that is what the contract states.

Q. Wasn't there something said by Mr. Carobine at that time that he was selling for $4600? A. Oh, no, just that agreement, Mr. Ockford.

Q. During the time between the date of the contract and the last date fixed for closing by your notice, Mr. Carobine, on a number of occasions, told you that he didn't have the money to discharge this prior lien, didn't he? A. Oh, yes.

Cross-examination by Mr. Cella.

Q. Mr. Degheri, you made application before Vice-Chancellor Fielder that this be stayed——

Mr. Kepsel: I object. The papers speak for themselves. We will give you your money right now.

The Court: Go ahead; I will permit you to cross-examine him.

Mr. Kepsel: The bond has not been put up yet. I will put that on the record.

Mr. Cella: All right; I have nothing more.

Redirect examination by Mr. Kepsel.

Q. When you spoke to Mr. Robinson, or, rather, when this agreement was made with Mr. Robinson

about releases, did he annex any terms and conditions to the giving of those releases?

Mr. Cella: I object as leading.

The Court: I will overrule the objection, because it is not leading in the sense that it indicates what counsel wants him to say, and the question ought to be answered by "yes" or "no."

A. I think I have covered all the terms and conditions that were asked at that time.

Q. Well, did he say he would give the release because these were first mortgages?

Mr. Cella: I object on the same ground.

The Court: Yes, that is equally leading.

Mr. Kepsel: Well, that is all.

The Court: I said if you found anything that you overlooked in your direct I would permit you to ask him after the cross-examination, to save time. Have you anything?

Mr. Kepsel: No, not that I can recall now.

THE COMPLAINANT RESTS.

DEFENDANT CAROBINE'S CASE.

CHRISTOPHER S. DEGHERI, sworn on behalf of defendant Carobine, testified as follows:

Direct examination by Mr. Ockford.

Q. You are a member of the bar? A. I am.

Q. Attorney and counselor at law? A. Attorney at law.

Q. When were you admitted? A. 1920.

Q. And your office is where? A. 921 Bergen Avenue, Jersey City.

Q. Been there since about when? A. Oh, 1920 or 1922.

Q. I show you what purports to be an abstract of title and ask you if you signed that? A. I did.

Q. And delivered it to the Fruit & Produce Acceptance Corporation of New York? A. I did.

Mr. Ockford: I ask that that be marked in evidence.

Mr. Kepsel: No objection.

(The same is marked "Exhibit D-1.")

Q. Do you know when that was delivered to Mr. Robinson, of the Fruit & Produce Acceptance Corporation? A. That was delivered, I think, soon after the abstract—I think the day after I sent it to Mr. Robinson; I think it was.

Q. The day after the date of the certificate? A. Yes.

Q. That was delivered in connection with the execution of the $15,000 mortgage, was it not? A. Yes, it was.

Q. Do you remember that the mortgage was executed in September? A. Yes, September 22nd, 1925.

Q. Did you have anything to do with the closing of that mortgage transaction, whereby the mortgage was given as security from Mr. Carobine to the Fruit & Produce Acceptance Company? A. Yes.

Q. You drew the papers? A. I drew the necessary papers, yes.

Q. You were the only attorney in the transaction? A. The only one.

Q. Representing the lender, the mortgage company, being paid by the borrower? A. Yes, sir.

Q. What was the reason, if there was any, for not furnishing the abstract at the time the mortgage was placed? A. Well, really no reason at all.

Q. It was six weeks later; was that the usual office routine? A. No, it isn't October 3rd.

Q. About a week or two weeks, then? A. That's all it was.

Q. I show you a deed from Teresina Carobine to Thomas R. Carobine; is that your signature as witness and as attorney at law in taking the acknowledgment? A. Yes.

Q. Is that a part of the same transaction? A. It is.

Mr. Ockford: I ask to have it marked in evidence.

(The same is marked "Exhibit D-2.")

Q. You represented the same party in connection with the $3,000 mortgage? A. I did.

Q. Any additional certificate of title given? A. None was requested.

Q. None was given, then? A. No, sir.

Q. I show you the $15,000 mortgage, witnessed by you, and the acknowledgment taken by you, was it not? A. That's right.

Mr. Ockford: I offer it in evidence.

(Admitted and marked "Exhibit D-3.")

Q. And the same is true of the $3,000 mortgage I now show you? A. That's right.

Mr. Ockford: I offer that in evidence.

(The same is marked "Exhibit D-4.")

Q. Do you recall the circumstances of the execution of the $3,000 mortgage? A. I do.

Q. Was that a part of the original transaction? A. It was not.

Q. Separate transaction? A. Separate transaction.

Q. Did you receive payment for your services in connection with the $3,000 mortgage transaction, from Mr. Carobine? A. I did.

Q. Did you represent Mr. Carobine in any other matters besides these two? A. Oh, yes, I did.

Q. When did you represent him next? A. I met Mr. Carobine for the first time in April, 1925. On that occasion——

Q. Never mind any extended answer; I just want to fix the date. What was the nature of the first matter in which you represented him? A. I drew up the necessary papers in closing the title for him to a party by the name of Webber, two lots.

Q. Real estate matter? A. Yes.

Q. And you continued to represent him down to what time? A. Down to August, 1925.

Q. What was the occasion of your last representation? A. I represented Mr. Carobine in regard to selling two lots on 4th Street in Cresskill to a Mr. Slocum.

Q. Did you represent him at all in 1926? A. Yes, in the Goodman attachment.

Q. When was that? A. That was in February, I think, 1926.

Q. Did you appear for him as attorney in that case? A. Not personally, no, I did not.

Q. But you took care of it for him? A. I did.

Q. Now, in connection with this contract between Bernard Degheri and Carobine, of March 12th, did you represent Mr. Carobine as his attorney in that matter? A. Mr. Carobine came——

Q. Can't you answer "yes" or "no"? A. No, I didn't; I was the broker in the transaction.

Q. And you were not the attorney? A. Oh, no.

Q. You didn't advise Mr. Carobine, as his legal adviser at all? A. Oh, no, I was only getting $200 for the commission.

Q. When did you first learn of the existence of the Armour attachment lien on this property, Mr. Degheri? A. In April of this year my brother came to me, after coming from Hackensack——

Q. Wait a minute now. April, 1926? A. Yes.

Q. From your brother? A. Yes.

Q. That is the first you knew about it? A. The first I knew.

Q. You were present when the contract of March 12th was made? A. I was.

Q. And you received $200 as broker for your part in the transaction? A. Yes, sir; personal check from Mr. Carobine.

Cross-examination by Mr. Bernard M. Degheri.

Q. Mr. Degheri, Mr. Ockford asked you if you appeared for Carobine in 1926, and you said in the Goodman attachment; that's right, is it? A. Yes, I did appear.

Q. And he asked you if you represented him, and I believe your answer was that you didn't represent him personally? A. No.

Q. Did you file a notice of appearance for the defendant? A. I did.

Q. In whose name? A. In my own name, Christopher Degheri.

Q. And did you receive any compensation for services in that matter? A. I did.

Q. How much did you receive? A. $25 from Mr. Carobine.

Q. How was that paid? A. That was paid by check of Mr. Carobine.

Q. Now, you also represented Mr. Carobine in closing the $3,000 mortgage transaction in March, 1926, and you were paid for that matter by whom? A. Mr. Carobine.

Q. How were you paid, by cash or check? A. I was always paid by check, always.

Q. And you billed Mr. Carobine in whose name? A. In my own name.

Q. Were you authorized at any time to sell any of these lots that Mr. Carobine owned? A. I was.

Q. When were you so authorized; for the first time, I mean?

Mr. Ockford: This is new matter, your Honor. I don't object to it, but I want to cross-examine on it.

Mr. Degheri: If your Honor please, I don't think it is new matter. I asked him whether he represented Mr. Carobine in any other matters in July, 1926, and I understood him to say that he did.

Mr. Ockford: I just want it understood that it is new matter, that's all.

The Court: I think it is, Mr. Degheri; and if you examine him along that line I will permit Mr. Ockford to cross-examine along the same line.

Mr. Degheri: Question withdrawn.

Q. You say you represented Mr. Carobine in 1925, in certain title closing; is that right? A. Yes.

Q. And the first one I understood you to say was Webber? A. Webber, yes.

Q. And you drew the deed from the seller to the purchaser in that transaction? A. I did.

Q. And who was the seller in that transaction? A. Teresina Carobine.

Q. Mr. Carobine's mother? A. Yes.

Q. And Mr. Carobine acted in what capacity for his mother? A. As attorney.

Q. As attorney for his mother? A. Yes.

Q. And he closed the deal and you would get the deed signed by the mother; is that right? A. Yes, I would.

Q. Was he present at that title closing of Webber? A. Yes.

Q. Where was it closed? A. Over in New York at Mr. Carobine's office on West Street.

Q. How many lots were there? A. Two lots.

Mr. Ockford: I object to the witness stating how many lots, as immaterial.

Mr. Degheri: I am going to show by this witness that he sold for his mother lots in the same tract for less than or about the same sum, as I have already shown by the other contract that he sold eighty-four lots for the sum of $15,000, which would be on an average of $178 a lot.

Mr. Ockford: And also new matter.

The Court: If it has something to do with the value, all right.

Q. Two lots, did you say? A. Two lots.

Q. Where were those two lots in connection with the property contracted for by him? A. Those two lots Mr. Webber contracted for were on 3rd Street. Those were approximately two blocks away from the lots you are concerned with.

Q. What was the consideration of those two lots sold to Mr. Webber? A. $175 a piece.

Redirect examination by Mr. Ockford.

Q. Did you ever see the premises in question? Were you ever on the property? A. Why, Mr. Ockford, I live there.

Q. You are the man we want, then. Show us on this map, which is a map of the premises, I believe, where the two lots are that you have just spoken of as being sold to Mr. Webber. A. Here is the main street in Cresskill and here is 3rd Street, and I think the lot numbers were 81 and 82. They were right in this location right here. Here is 81 and 82.

The Court: That is to say, they were on 3rd Street between Magnolia and Madison?

Q. That would be the west side of 3rd Street? A. Yes.

Mr. Kepsel: You may as well show where you live.

The Witness: Up here on Magnolia Avenue, between Jefferson and 8th Street. Here is Jefferson and here is 8th, and my house stands on those two lots, 785 and 786.

Q. With respect to lot 782 which were the nearest of the three lots included in the lots sold to your brother? A. The lots right here, 1, 2, 3, 4, 5, 6, 7, on this easterly side of 5th Street.

Q. Those are the nearest of the twenty-three to these? A. Correct.

Q. Of course, 3rd Street is not considered as desirable as 5th Street? A. It is the same thing there, unimproved streets, Mr. Ockford.

Q. As to the lay of the land; it is low down around 3rd Street? A. No, it is the same level.

Q. For residential purposes, would you say these nearest lots are about the same as on 3rd Street, 781 and 782?

Mr. Degheri: I object to that as not proper cross-examination.

Mr. Ockford: This was introduced as a matter of comparison, and I am simply asking him how they compare.

The Court: He hasn't yet asked what value he has placed upon them and I don't understand that he is going to.

Mr. Ockford: No.

Q. How do they compare?

Mr. Degheri: I object. This man is not an expert on that.

Q. How did these lots 81 and 82 compare with the lots you have indicated on 5th Street, as to elevation and street improvement? A. About the same.

Q. Is there any difference in the whole tract as to levels? A. Some lots are higher than others, yes.

Q. Where is the difference? A. Below 2nd Street, they call it the Kill, are the lowest and the lots down around here on 2nd Street are quite low.

Mr. Ockford: I would like to have this map marked in evidence.

Mr. Kepsel: No objection.

(The same is marked "Exhibit D-5.")

Q. Do you remember the terms and conditions of the Webber sale? A. I do.

Q. Was it all cash? A. All cash; yes, sir.

Q. And the purchaser to pay assessments? A. That's right.

Q. In addition to $175? A. Yes.

Q. You don't know what the amount was? A. I don't recall.

Recross-examination by Mr. Kepsel.

Q. The Webber sale was for two lots? A. Two lots, yes.

THOMAS R. CAROBINE, sworn on behalf of the defendants, testified as follows:

Direct examination by Mr. Ockford.

Q. Where do you live? A. 1406 Townsend Avenue, The Bronx.

Q. And where is your place of business? A. 339 East 102nd Street.

Q. New York City? A. New York City.

Q. What business are you engaged in? A. Wholesale fruit and produce business.

Q. How long have you been in that line of business? A. Seventeen years.

Q. Are you engaged in any other line of business? A. No, sir.

Q. Prior to March 12, 1926, the date of your contract with Mr. Bernard Degheri, when did you first discuss with anyone the sale of the twenty-three lots to Mr. Bernard Degheri? A. I discussed the matter with Christopher Degheri.

Q. About how long prior to the 12th did you first talk with Mr. Christopher Degheri about

selling him lots? A. I don't exactly remember, but it was during the winter months. I told him any time he got any customers to let me know.

Q. That would be the winter of 1925? A. 1925, yes.

Q. Was Mr. Christopher Degheri at that time your attorney in any matter? A. With regard to these lots I had in Cresskill.

Q. Did Mr. Christopher Degheri represent you in any legal capacity prior to the time you consulted him with regard to these lots? A. Just drawing up some deeds as I sold the lots, one or two at a time.

Q. Was the Webber sale the first sale of any of the lots? A. Yes, sir.

Q. When did you first meet Mr. Bernard Degheri? A. The day I went over to make the contract for the twenty-three lots. I don't remember the date.

Q. And who introduced you? A. Christopher Degheri.

Q. Were you present in Mr. Degheri's office when the contract was drawn or prepared for signature? A. Yes, sir.

Q. (By the Court) Was that the first time that you had met Mr. Bernard Degheri? A. Yes, sir.

Q. Had you ever been in the office before to see Mr. Christopher Degheri? A. No, sir.

Q. Where had you seen him in connection with the matter? A. In my office.

Q. The transaction in September, 1925, whereby you executed a mortgage to the Fruit & Produce Company, took place where? A. In the Fruit & Produce Acceptance Corporation's office.

Q. Mr. Degheri represented the parties? A. Yes, sir.

Q. And who represented you in that matter? A. He represented me.

Q. You paid him? A. I paid him, yes.

Q. Do you recall receiving a deed from your mother for the property about the same time you made the first $15,000 mortgage? A. Yes, a few days before.

Q. Christopher Degheri represented you in connection with that deed? A. Yes, sir.

Q. And in connection with the $3,000 mortgage Mr. Christopher Degheri represented you? A. Yes, sir.

Q. At the time that the contract of March 12 was being prepared what, if anything, was being said by you or either of the Degheris then present, as to the Armour attachment suit? A. There was nothing said when the contract was drawn.

Q. Anything said before the contract was drawn? A. No, nothing at all.

Q. When was there any talk about the Armour attachment? A. Four or five days after the contract was drawn.

Q. Before we come to that, I want to ask you about a release of the premises from the two mortgages held by the Fruit Company; was there anything said about that at the time the contract was being prepared? A. Well, I owed the money to the Fruit & Produce Acceptance Corporation, and whatever moneys I derived from the sale of the lots was to go to the Fruit & Produce Acceptance Corporation.

Q. Well, at the time this contract was being prepared was that matter discussed by you and Mr. Degheri? A. Yes, sir.

Q. And was there a conversation with Mr. Robinson at that time over the telephone? A. Yes, sir.

Q. Did you show him this contract before you signed it? A. No, sir.

Q. Was it drawn up and signed in a continuous session? A. Yes.

Q. Who was present besides yourself? A. Mr. Christopher Degheri and some other young fellow that took the acknowledgment—took my name.

Q. Was Bernard Degheri present? A. Yes, sir; he was present.

Q. Had you spoken to Mr. Bernard Degheri about the matter at the time you met there and the contract was drawn? A. I had spoken to him over the telephone.

Q. Was there any discussion as to the price? A. Why, the price set was $4,000 for the twenty-three lots, and he told me that—that is, Christopher Degheri told me that he had gone over to see Mr. Bryan, the tax collector.

Mr. Degheri: I think I should object to any conversation that may have been had with Christopher Degheri. He is not a party to this action. Can he in any way bind me by what he may have said?

The Court: What do you say to that, Mr. Ockford?

Mr. Ockford: Well, I don't know. It depends somewhat upon whether he later on communicated it. The witness is going back instead of forward. He is coming to it now, that Mr. Bernard Degheri was present when the contract was being prepared.

Q. What was said about the price? Never mind what talk you had previously. A. The price was a good price, and I should sell it because the assessment would be $1500, which would make it

$5500, and I should take it, and the first mortgagee was pressing me for the money, and thinking that the assessment was $1500——

Q. At the same time that that matter was talked over was it in the presence of Bernard Degheri? A. It was the same day.

Q. Christopher did the talking about that matter? A. Yes.

Q. Did you or did you not at that time know of the existence of the Armour judgment, or Armour attachment lien? A. Yes, I did know.

Q. Anything said about it that day? A. I had a case against the Armour Company and the case was pending, and I said, "I expect this trial to come up anyway and we will wait a while before we will close the contract." So Mr. Bernard Degheri insisted that this thing be closed. He suggested that some friend of his get me a bond and put up the bond, and I said I would get the bond—put up a bond for double the amount. And then we found out that we couldn't find any——

Q. Well, never mind about that.

Q. What, if anything, was said before you did that about putting it in the contract? A. Nothing was said about putting it in the contract.

Q. Did you say anything as to the amount of the claim of the Armour Company against the property? A. Yes, $3200.

Q. Who telephoned Mr. Robinson, you or Mr. Degheri? A. I did.

Q. Did you speak with him? A. I spoke to Mr. Robinson; yes, sir.

Q. And then Mr. Bernard Degheri also spoke with him? A. Yes, sir.

Q. Anything said by you, or either of the Degheris, at that time about putting in the contract itself some reference to what the terms of the re-

lease would be if released by Mr. Robinson's company? A. I don't remember, because Mr. Robinson and Mr. Degheri talked it over and I thought they had agreed between themselves as to what was going to happen.

Q. What did Mr. Robinson say to you at the time you spoke with him as to what he was willing to do by way of releasing the lots? A. I told Mr. Robinson that I was going to get $4,000 for the lots and that I was getting $2500 cash and $1500 mortgage, and then Mr. Robinson was willing that the first mortgage would be turned over to us. I wasn't getting anything out of it. The only money I was getting was enough money to pay the taxes on those lots, which was $200, because $200 I had to give back to Christopher Degheri, the broker.

Q. At that time, or any time prior thereto, had you told Mr. Robinson anything about this Armour claim? A. I never told Mr. Robinson about it.

Q. After the contract was signed, did you talk with Mr. Bernard Degheri about the bond that he thought he could get someone to put up and release the attachment? A. Yes.

Q. How long after the contract was signed did you speak with Mr. Bernard Degheri about it? A. Well, it was three or four days afterwards when Mr. Bernard Degheri found out that this attachment was on the lots, and so I said, "For your brother's sake and my sake, help me out."

Q. Where did that conversation take place? A. In his office.

Q. What else, if anything, was said as to how the attachment was to be taken care of? A. Well, we couldn't get a bond, and so I was trying to raise the money to pay the attachment so I could sell the lots and we couldn't get the money, and I went

to see a man in New York, a Mr. Vero, and he said he would help me out.

Q. Well, coming back to your conversation with Mr. Bernard Degheri, you said something about your sake and his brother's sake; now just what was said between you and Bernard Degheri as to this attachment? What did you mean by your sake and his brother's sake? A. Well, his brother had made an error in issuing this bond or mortgage without putting anything in about this attachment.

Q. Was that mentioned or talked about? A. That was talked about afterwards, because he had made an error in not finding this attachment. I didn't know it at the time—didn't know of the attachment when my mother gave me the lots.

Q. You did know there was a suit pending? A. I did know there was a suit pending, but I didn't know that the Armour Company had gotten an attachment on the lots.

Q. Mr. Christopher Degheri did not know, because he had already made a search? A. Yes.

Q. Mr. Bernard Degheri didn't know it until a few days after the contract had been signed? A. No, sir.

Q. Did you tell Mr. Robinson about it? A. No, I didn't need to tell Mr. Robinson. I was trying to raise the money. I didn't want to hurt his feelings; I didn't want him to think I was getting a mortgage on his property that was already attached.

Q. The agreement was that his mortgage was to be a first mortgage? A. Yes.

Q. What did you say to Mr. Bernard Degheri and what did he say to you later on in regard to the passing of title? Did you have any talk with him as to what you intended to do, or did he tell you what he intended to do? A. Well, we spoke of

trying to raise the money to pay off this attachment, and I couldn't raise the money, and he said, "I have a man that will buy the balance of your lots"—some man by the name of O'Toole, the same man that was buying the twenty-three lots.

Q. What do you mean; something was said about that before? A. I understood that the first twenty-three lots were to be sold to a man by the name of O'Toole.

Q. Did you know who he was? A. No, I didn't.

Q. Did anyone tell you who he was? A. Just told me he was a man in business in New York and that Bernard Degheri was representing him.

Q. Was that told to you prior to the contract being signed? A. Yes, sir.

Q. Was it communicated to Mr. Robinson at any time? A. Yes, I told Mr. Robinson about it.

Q. Did you talk to him in Mr. Degheri's office when the contract was being prepared? A. I don't remember.

Q. Do you remember agreeing to an extension of time to pass title, whereby the time was extended from April 15th to April 30th? A. Yes, sir.

Q. What was said as to what was to be done in that time? A. I was to raise the money to pay off the attachment.

Q. So the contract would go through? A. So the contract would go through, yes, sir.

Q. Did you have any talk with Mr. Bernard Degheri about April 30th as to a further extension of time or otherwise as to what should be done to carry out the contract? A. Well, there wasn't anything that I could do, only Mr. Degheri says he had a man that would give me $7,000 cash on the balance of the lots and $8,000—$7,000 mortgage, and out of that we will pay off the attachment.

Q. Did that ever come to a head? A. No.

Q. Did you tell Mr. Degheri at any time, about April 30th, as to what you thought you could do towards raising the money? Did you still think you could raise the money then? A. I was trying to then, yes.

Q. Did you at any time tell Mr. Degheri that you could not go through with it because you couldn't raise the money? A. I never told him I couldn't go through with it.

Q. You were always hopeful of going through with it, were you not? A. Yes.

Q. Did you find out later what the amount of the assessments was? A. I never inquired into what the amount was, but I took Mr. Christopher Degheri's word for it.

Q. You didn't look it up yourself? A. No, I never did.

Q. Did you discuss at any time with Mr. Christopher Degheri any of the legal matters connected with this contract, of the carrying out of this contract? A. Yes, sir.

Q. Did you ever yourself pay the Armour judgment that has been preceded by the attachment? A. No, I didn't pay it.

Q. Do you know who did pay it? A. Yes.

Q. Who? A. Mr. Verro.

Q. With your money? A. No, sir.

Q. Whose money? A. His money. He got some money to pay it; I don't know whether he paid it or not.

Q. It wasn't your money? A. No, sir.

Q. Were you at any time able to pay it? A. No, sir.

Q. You remember this Orbach agreement? A. Yes, sir.

Q. Whom did you make an appointment with, if anyone, to close that matter? A. I made the appointment with Bernard Degheri.

Q. For what place? A. At his office in Jersey City.

Q. Did you go to his office? A. Yes.

Q. I show you Exhibit C-4 and ask you if you remember this paper being signed by these two men? A. Yes, sir.

Q. Who drew this paper up, C-4? A. This fellow Aaronson.

Q. Was that drawn up and signed before you made an appointment with Mr. Christopher Degheri about the matter? A. Yes.

Q. Do you remember the date this was drawn up and signed? A. I don't remember.

Q. Was it on the date that is on the paper—the same date? A. Yes; it was on a Saturday.

Q. When was this appointment made for? A. Monday.

Q. Did you talk with Mr. Bernard Degheri about that appointment? A. No, I talked with Christopher Degheri early Monday morning.

Q. Did you go to their office? A. Yes, sir; in the afternoon.

Q. Who was there? A. Christopher Degheri and Bernard Degheri.

Q. Was Aaronson there? A. Yes.

Q. And a man named Hermann? A. Hermann and some lawyer, I don't know who now.

Q. What happened when you reached Mr. Degheri's office that afternoon? A. Christopher met me outside before I got inside, and he said, "Wait awhile, my brother wants to talk to you," and so we walked into another office, and Bernard Degheri said, "Look here, Carobine, my brother has been wasting a lot of time on these lots; now you are going to go through with this thing; what is in it for us?" So I said—"Well," I said, "I will give you $500"—no, I said, "I want you to get me out

of this mess. I am in the office with the fellows and I got a customer that will buy the property for $21,000, and if you get me out of this mess and I get the $21,000 customer, I will give you $500." And he said, "No, we want a thousand." And we argued ten or fifteen minutes, and then he said I was to give him $500 if I sold that to that customer.

Q. Is that the eighty-four remaining lots? A. Yes.

Q. After that talk, what did you do with respect to this Orbach payment? A. Why, he had already got my check.

Q. Who had? A. Bernard Degheri, and he was going to return it to Orbach so that I could sell the lots to the party.

Q. What was said in your presence to these two men and your lawyer? A. "This man Carobine can't sell these lots; there is an attachment on these lots and a lot of other litigation going on, and he can't go through with it."

Q. What did they say? A. They put up a stiff fight about it and wanted to know when the title time was to be set, and was told, "Well, we don't know; when we can raise the money to pay the attachment"; so there was no time set and that sale never went through.

Q. Was there anything else done in that time to end the contract? Was there any cancellation of the contract? A. Mr. Bernard Degheri just wrote a letter to Orbach and returned his check. That's all I know of.

Q. Did you ever hear anything else from it? A. Nothing else.

Q. Is that the first matter Mr. Bernard Degheri represented you in this matter? A. Yes, sir.

Cross-examination by Mr. Bernard Degheri.

Q. Mr. Carobine, it is a fact that you never saw me before the day you came to my office to draw this contract; isn't that so? A. Yes, sir.

Q. And the only reason you knew that I was in existence was because my brother Chris told you he had a brother who has an interest in some of those lots? A. Yes.

Q. And that was the latter part of February or the early part of March; that is a fact, isn't it? A. Yes.

Q. And my brother then made a proposition to you in my behalf for those lots, didn't he? A. Never mentioned your name about buying those lots; he mentioned O'Toole's name.

Q. Are you sure of that? A. The first time he said he had a customer and he wouldn't tell me who it was, and then it came out that the customer was O'Toole.

Q. When did it come out? A. The first time I spoke to you over the telephone.

Q. When was that? A. That was some time before the contract.

Q. How long would you say it was? A. Possibly a week or two.

Q. And you spoke to me over the telephone? A. Yes.

Q. Are you sure of that? A. I am pretty sure.

Q. Now, isn't it a fact, Mr. Carobine, that my brother told you that I was interested in thirty-three lots? A. Twenty-three.

Q. Originally thirty-three lots? A. Yes.

Q. And didn't you tell Mr. Robinson, of the Fruit & Produce Acceptance Corporation, that I was interested in thirty-three lots? A. No.

Q. You didn't say such a thing? A. No.

Q. And isn't it a fact that that deal for the thirty-three lots fell through, and that I then bargained for twenty-three lots? A. The deal was all talked over up in Mr. Robinson's office with your brother.

Q. My name was mentioned there as the buyer, wasn't it? A. I don't remember.

Q. Just stop and think. A. I don't remember.

Q. At any rate, you do remember that the buyer, whoever he was my brother mentioned to you, was for thirty-three lots; that is right, isn't it? A. That's right.

Q. But the deal, then, was made by my brother for twenty-three lots at a purchase price of $4,000? A. Yes.

Q. Subject, of course, that the purchaser would pay the assessments? A. Pay the assessments.

Q. Now, you say you don't recall, before you came to my office, whether I was the purchaser or someone else? A. I don't know. I only know one this, and that is he said he has a customer.

Q. Did you know you were coming to my office? A. Yes, surely.

Q. Who told you to come to my office? A. You did.

Q. That was in the telephone conversation? A. Yes, sir.

Q. Did my brother Christopher tell you to come to my office? A. Isn't it a fact that I disappointed you two or three times and that Mr. O'Toole was a busy man and I had to see Mr. O'Toole?

Q. Don't ask me questions. I understand you to say that you finally came on March 12, 1926? A. Yes, sir.

Q. And that was the first time you saw me; is that right? A. Yes, sir.

Q. Now, the purchase price was going to be $4,000? A. Yes, sir.

Q. And I was to pay for the assessments; is that right? A. Yes, sir.

Q. There was no doubt about those terms being settled in your mind, that those were the only terms entered upon for the purchase of those twenty-three lots? A. Yes, sir.

Q. When you came to my office on March 12th, 1926, you were introduced to me by my brother? A. Yes, sir.

Q. And that was in my office? A. Yes.

Q. In the corner room? A. Yes.

Q. And I was present, and my brother was present, and you were the third party? Is that right? A. Yes, sir.

Q. And didn't you say, Mr. Carobine, that you were glad that my brother had sold the lots to somebody he knew so that he could earn a commission, and that he had worked long on this matter and you were glad to hear that he had sold it and made a commission? A. Yes, sir.

Q. And that you were glad to know, although you had never met me before, that I was to be the purchaser of the property? A. I don't remember that.

Q. You remember that I dictated a contract while you were present in the room to the stenographer? A. Yes, sir.

Q. And you heard the terms of that contract? A. Yes.

Q. Do you remember when we came to the point of the encumbrances on that property that I asked you what encumbrances there were on the property? A. Yes, sir.

Q. Do you remember what you told me? A. Yes, sir.

Q. What did you tell me the encumbrances were on the property? A. The Armour attachment.

Q. Is that all? A. And Goodman, and that first time your brother was defending me and he said he would be over in a little while.

Q. Is that all? A. That's all.

Q. Mention anything about the mortgages? A. Oh, yes.

Q. What did you say about the mortgages? A. I said you would have to satisfy Mr. Robinson.

Q. Didn't you tell me at that time that you had already made arrangements with Robinson that in the event of any of the lots being sold he would arrange to give a release of those lots? A. Yes, sir, on his approval.

Q. In other words, you would have to get in touch with him; is that right? A. Yes.

Q. Now, I understood you to say when Mr. Ockford first asked you this question, at the time the contract was entered into at my office whether you mentioned the Orbach attachment, and your answer to that question was you did not, and when that question was repeated to you you said as your second answer, "I did tell Mr. Degheri." Now, which of those two answers is the fact, Mr. Carobine? Did you or did you not tell me before we entered into this contract that this Armour attachment existed? A. Well, I don't remember whether it was you or your brother. Your brother knew about this attachment, because he knew I had Mr. Brand defending me in the case.

Mr. Degheri: I ask that that be stricken out as not responsive to my question.

The Court: No, it isn't responsive. The question is, did you or did you not tell Mr. Degheri, the complainant here, about the at-

tachment of Armour before executing the contract?

A. No, I didn't tell him.

Q. Now, as a matter of fact, Mr. Carobine, on the day that we executed this contract——

The Court: I want to say that I don't think he contradicted himself.

Mr. Degheri: I am sure he did, your Honor; but I don't want to disagree with your Honor.

The Court: I may be wrong, but the impression I drew from his testimony was, he was first asked if he told you prior to the execution of the contract and he said no, he didn't; then I understood him later on in his testimony to say that afterwards he had told you about it, but I don't suppose he meant he told you about it because he said that you were the one that told him about it.

Mr. Degheri: It is straightened out, anyway.

Mr. Ockford: I think it is only fair to the witness to call the Court's attention to the fact that he said later on he didn't know of the attachment, but he had mentioned a suit pending. He didn't find out about the attachment.

Q. Isn't it a fact, Mr. Carobine, that the day that we entered into this contract this attachment had not ripened into a judgment yet, but was only an attachment? Is that not a fact?

The Court: Do you understand the question?

A. Yes.

Q. That is, a suit was started and it rested there; isn't that so? A. Yes, and the lots were attached.

Q. Now, do you recall, Mr. Carobine, that the closing was set for April 15th originally? A. Yes, sir.

Q. And do you recall my telephoning to you a few days prior to that time and telling you as to the condition of the title as I found it? Do you remember that conversation? A. Yes, sir.

Q. And do you remember that I suggested that you probably had better come over to my office so that we could explain the matter in detail? A. Yes, sir.

Q. And do you remember, in pursuance of that conversation, you did come to my office on the 15th of April? A. Yes, sir.

Q. And I did explain the details of the record to you, didn't I? A. Yes.

Q. And I then told you for the first time of the existence of this Armour attachment; is that right? A. Yes, sir.

Q. And isn't it a fact that you pretended you didn't know about it at first? Weren't you surprised at first to hear about it? A. I was surprised to hear about it.

Q. And isn't it a fact that I told you then—that I recalled to your mind, that you had been the agent for your mother in all these business transactions in which she was involved, and that you must have known about it, because Pierson & Schroeder had been engaged to represent her? A. Yes, sir.

Q. And then didn't you admit that you were the one who engaged Pierson & Schroeder? A. Yes.

Q. And you told me that you had sent for Pierson & Schroeder or some New York attorney, some young Hebrew fellow—I don't recall the name? A. Yes, sir.

Q. And you said you were satisfied with Mr. Brand who was handling the matter on April 15th? A. I don't remember that, that I was satisfied.

Q. And didn't you ask me if I would consent to be substituted for Mr. Brand, as attorney? A. Yes.

Q. And didn't you tell me that you thought there was nothing to worry about, that Mr. Brand had filed a counterclaim for $28,000? A. Yes, sir.

Q. And instead of the Armour people getting judgment against your mother you would get it against them? A. Yes.

Q. And you had a great deal of confidence in that counterclaim? A. Yes.

Q. And you wanted me to represent you in that matter; isn't that so? A. Yes, sir.

Q. And I told you I didn't think it was proper and I would not do so? A. Yes.

Q. And then didn't you ask me to see what I could do to help you out of this mess? A. Yes, sir.

Q. And didn't I tell you that I thought I had better help myself before I helped anybody else? A. Going to help your brother because he was in it.

Q. And, in fact, I censured you for not telling my brother in 1925? A. I didn't own it in 1925 when I executed those papers.

Q. You did own it in 1925, because you engaged Pierson & Schroeder. A. Yes.

Q. And didn't you think it was a gentlemanly thing to do if my brother in 1925 missed or slipped up in finding this record, to tell him about it? A. No, sir.

Q. You didn't think it was right to do that? A. No, sir.

Q. Now, you say in your affidavits, Mr. Carobine —you remember signing an affidavit in this case,

upon an application by me to strike out your answer and the answers of the other defendants; do you remember signing such an affidavit? A. I don't remember it.

Q. Well, possibly I can refresh your recollection.

Mr. Ockford: What is the date of the affidavit, please?

Mr. Degheri: The only affidavit on file, the 11th day of October, 1926.

A. I remember signing that.

Q. Do you remember saying in this affidavit, Mr. Carobine, that at the time the contract was drawn, namely, March 12, 1926, that I, the complainant, was your attorney?

Mr. Ockford: I object to that unless he is shown the paper.

Mr. Degheri: I would be glad to use the witness as I would like; I think the question is a proper one, if your Honor please, to attack this man's credibility.

By the Court.

Q. Do you remember it? A. I remember signing this affidavit.

Q. Do you remember what was in it, I mean, without looking at the paper? A. No, I don't.

Q. Now, just look at that paper and see. Of course, this is only a copy; you have the original affidavit; see if that is a copy of the affidavit that you signed at the behest of your attorney, Mr. Ockford, on or about October 19th, 1926? A. Yes, I remember signing that.

Q. Now, you remember reading this in your affidavit which you signed——

The Court: What paragraph?

Mr. Degheri: There are several instances. Paragraph 3.

Q. "Before the contract was signed I suggested that there would be some difficulty in securing a release of the Armour judgment, and I said to both of the Degheris that if a release of this judgment could not be secured it was no sale." Now, is that the fact, what I have just read, Mr. Carobine, or is it a fact that you just gave me a few moments ago, that nothing was said on March 12th, 1926? A. I don't understand the way that is put.

Q. Well, suppose you just read the first paragraph, No. 3. A. (Witness reads from affidavit.) That's right.

Q. Were you in error when you made this, or were you in error in the testimony you just gave to the court a few minutes ago?

Mr. Ockford: I object to that. He isn't necessarily in error because he didn't deny it before the contract was signed. That doesn't necessarily refer to the time when the contract was executed. He started to tell us about what he previously had told Christopher about it.

A. Christopher knew about it all the time.

The Court: It says here in his affidavit, "Before the contract was signed I suggested there would be some difficulty in securing a release of the Armour judgment, and I told both the Degheris that if a release of this judgment could not be secured it was no sale." How could that possibly be reconciled with his testimony that he never told

the complainant until after the execution of the contract?

Mr. Ockford: You see we have here a conflict of terms. As a matter of fact, this affidavit was dictated by Mr. Carobine himself and he used the word "judgment." I didn't change it, although I knew perfectly well, and I know now, that the judgment was not entered until long afterwards. There is a confusion of terms in there. I am perfectly willing to let Mr. Carobine explain the apparent inconsistency, but I don't want it stated that he is necessarily in error, because it grew out of a misunderstanding in terms.

The Court: That may be a very good explanation, but it doesn't help him much.

Mr. Ockford: I don't care whether it does or doesn't; that is the fact.

The Court: This was used on motion to strike out the answer?

Mr. Degheri: Yes, sir.

The Court: Go ahead.

Q. Now, Mr. Carobine, your counsel has just told us that you were the one who dictated this affidavit. A. Yes, sir.

Q. Where was this affidavit dictated? A. In Mr. Robinson's office.

Q. Did you consult Mr. Ockford before you dictated the affidavit? A. Yes.

Q. You did? A. Yes.

Q. Did you discuss the matters that you were going to put in the affidavit? A. He asked me to write what I knew about it—tell what I knew about it.

Q. And you made a writing in longhand, did you? A. Yes, sir; I dictated it to Mr. Robinson's stenographer.

Q. By the way, Mr. Robinson is an attorney in New York City? A. I don't know whether he is or not.

Q. Now, was this the affidavit that came out of the machine of the stenographer in Mr. Robinson's office, or a copy of it, I would say? A. That is a copy of it.

Q. There was no change made in this affidavit when it got to your attorney, Mr. Ockford? A. No.

Q. Was there anyone else present at Mr. Robinson's office when you drew this affidavit, besides you and Mr. Robinson? A. Mr. Ockford was present.

Q. And Mr. Ockford was also present in Mr. Robinson's office? A. Yes, sir.

Q. As your dictated it to the stenographer he heard you dictate it, did he? A. Yes, sir.

Q. Did he offer any suggestions? A. Not at all. I simply told my story.

Q. And you dictated your story and there was no change made? A. No, sir.

Q. Now, Mr. Carobine, when you were served with subpoena in this case, to answer in this specific performance action, did you engage counsel immediately? A. I was not served.

Q. That's right, too; you were not served; you were served with a verified bill of complaint. Isn't that right, that you were served with some paper? A. I wasn't served with any papers; I was asked to come here.

Q. In other words, somebody acknowledged service; isn't that so? In other words, somebody acknowledged service. Isn't that so? As a matter of fact, you acknowledged service, I believe—now it comes back to me—in the corridor on the re-

turn day of the original rule to show cause. Isn't that so? A. That's right.

Q. Yes, surely; and after you were served did you engage Mr. Ockford right away? A. I was never served.

Q. Well, after you acknowledged service—I beg pardon for making that error; I should have been a little more specific. After you acknowledged service did you engage Mr. Ockford right away? A. Yes, sir.

Q. When you went there did you tell him that I was your lawyer in any transaction previous to March 12, 1926?

Mr. Ockford: Just a minute; that is a privilege, what he tells a lawyer. It isn't fair to his lawyer to tell what went on between client and attorney.

The Court: How many times have you asked him if he told his lawyer all of his story? But what is the purpose of it, Mr. Degheri?

Mr. Degheri: The purpose is just this: I thought possibly it would be necessary to bring this point out, and I regretted to do it in this way, but Mr. Carobine in this suit deliberately charges me in the affidavit and the answer as being his attorney prior to the drawing of this contract. Now, a lawyer knows when he does and when he doesn't represent a man, and I don't mind having clients wished upon me, providing I can get some remuneration from them. But here is a man who makes me his attorney for the purpose of throwing dust in the eyes of the Court, to make it appear that there was a relation between Bernard Degheri and

Thomas R. Carobine and by reason of that I took advantage of him in some way, and I want to refute that.

The Court: Well, you have a right to be vindicated; but what do you say to his objection that this was a communication between attorney and client?

Mr. Degheri: It wouldn't be a privileged communication, a matter that is to be put in an answer in a suit in chancery.

The Court: Well, I am going to rule that it is a privileged communication.

Q. Now, there is no doubt in your mind, Mr. Carobine, as you have already testified, that prior to the time this contract was drawn I was not your attorney in any transaction; is that right? A. Yes, sir.

Q. You mentioned something about a bond; isn't it a fact, Mr. Carobine, that when you came to my office April 15th, 1926, I promised to help you? A. Yes, sir.

Q. And I suggested that the only way by which you could clear the record would be by paying the attachment or by possibly filing a bond if one could be found; isn't that so? A. Yes, sir.

Q. And I told you, upon your request, that I would try to locate such a person who would furnish such a bond; is that right? A. Yes, sir.

Q. I called you up between April 15th and April 20th, and told you that I had been unable to find such a person; isn't that correct? A. Yes, sir.

Q. And isn't it a fact that those are the only times that I mentioned to you, or you mentioned to me, or there was mentioned in our conversation, anything about a bond? A. Yes, sir.

Q. The price for these lots was agreeable to you, wasn't it, Mr. Carobine—$4,000 with the assessments? A. Yes, sir.

Q. Do you still think that the price was all right? A. If the assessments were $1500 I think the price was all right.

Q. Well, what difference would that make to you; you wouldn't have gotten any of that assessment money. A. No, I figured what was taken off, and in the assessment on all my lots it amounted to about $3,000.

Q. When did you know that? A. Right along, because I had received bills, and I figured if $1500 would be the assessment on twenty-three lots I would have only $1500 assessment on the balance of my lots. That is why I thought it was a good sale.

Q. Do you remember testifying on direct examination that at no time did you know what the assessment against this property was? A. Not against the twenty-three; but I knew on all.

Q. That is what you meant when you said that you knew that the assessment on all lots aggregated $3,000? A. Yes, sir.

Q. It is a fact that you would not have received any of that assessment money if I had been obliged to pay all that $1500? A. It would make no difference to me.

Q. That is the reason why you don't want to go through with this contract, is it? A. That is one of the reasons.

Q. You were asked by Mr. Ockford who it was that paid this attachment of the Armour Fertilizer Works and your answer was, Mr. Verro. A. I gave it to Mr. Verro to attend to it for me; I don't know whether he paid it or someone else.

Q. Who is Mr. Verro? A. He is a personal friend of mine.

Q. And when did you first talk to Mr. Verro about this Armour attachment, or judgment? A. Oh, I don't remember. It was during the summer, right before, some time in July.

Q. In July? A. No, before July; in June of this year.

Q. Don't you know that the judgment was assigned to Mr. Starace and that it occurred in May? A. I don't know anything about that.

Q. Do you know who Mr. Starace is? A. No, sir.

Q. Is he in court to-day? A. I don't see him.

Q. Was he here before? A. I don't know.

Q. Never saw him before? A. No, sir.

Q. Sure about that? A. Unless it was the little man who was in here before. He is an Italian, I believe.

Mr. Cella: Mr. Starace is my client and he was in court this morning.

Q. (By the Court) I understand you never met him? A. Never met him.

Q. At any time, to-day or previously? A. No, sir.

Q. The first talk with Mr. Verro was in July of this year? A. It was before July; it was in June.

Q. What was the purpose of the talk with Mr. Verro? A. I wanted him to help me pay off this judgment so that I could realize some money out of my lots.

Q. That was the only purpose for talking with him? A. That is all.

Q. And do you know what had happened to the attachment in the meantime, that is, between April 28 when the attachment was entered, and in

June when you talked with Mr. Verro? A. I don't remember. Mr. Verro took care of everything for me.

Q. Is he a lawyer? A. No, sir.

Q. Just a business friend? A. Yes, sir.

Q. What is his address? A. I know he lives in Ridgefield Park.

Q. Is he in business in New York? A. Yes, sir.

Q. Is he in court here to-day? A. Yes, sir.

Q. Is that the gentleman over there with glasses on? A. Yes, sir.

Q. Do you know that Mr. Verro is connected with the company? A. Yes.

Q. Do you know what capacity? A. No, sir.

Q. And I understood you to say you don't know Mr. Starace? A. I don't know him.

Q. And you don't know whether he is connected with the Alps Realty Company? A. I don't, no.

Q. Now, you mentioned something about O'Toole; when was the first time that you ever heard the name of O'Toole mentioned in connection with this transaction? A. The first time I talked to you on the telephone.

Q. Before you entered into this contract? A. Yes, sir.

Q. What was the subject of that conversation, if you can tell us. A. You told me you had a customer by the name of O'Toole.

Q. I told you this? A. Yes; and you asked me to come over, and Mr. O'Toole could only get in your office in the morning and I couldn't get away in the morning because I was busy, and I asked you to make it some afternoon, and you made it one afternoon and I couldn't get over there, until late anyway, and Mr. O'Toole couldn't wait any longer and I didn't meet him, and never did meet him, and I don't know who he is to-day.

Q. And on the 29th of March, 1926, Mr. O'Toole wasn't there? A. No, sir.

Q. Did it make any difference whether you sold it to me or to Mr. O'Toole? A. No, sir.

Q. And that isn't any reason why you didn't want to convey the property? A. The only reason I didn't want to convey is because of the misrepresentation about these assessments.

Q. But the O'Toole matter you don't care about? A. It makes no difference about that.

Q. I understood you to say, Mr. Carobine, that you received the bills from Mr. Bryan—the assessment bills—in respect to all of your property up there; is that right? A. Yes.

Q. When did you first get those bills? A. I had the first batch two or three years ago.

Q. Did you get any the early part of this year? A. No, sir.

Q. You didn't get any the early part of this year? A. No, sir.

Q. And you know approximately what was due on each lot, don't you? A. Yes.

Q. Now, at the time of this Webber deal, in which you were represented by Christopher S. Degheri as your attorney, were you the owner of the property at that time? A. No, sir.

Q. Your mother was? A. Yes, sir.

Q. Do you remember the consideration that you received as agent for your mother in that deal? A. Yes, sir.

Q. What was that consideration? A. $350 for two lots; no assessments on it.

Q. You mean there were no assessments to be paid? A. There were no assessments filed at that price.

Q. Had there been any improvements made? A. None whatsoever.

Q. Some time in April, 1926, you bargained to sell the balance of the eighty-four lots, and that was the contract or the agreement which was shown to you by Mr. Ockford, and that's the agreement that you signed for the sale of those eighty-four lots (showing witness Exhibit C-4)? A. Yes, sir. I called you, I believe, and spoke to Christopher.

Q. Do you remember speaking to me? A. I don't remember.

Q. That is all that happened; that was a Saturday? A. Yes, sir.

Q. That was all that happened on that day? A. Yes, sir.

Q. Do you remember calling up on Monday, two days later, the 26th? A. Yes, sir.

Q. And to whom did you speak on Monday? A. I spoke to you.

Q. You testified on direct examination that you spoke to Mr. Christopher Degheri; is that so? A. I spoke to both of you.

Q. And what was the substance of the conversation with me? A. That I had sold the lots and that I was having the man come over; that I wanted to get out of it because I could get more money.

Q. And you then asked me to take care of you, didn't you? A. Yes, I did.

Q. And didn't I say if anybody came before you got over that I would see you outside to get your version of the matter; isn't that right? A. Yes.

Q. And when you got there you were met at the door and told that the other people were there in the office? A. Yes, sir.

Q. And I did see you outside, didn't I, Mr. Carobine? A. Yes, sir.

Q. And didn't I tell you then that you should not have sent those men over to my office; isn't that so? A. I don't remember that.

Q. Don't you remember my censuring you and telling you that you should have talked it over between yourselves, but that I would represent you in this matter after telephoning to you firstly? A. I telephoned to you and you said to bring them over.

Q. When was that? A. I don't remember whether it was you or Christopher. I wouldn't take the liberty of coming to your office unless I was asked to.

Q. But you did ask me to do something? A. I thought you were connected with your brother; I thought it was the same thing, whether I gave it to you or your brother.

Q. What reason did you think that? A. Because you were brothers and in the same office.

Q. Who actually talked with the men who came there? A. You did.

Q. On behalf of Mr. Orbach? A. You did.

Q. Nothing was done that day, was there? A. When you talked to the men that were in the office, you had me hid in the next office with your brother.

Q. I had you hidden? A. Not hidden; you wanted me to keep away from these other people.

Q. And you finally came into my office? A. Yes, and when I came in you were talking about this attachment and couldn't go through with this sale.

Q. And no contract went through that day? A. No, sir.

Q. And you had received a $300 check from Mr. Orbach? A. Yes.

Q. You gave me that check? A. Yes.

Q. And for what purpose? A. You said you rescinded that contract.

Q. Now, did you think—by the way, Mr. Carobine, the balance of these eighty-four lots, which you contracted to sell for $15,000, of what did they

comprise; did they comprise lots of the character of the lots contracted to be sold to me or lots of better character? A. Some better and some worse, with pretty good average.

Q. And you felt that $15,000 for the eighty-four lots was a pretty fair price, didn't you? A. Considering the balance of the assessments, I thought I was getting $18,000.

Q. But you realize the assessments didn't make any difference to you? A. Didn't make any difference; I knew they would be paid by somebody.

Q. And it wasn't until you heard you could get $21,000 for this same property that you wanted this contract broken? A. Yes, sir.

Q. Now, do you remember receiving a letter from me, Mr. Carobine, on May 7, 1926, calling upon you to close the title at my office on May 10th? A. I don't remember that.

Q. If I show you a register return card with your signature thereon, purporting to be Thomas R. Carobine, would that help you any (handing card to witness)? A. Yes, I remember that.

Q. Did you come over to my office, or get in touch with me, and reply to this demand? A. I called you on the telephone, and you told me to go and hire a lawyer.

Q. Now, that was on May the 7th that I sent it to you and you probably received it the next day; is that right? A. Yes.

Q. Did you then go and hire a lawyer? A. No, I didn't pay any attention to it.

Q. You did make a deed of the balance of the eighty-four lots on May 10th, didn't you, Mr. Carobine? A. I did make a deed?

Q. Yes, a deed to the Alps Realty Company? A. Yes.

Q. And when did you first know that you were going to sell this property to the Alps Realty Company? A. I didn't sell the property to the Alps Realty Company.

Q. Do you still own it? A. I gave it to the Alps Realty Company as security.

Q. Did you owe them any money? A. It was given to help me in paying this attachment.

Q. Oh, I see; in other words, in consideration of their taking care of this attachment? A. And all other attachment and everything.

Q. And everything else; you gave them title to eighty-four lots? A. Yes.

Q. Did you receive any money from that transaction? A. No, sir.

Q. Do you know whether the Alps Realty Company made a search or examination of the total eighty-four lots? A. I don't, no.

Q. When did you first talk to the Alps Realty Company about giving this property as security? A. I don't remember when.

Q. Well, was it after you got my letter of the 7th or before? A. After.

Q. Where was this deal closed, Mr. Carobine, the Alps Realty Company deal I am referring to? A. In Mr. Cella's office.

Q. And you say you received no consideration at all for the conveyance of those eighty-four lots? A. None whatsoever.

Q. And the only consideration was that they were to pay this attachment and all other attachments which were against the property? A. I don't know.

Q. Did they pay my attachment? A. I don't know.

Q. Did they pay Goodman's attachment? A. No, sir.

Q. Did you take any trouble to find out? A. No, sir; I didn't care.

Q. Your only interest was to see that this attachment was paid? A. Yes.

Q. You had no interest in the property? A. No, sir.

Q. After the closing of that deal, did you see Mr. Starace there? A. No, sir.

Q. Who was there? A. Mr. Verro and Mr. Cella and myself.

Q. Isn't it a fact that Mr. Cella was the first attorney you went to when you received my letter of May 7, 1926? A. Not to see him in reference to the letter.

Q. What did you go to see him in reference to? A. I never went to see him at all; never had met the man.

Q. You never met Mr. Cella? A. Not until I signed the deed.

Q. Which deed do you mean? A. Of the eighty-four lots.

Q. That was about May 10th; and you didn't see him prior to that time; are you sure of that? A. Positive.

Q. Would it be interesting to you to know that Mr. Cella wrote a letter as to having consulted with you, on May 7th or prior to that time? A. I don't remember dates.

Mr. Cella: My letter will speak for itself.

Mr. Degheri: I would like to offer it, with your consent, this letter of May 7th.

Mr. Cella: It is May 11th.

Mr. Degheri: May 11th is the date; that's right.

(Admitted and marked "Exhibit C-6.")

Q. You say you have been in business for seventeen years, Mr. Carobine? A. No, I haven't been; I have been in that business with my father.

Q. You have two offices in New York; isn't that so? A. Yes, sir.

Q. Uptown and downtown office? A. Yes, sir.

Cross-examination by Mr. Cella.

Q. The day you called at my office the first time was when?

The Court: He says he can't remember dates.

Q. The date the deed was signed; is that right? A. Yes.

Q. Did you ever see me before that time? A. No, sir.

Q. Ever see me since that time? A. I don't think so. It was only once that I was in there.

Q. On May 10th when you signed the deed? Is that correct? A. Yes.

Q. You signed the deed of the eighty-four lots to the Alps Realty Corporation and I took your acknowledgment? A. Yes.

Q. There was no consideration passed? A. No.

Q. And you did so at that time because there were charges against the property? A. Yes, sir.

By Mr. Degheri.

Q. Who suggested that you make this arrangement with Mr. Verro? A. I thought of the thing myself. I thought it was better to give the lots to somebody who would look after it for my interest and conserve the public as well.

By Mr. Cella.

Q. Did you mention at that time that there was a sale of the land under that judgment? A. I did.

Q. Under the judgment of the Armour Company? A. Yes.

By Mr. Ockford.

Q. Was there any agreement in writing between the Alps Company and Mr. Verro and yourself, whereby you were to convey the eighty-four lots? A. No, none in writing.

Q. You were satisfied to accept Mr. Verro's recollection as to what the amount was? A. Yes.

Q. You yourself hadn't paid any taxes or assessments on account of that property since turning it over to Mr. Verro's company, had you? A. No, sir.

Q. Your understanding was that the Alps Company should hold the title for any moneys advanced in connection with the property? A. Yes, sir.

Q. Pending this judgment? A. Yes.

Q. For assessments and taxes in the future as well as——

Mr. Degheri: Just a minute. I don't mind counsel asking questions but I do object to his putting words into his mouth.

The Court: In other words, you object to counsel testifying?

Mr. Degheri: Yes.

The Court: I think your objection is well founded.

Q. Was there any discussion as to the future disposition of the eighty-four lots?

Mr. Degheri: I don't see the relevancy of that question.

The Court: You brought the subject out.

Q. Was there any understanding? A. There was.

Q. What was the understanding? A. I don't care to tell.

Q. I am not asking you the details; was there any arrangement for future disposition? A. There was, yes.

Q. Confidential terms between you? A. Yes.

Q. What arrangement, if any, was made for the payment of the amount the Fruit Company had on its holdings? A. Mr. Verro was to handle all those matters for me.

Q. That was a part of the same transaction whereby you turned over these lots? A. Yes, sir.

Q. You haven't paid the Fruit Company on account of the mortgage? A. No, sir.

By Mr. Degheri.

Q. At the time you executed this $3,000 mortgage in March, 1926, to the Fruit & Produce Acceptance Corporation, how much did you owe them at that time? A. $13,000.

Q. And you had already executed to them the $15,000 mortgage covering ninety-one lots in September, 1925; isn't that so? A. Yes, sir.

Q. So that for the execution of this $3,000 mortgage you received no additional security, did you? A. No. I was doing business with them right along.

Q. And they demanded this mortgage from you? A. No.

Q. Didn't you tell me that? A. I suggested that to protect me.

Q. Now, you have mentioned Verro and the Alps Company, do you remember seeing me on the

evening of the day of November 13th in New York? A. Yes.

Q. When did you see me? A. On Saturday night.

Q. You saw me in a restaurant? A. Yes.

Q. You came over and shook my hand? A. Yes.

Q. And what did you say to me and what did I say to you? A. I don't recall.

Q. Did I refuse to shake your hand? A. (Witness pauses.)

Q. You can answer that "yes" or "no." A. I don't remember. If I thought you would refuse to shake hands I would not have come near you.

Q. But you remember seeing me? A. Yes, I remember seeing you.

Q. And you remember talking with me a moment or two? A. Yes.

Q. And do you remember saying to me, in answer to a question that the case would come on soon and I would like to see you over there, and you said "I won't appear"; do you remember saying that? A. I said I don't think I would appear because I had nothing to do with it.

Q. And I asked you why, and you said you didn't have anything to do with the lots; that you sold them to Mr. Verro; isn't that so? A. I don't remember telling you I sold them.

Q. Do you remember my asking you who he was? A. I don't remember that.

By Mr. Ockford.

Q. You haven't sold or agreed to sell the twenty-three lots in the Degheri contract, have you? A. No.

Q. You haven't made any deed of those to anybody, have you? A. No.

Q. The $3,000 mortgage given March the 1st was for what purpose? A. Additional security for the

business with the Fruit & Produce Acceptance Corporation.

Q. Was it in pursuance of some agreement or was it not? A. Well, the agreement was that I was—I owed them $13,000, and I said, "Make the mortgage for a lot of more, because I am doing business with you right along and I want to see you well secured."

Q. Do you know what lots were covered by the $3,000 mortgage? A. They were the sixty lots that I had sold to Goodman and he didn't show up to take them in time, and I took them back.

Q. What had been the arrangement between you and the company as to what it should receive a mortgage of in the beginning? A. I fell behind that much money that year.

Q. No, as to what lots the Fruit Company were to receive a mortgage upon? A. On ninety-one lots, the first bunch, and then I had sold sixteen of the lots.

Q. And what was your agreement with the mortgage company as to what you were to do with the proceeds on the sixteen lots? A. Turn it over to them.

Q. And the sale didn't go through and you didn't turn it over? A. No.

Q. And the $13,000 mortgage was pursuant to your original arrangement? A. Yes.

By Mr. Cella.

Q. I believe you stated on your cross-examination that the Alps Company was to take care of the judgment against the eighty-four lots; is that right? A. I don't know whether it was the Alps Realty Company or Mr. Verro himself.

Q. That was the eighty-four lots? A. Yes.

By Mr. Degheri.

Q. You don't mean, Mr. Carobine, that the mortgage for $3,000 you made to the Fruit & Produce Company on March 26, on the sixteen lots, was considered in the original transaction with Mr. Robinson in September, 1926? Is that what you want us to believe? A. Exactly.

Q. Well, you didn't have the property then, did you? A. They were lending me money on my mother's signature, and I was conducting the business for my mother, and I had sold these sixteen lots and the net proceeds I was to give to the Fruit & Produce Acceptance Corporation, and, in the meantime, my mother turned the lots over to me so that she wouldn't be bothered any more signing deeds, and when the sale went through I would give it to them.

Q. Now, just one more question: Would you be good enough to read paragraph 7 of this affidavit which you made and which I referred to before (handing paper to witness). That is an affidavit made by Thomas R. Carobine on the application to strike out the answer, verified October 11th? A. That's right.

Q. You say there "if the mortgage was signed to the company"; was that signed? A. I meant "assigned."

By the Court.

Q. Mr. Carobine, I don't know whether you realize what a peculiar position you leave your testimony in, in regard to your arrangement when you conveyed title to those eighty-four lots to the Alps Realty Company. It is usually a very questionable transaction of a man pressed by his creditors who disposes of all or a considerable portion of his prop-

erty without consideration and without any explanation of the consideration; you realize that yourself? A. Yes, I was in pretty bad condition then, your Honor, and the assessments were due and the taxes were due, and this attachment was on the property and due, and if I didn't pay the attachment they would foreclose and sell the lots themselves; and so I figured I would give it to Mr. Verro and he would take care of everything and charge me a reasonable amount for anything he expended, and we would have some agreement later on, and if he sold the lots and there was anything coming to me I would get it, and if there wasn't, I would let it stand as it was. We drew no papers of any kind.

Q. Did you have that general understanding with him orally? A. Yes.

Q. Was there anything said about your ever redeeming the property? A. I told him if I could get hold of enough money to give his money back I would pay him whatever he expended, with interest, and I would take them back.

Q. Did he agree to that? A. Yes, he is ready to take his money now.

LEONARD G. ROBINSON, sworn on behalf of the defendants, testified as follows:

Direct examination by Mr. Ockford.

Q. What is your office in the Fruit & Produce Acceptance Corporation? A. I am the president.

Q. You have active charge of the business? A. Yes, sir.

Q. And familiar with the Carobine transaction? A. Yes.

Q. The two mortgages, Exhibits D-3 and D-4, held by your company, are still outstanding obligations to your company, are they not? A. They are, yes.

Q. What is the amount due on those two mortgages? A. The exact amount?

Q. Yes. A. In the neighborhood of about $14,000 with accrued interest.

Q. What led to the execution of the mortgages separate; what were the circumstances; what was the agreement? A. A mortgage on the entire property aggregating 106 or 107 lots was to have been given us as collateral for existing obligations aggregating about $7,000 for future advances. Sixteen or seventeen lots at that time were on contract from Mr. Carobine to somebody else, and they asked if I would be satisfied not to take the mortgage on the sixteen lots, provided they agreed to turn over the entire proceeds of the sixteen lots to us. I was assured that that would be the case, that the money would be turned over to us. Mr. Degheri was there representing Carobine, and I agreed to that. It developed that the sale fell through, and I insisted upon his carrying through his original intention of mortgaging the entire property to us, and this was done a few months later.

Q. The two mortgages in reality under your agreement constituted a single transaction? A. Yes, sir.

Q. And in one mortgage? A. Yes, sir.

Q. How did you arrive at that figure of $3,000 for the second mortgage? A. My idea was that there was——

Mr. Degheri: I don't want this man's idea, and I don't think the Court wants it; the Court wants the facts.

The Court: I suppose that is exactly what he means.

Q. How did it come about that you fixed the figure $3,000, when your testimony is that the consideration was a part of the consideration? A. I was bound to have a second mortgage also for $15,000, and seeing it was one obligation I so instructed Christopher Degheri. He telephoned me afterwards and he told me it wouldn't look well to have the $15,000 mortgage on those lots, and suggested that he make it $3,000, which he did.

Q. When did you first talk with Mr. Christopher or Bernard Degheri about the contract of March 12, 1926? A. I don't recall the date, but it must have been around that time.

Q. Did any conversation call those gentlemen at your office prior to the contract being executed? A. They told me that a man by the name of O'Toole——

Mr. Degheri: Let him specify which of the two.

Q. The question is, did either of the men come to your office? A. Christopher Degheri was around at my office.

Q. How about Bernard Degheri; did he come to see you?

Mr. Degheri: When, to-day? State the time.

Q. Any time prior to March 12th? A. I think he must have come once or twice.

Mr. Degheri: I object to his saying "he must have come"; I want to know.

The Court: I suppose if he said "My best recollection is that he did come" you wouldn't object.

Mr. Degheri: No.

The Court: That is what he means.

Q. Did Mr. Bernard Degheri speak to you about the proposed contract on the occasion of any visit to his office? A. I don't believe he did. The only time he discussed the terms of the contract with me was over the telephone, apparently on the day on which the contract was executed.

Q. What did you say to him on that occasion? A. I was noncommittal. I discussed the terms with him, and I told him I wouldn't do anything without Carobine's approval; he was our client; he was our customer, and I would look out for his interest; and I called him up on the telephone, and I asked him what he thought of the proposal, and he said it was rather a low price, but he thought the best thing to do under the circumstances would be to let the property go at that price. I told him, under the circumstances I would interpose no objection.

Q. What did you say as to the release of the lots covered by the contract? A. I told Mr. Carobine I would release these lots upon his turning over to me the cash on the purchase price and the mortgage of $1500.

Q. When next did you hear from Mr. Degheri about the contract? A. I heard from Mr. Bernard Degheri quite a number of times over the telephone, telling me his client, Mr. O'Toole, was ready to buy the balance of the property and made an offer, first, of $17,000 for the property, and then

increased it to $18,000, and then increased it to eighteen five, and wanted to know if Carobine would sell the property at that price.

Q. What did you tell him? A. I told him that was something on which I would take no definite stand, because I knew nothing about the property and it was up to Carobine to decide.

Q. When did you first learn that the contract had not gone through on the date fixed for the sale of the lots? A. It must have been shortly after the expiration of the time. I haven't kept track of it.

Q. Have you talked to Mr. Bernard Degheri at any time as to the performance of the contract and the consideration being turned over to you? A. I don't think that question was raised. Whatever discussion there was between Mr. Degheri and myself was his grievance against Carobine for not conveying title to the property.

Q. Did he ever ask you to interest yourself in that part of the transaction? A. On several occasions, both Mr. Bernard Degheri and Christopher Degheri did ask me to try and induce Mr. Carobine to convey the property to them.

Mr. Degheri: If your Honor please, I think we ought to have dates. "On several occasions" is very indefinite.

Q. Well, did you do anything about it? A. I told them that I would take no action that would in any way prejudice Carobine's interest.

Q. Did you find out that the mortgage your company held was a first mortgage? A. I must have discovered that some time in May.

Q. In connection with placing that mortgage you relied, did you, on the services of Mr. Degheri? A. I did, yes.

Q. And that was the only report you had in the matter? **A. Yes.**

Q. May, 1926, was the time when you first learned of the Armour judgment? A. I couldn't tell you the date.

Q. You know it wasn't the 1st of March ? A. No.

Q. When did you first learn about this prior lien? A. I don't recall the date.

Q. You took the matter up with whom? A. I took the matter up with Carobine. He came around to my place of business and said he hoped I would do something in regard to the sale of that property under attachment.

Q. Did you speak to Bernard Degheri about the Armour attachment? A. Yes.

Q. What did he say about it? You told us what Christopher said; what did Bernard say? A. He blamed Carobine for all his trouble.

Q. What, if anything, was said by you or Mr. Bernard Degheri as to the effect of your agreement to release the twenty-three lots? A. That question, to my best recollection, has never been raised, but I felt right up to that time that our interest would be vitally prejudiced if he were to release those lots.

Q. Do I understand you were not asked at any time to actually execute a release? A. No, sir.

Q. You talked with Mr. Carobine about the existence of this attachment lien? A. Yes.

Q. Was that the first you learned of the matter? A. Yes, sir.

Q. Carobine had never told you about it? A. The first I heard of it was through Mr. Cella.

Q You are quite sure that was in May? A. It was about the middle of May.

Q. What reason was there, if any, for the deed from Mr. Carobine and his mother to himself at the time the first mortgage was made? A. So that Mr. Carobine could execute the mortgage without bothering his mother to do so, and also to convey the lots to the purchaser whenever that was necessary.

Q. The mortgage of March 1, 1926, was given at your instance, was it not? A. Yes, sir.

Q. You are an attorney yourself, are you not? A. Yes, sir.

Q. Member of the bar of New York? A. Yes, sir.

Q. Who engaged Mr. Christopher Degheri, Mr. Carobine or Mr. Verro? A. It is pretty hard to differentiate the part for both of us.

Q. Prior to that time did he represent your company? A. No, sir.

Q. Who introduced him? A. Carobine.

Q. Did Mr. Carobine or Mr. Degheri at any time request you to do anything with respect to this Armour judgment? A. They did not.

Q. Did either Mr. Carobine or Mr. Bernard Degheri suggest that any course should be pursued in respect to it? A. Not to the best of my recollection.

Cross-examination by Mr. Degheri.

Q. Now, Mr. Robinson, when was the first time that you say that you knew of this Armour attachment? A. About the middle of May.

Q. Would May 15th be about the right time? A. Anywhere probably between the 15th and the 20th; somewhere around there.

Q. And who was it that told you about it? A. Mr. Cella.

Q. What was the occasion of Mr. Cella mentioning this to you? A. Mr. Cella was to have taken an assignment of our mortgage.

Q. Mr. Cella was to have taken an assignment of your mortgage? A. Yes.

Q. Did he take such an assignment? A. He did not.

Q. And why did that fall through? A. On account of the complications about the judgment and your action.

Q. Complications about the Armour Fertilizer action? A. Yes.

Q. And my attachment suit? A. Yes, sir.

Q. (By Mr. Ockford) This chancery suit? A. Yes.

Q. Well, don't you know that at the time about the middle of May, 1926, that that chancery suit was not started, Mr. Robinson? A. If you will permit me, I didn't say that the deal was called off at that time; I only said that Mr. Cella informed me of that judgment at that time. He was still examining the title and this is what he had discovered and the assignment was to have gone through but you people stopped it.

Q. Until who stopped it? A. Until this suit stopped it.

Q. And do you know when the suit was started? A. (No answer.)

Q. Would the date of June, 1926, help you any? A. It must have been some time around that period.

Q. Well, isn't it a fact, Mr. Robinson, that it wasn't this suit that stopped your assignment to Mr. Cella going through? A. Well, then you know more about it than I do.

Q. Well, I am asking you; can't you answer "yes" or "no"? A. To my knowledge, no.

Q. It wasn't a fact? A. No.

Q. Now, you say you heard about this attachment in the middle of May; when did you think, after that time, that there was any danger about your mortgage? A. Well, I have had that feeling right along after that.

Q. You had the feeling after Mr. Cella told you that your mortgages were in rather a precarious position? A. Yes, sir.

Q. Don't you remember seeing me in your office the first week in May, at which time he had a conversation with you and told you about this Armour attachment? A. I remember your having told me about various attachments.

Q. Well, this one in particular I have reference to. A. I don't recall this one now.

Q. How many times do you recall that I went to your office in connection with any phase of this matter? A. I should say about two or three times.

Q. Not any more than that? A. I doubt it.

Q. Now, can you fix the first time, approximately, Mr. Robinson? I appreciate it may be a little difficult for you, but the first time I called at your office in connection with this matter. A. The first time you called at my office was in reference to wanting to buy the property for Mr. O'Toole.

Q. And when was that? A. Some time in the spring.

Q. Well, that doesn't help us very much; was it during the month of April? A. Possibly.

Q. Well, isn't it a fact that some time between April 15th and April 30th I did go to see you and I did tell you that there was a man who might buy the balance of the eighty-four lots that Carobine owned? Isn't that a fact? A. I know you did it, but I couldn't tell you whether the dates are correct.

Q. You can't tell the dates and you don't want to commit yourself? A. No, sir.

Q. Do you remember the second time I called to see you? A. I'm sorry, but my faculty for remembering dates is not so well developed as yours.

Q. I am sorry for you, but I thought you would be able to help me out. A. I would like to if I could.

Q. All right; I know you would; I appreciate that. So you can't help me out at all as to the time I called at your office? A. I told you maybe two or three times; it may be once or twice more.

Q. About the dates? A. I can't tell you that.

Q. Do you remember my coming to your office, or going to your office, at any time after Mr. Cella told you about the Armour attachment or judgment? A. I think so.

Q. You think I called after that? A. Yes.

Q. That would bring a visit from me to your office some time after the 15th of May; do you think I called there as late as that? A. I wish I could tell you, but I really can't.

Q. You couldn't even tell me whether I called at your office after Mr. Cella told you about this Armour matter, or before; you can't tell that? A. I could not.

Q. Do you keep a diary, Mr. Robinson? A. I do, but in this particular instance it meant very little to me; it was just a part of my day's work and I paid very little attention to it.

Q. You don't mean it meant very little to you; there was $13,000 involved. A. $13,000 was not involved in the dates of your calling and visiting me.

Q. It was involved in the question whether your lien was good or bad? A. Yes.

Q. And you were a little worried about it? A. A little bit disturbed.

Q. Surely you were, and in the course of your disturbance you wrote several letters to Mr. Christopher Degheri, didn't you? A. Quite correct; I believe I did.

Q. Do you recall, at any time I called at your office, that I told you about this Armour attachment? A. I think so, yes.

Q. Could you fix that time, Mr. Robinson? A. I could not.

Q. You can't fix the time? A. It must have been after Mr. Cella's telling me.

Q. Is that just a guess on your part, or is it a fact? A. I am absolutely certain that the first man I learned about this matter was Mr. Cella.

Q. You didn't learn it from me first, or from Mr. C. S. Degheri? A. That is quite correct.

Q. Do you remember your telling me about it? A. Yes.

Q. And do you remember telling me words to this effect: "I am not going to worry about it; we have mortgages of $18,000; there is only due us about $13,000, and if anything is done on that judgment we might buy it in to protect ourselves"? Isn't that the conversation you told me? A. I think you are pretty near correct.

Q. Or words to that effect? A. Yes.

Q. And you so wrote to Mr. C. S. Degheri? A. Yes.

Q. To the same effect? A. Yes, to the same effect.

Q. And if the occasion demanded it you would have bought in this judgment of the Armour Fertilizer Works? A. I would have had no other alternative.

Q. Now, what did you do when you heard that there was such a judgment, after Mr. Cella told you about it, of the Armour Fertilizer Works; what did you do to protect your mortgage? A. I asked Mr. Christopher Degheri to see that no sale took place under that judgment.

Q. And you wrote a letter to that effect? A. Yes, I wrote a letter to that effect.

Q. And he replied by letter? A. I think he both replied to my letter and he was personally at my office also.

Q. Did you do anything personally, or did you give any instructions to any attorney at that time to protect you in this matter? A. I asked Mr. Christopher Degheri to do it.

Q. Is that all you did? A. I also asked the Sheriff's office to watch out for it.

Q. Did you do anything else? A. And the County Clerk's office.

Q. Did you do anything else? A. I think that is about all.

Q. Did you engage any attorney? A. I did not.

Q. Did you think that the judgment might be assigned to someone else and you might be interested in getting it before that assignment; did you think of that fact? A. Yes, but I would rather not have it. I thought I was certain before the sale took place on the attachment I would get wind of it.

Q. In other words, you believed they would advise you of any assignment and you didn't care who had it? A. Yes.

Q. When did you first learn that this judgment was assigned to Mr. Starace? A. You know, when it comes to dates, Mr. Degheri——

Q. You seem to be hopeless, but I am going to try to help you out. Do you know when the assign-

ment was made? A. I should judge it must have been made some time in June.

Q. If I told you that the assignment of the judgment was made May 11th and recorded May 20th in the County Clerk's office of Bergen County would you be surprised in hearing it? A. I would be surprised.

Q. You would? A. I think I would.

Q. You heard me so testify this morning that there was an assignment of judgment entered May 20, 1926? A. Yes.

Q. You heard me testify to that effect from the records that I have before me? A. No doubt that is correct.

Q. You didn't think you were interested in this Armour judgment, Mr. Robinson? A. I didn't say that, Mr. Degheri; I was vitally interested, but if I didn't have to lay out an additional $3400 I would greatly prefer to have somebody else hold it.

Q. Were you apprised of the deal between Mr. Degheri and the Alps Realty Company? A. Yes.

Q. When did you first know anything about it? A. About the time Mr. Cella told me about the Armour matter.

Q. Some time in the middle of May? A. Yes.

Q. Did you know when you heard from Mr. Cella that the deal with the option had gone through? A. I so understood.

Q. Were you apprised of the deal going through? A. What do you mean?

Q. Did anybody tell you that Cella was selling the property, eighty-four lots in number, to the Alps Realty Company? A. Well, I knew that Mr. Cella discovered the attachment.

Q. The substance of my question was, prior to the going through of some deal whereby Carobine

sold eighty-four lots to the Alps Realty Company, did anybody tell you that such a deal was going through? A. Yes.

Q. Who was it? A. Carobine.

Q. Did he tell you the circumstances or the consideration of that deal? A. He told me something about it, yes.

Q. What did he tell you about it? A. That the property is to be conveyed to the Alps Realty Company and they are to take care of all the obligations, including ours.

Q. And you would have nothing to worry about, in other words? A. That's right.

Q. When you heard that the deal was being made to the Alps Realty Company you knew then that your mortgage would be secure? A. Yes.

Q. And you knew that the man that took that judgment over, Michael Starace, was a friend or stockholder of the Alpine Realty Company? A. The name of Michael Starace meant nothing to me.

Q. Is there such a man as Michael Starace? A. I don't know.

Q. He was here; didn't you meet him this morning? A. I saw a gentleman there, but I didn't know whether it was Michael Starace or who it was.

Q. Your idea is that Michael Starace—shall I call him—a dummy in this matter? A. I don't know. I understand that Mr. Michael Starace is an officer in the Alps Realty Company.

Q. Your understanding and mine agree on that. And yet you said a minute ago, Mr. Robinson, that Michael Starace is not the real man in interest; is that right? A. That, I am sorry to say, I couldn't tell you; I don't know.

Q. Do you know how Mr. Verro happened to come into this transaction? A. He is president of the Alps Realty Company.

Q. How do you know that? A. Mr. Verro has been in my office a number of times and told me about that arrangement with Mr. Carobine.

Q. Did Mr. Verro tell you that Mr. Starace, who held the assignment of the judgment, never really paid anything for that assignment? A. No, sir.

Q. He didn't tell you? A. No, sir.

Q. You know nothing else about this transaction in respect to that assignment of judgment? A. All I know is this: I told Mr. Verro if he didn't take up the judgment I would.

Q. Well, you don't know how Mr. Verro happened to come into this transaction originally, do you? A. No, I do not.

Q. At any rate, when you were apprised of the transaction with Mr. Verro you knew then, Mr. Robinson, that there was no further worry on your part about your mortgages; is that so? A. Except that I learned that the judgment has been paid.

Q. Then you never spoke to Mr. Verro after you learned of the judgment? A. Why, yes, I have spoken to Mr. Verro a number of times.

Q. Of course you did, and Mr. Verro explained the transaction which the Alps Realty Company had with Carobine? A. Yes.

Q. And when you heard of that transaction with Mr. Carobine, that he was to turn over the property to the Alps Company, you knew that you were perfectly all right? A. I did not know that, because Mr. Verro wasn't as optimistic as he was before.

Q. In other words, he was sorry he got into it? A. So he told me.

Q. Maybe you don't blame him for that. Now, do you remember being served, Mr. Robinson, in the action which I instituted for specific performance against Mr. Carobine and yourself and Mr. Starace? A. Yes.

Q. And that was approximately the 26th day of June, this year, when that action was started; isn't that right? A. I remember having been served.

Q. You do remember that date, do you? A. No, sir.

Q. Your recollection, then, is hopeless on dates? A. I make it my business not to remember any dates.

Q. You can remember the figures of transactions pretty well? A. Yes.

Q. And if I were to tell you that you were served June 26 of this year— A. I would take your word for it.

Mr. Ockford: What difference does it make?

Mr. Degheri: We will come to that in a minute, Mr. Ockford.

Q. After I started this specific performance action in which you were defendant, it was then, for the first time, that you believed that your mortgages were in jeopardy; isn't that right? A. I had some doubts on that score before.

Q. And when I started the action you were convinced that your mortgage was in jeopardy? A. A little troublesome.

Q. And it was only then that you conceived the idea that you would foreclose your mortgages; isn't that right? A. After you started suit?

Q. Yes, after I started my specific performance action? A. Yes.

Q. You never thought of it before I started the action, did you? A. I wouldn't say that. I didn't take any action before that, but I considered it a number of times.

Q. In other words, you didn't believe it necessary to take any action before that time? A. I wouldn't say that, either. It was something that was very serious. You might have taken action at any time.

Q. The fact is, you didn't take action? A. You precipitated it.

Q. In other words, my specific performance action precipitated your action? A. Yes.

Q. Now, are you willing to-day to make an assignment of your mortgage? A. Yes.

Q. You haven't any objection who buys your mortgages, have you? A. Of course not.

Q. All you are interested in is getting your money, the thirteen or fourteen thousand dollars? A. That's right.

Q. If I were to offer you, or some other person was to offer you, either on my behalf or on the behalf of anybody else, to buy your mortgages, you would readily give them an assignment, wouldn't you? A. Yes.

Q. Upon the payment of principal and interest? A. With this exception, Mr. Degheri: I have an agreement with the Alps; that may complicate the situation somewhat.

Q. Let's hear about that agreement; what is it? A. That I would give an assignment of the mortgages to them. I got $2500 on account.

Q. You have already received $2500 on account? A. Yes.

Q. When did you get that, Mr. Robinson? A. I got that about the time that the Alps went into the agreement with Carobine, or shortly after that.

Q. So you are, in a way, by agreement with the Alps Realty Company, bound to assign your mortgage to them? A. I presume so.

Q. Well, isn't that the fact? A. Surely.

Q. And is that agreement a verbal agreement or in writing? A. In writing.

Q. Have you that agreement here? A. I have not.

Q. Where is that agreement? A. In my office.

Q. Will you bring it over to-morrow morning? A. Maybe I am not coming to-morrow morning.

Q. Well, you can send it over? A. Yes.

Q. There is no objection to my seeing it? A. None whatever.

Q. Do you know now for a fact, Mr. Robinson, that I never represented Mr. Carobine before March 12, 1926?

Mr. Ockford: I object to that. What difference does it make whether he knew or didn't know? Or whether he knows now or don't know.

Mr. Degheri: It makes this difference, because this question goes to the credibility of this witness as to his testimony at this time and as to his affidavit—one affidavit which he has made in this cause before.

Q. I will change my question in this way: Your affidavit reads as follows: "In connection with the placing of the aforesaid mortgages (referring to the mortgage of $15,000 and of $3,000) complainant himself (meaning me) acted as attorney." Is that so? A. I have always believed, Mr. Degheri, that you and your brothers were partners.

Q. Who gave you that belief? A. I don't know, but I have always had that impression.

Q. When did you first know that I existed, Mr. Robinson? A. Shortly after I met your brother.

Q. Well, that doesn't help me. A. I'm sorry; I would like to help you.

Q. Well, now, that is very important. I am going to ask you to try to think when you first met me, or when you first saw me.

Mr. Ockford: The question is, when he first heard of your existence. He says, shortly after he met your brother. Now, when did he meet your brother?

Mr. Degheri: I will take care of it; you can have a chance after I get through with him.

Q. When did you first see me or speak to me? A. When?

Q. At any time, Mr. Robinson, prior to the execution of this contract I submitted in this action. When did you first hear of me, or when did you first speak to me, or when did you first see me? Can you answer that? A. No, I could not, not definitely enough.

Q. All right. Now, upon the execution of the first mortgage of $15,000 by Carobine to your company, where was that deal closed? A. In my office.

Q. Who was present? A. Christopher.

Q. And who else? A. Carobine.

Q. And yourself? A. Yes.

Q. Was I there? A. You were not.

Q. Did you know me at that time? A. I don't believe I did.

Q. Now, where was the deal for the $3,000 mortgage closed? A. Also in my office.

Q. Who was there? A. Christopher Degheri and Carobine.

Q. And yourself? A. Yes.

Q. Was I there? A. You were not.

Q. You did hear of me at that time? A. I heard of you before that time.

Q. Who told you about me? A. I think that your brother said something about you.

Q. Was it complimentary, or otherwise? A. He thinks well of you.

Q. Well, I am glad to hear that. You heard Mr. Carobine testify that I did not represent him at any time prior to the execution of this contract; did you hear him so testify? A. So I heard.

Q. Does that change your testimony now, or help you any? A. All that I said, Mr. Degheri, was what I have always believed. If I am wrong, I am perfectly willing to take it back.

Q. Well, do you take it back? A. That doesn't change my statement, that I have always believed that.

Q. You haven't got any reason why you do believe that?

Mr. Ockford: I object to that. It isn't a question.

Q. Well, you can answer it; have you any reason? A. It may have been only an inference.

Q. And when you put that inference in your affidavit, which you swore to in this cause, it was only an inference? A. A belief, yes.

Q. During the time that you first met Christopher S. Degheri and the first time that you met me, some time in 1926, which you have fixed, some time in May, I believe, did you have occasion to write any letters to me? A. I don't recall it.

Q. Did you actually ever write any letters to me, or to my name, Bernard M. Degheri? A. I don't recall it.

Q. Isn't it a fact that all of your correspondence during that period of time was with Christopher S. Degheri? A. Yes.

Q. And you knew that Christopher S. Degheri was the attorney of Thomas R. Carobine? A. Yes.

Q. Christopher S. Degheri was the only attorney at either of those two mortgage transactions; isn't that so? A. But I still didn't know that there was no partnership.

Q. You didn't know there was a partnership up to that day? A. I may be wrong, but that was my impression.

Q. How could you think there was a partnership when I never had met you and you never saw me? A. I know a number of partnerships where I don't know all of the members of the firm.

Q. I show you a letter dated September 25, 1925, addressed to Mr. Christopher S. Degheri, with what purports to be your signature thereon, and ask you did you send that letter to Mr. Christopher S. Degheri? A. Yes, sir.

Mr. Degheri: I offer the letter in evidence if there isn't any objection. It is one of the letters attached to the bill.

Mr. Ockford: I don't think it is relevant, but I have no objection.

(The same is marked Exhibit C-7.)

Q. And I show you another letter, dated February 1, 1926, also addressed to Mr. Christopher S. Degheri, with what purports to be your signature, and ask you if you sent that letter? A. Yes, sir.

Mr. Degheri: I also offer this. It is also attached to my notice of motion to strike out the answer.

(Admitted and marked Exhibit C-8.)

Q. I show you a letter dated March 5, 1926, also addressed to Mr. Christopher S. Degheri, with what

purports to be your signature thereon, and ask you if you sent that letter? A. Yes, sir.

Mr. Degheri: I offer that.

(Admitted and marked Exhibit C-9.)

Q. Now, Mr. Robinson, by reason of your holding these two mortgages, you controlled the action of Mr. Carobine somewhat, didn't you?

Mr. Ockford: Wait a minute. I object to that. It is rather beside the power of anybody to answer. He might have thought he controlled him.

Mr. Degheri: Is that your objection?

Mr. Ockford: Yes. He doesn't know whether he controlled the man or not.

Q. Can you answer that? A. I can answer you better than you expect. I did not control Carobine.

Q. But you were looking out for his interests, weren't you, Mr. Robinson? A. Only so far as they were identical with ours.

Q. You testified on direct examination that you did look after Mr. Carobine's interests with respect to the Cresskill property? A. I did, because his interests were naturally entwined with ours.

Q. Now, do you recall Mr. Christopher S. Degheri coming to your office some time in the early part of February, 1926, and saying to you that he had spoken to Mr. Carobine regarding the sale of thirty-three lots on this tract? A. Yes.

Q. And do you remember writing to Mr. Christopher S. Degheri with reference to that matter? A. I must have written him.

Q. And why do you say you must have written him? A. Well, here is the letter (witness referring to C-9).

Q. Do you know whether that deal was consummated? A. I don't think it was.

Q. Do you know whether any other deal came out of that particular proposed deal? A. As far as I know, no deal came out of it.

Q. Didn't Mr. Christopher S. Degheri tell you that his brother was interested in buying twenty-three of the thirty-three lots? A. He told me that Mr. O'Toole was a client of his.

Q. Did it make any difference to you who was buying the property, Mr. Robinson? A. Not a particle.

Q. Do you remember Mr. Carobine telephoning you on March 12, 1926, at your office in New York? A. I know he has telephoned to my office in New York a great number of times.

Q. Well, let's be specific; the date this contract was signed. A. I presume he did; I'm sure he did.

Q. Of course you do; you don't presume, but you are sure he did. Now, what was the subject of that conversation? A. He wanted to know if I would be agreeable to his selling the twenty-three lots for $4,000, $2500 cash and $1500 mortgage.

Q. What did you say to that? A. I said, so far as I could see, I would have no objection.

Q. And the reason you said that was you wanted some cash? A. I was very glad always to secure cash.

Q. You had two mortgages and you weren't getting anything? A. That's right.

Q. The first mortgage of $15,000 was drawing no interest? A. Yes.

Q. And you were in hopes of getting a mortgage that would draw interest? Didn't that enter into

your mind when you agreed to take this assignment and the $1500 mortgage, the fact that you were going to get interest on it?

Mr. Ockford: I object to that. The question is if he got it, not what his motive was.

Q. Will you please answer that? Did it enter your mind? A. In the $1500 mortgage there was no consideration at all.

Q. Well, what was the consideration for your agreeing to release the lots?

Mr. Ockford: I object to that, upon the ground as immaterial, what his motive was. The testimony is he agreed to do it.

Q. Will you please answer the question? (Question read by the stenographer.) What was the consideration? A. The consideration was to help Carobine liquidate his affairs.

Q. Is that all? A. That was the principal thing.

Q. And in helping Carobine liquidate his affairs you would have to help the purchaser by releasing the lots; isn't that so? A. No. The purchaser was not considered at all.

Q. In other words, if the purchaser wanted to buy the property and couldn't pay all cash, that kept him out of the picture; is that right? A. That is what I wanted.

Q. You wanted cash? A. I wanted cash.

Q. But you realized, Mr. Robinson, that you probably couldn't get all cash for the sale of those lots, didn't you?

Mr. Ockford: I object as immaterial.

A. I realized there was some difficulty in selling real estate, especially vacant lots, for all cash.

Q. And that is why, in the proposition that was mentioned by Mr. Carobine, you mentioned awhile ago, over the telephone, on the day of March 12, 1926, you assented to release the lots provided the $1500 mortgage was assigned to you; is that right? A. Yes.

Q. And provided you received the cash in the deal from Mr. Carobine; is that right? A. Right.

Q. Now, when the mortgage of September, 1925, was executed by Mr. Carobine to you for $15,000, he only owned ninety-one lots? A. No, he owned 107 lots.

Q. Isn't it a fact that he didn't get the sixteen until January, 1926? A. That is true, but I did not take a deed to those sixteen lots. Probably the reason why was because he was under contract to sell, and they asked me if I would be satisfied to allow the sale to go through upon condition that I got the proceeds of that sale, which I assented to.

Q. And your recollection is, then, that you didn't get the sixteen lots because he had agreed to sell them to Goodman at that time? A. I don't know the name.

Q. Now, what was actually due your company from Mr. Carobine on September 22, 1925? Have you your records with you, Mr. Robinson? A. I have not.

Q. I noticed you had some papers in your pocket when you were examined on direct by Mr. Ockford. A. I have some figures.

Q. Perhaps they will help us, you will refer to them, please. A. I am sorry I cannot give you any information at all.

Q. You can't give me, in other words, the amount of the indebtedness of Carobine to you when he executed the $15,000 mortgage on March 22nd? A.

My best recollection is it was in the neighborhood of $9,000.

Q. And you exacted, then, a $15,000 mortgage for that amount?

Mr. Ockford: I object to the word "exacted."

A. Because I gave him an additional line of credit up to $15,000.

Q. You extended his credit? A. I extended his credit up to $15,000.

Q. What was the highest amount that you ever advanced Mr. Carobine at any time since September, 1925, to March, 1st, the date of the second mortgage, 1926?

Mr. Ockford: I presume you mean the highest balance due.

Q. Yes, put it that way, the highest balance due; what was that amount? A. I couldn't tell you.

Q. Don't those papers show? A. No.

Q. Have you your records in your office? A. Yes.

Q. You knew you were going to testify? A. Yes.

Q. You knew you were going to be asked about the amount due on those mortgages? A. Yes.

Q. You are an attorney? A. I am, but not a good one.

Q. I won't argue that point with you; but you didn't think of it, anyway? A. No.

Q. The fact is, you didn't bring those figures? A. No.

Q. Would you bring them over to-morrow morning? A. Unless counsel objects to it.

Mr. Ockford: It makes no difference if he agrees to release you, what the amount was.

Q. Would you say that the highest balance that was ever due you from Mr. Carobine was more than $15,000 at any time between September, 1925, and March, 1926?

Mr. Ockford: Just a moment; I object to it, on the ground as immaterial.

A. I don't think it was.

Q. In other words, between that date, September, 1925, and March, '26, the date of the second mortgage was executed, there was never a balance due you from Carobine of $15,000? A. That is my best recollection.

Q. So when you procured—or when you asked for this $3,000 mortgage of March 1, 1926, you knew you were getting something for which there was no consideration, didn't you? A. I did not know that.

Q. Well, you were getting $18,000 worth of mortgages, weren't you?

Mr. Ockford: I object, on the ground that he has already testified as to the purpose of the second mortgage.

Mr. Degheri: I am asking the question.

Mr. Ockford: If you are going to dispute the fact——

Mr. Degheri: That remains with me, if I am going to dispute it or not.

A. The second mortgage was a part of the original transaction, of the first mortgage.

Q. But at that time the $15,000 mortgage on the ninety-one lots more than covered the indebtedness that Carobine owed you?

Mr. Ockford: I object to the question, upon the ground that the witness has already carefully explained the purpose of the second mortgage.

A. The amount of $15,000 probably did, but the security wasn't there.

Q. In other words, you wanted more security? A. I wanted the security that we agreed upon at the outset.

Q. And that is the reason for the execution of this second mortgage? A. Right.

Q. Why was there no interest put in the mortgage of September, 1925? A. I think your brother, Christopher Degheri, can tell you more about that than I can.

Q. I am asking you now. A. I don't know; it was done against my instructions.

Q. Did you ever tell Mr. Christopher Degheri it was against your instructions? A. Yes, I raved and howled about it.

Q. Did you ever write him a letter? A I don't think so.

Q. In pursuance of that agreement to release the lots didn't you tell Mr. Christopher S. Degheri to draw the necessary papers that would protect you, namely, the assignment of the mortgage to go from Thomas R. Carobine to the Fruit & Produce Acceptance Corporation, and the release of the $15,000 mortgage in respect to the seven lots that it covered? A. To the best of my recollection, our talks have never reached that point, although I did tell Mr. Christopher Degheri that, in order not to pile up expenses against Mr. Carobine, I would be very glad to let Mr. Christopher Degheri look after the interest of our corporation at the same time.

Q. I show you a letter dated May 20, 1926, addressed to Mr. Christopher S. Degheri, with the

signature purporting to be yours, and ask you if you sent that letter? A. I did.

Q. And I call your attention to the last paragraph on the first page and ask you to kindly read it (handing paper to the witness). A. I have read it.

Mr. Degheri: I offer this in evidence.

(Admitted and marked Exhibit C-10.)

Redirect examination by Mr. Ockford.

Q. Is Mr. Carobine indebted to your company in connection with any other matter than this particular indebtedness covered by the mortgage? A. Yes, a current account.

Q. He is a debtor of your company? A. Yes, sir.

Q. And you are interested in helping him out for that reason? A. Yes.

FRANK VERRO, sworn on behalf of the defendants, testified as follows:

Direct examination by Mr. Ockford.

Q. What do you know, Mr. Verro, about the payment of the money to the Armour Company for the purchase of the judgment? A. I know that we paid out the money with our own check.

Q. By "we" you mean— A. I as president of the corporation.

Q. What is the name of the company? A. Alps Realty Company.

Q. How much was the money? A. Three thousand and something, I don't remember exactly.

We have a check to that effect. We also paid the lawyers for their services.

Q. Have you been repaid the amount of that judgment? A. Not one cent.

Q. Have you paid any other moneys out in connection with this property? Oh, yes.

Q. What else have you paid? A. I will tell you: We have taken care of an obligation to the insurance company to take up the mortgage, and through a friend of ours we have advanced to Mr. Robinson $2500 on account of the agreement to buy his two mortgages—to take up those two mortgages.

Q. That has not been paid back to you? A. No.

Q. Has Mr. Carobine paid any money to your company? A. No.

Q. Has he paid any other moneys for taxes or assessments? A. No, we paid everything.

Q. Has your company paid any money for taxes or anything? A. Surely we did.

Q. How much, about? A. Well, I will tell you: There are bills made by the town on the eighty-four lots, and we have paid a balance of $845, you understand, for taxes and assessments. Now, a part of the lots went on those bills and the balance is being paid by the Alps Corporation, so everything is cleaned up.

Q. Amounting to how much? A. Oh, over a thousand dollars altogether.

Q. Your company has received a deed for the eighty-four lots as security for these moneys; is that correct? A. Well, I will tell you: The company has agreed, you understand, to take over these four lots, you understand, because Mr. Carobine was in a funny frame of mind; he was thinking that he was losing everything in the hands of a bunch of sharks.

Mr. Degheri: I object to the answer and ask that it be stricken out.

A. (Continuing) That is the proper wording.

Q. What agreement is there between you and Mr. Carobine? A. I am ready to say anything and everything if I will get everything that is coming back to me. I don't care two cents for the land or anything.

Q. You only want to get your money back? A. And get it.

Q. What, if any, arrangement have you with Mr. Carobine as to the title to the land? A. As long as we hold the title to the land we don't want to make one cent on it; it is not ours. We want whatever is reasonable and fair to ourselves.

Cross-examination by Mr. Degheri.

Q. Now, Mr. Verro, if you will calm yourself a little bit I am going to try to help you help yourself, and I wish you would speak in a lower tone. When did you first become interested in this proposition? A. Twenty-four hours before we signed a contract.

Q. Now, what date was it? A. The date of the deed, May 11.

Q. The deed was dated, as I recall it, May the 10th? A. May the 10th.

Q. And you got interested in this transaction twenty-four hours before that time? A. I am not interested at all.

Q. I asked you if that was the first time that you became interested in the transaction in any way, twenty-four hours before May 10, 1926; is that right? A. Well, it was very short; but a few hours.

Q. Who got you interested in this property? A. Mr. Carobine complaining and whining.

Q. Mr. Carobine came to see you? A. Yes.

Q. Where did you see him? A. I don't remember; some place.

Q. Did he see you at your home? A. No, no.

Q. At the office? A. No, no.

Q. At a restaurant? A. Maybe in a public place, yes.

Q. What was the nature of that conversation; what did he say to you? A. I don't remember.

Q. You don't remember? A. No.

Q. But you say he was complaining and whining? A. Of course; he wanted to give us the land.

Q. And he said, "Verro, here's some lots; you can take them"? A. Yes.

Q. What did you say? A. "I don't care for the lots, but to help you out I will take a deed and attend to all your obligations," that's all.

Q. Is that all you said to him? A. Yes, sir.

Q. First you said to him, "I don't want the property," but you finally said to him, "I will take a deed and attend to all your obligations"? A. Yes. It is such a small matter for me—such a small matter for me—that I don't care to take hold of anything like that.

Q. But the fact is, you did take it, Mr. Verro? A. Yes.

Q. Now, all right, take your time, take it easy and you will live longer. He told you about the attachment of the Armour Fertilizer Works? A. Yes.

Q. And he told you they might issue an execution? A. No, sir.

Q. He was afraid of that judgment? A. Yes, he says, "You got to pay that judgment in thirty days."

Q. Did you take the judgment then? A. I paid the judgment—my lawyer.

Q. And by your lawyer you mean Mr. Cella? A. Yes.

Q. And Mr. Cella dealt with the fertilizer people? A. Yes.

Q. And you paid how much? A. $3,400; I don't remember exactly.

Q. Anyway, the amount that you paid for that judgment is in the paper? A. Absolutely.

Q. Now, why didn't you take that assignment in your name, Mr. Verro?

Mr. Ockford: I object to that.

A. My counsel will arrange that.

Q. In other words, you wanted to take it in your name? A. No, I never considered myself.

Q. You didn't take care of the working part at all or how the deal was to be worked out? A. What do you mean?

Q. I say, you didn't look after the matter of how the deal was to be worked out? A. Anything that I do is properly made.

Q. And you told your lawyer, Mr. Cella, to pay this assignment and take it in the name of Starace, did you? A. Exactly.

Q. And you don't know why it was taken in the name of Michael Starace? A. Yes, I know.

Q. And you considered this Armour Fertilier judgment a lien? A. Yes.

Q. In other words, if you pay that lien it becomes merged in the property ? A. Yes, with expenses.

Q. Now, who paid for that assignment of judgment; did you pay for it? A. We, the Alps Realty Company paid.

Q. And did you sign that check? A. Yes, I did.

Q. Was Mr. Robinson interested in that proposition with Mr. Carobine and yourself? A. I don't know.

Q. Did you ever consult with Mr. Robinson prior to the time that you took this assignment of judgment? A. I understand that Mr. Robinson had a mortgage on this land; I may have consulted with Mr. Robinson in the matter of the assignment of the judgment to pay all expenses and save Mr. Carobine's property; I may have spoken to Mr. Robinson.

Q. Now, as a matter of fact, when you bought up this assignment of judgment did Mr. Robinson get in touch with you and tell you about foreclosing his mortgage? A. I don't remember.

Q. On the day that you got this deed to the eighty-four lots from Carobine, May 10, 1926, did you have a search made, or an examination of the title made? A. That was made subsequently, I told you, in forty-eight hours.

Q. In other words, you had to act quickly? A. Yes.

Q. You didn't know what was to be the result, whether it was something else than the mortgage or this attachment judgment? A. In other words, I carried it out as any man would and I saved him. Someone else could have done it, but I did it.

Q. Have you any other occupation, Mr. Verro, excepting being connected with the Alps Realty Company? A. Well, not at present. I had an occupation before.

Q. You are retired? A. Yes.

Q. And your only business interests are with the Alps Realty Company? A. Yes.

Q. Now, I understand that the money that was paid for this attachment judgment of the Armour

Fertilizer judgment was money of the Alps Realty Company? A. Yes, I paid it as president.

Q. Are you treasurer, too? A. Yes.

Q. And Mr. Starace is what? A. Vice-president.

Q. Has the company any other officers? A. Yes, the secretary.

Q. Any other officer? A. No.

Q. Is Mr. Cella an officer? A. No.

Q. So that if Mr. Starace says that he paid this money for this assignment of judgment he is in error, isn't he? A. Pardon me; Mr. Starace never said that he paid it.

Q. Now, what arrangement did you have with Mr. Carobine with respect to getting the property cleaned up? A. To pay every obligation.

Q. What did that include? A. I don't know—everything.

Q. You didn't know what it included; you were just taking a chance? A. Chance? What do you mean, chance?

Q. Well, I don't know. What do you mean by chance? A. What is in your mind by "chance"?

Q. Well, what is in my mind, Mr. Verro, is the Alps Realty Company wanted to help Mr. Carobine out; is that right? A. Well, maybe. It was like picking up a drowning man.

Q. And he said there are sharks all around you? A. Yes.

Q. He must have been in the water. A. I don't know.

Q. You wanted to help him out? A. Yes.

Q. You went to Mr. Cella? A. To what?

Q. Mr. Cella, your lawyer? A. To do what?

Q. To do anything that was necessary. A. Only for the deed.

Q. Is that all Mr. Cella did? A. That's all he did.

Q. Now, getting back, what arrangement was to be, then, between you and Carobine with respect to your getting, or the Alps Realty Company getting the eighty-four lots? Were you ever to give the lots back to him? A. No, with the exception that we are ready to turn back the eighty-four lots at any time, as long as we get our money and interest at 6 per cent., and then we are satisfied to give it up.

Q. Now, how much money have you figured you have expended for and on behalf of Mr. Carobine? A. Well, figure it out.

Q. I will have to ask you to do that. What do you say to that? A. You figure it.

Q. Can't you help me figure it out? A. Our attachment, $2500 on account of the mortgage, and $1,000 given to Mr. Carobine directly, and that is all for the present, and we are ready to do that. We are to pay lawyers' fees and everything in connection with this action, and everything.

Mr. Ockford: What about assessments?
The Witness: Assessments and taxes.

Q. Did you pay them? A. Oh, yes.

Q. So that if those obligations are paid to you you will turn back to Mr. Carobine those eighty-four lots? A. To Mr. Carobine, yes; oh, yes.

Q. You heard Mr. Carobine testify when Vice-Chancellor Bently asked him whether he received any instructions? Did you hear him say that he didn't receive a penny? A. I sat back there and I didn't hear the whole of what he said.

Q. You say now that Mr. Carobine got $1,000? A. Surely.

Q. Besides your paying these other debts? A. Exactly. He got it in the form of a loan and he never returned it, the $1,000.

Q. Was that loan given to him before the deed or after the deed? A. No, that was given at the time of the deed.

Q. Didn't you testify on direct examination, Mr. Verro, that if the lots were sold that a part of the consideration would go to Mr. Carobine? A. That has never been stated.

Q. You didn't state that? A. No, sir; I won't ask him a cent, but I will make him a present of the whole show and he can get the whole thing back for nothing so long as we get our money.

Q. Are you a relative of Mr. Carobine? A. No, sir.

Q. Would you be willing, Mr. Verro, to release your judgment which you received, or which Michael Starace received from the Armour Company, release these twenty-three lots and receive 23/107ths part of the amount that you paid for that assignment? A. I would be willing to return everything to Mr. Carobine at any day, but would not go into any transaction with anybody else.

Q. So that, I take it, if we offer you 23/107ths part of the amount of this attachment judgment you would execute a release of that judgment to Mr. Carobine? A. You take me for a damn fool? For a cuckoo? You know they are the best twenty-three lots there. Do you expect that I should be so stupid as to release you them twenty-three lots?

Q. You seem to have changed your attitude from what you said a moment ago, that you didn't care to make anything and would turn them back if you merely got your money. A. I will, to Carobine.

Q. To nobody else? A. To nobody else.

Q. In other words, if Mr. Carobine said to you "Mr. Verro, will you release those twenty-three lots if I pay you 23/107ths parts?" you wouldn't do so

A. If Mr. Carobine returns to me all the money in this transaction, with 6 per cent., he can do what he pleases afterwards.

Q. That is all you would do? A. That is all.

CASE CLOSED.

Opinion.

IN CHANCERY OF NEW JERSEY.

Between

BERNARD M. DEGHERI, Complainant,

and

THOMAS R. COROBINE, *et al.*, Defendants.

ON BILL, &c.

Decided December 29, 1926.
Submitted Dec. 16, 1926,

JULIUS A. KEPSEL, Esq., For the Complainant;

JOHN W. OCKFORD, Esq., For Defendants Carobine and Fruit & Produce Acceptance Corporation;

CARLO D. CELLA, Esq., For Defendant Michael Starace.

BENTLY, V-C.:—

On bill for specific performance of a contract to convey real estate.

On the 12th day of March, 1926, the complainant and the defendant Carobine sufficiently executed a written contract whereby that defendant agreed to convey to the complainant 23 designated lots in the County of Bergen, in consideration of the payment of $4,000, consisting of $2500 in cash and a purchase-money mortgage for the sum of $1500. At the time fixed in the contract for the passing of title the parties thereto, by mutual consent, continued that transaction to April 30th, 1926, at which time the complainant was ready, willing and able to perform his part of the contract, but the said defendant defaulted. On May 7th the complainant notified the vendee in writing that he demanded a compliance with the agreement, and fixed the 10th day of May, 1926, at his office, as the time and place for the carrying out of the contract. Again this defendant failed to comply, and on June 28th following this bill was filed.

The negotiations leading up to the execution of the contract of March 12th were carried on in one single session between the parties thereto, during the course of which the complainant learned of a subsisting mortgage of $15,000 affecting a large number of lots, of which those designated in the above contract were a portion. He thereupon communicated by means of the telephone with one Robinson, the active manager of a corporation known as The Fruit & Produce Acceptance Corporation (one of the defendants herein), the mortgagee holding the above-mentioned lien on the property to be conveyed. After some conversation, it was finally agreed that the corporation just named would execute releases on any lot or lots which the complainant might desire to sell, in consideration of the payment of $100 for each lot so released. This agreement was not reduced to writ-

ing or mentioned in the contract which is the basis of this suit.

Between the execution of the contract and the time set for the passing of title the complainant's search disclosed that a judgment had been entered under a writ of attachment issued out of the Bergen County Circuit Court, for the sum of $3428.64, which was a lien upon the entire tract owned by Carobine. The complainant, of course, demanded that the vendee satisfy or remove this lien upon that part of the land to be conveyed. This, Carobine was entirely unable to do; in fact, his financial condition was such that he was driven to apply to a man named Verro for assistance to prevent, he says, the loss of any equity he might have in the remaining 84 lots of land besides the 23 mentioned in the contract with the complainant. Thereupon, the judgment was paid by a corporation known as The Alps Realty Company, and an assignment of it was taken in the name of one of the officers thereof, another defendant named Starace. This artifice was adopted to prevent any future question of a merger.

The judgment in the attachment proceeding has been assigned to the defendant Starace, who is the present holder of it. There is nothing from which I can gather the impression that the assignment whereby he took was tainted with fraud, or any attempt to hinder, embarrass or delay the complainant, and this is borne out by his position upon the final hearing. He then and there offered and agreed in open court to release from the lien of his judgment those lots of land which the complainant now seeks to have conveyed to him, upon the payment by the complainant of a sum of money that will bear the same proportion to the amount of the judgment that the value of the complainant's

lots bears to the value of the entire tract of which they are a part. This I consider to be eminently fair. The complainant wishes the release to be upon the condition that he pays Starace a sum of money that will bear the same proportion to the amount of the whole judgment as the number of lots (not the value) he demands from Carobine will bear to the entire number of lots of which Carobine was seized on March 12, 1926. This is very unfair unless all of the lots are identical in value which, of course, is difficult to believe, and the proofs and testimony were very much to the contrary. The complainant's position alone would indicate that he hopes to profit by the method he would adopt, and this could only be done at the expense of Starace. The proposal is made by Starace that he and the complainant each nominate an arbitrator, they to name a third, and the vote of any two of them to fix the amount that the complainant shall pay on account of the judgment. I will hear these parties on the question whether that procedure should be adopted, or some other, such as the appointment of a special master by the court or an expert to be named by the court who will be satisfactory to both Starace and the complainant.

A further complicating situation arises out of the fact that the Alps Realty Company has now entered into negotiations with The Fruit & Produce Acceptance Corporation to take an assignment of the latter's mortgage for $15,000 and a second mortgage executed to it by Carobine to secure the sum of $3,000 which the complainant maintains is void for want of consideration. This last contention is not sound. The mortgage came into being in this way: The defendant Carobine, at the time of the

execution of the $15,000 mortgage, was under contract to convey a number of lots to a third party, who defaulted upon his agreement. It had been arranged between Carobine and the mortgagee that he would turn over to the latter all or some of the consideration he was to receive upon the sale of the lots just mentioned. Consequently, when the prospective purchaser broke his agreement Carobine then delivered the smaller mortgage, in place of the cash consideration he had bound himself to pay and which he owed to the mortgagee because the mortgage was not extended to the lots under contract to be conveyed, only because the proceeds of that sale were to become the property of the mortgagee.

The negotiations mentioned above, for an assignment of the mortgages held by The Fruit & Produce Acceptance Corporation to the Alps Realty Company, cause me no concern, because I am convinced that both of these corporations had actual knowledge of the rights of the complainant and it was frankly confessed that everything which was done was for the benefit of the defendant Carobine and that his conveyance of his remaining 84 lots was to be regarded as a mortgage and not as a conveyance of the fee at all. That is to say, Carobine was to have an equity of redemption which consisted of the repayment to the Alps Realty Company of any expenditures for the protection of Carobine's property.

But a serious situation is presented by the nature of the mortgages held by The Fruit & Produce Acceptance Corporation upon this land. They are of a kind commonly known as demand mortgages, which is to say that the principal sums were to become due and payable immediately upon demand by the mortgagee. It will be recalled that the agree-

ment made by The Fruit & Produce Acceptance Corporation with the complainant was that it would release from the lien of its mortgages any one or more of the 23 lots the complainant has contracted to purchase, provided $100 should be paid by him for each lot so released. Now, a simple decree designed to carry this promise into effect would result in the awkward situation that the mortgagee would have no way of determining how long it would have to wait for its money. Neither could provision very well be made for compelling the mortgagor, Carobine, to continue the punctual payments of the installments of interest. But it would appear that complete justice in this respect would be accomplished by making the decree conditional upon the payment by the complainant to The Fruit & Produce Acceptance Corporation of the complete sum of $2300, which would be $100 for each of the 23 lots so to be conveyed, and directing a formal release upon the discharge of this payment. This is a term that might fairly be imposed upon the complainant for the assistance he seeks and it certainly would not be unjust to the corporation, because that entity has already, under the provision of the mortgages, elected to demand the whole of the principal sum, and it would thus receive at once and without further litigation the equitable share of the principal of its mortgages secured by the lots in question. Not only has The Fruit & Produce Acceptance Corporation filed its bill to foreclose its mortgages, but one of the objects of the present suit was to restrain the prosecution of the foreclosure suit so that the lands would not escape the jurisdiction of this court by an execution sale.

I can see nothing in the opinion of the Court of Errors and Appeals in Brisbane v. Sullivan, 86

N. J. Eq., 411, or in the opinion of Vice-Chancellor Griffin in the same case, 93 N. J. Eq., 578, that would interfere with such a decree. In that case the result of a decree in conformity with the prayer of the bill would have been to compel the performance of a contract "materially variant from the one entered into by the parties" (86 N. J. Eq., 413). In addition, it was pointed out that it would have resulted in a serious loss to the defendants if the point on which it turned should ever be differently decided in an action by the defendants against their predecessors in title in a subsequent action where the decision of the Brisbane case should not have been considered *res judicata,* and in other ways much hardship would have been occasioned.

It is also said on behalf of the defendants that there is lack of any proof indicative of the complainant requiring this property for any "special or unusual reasons," as was said in the earlier opinion in Brisbane v. Sullivan, at page 415, and that the complainant should be left to his legal remedy. "The principle [jurisdiction in specific performance] which is material to be considered is that the court gives specific performance instead of damages only when it can by that means do more perfect and complete justice." Wilson v. Northampton, etc., R'y Co., L.R., 9 Ch., 279. Notwithstanding the rationale thus expressed, I think that the equitable discretion should be exercised, in view of the habitual rendering of decrees for specific performance in every case where the contract is for the conveyance of real property, and where "the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party" (Pom.

Eq. Jurisp., Sec. 1404) as is concededly the case with the contract under examination.

While the defendant The Fruit & Produce Acceptance Corporation in its answer does not set up the Statute of Frauds and Perjuries by distinctly pleading the act, it does deny that there was any legal agreement to release any of the lots in question, "and this defendant stands upon its legal right to refuse so to do." If this does not amount to what would have been a plea under the former practice it cannot be denied that at least it amounts to a denial of any enforceable contract or agreement having been made. Under these circumstances, this defendant has a complete right to take refuge behind the statute. Lozier v. Hill, 68 N. J. Eq., 300. As I understand the practice with regard to pleading the act, it is not necessary either at law or in equity to allege in the complaint or bill that a contract required to be in writing was, in fact, in writing; but, on the other hand, if it be made to appear that it was by parol, that is demurrable. In defensive pleadings, if it be admitted that such a contract was entered into without at the same time setting forth the informality, that bars the defense created by the statute. But if, on the other hand, the making of the contract be denied then the defense may resort to the enactment, because, in the face of this denial, the actor must prove a legal, enforceable contract. Douma v. Powers, 111 Atl. 401. The last illustration is the one followed by this defendant and, therefore, it is entitled to resist specific performance.

The fifth section of our Statute of Frauds and Perjuries (2 C. S., 2612) provides, among other things, that no action shall be brought "upon any contract or sale of lands, tenements or heredita-

ments, or any interest in or concerning them" unless the agreement be in writing and signed by the party sought to be charged therewith or his lawfully authorized agent. From this it is argued that the court cannot compel performance of the promise to release from the lien of its mortgage made by The Fruit & Produce Acceptance Corporation. An examination of the decisions in other jurisdictions shows them to be in a state of the wildest confusion. It is declared, in 27 C. J., p. 218, "It is also held that an oral contract to execute a release is valid; but the weight of authority is to the contrary on this proposition." An examination of the authorities cited to sustain the text is most unsatisfactory, and some of them are in direct conflict with it. For example, Chancellor Kent did not discuss the statute and it application in Stevens v. Cooper, 1 Johns. Ch., 425, but confined his decision to an application of the parol evidence rule. In the case of Malins v. Brown, 4 N. Y., 403, Judge Taylor, who wrote the opinion for the Court of Appeals, discussed the subject now under consideration and declared the promise not to be within the act; but the case was decided upon an entirely different point. The decision rests upon the fraud arising out of the refusal to perform an oral contract after full performance by the other party thereto. There is a great deal that might be said upon both sides of the question as to whether the promise made by The Fruit & Produce Acceptance Corporation to release by parcels without the same being reduced to writing is within the act or not. I must confess that my mind is not entirely clear as to which is the better rule. But there is enough in this case to take it out of the mischief that the legislature sought to render impossible by the adoption of the statute: and that is the fact

that the promissor frankly admits, the making of the promise, so that the proof thereof actually amounts to demonstration, as Vice-Chancellor Fielder pointed out, is necessary in any case where a parol contract is taken out of the operation of the statute. Magnolia Construction Co. v. McQuillan, 94 N. J. Eq., 342.

There is considerable authority to the effect that a promise to release need not be in writing, so far as equity is concerned, when there is borne in mind the difference between the legal and the equitable views. Of course, if the execution of a mortgage were to pass the fee, as it did at the early common law (3 Pom. Eq. Jurisp., Sec. 1179) it would create an estate in land that could only be efficiently dealt with by a written instrument. But when it is considered "The mortgage is not a conveyance, nor does it confer upon the mortgagee any estate *in* the land. It creates a lien *on* the land, or, in the apt language already quoted, 'a potentiality to follow the land by proper process, and condemn it for payment' of the debt." (3 Pom. Eq. Jurisp., 1188), a different situation exists. Of course, we are not concerned with the difference, if any, that arises after breach. But whatever the rule should be in a case in which there is a denial of the making of an oral promise to release all or part of mortgaged premises from the lien of a mortgage, it is difficult to perceive why the statute should be a bar to compelling one to carry out an honest agreement into which he has entered with another and which he admits having made. The Statute of Frauds was designed to protect the innocent from false claims that were made and enforcement of which was secured through perjury.

Unfortunately, it is not practicable to apply the doctrine of equitable estoppel, as was done in Swain v. Seamens, 9 Wall., 254, because my understanding is that equitable estoppel is invoked only where a party, relying upon the promise or conduct of another, changes his position for the worse or obligates himself to a third party. In the case at bar neither of these circumstances occur, because the complainant, if he is robbed of his bargain, loses nothing else, and the vendor will gladly release him from the contract to purchase.

It is true that this case presents more complications than usually appear in a specific performance suit where the discretion of the court is exercised in favor of the complainant. However, I do not understand that this is any reason for refusing to do justice, where none of the legal rights of any of the parties are infringed. For the reasons I have already expressed, I do not think that any of the rules which operate against compliance with the prayer of a bill in a case of this sort exist herein, and it seems to me that the defendant Carobine and The Fruit & Produce Acceptance Corporation will be compelled to do nothing more than they are equitably bound to do, while the defendant Starace, as already said, will be bound to do nothing more than he has voluntarily agreed to do.

I will advise a decree directing the conveyance of the fee by Carobine to the complainant, in accordance with the contract of March 12, 1926, upon compliance by the latter of the obligations upon his part to be performed, and directing the defendant The Fruit & Produce Acceptance Corporation to execute a release, at the request of the complainant, of all of the lots of land to be conveyed, upon receipt of $2300, and enjoining the last-mentioned defendant from causing any sales to be held

of any of the lots to be conveyed by Carobine under any decree or execution in the suit wherein it seeks to foreclose the right of redemption of Carobine in his lands described in the mortgage held by The Fruit & Produce Acceptance Corporation. The decree will also provide for the liquidation of Starace's judgment, in accordance with the views hereinabove expressed with regard thereto. The acceptance of those views by the complainant would, of course, be a *sine qua non* to the making of the decree, as otherwise the contract will be unenforceable.

Memorandum by Vice-Chancellor.

COURT OF CHANCERY OF NEW JERSEY.

JOHN BENTLEY
Vice-Chancellor

Jersey City, N. J., May 17, 1927.

Julius A. Kepsel, Esq.,
921 Bergen Ave., Jersey City.

John W. Ockford, Esq.,
143 Summit Ave., Union City.

Gentlemen:

It will be recalled that, after reading the opinion in Degheri v. Carobine, Mr. Ockford brought to my attention an error into which he believed I had fallen in deciding the case. As I recall his explanation, it was to the effect that there was no proof that Mr. Robinson of the Fruit & Produce

Acceptance Corporation ever agreed to release the 23 lots purchased by Mr. Degheri from the lien of the then existing mortgages, and, as I understood Mr. Ockford, he thought the only proof to that general effect related to releases of individual lots from the lien of the $1500 purchase-money mortgage to be given Carobine by the complainant and then assigned to the Fruit & Produce Acceptance Corporation.

In view of the fact that much water had gone under the bridges between the time of the final hearing and Mr. Ockford calling to my attention what he considered an inadvertent error into which I had fallen, I secured a transcript of so much of the testimony of Mr. Degheri as dealt with the fateful conversation with Robinson by telephone, and that transcript shows the following language:

> "I then told Mr. Robinson exactly what Mr. Carobine had told me, that I was about to purchase 23 of these lots and I wanted to be sure before I entered into the contract that the Fruit & Produce Acceptance Corporation would be agreeable to release these lots *from the lien of those two mortgages.*"

The two mortgages to which reference must have been made were those for $15,000 and $3,000, respectively, which the witness had been talking about only a minute or two before using the language just quoted. At the foot of the same page whereon the quoted language ends the second mentioned mortgage was dealt with by Mr. Degheri in a manner that admits of only one construction, because without again mentioning that mortgage in any of his intervening testimony, he says that Robinson made some admission "as to this $3,000

mortgage." Almost immediately thereafter he says, with regard to his conversation, "It was then, upon Mr. Robinson's agreement to release the *mortgages* that we went on to complete the contract" (In both quotations the italics are mine).

From the language quoted I am at a loss to understand how the complainant's testimony could possibly be understood to deal with anything except the two mortgages then held by the Fruit & Produce Acceptance Corporation which were liens on the entire 107 lots out of which the 23 purchased by the complainant were to be carved.

To make certain that there could have been no error in transcribing the notes, I have gone over the matter with Mr. Bailey, and he has pointed out to me that Mr. Degheri spoke in the plural wherever the underscored language appears. Therefore, I will file the decree dated January 20th, 1927, the terms of which were fixed after argument, so that the parties may know their rights either by perfecting an appeal or accepting this decree.

Yours very truly,

JOHN BENTLEY.

INDEX.

New Jersey Court of Errors and Appeals

BETWEEN

BERNARD M. DEGHERI,
Complainant-Appellee,

AND

THOMAS R. CAROBINE, *et al.*,
Defendants-Appellants.

Amendments to State of Case.

Statement.

1. The stipulation referred to in objection #1 is herewith presented.

2. The affidavit referred to in objection #2 is herewith presented.

3. The affidavit referred to in objection #3 is herewith presented.

4. The answer referred to in objection #4 is herewith presented.

5. The affidavit referred to in objection #5 is herewith presented.

6. Line 39, page 37, should read "the hours of twelve and one o'clock in the afternoon".

7. The exhibit referred to in objection #7 has already been printed as an exhibit to the Bill of Complaint, but it is also again printed herewith.

8.) The exhibits referred to in objections
9.) 8-14 inclusive are presented herewith.
10.)
11.)
12.)
13.)
14.)

Statement.

15. Referring to objection #15, the Notice of Appeal is correctly printed in the State of the Case. The word "concede" is manifestly intended to be "conceive".

16. The Notice of Appeal, page 1, State of Case, was filed May 25, 1927.

17 and 20. Appellants have been allowed by this Court to proceed upon the Amended Notice and Amended Petition.

18. The Amended Notice of Appeal was filed July 20, 1927.

19. The Petition of Appeal was filed May 29, 1927.

21. The Amended Petition of Appeal was filed August 4, 1927.

22. The Bill of Complaint was filed June 26, 1926.

23. The Answer of defendant, Carobine, was filed July 19, 1926.

24. The Answer of defendant, Fruit and Produce Acceptance Corporation, was filed July 19, 1926.

25. The Final Decree appealed from, bearing the date of January 20, 1927, was endorsed by Vice-Chancellor Bentley, as filed May 16, 1927, and was received in the office of the Clerk May 17, 1927.

The aforesaid objections are also presented herewith.

JOHN W. OCKFORD,
Solicitor for Defendants-Appellants, Thomas R. Carobine and Fruit and Produce Acceptance Corporation.

Stipulation Amending Bill of Complaint.

(Not Filed.)

IN CHANCERY OF NEW JERSEY.

Between

Bernard M. Degheri,
Complainant,

and

Thomas R. Carobine, *et al.,*
Defendants.

On Bill, &c.
Stipulation.

It is hereby stipulated and agreed that the first word of paragraph 8 of the Bill of Complaint be struck out and the words "Prior to" be inserted in the place and stead thereof.

Dated: July 6th, 1926.

Julius A. Kepsel,
Solicitor of Complainant.

John W. Ockford,
Sol'r of Defts., Fruit & Produce Acceptance Corp. and Thomas R. Carobine.

Carlo D. Cella,
Sol'r for Deft., Michael Starace.

Affidavit of Leonard G. Robinson.

(Filed July 6, 1926.)

IN CHANCERY OF NEW JERSEY.

Between

Bernard M. Degheri,
Complainant,

and

Thomas R. Carobine, *et al.*,
Defendants.

On Bill, etc. Affidavit on Behalf of the Fruit and Produce Acceptance Corporation.

State of New York)
County of New York) ss.:

Leonard G. Robinson, being first duly sworn according to law, on his oath, deposes and says:

1. I am an officer of the Fruit and Produce Acceptance Corporation, which is a New York corporation, with its principal place of business at #97 Warren Street, New York City, and I have had charge of, and am personally familiar with all of the matters herein set forth.

2. I have read the Bill of Complaint filed herein and the affidavit attached thereto, and am familiar with the allegations therein contained.

3. The Fruit and Produce Acceptance Corporation is the owner and holder of the two mortgages set forth in Paragraph 7 of the Bill of Complaint. It is untrue that the $3,000.00 mortgage is without consideration, and the fact is that there is now actually due and owing on the two

mortgages the sum of $13,056.41 with interest thereon from June 1st, 1926.

4. It is not true that the Fruit and Produce Acceptance Corporation entered into any agreement with complainant, as set forth in Paragraph 8 of the Bill of Complaint. Said corporation did agree informally with the defendant, Carobine, that it would release the lots described in the contract referred to in said paragraph of the Complaint, upon certain terms and conditions, but such agreement was never entered into in writing, nor was there any consideration for same, and after such informal arrangement was made, said corporation discovered that the lien of its mortgages was subordinate to the lien of the judgment set forth in Paragraph 9 of the Bill of Complaint, although the said Carobine had represented that the said corporation's mortgage was to be a first mortgage, and it was so certified by complainant's brother, with whom complainant is engaged in the practice of law, and upon ascertaining such situation, said corporation duly notified the said Carobine that it would not release any of the lots until the lien of such judgment was discharged and its mortgage made a first mortgage as agreed. Said corporation also subsequently discovered that there are unpaid taxes and assessments, so that it now insists that such taxes and assessments be paid as a condition of any release. The security has thus been very materially reduced, and said corporation is placed in jeopardy with respect to its mortgage because of the existence of these liens, and in order to properly protect its rights in the matter, foreclosure will be resorted to unless these liens are promptly discharged.

Affidavit of Leonard G. Robinson.

5. In connection with the placing of the aforesaid mortgages, complainant himself acted as attorney, and has personal knowledge of all of the matters hereinabove set forth, and the mortgages would not have been accepted but for the certificate of the attorney, Degheri. The arrangement above referred to was solely and entirely a gentleman's agreement with the defendant, Carobine, and was for the purpose of assisting said Carobine to discharge his indebtedness to the Fruit and Produce Acceptance Corporation, but because of the facts above stated, said corporation now stands upon its legal rights to decline to execute a release, and also urges its right to presently foreclose its mortgage or assign same. Said corporation can obtain its money by assignment and desires so to do.

6. Complainant, having been the attorney for the defendant, Carobine, during the times set forth in the Bill of Complaint, had actual personal knowledge, as well as constructive notice, and entered into the agreement attached to the Bill of Complaint with his eyes open and well knowing that he would have no right whatsoever to compel said corporation to execute releases of the lots in question.

LEONARD G. ROBINSON.

Sworn to and subscribed before me
this 2nd day of July, 1926.

JOHN S. CONSIDINE,
Notary Public, Nassau County
New York County Clerk's No. 174
Commission expires March 30, 1928
County Clerk's Certificate attached

Affidavit of Michael Starace.

(FILED JULY 6, 1926.)

IN CHANCERY OF NEW JERSEY.

BETWEEN

BERNARD M. DEGHERI,
Complainant,

AND

THOMAS R. CAROBINE, *et al.,*
Defendants.

On Bill, etc.
Answering Affidavit on Behalf of Michael Starace.

STATE OF NEW YORK }
County of New York } SS.:

MICHAEL STARACE, being duly sworn, according to law, says that:—

1. I reside at 6617 19th Avenue, Borough of Brooklyn, City and State of New York.

2. I have no knowledge or information of the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 11 and 12 of the bill of complaint and paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 11 and 12 of the affidavit of Bernard M. Degheri.

3. I deny the allegations of paragraph "10" of the complaint and of said affidavit of Bernard M. Degheri that Thomas R. Carobine paid the amount of the attachment judgment of $3,428.64 obtained by Armour Fertilizer Works, Inc., against Teresina Carobine, and that the assignment of said judgment to me was made in order

to embarrass, harass and obstruct the complainant.

4. I purchased said judgment and no part of said purchase price was paid or advanced by said Thomas R. Carobine, and in no way whatsoever did he contribute as much as one cent toward the purchase price of said judgment. There is now due on said judgment the full amount thereof with interest.

5. I am the Secretary of the Alps Realty Co. Inc., to which corporation said Thomas R. Carobine has conveyed 84 lots as more fully set forth in the deed between the parties dated May 10, 1926 and recorded in the office of the Register of Bergen County on May 12th, 1926 in Book 1408 of Deeds at page 415 &c. The judgment above described is, I am informed, a lien against said 84 lots as well as against the 23 lots which complainant seeks to have conveyed to him by the bill of complaint herein. I was informed that Armour Fertilizer Works, Inc., as judgment creditor, were to cause execution to issue and have said 84 lots of Alps Realty Co. together with other property covered by said judgment sold at a Sheriff's sale. To prevent the sale of the said 84 lots of Alps Realty Co., Inc., I purchased said judgment and had the same assigned to me.

6. If complainant will pay me the amount of said judgment with interest, I will either (1) satisfy the same or (2) assign the judgment to him provided he will upon such assignment release and discharge from said judgment, the 84 lots of the Alps Realty Co., Inc., above described.

7. No threat or attempt has been made by me to issue execution, and any statement to that effect by complainant is untrue. However I do not waive nor release any lien of said judgment against any part of the property or lots covered thereby.

WHEREFORE, I respectfully pray the Court that the order restraining me from taking any proceedings for the collection or enforcement of the attachment judgment assigned to me so far as it relates to the land and premises described in said bill of complaint be dismissed with costs.

MICHAEL STARACE.

Sworn to before me this 2nd day of July, 1926.

LILLIAN VAN HOUTEN
Notary Public, Queens Co. No. 3838
Certificate filed in New York County
New York County Clerk's No. 109
Term expires March 30, 1927
County Clerk's Certificate attached

Answer of Defendant Starace.

Filed July 20, 1926.

IN CHANCERY OF NEW JERSEY.

Between Bernard M. Degheri, *Complainant,* and Thomas R. Carobine, *et al.*, *Defendants.*	On Bill, etc. Answer of Defendant Michael Starace.

The answer of defendant, Michael Starace.

This defendant, Michael Starace, answering the bill of complaint, says that:

1. This defendant has no knowledge or information sufficient to form a belief as to the statements in paragraphs 1-8 inclusive and paragraphs 11 and 12.

2. Paragraph 9 is admitted.

3. Paragraph 10 is denied.

4. As to paragraph 13, this defendant is ready and willing to accept from the complainant the sum due on the judgment mentioned in the bill of complaint and which this defendant holds by assignment from Armour Fertilizer Works and either satisfy said judgment of record or assign said judgment to complainant upon condition that the 84 lots conveyed to Alps Realty Co. Inc. by deed dated May 10, 1926 and recorded in the office of the Register of Bergen County, New Jersey, on May 12, 1926, in Book 1408 of Deeds, at page

415 &c., be released and discharged from the lien of said judgment.

CARLO D. CELLA,
Solicitor of Defendant,
Michael Starace,
Office and P. O. Address,
141 Broadway,
New York City,
and
23 Pomander Walk,
Ridgewood, N. J.

Affidavit of Thomas R. Carobine.

Filed October 25, 1926.

IN CHANCERY OF NEW JERSEY.

Between Bernard M. Degheri, *Complainant,* and Thomas R. Carobine, *et al.*, *Defendants.*	On Bill &c. Affidavit.

State of New York }
County of New York } ss.:

Thomas R. Carobine, being first duly sworn according to law, on his oath deposes and says:

1. I am one of the defendants in this cause and I am engaged in the Wholesale and Retail Fruit business in New York.

2. I signed the Contract of Sale which is the basis of this suit, on March 12, 1926, at the offices of Bernard M. Degheri and Christopher S. Degheri, in Jersey City, and at the time of the execution of the contract both of the Degheris were present.

3. Before the contract was signed I suggested that there would be some difficulty in securing the release of the Armour judgment and I told both of the Degheris that if a release of this judgment could not be secured it was no sale. I also suggested that this condition be put in the contract, but both of the Degheris told me that this would be the understanding, but they did not want the condition put in the contract because they did not want Mr. Robinson to know the existence of this judgment, as it was a prior lien to the Fruit Company's mortgage and that Christopher Degheri had slipped up on his search and had not discovered the attachment and had made a certificate of title to the effect that the mortgage was the first lien and that he would get into trouble if the Fruit Company should learn of the error. Both of the Degheris told me that they would take care of this attachment and would secure a release of it by securing a friend of theirs to sign a bond to release the attachment. I was thereupon persuaded to agree to this, and both of the Degheris promised me that they would see to it that the attachment was released.

4. Before the contract was signed, Bernard Degheri told me that he was buying the lots for a client of his and Christopher Degheri told me that his brother was buying for a client.

5. Prior to the making of the contract I had had several discussions with both of the Degheris relative to the Armour judgment and both of them begged me not to say anything to Mr. Robinson about it and both of them promised to take care of it and see that I was protected.

6. Before the contract was signed Christopher Degheri told me that it was advisable for me to sell these lots, as there were assessments against them of more than $1,500.00, and just before signing the contract Bernard Degheri told me he was paying a good price because the assessments were over $1,500.00 and that he would have to pay this amount in addition to the $4,000.00. In signing the contract I relied upon these representations and believed them to be true. I felt that this brought the price upwards to $5,000.00 and thought that this would be a fair price.

7. Before the contract was signed I called Mr. Robinson on the telephone from Degheri's office and told him about the contract and I also put Mr. Bernard Degheri on the telephone to talk to Mr. Robinson. It is true that Mr. Robinson agreed to release the lots from the mortgage, provided a purchase money mortgage was signed to his company and a part of the cash consideration turned over in addition.

8. In connection with the transaction I was advised only by Bernard Degheri who was buying and by his brother Christopher Degheri who was interested in the contract by way of receiving a commission which I paid to him out of the deposit given to me.

9. Between March 12th and April 15th, Bernard Degheri talked to me over the telephone and

also at his office where I called to see him at his request. He prepared a form of bond to release the attachment for me to sign, but later told me that a cash bond was necessary. He told me that he could not secure the bond he intended and that I would have to get a release of the 23 lots. He asked me to see Mr. Brand and have him get the lawyers for the Armour Company to consent to release the 23 lots from the attachment and let it stand against the balance of the property. I tried to do so, but Mr. Brand was unsuccessful in getting the lawyers for the Armour Company to consent to release the lots.

10. During these conversations with Mr. Bernard Degheri he told me a number of times that his client would insist upon closing on April 15th and that I must do something to get the release. On one of these occasions I asked him who his client was and he told me his name was O'Toole.

11. A short time afterward Bernard Degheri told me that his client wanted to buy the remaining 84 lots and Christopher Degheri told me that his brother's client O'Toole wanted to buy the remaining lots. At one time the figure of $18,000.00 for all of the lots was mentioned by both Degheris. This price was to include the 23 lots.

12. On April 24th I made an agreement with one Orbach to sell the 84 lots. I had been asking $20,000.00 for all of the lots. The Orbach agreement was for $15,000.00 for the 84. This agreement was informal. I took it to Bernard Degheri and he told me that he would represent me and get me out of the tangle. He made an appointment at his office for April 26th for the purpose

of executing a formal contract. When I got to the building on the 26th Bernard and Christopher Degheri met me at the elevator and asked me to go in another office and talk with them first. Bernard Degheri told me he would not let the deal go through unless I agreed to give Christopher Degheri $1,000.00. After a talk I agreed to $500.00. We then went into the Degheri office and talked with a representative of Orbach. So far as I saw no formal contract had been prepared and none were prepared. Bernard Degheri told Mr. Herman, who represented Orbach, that I could not make the sale because of attachment and judgment. Bernard Degheri had assured me that his client O'Toole would take over the 84 lots and that I need not worry. I returned the deposit of $200.00 to Mr. Orbach's agent.

13. At a subsequent date I took another buyer named Schneider, but Bernard Degheri told this man I could not sell. It was then that I made up my mind that Mr. Degheri was more interested in his client O'Toole than he was in me and I ceased to act upon his advice any further.

14. At no time did I offer or authorize anyone to offer for me a payment of $1,000.00 to Bernard Degheri for the release of his contract.

THOMAS R. CAROBINE.

Subscribed and sworn to before me
this 11th day of October, 1926.

STUART H. FRANK,
Notary Public, Westchester Co.
N. Y. Co. Clk's No. 475, Reg. No. 7351
(SEAL) Commission expires March 30, 1927.

Exhibit C-1.

ARTICLES OF AGREEMENT, made the 12th day of March, in the year of Our Lord One Thousand Nine Hundred and Twenty-six, between Thomas R. Carobine, single, of the City of New York, in the County of New York and State of New York, party of the first part, and Bernard M. Degheri, of the City of Jersey City, in the County of Hudson and State of New Jersey, party of the second part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of four thousand ($4000.00) dollars, to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that he the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of full covenant and warranty free from all encumbrance except as hereinafter stated, on or before the 15th day of April next ensuing the date hereof, all those lots, tract, or parcel, of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Cresskill, in the County of Bergen and State of New Jersey.

More particularly described, situate, lying and being in the Borough of Cresskill, in the County of Bergen and State of New Jersey, known and designated on a certain map filed in the Office of the Clerk of the County of Bergen, entitled, "Hitchcock Land Improvement Company's Map of Cresskill Park, Bergen County, New Jersey," as and by lots numbers 661, 662, 663, 664, 665, 666, 675, 676, 677, 679, 680, 681, 682, 684, 685, 686 in

Block 48, and also lots numbers 627, 628, 629, 630, 631, 632, 633 in Block 49.

Lots numbers 675, 676, 677, 679, 680, 681, 682, 684, 685, 686 front and face on the easterly side of 6th Street. Lots numbers 661 to 666 inclusive front and face on the westerly side of 5th Street. Lots numbers 627 to 633 inclusive front and face on the easterly side of 5th Street.

The party of the second part is to pay all assessments at present a lien on the aforementioned lots. And the said Bernard M. Degheri, for his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, his 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 four thousand ($4000.00) dollars, as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On execution of this agreement for which this is also a receipt	$ 400.00
On delivery of deed, cash	$2100.00
On bond and mortgage, same containing usual interest, tax, assessment, insurance and installment default clauses, and an agreement not to claim credit on the interest payable on bond and mortgage, by reason of any tax assessed, or to be assessed against the premises, with interest at 6% payable quarterly for two years	$2100.00

And the said party of the first part hereby agrees to pay to Christopher S. Degheri a com-

Exhibit C-1.

mission of 5% on the purchase price aforesaid, said commission to be paid in consideration of services rendered in consummating this sale; said commission to become due and payable upon the execution of this agreement.

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

The above mortgage to contain a release clause by which the party of the first part or his assigns will release each and any of the aforementioned lots on the payment of $100.00. Said sum so paid to be in reduction of the principal of said mortgage.

Taxes shall be adjusted, apportioned and allowed as of the date of delivery of said deed.

And it is further agreed, by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises on the day of passing title next ensuing the date hereof, and from thence take the rents, issues and profits to his and their use.

And it is further agreed, by the parties hereto, that the said deed of warranty shall be delivered and received at the office of Bernard M. Degheri, #921 Bergen Avenue, Jersey City, N. J., between the hours of ten in the forenoon and three o'clock in the afternoon on the said 15th day of April next ensuing the date hereof.

It is hereby understood and agreed that the time of closing is of the essence of this contract.

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.

Exhibit C-1.

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

Thomas R. Carobine L. S.
Bernard M. Degheri L. S.

Signed, Sealed and Delivered in the presence of

Nathan Schulman.

State of New Jersey, County of Hudson, } ss.:

Be it Remembered, That on this 12th day of March, in the year of our Lord One Thousand Nine Hundred and Twenty-six, before me, the subscriber, a Notary Public of New Jersey, personally appeared Thomas R. Carobine, single, who, I am satisfied, is the grantor mentioned in the within instrument, to whom I first made known the contents thereof, and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

Nathan Schulman,
Notary Public of New Jersey.

Exhibit C-2.

ALEXANDER F. ORMSBY
CHRISTOPHER S. DEGHERI

Bergen 7935-569.

BERNARD M. DEGHERI
COUNSELLOR-AT-LAW
Trust Co. of N. J. Bldg.,
Bergen and Sip Avenues,
Jersey City, N. J.

May 7th, 1926.

MR. THOMAS R. CAROBINE,
1983 First Avenue,
New York City, N. Y.

SIR:

You have failed and neglected to convey title to certain 23 lots and premises at Cresskill, N. J., under a contract made by and between you as seller and me as buyer, dated March 12th, 1926, and recorded in the Bergen County Clerk's Office and which contract called for closing of title, at this office, April 15th, 1926, and which closing was continued by mutual agreement, in writing, to April 30th, 1926.

Further notice is hereby given you that I shall be prepared to take title to said lots and premises on next Monday afternoon, May 10th, 1926, at 2 o'clock, at this office.

You are hereby called upon to fulfill the terms and conditions of the above mentioned contract at the time and place above indicated, and in default thereof I shall hold you to legal accountability.

Respectfully,

(Signed) BERNARD M. DEGHERI.

BMD:ES

Exhibit C-4.

April 24, 1926.

AGREEMENT made this day, between T. CAROBINE, seller, and SIGMUND ORBACK, purchaser, subscriber hereto.

Purchaser agrees to purchase about 84 lots indicated by red crosses on a certain survey of the Hitchcock Land Improvement Company's Map of Cresskill Park, Bergen County, dated June, 1899, in Bergen County, in the Town of Cresskill, State of New Jersey, at the price and terms and conditions satisfactory to both seller and purchaser. A deposit of $200.00 is hereby given for which receipt is hereby acknowledged when a formal contract is to be signed by owner and purchaser within a specified time (written in). Monday, April 26, 1926 $15,000.00 Fifteen Thousand for 84 lots.

The brokers of this transaction are Mr. Louis Aronson and Mr. Samuel L. Herman.

The above agreement is subject to no commission.

Net Price (note)

Price $15,000.00 owner will pay taxes which is due on this property.

Accepted by seller—T. CAROBINE (L. S.)

All assessments to be paid by purchaser.

LOUIS ARONSON
SAMUEL L. HERMAN

Deposit	$ 200.00
on contract	1000.00
on title	3800.00
on mtge.	1000.00
	$15000.00

3 yr. close
with a prepayment

Exhibits C-6 and C-7.

Exhibit C-6.

May 11, 1926.

MR. CHRISTOPHER S. DEGHERI,
921 Bergen Avenue,
Jersey City, N. J.

DEAR SIR:—

Mr. Thomas R. Carobine has consulted me in the matter of a claim made against him by Bernard M. Degheri in the sum of Five Hundred ($500.00) Dollars.

I would be very much pleased if you would take this matter up with me at your very earliest convenience.

Very truly yours.

(Signed) CARLO D. CELLA.

CDC/SR

Exhibit C-7.

September 25, 1925

In Re: THOMAS R. CAROBINE.
MR. CHRISTOPHER S. DEGHERI,
921 Bergen Avenue,
Jersey City, N. J.

DEAR MR. DEGHERI:

Mr. Carobine handed me the receipted bill from the County Clerk of Bergen County for the recording fees of the deed from Carobine to Carobine and of the mortgage from Carobine to our Corporation.

I understand that owing to the accumulation of business it requires in the neighborhood of from

Exhibit C-8.

three to four weeks before these documents will be recorded. I would appreciate if you will be good enough to instruct the County Clerk in the premises, if you have not already done so, to forward the mortgage direct to us as soon as it is recorded.

I presume that you are proceeding with the title policy as arranged, and that you will send the same to us as soon as it is issued and that it will be brought down to date showing the recording of the mortgage to us.

It gives me great pleasure to express to you my appreciation as to the manner in which you are handling this business and to assure you if there is any way I can be of any service to you all you have to do is to command me.

Yours very truly,

(Signed) LEONARD G. ROBINSON,
President.

LGR/jb.

Exhibit C-8.

February 1, 1926.

In Re: THOMAS R. CAROBINE.
MR. CHRISTOPHER S. DEGHERI,
921 Bergen Avenue,
Jersey City, N. J.

DEAR MR. DEGHERI:

Tom Carobine was here in our office this afternoon. I told him I feel that $18,000 was a pretty fair offer for his 107 lots at Cresskill and advised him to accept it. He seems to feel, however, that he ought to do better between now and April. In

Exhibit C-9.

any event, he says he has a customer who is offering him $200 per lot net. I strongly urged him to realize that a contract accompanied by cash in the hand is better than promises no matter how attractive.

I still hope to be able to convince him to do business with you. In the meantime, I wish you would not delay the matter of the mortgage on the 16 lots to which he recently took title from his mother and which are not covered by our existing mortgage on the 91 lots. I will greatly appreciate your giving this matter your promptest attention.

Yours very sincerely,

LEONARD G. ROBINSON,
President.

LGR/jb.

Exhibit C-9.

March 5, 1926.

Mr. Christopher S. Degheri,
921 Bergen Avenue,
Jersey City, N. J.

Dear Mr. Degheri:

I acknowledge receipt of your letter of yesterday with Bond from Thos. R. Carobine to Fruit and Produce Acceptance Corporation, which I have examined and find okeh. Please have the mortgage recorded and sent to us as promptly as possible. As regards the sale of the thirty (twenty) three (33) (23) lots, I wish you could see me tomorrow, if possible, so that we can try to

Exhibit C-10.

put this sale over without further delay. This is very much to be desired by all concerned.

Yours very truly,

LEONARD G. ROBINSON,
President.

LGR/jb.

Exhibit C-10.

May 20, 1926.

In Re: Thomas R. Carobine.

Mr. Christopher S. Degheri,
Attorney at Law,
921 Bergen Avenue,
Jersey City, N. J.

Dear Mr. Degheri:

I acknowledge receipt of your letter of the 17th with recorded mortgage from Thomas R. Carobine to this Corporation, in the amount of $3,000, for which please accept my thanks.

I am also in receipt of your letter of the 15th in which you confirm the conversation you had with me last Saturday about the Armour Company attachment and judgment which turns out to be a prior lien to our $15,000 mortgage on the Carobine Cresskill property. You say in your letter:

> "I take this means of formally advising you that should execution issue on the above attachment judgment, you will be placed in a position whereby your mortgage will be cut off unless you attend the execution sale and bid in to protect your interests.

Exhibit C-10.

I would suggest that you keep in touch with the situation from day to day inasmuch as a sale may be held without your knowledge. It is not necessary under the statute to notify you, the attachment having issued prior to your mortgage. You will therefore be governed accordingly."

Although the value of the property in question is such that our mortgages are apparently sufficiently protected, it is needless to point out that the judgment is liable to cause us embarrassment.

Under date of October 31, 1925, you certified that our mortgage is a first lien against the property in question in spite of the fact that the attachment was filed on September 22, 1925—that is, more than a month before that. Without any intention to find fault, we should have been apprised of the fact immediately, and we would have secured other or additional collateral. Be that as it may, we look to you to do everything possible to protect our interests in the premises.

As I told you over the telephone this morning, I should like you to keep a watch upon the situation so that no possible execution or sale take place without being advised beforehand. It is not our intention to let the property go to sale and buy it at the sale. Should execution be issued and the property be advertised for sale, it is our intention to secure an assignment of the judgment rather than to permitting the sale to take place.

Kindly watch this matter accordingly and advise us promptly of any developments.

Yours very truly,

LEONARD G. ROBINSON,
President.

LGB/jb.

Objections to State of Case.

NEW JERSEY COURT OF ERRORS AND APPEALS.

BERNARD M. DEGHERI, *Complainant-Appellee,* *vs.* THOMAS R. CAROBINE, *et al.,* *Defendants-Appellants.*	On Appeal from Court of Chancery. Notice of Objections to State of Case.

To the Appellants, THOMAS R. CAROBINE, and FRUIT AND PRODUCE ACCEPTANCE CORPORATION; or JOHN W. OCKFORD, ESQ., Solicitor for Defendants-Appellants, THOMAS R. CAROBINE, and FRUIT AND PRODUCE ACCEPTANCE CORPORATION:

TAKE NOTICE, that the appellee, BERNARD M. DEGHERI, in the above entitled cause objects to the alleged State of Case served upon him by you for the followings reasons:

1. Stipulation of July 6th, 1926, which amends and corrects paragraph 8 of the Bill of Complaint, and which is material to the questions involved in this Appeal, has been omitted.

2. Affidavit of Leonard G. Robinson, made in July, 1926, and used on the argument of Order to Show Cause returnable July 6th, 1926, and which is material to the questions involved in this Appeal, has been omitted.

3. Affidavit of defendant, Michael Starace, made July 2nd, 1926, and used on the argument of

Objections to State of Case.

Order to Show Cause returnable July 6th, 1926, and which is material to the questions involved in this Appeal, has been omitted.

4. Answer of defendant, Michael Starace, which is material to the questions involved in this Appeal, has been omitted.

5. Affidavit of defendant, Thomas R. Carobine, made October 11th, 1926, and used by the said defendant on Motion to Strike Out Answer, and which is material to the questions involved in this Appeal, has been omitted.

6. A portion of the contents of the Final Decree has been omitted. (Case, p. 37, fol. 30.)

7. Exhibit C-1, on the part of the complainant, consisting of an agreement, in writing, between the complainant Bernard M. Degheri and the defendant Thomas R. Carobine, and which is material to the questions involved in this Appeal, has been omitted.

8. Exhibit C-2, on the part of the complainant, consisting of a letter written by complainant Bernard M. Degheri to defendant Thomas R. Carobine, under date of May 7th, 1926, and which is material to the questions involved in this Appeal, has been omitted.

9. Exhibit C-14, on the part of the complainant, consisting of an agreement to sell, in writing, between defendant Thomas R. Carobine and one Sigmund Orbach, and which is material to the questions involved in this Appeal, has been omitted.

Objections to State of Case.

10. Exhibit C-6, on the part of the complainant, consisting of a letter written by Carlo D. Cella to Christopher S. Degheri, under date of May 11th, 1926, and which is material to the questions involved in this Appeal, has been omitted.

11. Exhibit C-7, on the part of the complainant, consisting of a letter written by defendant Fruit and Produce Acceptance Corporation to Christopher S. Degheri, under date of September 25th, 1925, and which is material to the questions involved in this Appeal, has been omitted.

12. Exhibit C-8, on the part of the complainant, consisting of a letter written by defendant Fruit and Produce Acceptance Corporation to Christopher S. Degheri, under date of February 1st, 1926, and which is material to the questions involved in this Appeal, has been omitted.

13. Exhibit C-9, on the part of the complainant, consisting of a letter written by defendant Fruit and Produce Acceptance Corporation to Christopher S. Degheri, under date of March 5th, 1926, and which is material to the questions involved in this Appeal, has been omitted.

14. Exhibit C-10, on the part of the complainant, consisting of a letter written by defendant Fruit and Produce Acceptance Corporation to Christopher S. Degheri, under date of May 20th, 1926, and which is material to the questions involved in this Appeal, has been omitted.

15. The Notice of Appeal at page 1 of the State of Case, fol. 30, is incorrectly given as follows: "I conceive there is good cause for Appeal

in the above stated cause," whereas the said Notice of Appeal as served upon complainant-appellee was as follows: "I concede there is good cause for Appeal in the above stated cause."

16. The date of filing of Notice of Appeal at page 1 of the State of Case has been omitted.

17. Amended Notice of Appeal at page 2 of the State of Case has been improperly included in the State of Case because complainant-appellee was never served with a copy thereof.

18. The date of filing of the alleged Amended Notice of Appeal at page 2 of the State of Case has been omitted.

19. The date of filing of the Petition of Appeal at page 3 of the State of Case has been omitted.

20. The Amended Petition of Appeal at page 6 of the State of Case has been improperly included in the State of Case because complainant-appellee was never served with a copy thereof.

21. The date of filing of the alleged Amended Petition of Appeal at page 6 of the State of Case has been omitted.

22. The date of filing of the Bill of Complaint, at page 9 of the State of Case, has been omitted.

23. The date of filing of the Answer of defendant, Thomas R. Carobine, at page 27 of the State of Case, has been omitted.

24. The date of filing of the Answer of defendant, Fruit and Produce Acceptance Corporation, at page 30 of the State of Case, has been omitted.

25. The date of filing of the Final Decree appealed from, at page 34 of the State of Case, has been omitted.

This Notice does not admit or concede the regularity of appellants' proceedings upon this Appeal and is given without prejudice to the Notices heretofore served in this cause on appellants, Thomas R. Carobine and Fruit and Produce Acceptance Corporation, on July 8th, 1927, and October 1st, 1927, to dismiss this Appeal, both of which Notices are returnable on October 18th, 1927.

JULIUS A. KEPSEL,
Solicitor for and of Counsel with Appellee.

New Jersey Court of Errors and Appeals

Between: BERNARD M. DEGHERI, *Complainant-Appellee,* AND THOMAS R. CAROBINE, et als, *Defendants-Appellants.*	On Appeal from the Court of Chancery.

APPELLANTS' POINTS

The bill in this case is for specific performance of a contract for the sale of real property and for other relief.

The Court of Chancery has decreed specific performance upon certain terms and conditions. (Case, page 34.) The defendant, Carobine, who is the vendor, appeals from this decree as does the defendant, Fruit and Produce Acceptance Corporation, which holds mortgages upon the premises in question.

The appellants make the following contentions:

POINT I

It being impossible to perform the agreement according to its terms, specific performance with terms fixed by the court should not be decreed.

POINT II

Specific performance being discretionary and not a matter of right, should not be decreed, where as here, specific performance cannot be had without a change of the terms agreed upon.

POINT III

The contract, being silent on important matters, the court should not decree specific performance of vague and indefinite terms and conditions not included in the written contract.

POINT IV

In an action for specific performance, there should not be a decree for the release by the mortgagee, where as here, there was no agreement in writing for such a release, and the oral agreement for a release is only a vague understanding between the vendor and the mortgagee.

POINT V.

This indefinite, oral arrangement between vendor and mortgagee was subject to conditions that cannot be complied with, and there should be no specific performance because the decree of specific performance requires the mortgagee to execute a release upon terms and conditions other than as agreed upon.

POINT VI.

The decree directs specific performance of an agreement which the parties did not make.

POINT VII.

The contract price for 23 lots was $4,000.00. $400.00 was paid upon the execution of the agreement. The balance was to be paid by a $2,100.00 cash payment and by the execution of a purchase money mortgage of $1,500.00. It was agreed that this purchase money mortgage should carry a release clause at the rate of $100.00 per lot. There was a further oral agreement between the vendor and the mortgagee, whose mortgages covered 107 lots, of which the 23 lots were a part, that for a release from the operation of these mortgages, the mortgagee should receive the $2,100.00 in cash and an assignment of the $1,500.00 purchase mortgage to be given by complainant. It being impossible to carry out this agreement because of liens against the property, the Chancery Court decreed that the mortgagee should only receive $2,300.00 for its release instead of $3,600.00 as agreed, and fixed this amount by reference to the $100.00 per lot release clause in the contemplated purchase money mortgage. In other words, a condition which related to the future was applied to a totally different aspect of the case and to which it had no relation. This error is not only disclosed by an examination of the whole case, but it is also found in the opinion of the Court. (Case, page 160.)

The court says:

> "After some conversation, it was finally agreed that the corporation just named would execute releases on any lot or lots which the complainant might desire to sell, in consideration of the payment of $100 for each lot so released. This agreement was not reduced to writing or mentioned in the contract which is the basis of this suit."

". . . which the complainant might desire to sell," manifestly does not relate to the terms upon which the complainant was buying. It only related to a clause which was to be included in the prospective purchase money mortgage of $1,500.00, which was only a part of the consideration which the mortgagee was to receive for its release.

The mortgagee was to receive $3,600.00, by a cash payment of $2,100.00 and an assignment of the $1,500.00 purchase money mortgage. This purchase money mortgage was to include a release clause at the rate of $100.00 per lot. To say that the result of this arrangement was that the mortgagee could be compelled to execute a release for $2,300.00 instead of $3,600.00, is to enforce a new arrangement which was neither agreed upon nor contemplated by the parties.

Facts

The facts in this case are somewhat involved, but there is little, if any, dispute as to material matters.

Defendant, Carobine, was the owner of 107 lots in Bergen County. Defendant, Fruit and Produce Acceptance Corporation, held two mortgages on all these lots, one of which was for $15,000.00 and the other for $3,000.00. There was due on these mortgages about $14,00.00 with accrued interest. (Case, page 123, Fol. 10.)

Complainant agreed to buy 23 of the lots for $4,000.00. The payments were $400.00 down; $2,100.00 on closing; $1,500.00 purchase money mortgage. (Case, pp. 17-20.) The $400.00 deposit was paid and out of it a commission of $200.00 was paid by Carobine to Christopher S. Degheri. (Case, p. 19, Fol. 20; Case, p. 59, Fol. 10.)

Christopher S. Degheri is a brother of complainant (Case, p. 58, Fol. 40). Mr. Bernard Degheri, the complainant, and Mr. Christopher S. Degheri, are attorneys and share the same suite of offices. (Case, p. 60, Fol. 30.)

The contract between Carobine and complainant makes no reference to the mortgages, but it appears that at the time the contract was entered into, there was a telephone conversation between Mr. Carobine and Mr. Robinson, the head officer of the mortgagee company, and Mr. Bernard Degheri. This resulted in an oral agreement between Carobine and the mortgagee company, to the effect that the mortgagee would release the 23 lots upon receiving of the cash ($2,100.00) and an assignment of the $1,500.00 purchase money mortgage.

That Mr. Bernard Degheri thoroughly understood that this was the arrangement was found in his own testimony. (Case, p. 62, Fol. 10-20.)

"Q. Did he say that his company would require besides, an assignment of the $1,500.00 purchase money mortgage? A. He said that that would be arranged with Mr. Carobine; that he would probably take all the cash. In other words, Mr. Carobine was to turn over all the cash that he was to get out of that transaction.

"Q. And he said that could be arranged between Mr. Carobine and himself? A. Yes, but that he would have a representative at the closing of title, to see that that was carried out.

"Q. No definite figure was arrived at? A. The only definite figure that I can

remember is, that he was to get the balance over the mortgage, the $2,100.00 cash and the $1,500.00 mortgage.

"Q. Mr. Robinson didn't state that that would be what would be required for his company? A. No, no; he didn't state that. He said it would be agreeable to him. By his conversation he told me that he was going to get the balance of the money. In other words, Carobine wouldn't get anything except the $400.00 deposit."

Mr. Robinson testified to the same effect. (Case p. 125, Fol. 30.) Carobine testified to the same effect. (Case, p. 88, Fol. 10.)

It was also agreed that the $1,500.00 purchase money mortgage should carry a release clause at the rate of $100.00 per lot. This provision was included in the agreement. (Case, p. 19, Fol. 30.)

Bernard Degheri with respect to this clause, testified as follows (Case, p. 45, Fol. 10-20):

"It was then, upon Mr. Robinson's agreement to release the mortgages ,that we went on to complete the contract; but before I left Mr. Robinson on the telephone we got into a discussion as to what amount would be put in this $1,500.00 mortgage for release of individual lots, should I sell any thereafter. He held out for $150.00; that is, he wanted me to put into this purchase money mortgage the sum of $150.00 that I would have to pay if I required a release of any of the individual lots. I told him that that was unreasonable and too high, the amount of the mortgage itself being $1,500, and being security for twenty-three lots it

was out of all proportion. I held out for $75 and Mr. Robinson agreed that $100 would be pretty near the right figure, and it was that figure that was put in the contract."

This oral agreement was entered into at a time when all of the parties believed that the Fruit Company's mortgages were a first lien on the property. Christopher Degheri had given a Certificate of Title to the Fruit Company to this effect. (Case, p. 75, Fol. 10.)

After the contract was made, all of the parties learned of the existence of a prior lien. It was discovered that on August 29th, 1925, a Writ of Attachment had issued at the suit of the Armour Fertilizer Works, and that in this action a judgment was entered on April 28th, 1926, for $3,428.64. The lein of this judgment was prior to the lien of the mortgages held by the Fruit Company and was, of course, superior to the rights of Bernard Degheri under his contract to purchase.

Carobine, not having the means to discharge this lien, obtained help from a friend named Verro, who purchased the judgment and took an assignment in the name of one Starace, holding it as security for the money which he advanced to acquire the judgment. He also took a deed to the remaining 84 lots as additional security. He also advanced Carobine other moneys to aid him, and testified that the transaction was a loan, and that "if Mr. Carobine returns to me all of the money in this transaction, with 6 per cent., he can do what he pleases afterward." (Case, p. 159, Fol. 10.)

The Court found that this transaction was entirely free from fraud and there was no attempt

to hinder, embarrass or delay the complainant. (Case, p. 161, Fol. 30.)

At the trial the defendant, Starace, agreed to release the 23 lots from the lien of this judgment, upon the payment to him of the sum of $858.00, and the decree so provides. (Case, p. 36, Fol. 30.)

A difficulty is, however, presented. If this sum is deducted from the $3,600.00, the Fruit Company cannot receive the amount which it is entitled to receive under the agreement in exchange for a release of the 23 lots. There are also other deductions for taxes.

Carobine being financially unable to make up the deficit, and it being impossible to pay the Fruit Company the $3,600.00, either all cash or part mortgage, why should the mortgagee company be required to execute a release upon the payment of $2,300.00?

The Court says (Case, p. 164, Fol. 10):

> "But it would appear that complete justice in this respect would be accomplished by making the decree conditional upon the payment by the complainant to the Fruit & Produce Acceptance Corporation of the complete sum of $2,300.00, which would be $100.00 for each of the 23 lots so to be conveyed, and directing a formal release upon the discharge of this payment. This is a term that might fairly be imposed upon the complainant for the assistance he seeks and it certainly would not be unjust to the corporation, (because that entity has already, under the provision of the mortgages, elected to demand the whole of the principal sum, and it would thus receive at once and without further litigation the

> equitable share of the principal of its mortgages secured by the lots in question. Not only has the Fruit and Produce Acceptance Corporation filed its bill to foreclose its mortgages, but one of the objects of the present suit was to restrain the prosecution of the foreclosure suit so that the lands would not escape the jurisdiction of this court by an execution sale."

But where is there any authority to make a contract for the parties, and where is there any authority to decree specific performance of a contract so made? The rule is quite the other way.

Brisbane vs. *Sullivan*, 86 N. J. E. 411.

In that case this court reversed a decree for specific performance because of material variance between the contract entered into by the parties and as decreed to be specifically performed by the court. In that case this court also said:

> "There is nothing in this case which shows that the complainant requires this property for any special or unusual reason, which would put this case out of the ordinary class in which this special relief is sought or that this legal remedy is insufficient."

The Chancery Court fully recognized the impossibility of performing the contract according to its terms, but then made a new arrangement and decreed specific performance. However fair, just and equitable this new arrangement may be, it manifestly is not the agreement, nor are there any circumstances whatsoever which may be said to

create an estoppel. However fair the consent of the holder of the judgment lien to take a proportionate amount for a release of the 23 lots, how can the court require the Fruit Company to agree to a reduction of the amount it is entitled to receive (in order that this proportionate payment can be made, and why should specific performance be decreed of an oral agreement between Carobine and the Fruit Company, at the suit of complainant, when most certainly Carobine himself could not compel specific performance, he being in default upon his covenants that the premises were free and clear and also being in default in the payment of interest.

It has long been the rule that specific performance will not be decreed where there has been a great change of circumstances.

Johnson vs. *Hubbell,* 10 N. J. E. 332.

The change of circumstances in this case is the discovery of the Amour lien. Suppose the parties had known of this lien at the time the contract was entered into. Mr. Robinson would not have agreed to any release, because the existence of this prior lien would have disturbed him as much as it did later when he discovered it. (Case, p. 132, Fol. 10). Bernard Degheri would not have entered into the contract until some arrangement was made for a release of this lien. It would have been apparent that the contract could not be safely entered into until definite agreements were made with both the Armour lien holder and the mortgagee.

The Chancery Court quotes from "Pomeroy" (Case, P. 165, Fol. 30):

> "The contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party."

The opinion goes on to say that:

> "——as is concededly the case with the contract under examination."

But is it not a hardship to require the Fruit Company to take $2,300 instead of $3,600, especially where its agreement to take $3,600 was entered into in ignorance of the impairment of its security by the existence of a prior lien?

The Fruit Company, while frankly admitting the oral arrangement between itself and Carobine, does not admit that it is legally bound, and in view of the circumstances of this case, feels justified and does urge the defense of the Statute of Frauds, and submits that it should not be decreed to specifically perform the oral agreement for a release.

2 Compiled Statutes, 2612.

In certain cases a court of equity will give relief against the operation of the statute to prevent fraud, provided the parol agreement be clearly proven.

Magnolia Co. vs. *McQuillan,* 94 N. J. E. 342.

But can the statute be ignored merely because the proofs demonstrate the existence of the parol contract?

Certainly in this case the complainant was not induced by fraud to enter into the contract to buy. He has invested $400, and it may very well be that he is entitled to a vendor's lien against the 23 lots for this sum, but wherein has he shown that he is entitled to the relief of specific performance? He did not even take the trouble to join the Fruit Company as a party to his contract, nor secure a separate agreement for a release. He was content to let the matter rest upon a mere oral arrangement between Carobine and Robinson. He has not shown any special circumstances to move a court of equity to interfere in his behalf and specifically enforce this oral agreement.

It is extremely doubtful, whether as a matter of law, he would be entitled to enforce this agreement, even though it were possible to pay the full consideration to the Fruit Company.

Certainly a court of equity should hesitate in view of the mutual understanding as to the security which would remain in favor of the mortgagee after the proposed release be executed. How much less can be said in favor of enforcing the agreement with an arbitrary reduction of the amount to be paid?

It is, of course, perfectly proper for the vendee to waive any and all conditions so as to aid the court in enforcing the contract, but it is not proper to compel the unwilling defendant to accept new conditions never agreed to.

It is respectfully submitted that the decree should be reversed and the Bill of Complaint dismissed.

JOHN W. OCKFORD,
Of Counsel with Defendants-Appellants.

New Jersey Court of Errors and Appeals

BERNARD M. DEGHERI, *Complainant-Appellee,* and THOMAS R. CAROBINE, et als., *Defendants-Appellants.*	On Appeal From Court of Chancery.

APPELLEE'S BRIEF.

The decree of the Court of Chancery, brought up by this appeal, decrees specific performance of a contract, made on March 12th, 1926, for the sale of real property between complainant and defendant Carobine, and also decrees specific performance of an oral agreement made on the same day by complainant with defendant Fruit & Produce Acceptance Corporation, for the release of the lands and premises, to be sold, from the lien and operation of two mortgages held by the defendant Fruit Company. Defendant Carobine owned a tract of land containing 107 lots in Bergen County. The contract of March 12th, 1926, between complainant and defendant Carobine, was for 23 of said lots. One of the two mortgages of the defendant Fruit Company, the one for $15,-

000.00, covered 91 lots of the 107 lot tract owned by the defendant Carobine, and 7 of said 23 lots, contracted to be sold to complainant. The other mortgage held by the defendant Fruit Company, the one for $3,000.00, covered the remaining 16 lots of the above 107 lot tract; said 16 lots were the balance of the said 23 lots contracted to be sold to complainant.

The opinion of the Court below was filed January 3rd, 1927, and immediately thereafter counsel for the appellants Thomas R. Carobine and Fruit and Produce Acceptance Corporation, called the attention of the trial court to an error into which appellants' counsel believed the trial court had fallen and thereupon the trial court gave a day for the re-argument of the cause. Upon the re-argument the same points raised on this appeal by appellants were urged before the trial court. The trial court took the matter under advisement and after a lapse of several months and on May 17th, 1927, made and filed a memorandum, supplementing the opinion theretofore made (Case, pp. 170, etc.). The Court refused to disturb its findings and filed the decree appealed from.

Argument.

Appellants' contentions under points 1, 2, 3, 4, 5 and 6, we think, can be disposed of together. As we understand them, they urge that there was no agreement between complainant and the defendant Fruit Company, for the release of the 23 lots to be sold to complainant, from the operation of the $15,000.00 and $3,000.00 mortgages held by the Fruit Company; and if there was an agreement to release, it was between defendant Carobine, and the defendant Fruit Company. How appellants can hope to sustain such a view, under the testimony, is beyond our conception. The fact is and the testimony clearly indicates, that just before the contract of March 12th, 1926, was executed, complainant spoke to Robinson, the president and active managing head of the defendant Fruit Company over the telephone about a release of the 23 lots from said mortgages and obtained an agreement to release and that the defendant Carobine also spoke to said Robinson at the same time.

That defendant Fruit Company agreed with complainant to give a release is found in the testimony of complainant (Case, pp. 43-44-45):

> "Q. On March 12, 1926, at the time of the execution of this contract C-1, did you have any discussion with Carobine as to the encumbrances that were on this property? A. Yes; I asked Carobine what encumbrances were on the property, and he told me that there were two mortgages, one of $15,000 which was on ninety-one of the lots held by the Fruit & Produce Acceptance Corporation, and another mortgage of $3,000 on sixteen lots, also held by the same corporation. He said that—
>
> Mr. Ockford: This was prior to the execution of the contract?
>
> The Court: Yes, at the time, as I understand it.
>
> A. (Continuing) This was on the day before the contract was executed, prior to the execution of the contract, at my office, on Journal Square, Jersey City, on March the 12th, 1926. I asked Mr. Carobine whether he had made any arrangements with the holders of those mortgages for releasing, in the event

of a sale to me, and he said, not only had he made such an arrangement with Mr. Robinson, who was president of that corporation, but also that my brother Christopher had been delegated by Mr. Carobine to make such arrangement. I told Mr. Carobine that I deemed it wise to get the word of Mr. Robinson personally, and he suggested that he would telephone to him right then. I thought that was the proper thing to do. And, thereupon, Mr. Carobine got Mr. Robinson on the telephone and told him—as I heard Mr. Carobine's part of the conversation—that he was at my office in Jersey City and was about to enter into a contract for the sale of twenty-three of the lots at Cresskill. And, after some discussion back and forth, I heard Mr. Carobine ask him again whether it would be agreeable to Mr. Robinson and the Fruit & Produce Acceptance Corporation to release those lots from the lien of these two mortgages. I thought it would be wise for me to talk with Mr. Robinson myself and to check up on what conversation was had between Mr. Carobine and Mr. Robinson, and Mr. Carobine thereupon asked Mr. Robinson to hold the wire, that Mr. Degheri—Bernard Degheri—wanted to speak to him. I then told Mr. Robinson exactly what Mr. Carobine had told me that I was about to purchase twenty-three of these lots, and I wanted to be sure before I entered into the contract that the Fruit & Produce Acceptance Corporation would be agreeable to release these lots from the lien of those two mortgages. Mr. Robinson said if I would tell him the complete details of the transaction he would then tell me whether that would be

agreeable to him. I then explained that we had practically agreed upon the terms; that the purchase price was to be $4,000, and I was to pay all the assessments that were on those lots. I then further told him that the cash involved would be about $2500, of which I was going to pay $400 as a deposit under the contract; and I then further told him that, for the balance, I was to give Mr. Carobine a purchase-money mortgage of $1500. He listened quite attentively, and his objection first was as to the mortgage. He wanted to know why I could not pay all cash. I told him that those were the best terms that I could give; and he then said, 'Well, if you will assign or see to it that the Fruit & Produce Acceptance Corporation gets this mortgage of $1500 which you are going to give to Carobine we will be agreeable to release the twenty-three lots.' He went on to admit, even before I questioned him, as to this $3,000 mortgage; he said that the $3,000 mortgage was merely procured from Mr. Carobine for the purpose of giving some additional security; that, in reality, the money for that mortgage never passed. I subsequently checked up with Mr. Carobine that that was the true fact, and he said those were the true facts. It was then, upon Mr. Robinson's agreement to release the mortgages, that we went on to complete the contract; but before I left Mr. Robinson on the telephone we got into a discussion as to what amount would be put in this $1,500 mortgage for release of individual lots, should I sell any thereafter. He held out for $150; that is, he wanted me to put into this purchase-money mortgage the sum of $150 that I would

have to pay if I required a release of any of the individual lots. I told him that that was unreasonable and too high, the amount of the mortgage itself being $1,500, and being security for twenty-three lots it was out of all proportion. I held out for $75 and Mr. Robinson agreed that $100 would be pretty near the right figure, and it was that figure that was put in the contract. That about ended the conversation with Mr. Robinson, except that Mr. Carobine went back on the telephone and, after a minute or two, the conversation ended. That, in substance, is the telephone conversation of March 12, 1926, prior to the time the contract was executed.

Q. And the contract was executed? A. The contract was then executed, upon the terms that were agreed upon between Mr. Carobine and myself, and the releasing of individual lots for the payment of $100."

In substance complainant is corroborated by defendant Carobine (Case, p. 87, lines 33 to 40; p. 88, lines 1 to 9).

"Q. Who telephoned Mr. Robinson, you or Mr. Degheri? A. I did.

Q. Did you speak with him? A. I spoke to Mr. Robinson; yes, sir.

Q. And then Mr. Bernard Degheri also spoke with him? A. Yes, sir.

Q. Anything said by you, or either of the Degheris, at that time about putting in the contract itself some reference to what the terms of the release would be if released by Mr. Robinson's company? A. I don't remember, because Mr. Robinson and Mr. Degheri

talked it over and I thought they had agreed between themselves as to what was going to happen."

The witness Robinson of the defendant Fruit Company, also corroborates complainant (Case, p. 125, lines 12 to 30).

"Q. Did Mr. Bernard Degheri speak to you about the proposed contract on the occasion of any visit to his office? A. I don't believe he did. The only time he discussed the terms of the contract with me over the telephone, was apparently on the day on which the contract was executed.

Q. What did you say to him on that occasion? A. I was noncommittal. I discussed the terms with him, and I told him I wouldn't do anything without Carobine's approval; he was our client; he was our customer, and I would look out for his interest; and I called him up on the telephone, and I asked him what he thought of the proposal, and he said it was rather a low price, but he thought the best thing to do under the circumstances would be to let the property go at that price. I told him, under the circumstances I would interpose no objection."

The witness Robinson of the defendant Fruit Company, again corroborates complainant (Case, p. 144, lines 20 to 32).

"Q. Do you remember Mr. Carobine telephoning you on March 12, 1926, at your office in New York? A. I know he has telephoned to my office in New York a great number of times.

Q. Well, let's be specific; the date this contract was signed. A. I presume he did; I'm sure he did.

Q. Of course you do; you don't presume, but you are sure he did. Now, what was the subject of that conversation? A. He wanted to know if I would be agreeable to his selling the twenty-three lots for $4,000, $2500 cash and $1500 mortgage.

Q. What did you say to that? A. I said, so far as I could see, I would have no objection."

Further corroboration by the witness Robinson, of the defendant Fruit Company, appears as follows (Case, p. 145, lines 14 to 25):

"Q. Well, what was the consideration for your agreeing to release the lots?

Mr. Ockford: I object to that, upon the ground as immaterial, what his motive was. The testimony is he agreed to do it.

Q. Will you please answer the question? (Question read by the stenographer.) What was the consideration? A. The consideration was to help Carobine liquidate his affairs.

Q. Is that all? A. That was the principal thing."

It should not require further argument to show that appellants' contention, that there was no agreement between complainant and the defendant Fruit Company, for a release, is manifestly unwarranted.

This telephonic conversation of March 12th, 1926, took place from complainant's office; defendant Carobine, called and talked to Robinson, then

put complainant on to talk with him and then defendant Carobine, went on again to finish the conversation. What motive could complainant have had in talking with Robinson if not to arrange for the release of the premises to be sold to complainant? Complainant is a lawyer and knows the effect of having property encumbered by open mortgages and he must also be credited with knowing that the only way to get a part of a large tract of land, covered by mortgages, free therefrom, is to obtain a release thereof. That complainant did talk with Robinson and obtained from him the agreement of release is so conclusively demonstrated by the proofs above referred to, that we think there can be no longer any doubt on that question.

That an oral agreement to release premises from the operation of a mortgage will be enforced in equity, especially when coupled with demonstration, as in this case, is so well discussed in the opinion below that we do not deem it necessary to enlarge thereon (Case, p. 167, lines 38 to 41; p. 168, lines 1 to 11).

Throughout appellants' brief, repeated reference is made to an agreement to release as being an agreement between defendant Carobine, and defendant Fruit Company. The testimony referred to in appellants' brief and cited by them utterly fails to prove their contention. We respectfully submit that this contention of appellants is not supported by the testimony and therefore appellants' argument thereon is predicated upon a false premise. Before leaving this point, it may be well to say that appellants' brief has quoted therein, so much of complainant's testimony as they believe supports their contention that terms and conditions were exacted from complainant for the

release aforesaid. If appellants were sincere in their contention and possessed a desire to aid this Court in ascertaining the truth, they would have continued in the recital of complainant's testimony and they would have found on page 63, lines 11 to 33, of Case, the following:

"Q. What, if anything, was said in reference to reducing that release to written form? A. Nothing was said. I thought I was dealing with gentlemen. The only thing that entered into my mind was to get the amount put into the release for the individual lots and release them from the mortgage, which was $100, as I said before.

Q. Was there anything said by you or Carobine that would make it necessary to reduce that agreement to some written form? A. No. As I told you before, Mr. Ockford, it didn't enter my mind at all and I didn't mention it that it should be reduced to some written form. I took his word over the telephone that he would do just as he agreed.

Q. Of course, at that time you had no knowledge as to what arrangement existed between Mr. Carobine and Mr. Robinson in respect to a release of this property? A. Except that before I telephoned Mr. Robinson, as I said before, Mr. Carobine told me that he ought to do that, make arrangement to release the lots to be sold.

Q. You weren't informed as to the terms and conditions? A. No, sir; I was not."

It is respectfully urged that any agreement, if one there was, between the defendant Fruit Company and the defendant Carobine, relating to the

portion of the purchase money that was to go to the Fruit Company for a release, in no way binds complainant. The only agreement between complainant and defendant Fruit Company, was to release the 23 lots from its mortgages and that was all that complainant was interested in. It will be recalled, that it was only after the agreement to release, made by complainant with defendant Fruit Company, that complainant relying thereon, went on to complete and execute the contract of March 12th, 1926.

That there was no agreement and understanding, even between the Fruit Company and Carobine, that all the cash in the transaction was to be turned over to the Fruit Company, and that this alleged understanding was hit upon after the testimony was all in and the case closed, is demonstrated by the failure of defendants to charge such an agreement in their answers; and further by an affidavit, dated October 11th, 1926, made by defendant Carobine, used in the Court below on motion to strike out answers. In paragraph 7 of said affidavit, defendant Carobine says:

"7. Before the contract was signed I called Mr. Robinson on the telephone from Degheri's office and told him about the contract and I also put Mr. Bernard Degheri on the telephone to talk to Mr. Robinson. It is true that Mr. Robinson agreed to release the lots from the mortgage, provided a purchase money mortgage was signed to his company and a part of the cash consideration turned over in addition."

This affidavit was made at a time when there was no idea of how the case would be decided and when the appellants relied upon entirely different

lines of defense. The issue now urged was never before the Court below either before or at the time of the hearing, but was urged only after the Court indicated its views, as has already been pointed out. The affidavit of October 11th, 1926, of the defendant Carobine, above referred to, the testimony indicates, was made in the office of the defendant Fruit Company, in the presence of Mr. Robinson and Mr. Ockford, as will be found by the following testimony of the defendant Carobine (Case, p. 103, lines 28 to 40; p. 104, lines 1 to 26; and p. 121, lines 23 to 32).

"Q. Now, Mr. Carobine, your counsel has just told us that you were the one who dictated this affidavit. A. Yes, sir.

Q. Where was this affidavit dictated? A. in Mr. Robinson's office.

Q. Did you consult Mr. Ockford before you dictated the affidavit? A. Yes.

Q. You did? A. Yes.

Q. Did you discuss the matters that you were going to put in the affidavit? A. He asked me to write what I knew about it—tell what I knew about it.

Q. And you made a writing in longhand, did you? A. Yes, sir; I dictated it to Mr. Robinson's stenographer.

Q. By the way, Mr. Robinson is an attorney in New York City? A. I don't know whether he is or not.

Q. Now, was this the affidavit that came out of the machine of the stenographer in Mr. Robinson's office, or a copy of it, I would say? A. That is a copy of it.

Q. There was no change made in this affidavit when it got to your attorney, Mr. Ockford? A. No.

Q. Was there anyone else present at Mr. Robinson's office when you drew this affidavit, besides you and Mr. Robinson? A. Mr. Ockford was present.

Q. And Mr. Ockford was also present in Mr. Robinson's office? A. Yes, sir.

Q. As you dictated it to the stenographer he heard you dictate it, did he? A. Yes, sir.

Q. Did he offer any suggestions? A. Not at all. I simply told my story.

Q. And you dictated your story and there was no change made? A. No, sir.

Q. Now, just one more question: Would you be good enough to read paragraph 7 of this affidavit which you made and which I referred to before (handing paper to witness). That is an affidavit made by Thomas R. Carobine on the application to strike out the answer, verified October 11th? A. That's right.

Q. You say there 'if the mortgage was signed to the company'; was that signed? A. I meant 'assigned.' "

Appellants further contend that the contract to sell of March 12th, 1926, is impossible of performance. We cannot subscribe to this view. Assuming, but not conceding appellants' claim, we submit that any alleged impossibility was created by the appellants with the aid of the defendant, Starace and the Alps Realty Company and therefore, appellants should not complain now. Complainant has done nothing to make performance impossible and if the subsequent facts are involved, that is the fault of the several defendants, only.

The defendant Carobine does not lend support to his own contention. He states that the reason

for his refusal to perform his contract of March 12th, 1926, is:

> "The only reason I didn't want to convey is because of the misrepresentation about these assessments" (Case, p. 110, lines 10 to 12).

The reason ascribed is amusing, but none the less interesting, as it indicates that appellants have endeavored to grasp at every straw to defeat complainant of his bargain. It is readily seen that defendant Carobine does not believe that the contract is impossible of performance, and the subsequent developments bear this out.

To begin with, we have defendant Carobine in the position of a customer or client of the defendant Fruit Company. Robinson of the Fruit Company says:

> "He was our client; he was our customer, and I would look out for his interests" (Case, p. 125, lines 21 to 23).

It follows when later Carobine desired to get from under his contract of March 12th, 1926, with complainant, the same desire to help Carobine that Robinson had on March 12th, 1926, continued; even to the extent of bringing about the defeat of complainant's claim under his contract. When complainant threatened defendant Carobine with suit, Carobine went to one Verro, the president of the Alps Realty Company, who employed Carlo D. Cella, a member of the Bar, to prepare a deed from Carobine to the Alps Realty Company for 84 lots still in Carobine's name; this deed not including any of the 23 lots contracted to be conveyed to complainant.

As much of the details of this transaction as the defendant Carobine wished to give are found on pages 113, lines 36 to 40; 114, 115, 116 and 117, of the Case. That defendant Carobine did not disclose all the details of this transaction is evidenced from his testimony (Case, p. 118, lines 1 to 23). The details of this transaction were finally obtained by the trial court upon pressing the defendant Carobine, and the Court was constrained to comment thereon, as will appear (Case, p, 121, lines 33 to 40; p. 122, lines 1 to 30).

"By the Court:

> Q. Mr. Carobine, I don't know whether you realize what a peculiar position you leave your testimony in, in regard to your arrangement when you conveyed title to those eighty-four lots to the Alps Realty Company. It is usually a very questionable transaction of a man pressed by his creditors who disposes of all or a considerable portion of his property without consideration and without any explanation of the consideration; you realize that yourself? A. Yes, I was in pretty bad condition then, your Honor, and the assessments were due and the taxes were due, and this attachment was on the property and due, and if I didn't pay the attachment they would foreclose and sell the lots themselves; and so I figured I would give it to Mr. Verro and he would take care of everything and charge me a reasonable amount for anything he expended, and we would have some agreement later on, and if he sold the lots and there was anything coming to me I would get it, and if

there wasn't, I would let it stand as it was. We drew no papers of any kind.

Q. Did you have that general understanding with him orally? A. Yes.

Q. Was there anything said about you ever redeeming the property? A. I told him if I could get hold of enough money to give his money back I would pay him whatever he expended, with interest, and I would take them back.

Q. Did he agree to that? A. Yes, he is ready to take his money now."

The witness Verro openly and frankly admitted his part in this transaction as will appear by reference to all of his testimony (Case, p. 150, etc.).

In furtherance of the arrangement between the several defendants, Verro proceeded to pay the amount due on the attachment judgment, having an assignment thereof taken in the name of defendant Starace and to negotiate with the defendant Fruit Company for an assignment of its mortgages, going to the extent of entering into a written agreement for such assignment and paying the Fruit Company $2,500 on account. The details of this transaction are given by Robinson of the defendant Fruit Company (Case, p. 138, lines 21 to 40; p. 139, lines 1 and 2).

"Q. If I were to offer you, or some other person was to offer you, either on my behalf or on the behalf of anybody else, to buy your mortgages, you would readily give them an assignment, wouldn't you? A. Yes.

Q. Upon the payment of principal and interest? A. With this exception, Mr. Degheri: I have an agreement with the Alps; that may complicate the situation somewhat

Q. Let's hear about that agreement; what is it? A. That I would give an assignment of the mortgages to them. I got $2500 on account.

Q. You have already received $2500 on account? A. Yes.

Q. When did you get that, Mr. Robinson? A. I got that about the time that the Alps went into the agreement with Carobine, or shortly after that.

Q. So you are, in a way, by agreement with the Alps Realty Company, bound to assign your mortgage to them? A. I presume so.

Q. Well, isn't that the fact? A. Surely.

Q. And is that agreement a verbal agreement or in writing? A. In writing."

It is not denied that when these steps were taken all the parties had knowledge of the rights of complainant. The contract of March 12th, 1926, between complainant and Carobine was recorded May 7th, 1926 (Case, p. 54, lines 20 to 22). The attachment judgment was paid by money of the Alps Realty Company and the Alps Realty Company paid $854 for taxes and assessments (Case, p. 150, lines 30 to 40; p. 151, lines 20 to 40). And yet the Alps Realty Company, in reality Verro, a friend of Carobine, had an assignment of the attachment judgment taken, as has been pointed out, in the name of defendant Starace, an officer of the Alps Realty Company, for no other purpose than to keep it open and to place in the Court's way an imaginary obstacle to performance.

Assuming the motives that actuated the transactions between Carobine and Verro, and Fruit Company and Verro, were honest, why did Verro

stop in his assistance of Carobine after paying the attachment judgment, taxes and assessments and making the agreement for the purchase of the Fruit Company's mortgage, and advancing to the Fruit Company the sum of $2,500? The reason must be obvious.

In light of this condition, what has the Fruit Company to complain about? What has Carobine to complain about? What has Starace to complain about? Starace is none other than the Alps Realty Company, and the Alps Realty Company is holding for Carobine, and so far as the Fruit Company is concerned we find them under an agreement to sell their mortgages to the Alps Realty Company and thus receive the amount due it. The Fruit Company has been paid $2,500, so that the Fruit Company is now, in fact, the Alps Realty Company. All of these parties entered into their respective agreements and transactions with full knowledge and notice of complainant's rights under his contract of March 12th, 1926. The cash is now really going to the Alps Realty Company which, under the agreement it has with the Fruit Company, is now the equitable owner of the two mortgages and the actual owner of the attachment judgment. The money to be paid by complainant ultimately reaches the coffers of the one now entitled to it, namely, the Alps Realty Company.

The final point relied upon by appellants is that the trial Court directed performance of an agreement that the parties did not make. In support of this contention appellants quote a portion of the opinion of the trial Court. Manifestly, in a case of this nature, with so many complexities and involved facts, it is eminently unfair to quote but a small portion of the trial Court's opinion in

support of such a contention. We do not concede that there is any merit to appellants' point, but assuming that the point is well taken, how can appellants hope to benefit thereby? Whatever doubt the portion of the opinion quoted created in appellants' minds, surely that doubt should be removed upon examination of the trial Court's supplemental memorandum herein (Case, p. 170, etc.).

> "It will be recalled that, after reading the opinion in Degheri vs. Carobine, Mr. Ockford brought to my attention an error into which he believed I had fallen in deciding the case. As I recall his explanation, it was to the effect that there was no proof that Mr. Robinson of the Fruit & Produce Acceptance Corporation ever agreed to release the 23 lots purchased by Mr. Degheri from the lien of the then existing mortgages, and, as I understood Mr. Ockford, he thought the only proof to that general effect related to releases of individual lots from the lien of the $1,500 purchase-money mortgage to be given Carobine by the complainant and then assigned to the Fruit & Produce Acceptance Corporation.
>
> In view of the fact that much water had gone under the bridges between the time of the final hearing and Mr. Ockford calling to my attention what he considered an inadvertent error into which I had fallen, I secured a transcript of so much of the testimony of Mr. Degheri as dealt with the fateful conversation with Robinson by telephone, and that transcript shows the following language:
>
> 'I then told Mr. Robinson exactly what Mr. Carobine had told me, that I was about

to purchase 23 of these lots and I wanted to be sure before I entered into the contract that the Fruit & Produce Acceptance Corporation would be agreeable to release these lots *from the lien of those two mortgages.*'

The two mortgages to which reference must have been made were those for $15,000 and $3,000, respectively, which the witness had been talking about only a minute or two before using the language just quoted. At the foot of the same page whereon the quoted language ends the second mentioned mortgage was dealt with by Mr. Degheri in a manner that admits of only one contruction, because without again mentioning that mortgage in any of his intervening testimony, he says that Robinson made some admission 'as to this $3,000 mortgage.' Almost immediately thereafter he says, with regard to his conversation, 'It was then, upon Mr. Robinson's agreement to release the *mortgages* that we went on to complete the contract' (in both quotations the italics are mine).

From the language quoted I am at a loss to understand how the complainant's testimony could possibly be understood to deal with anything except the two mortgages then held by the Fruit & Produce Acceptance Corporation which were liens on the entire 107 lots out of which the 23 purchased by the complainant were to be carved.''

It is obvious that the trial Court found, and properly so, that there was an agreement to release between complainant and defendant Fruit Company, and that this agreement to release was

unfettered by any terms and conditions. How the Court saw fit to distribute the purchase price among the several defendants is of no concern to complainant, but there is ample testimony throughout the whole case to warrant the Court's action. The Court had before it all the parties to be affected by the decree and, manifestly, the equities were all in favor of complainant, as will be seen by reference to the opinion of the Court of Chancery (Case, p. 169, lines 16 to 31).

''It is true that this case presents more complications than usually appear in a specific performance suit where the discretion of the court is exercised in favor of the complainant. However, I do not understand that this is any reason for refusing to do justice, where none of the legal rights of any of the parties are infringed. For the reasons I have already expressed, I do not think that any of the rules which operate against compliance with the prayer of a bill in a case of this sort exist herein, and it seems to me that the defendant Carobine and The Fruit & Produce Acceptance Corporation will be compelled to do nothing more than they are equitably bound to do, while the defendant Starace, as already said, will be bound to do nothing more than he has voluntarily agreed to do.''

We are unable to find that the case of Brisbane vs. Sullivan, 86 N. J. E., 411, cited by appellants, has any application to the facts in this case. The Brisbane case may be immediately distinguished from the instant case in that in the instant case all the parties to be reached by the Court's decree are before it. This was not the situation in the Brisbane case.

Mr. Justice Garrison, speaking for the Court of Errors and Appeals, in Page vs. Martin, 46 N. J. E., 585, said:

> "That relief rests not upon what the court must do but rather what, in view of all the circumstances, it ought to do. * * * In every case of this character the court is chiefly concerned with the equities of the parties before it."

It is respectfully submitted that the decree of the Court of Chancery should be affirmed.

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