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BILL.

(Filed Oct. 8, 1926.)

IN CHANCERY OF NEW JERSEY.

*Honorable Edwin Robert Walker, Chancellor of the  
State of New Jersey:*

Complainants, Charles Van Buren and Mable S. 10  
Van Buren, his wife, of the Borough of Merchant-  
ville, County of Camden, and State of New Jersey,  
respectfully show that:

1. On the twentieth day of October, 1925, com-  
plainants, Charles Van Buren and Mable S. Van  
Buren, his wife, were seized in fee simple of all that  
certain lot or tract of land and premises, lying and  
being in the Borough of Merchantville aforesaid 20  
more particularly described as follows: BEGIN-  
NING in the Northwesterly line of Park Avenue at  
a distance of 151.82 feet Northeastwardly from the  
Northwest corner of Maple Avenue and Park Ave-  
nue, said point being a corner to lot #3 as shown  
on plan of lots of the estate of Alexander G. Cat-  
tell, deceased, and running thence (1) North along  
the West line of lots #3 and parallel with Centre  
Street 290.52 feet to a point in the South line of  
land now or late of Collins and Pancoast, thence 30  
(2) East and parallel with the Camden and Burling-  
ton County Railroad 52.35 feet to line of land now  
or late of Marie Fuch's, thence (3) South along  
said Fuch's land and parallel with Centre Street  
261.12 feet to point in the Northwesterly line of  
Park Avenue, thence (4) Southwest along the North-

west line of Park Avenue 60 feet to place of beginning.

BEING Lot #3.

2. On the date last mentioned the complainants entered into a certain agreement, in writing, with Jacob Fine, wherein and whereby complainants agreed to convey said lands and premises by a deed with special warranty, on or before April 1, 1926, to the said Jacob Fine, and the said Jacob Fine agreed to pay to the complainants a purchase price of \$58,000.00 by a payment of \$1500.00 at or before the execution of the said agreement, and a further payment of \$1500.00 on October 23, 1925, and a further payment of \$1000.00 within thirty days from the date of the said agreement, and a further payment of \$1000.00 within sixty days of the said agreement, and the balance to be secured by a first mortgage of \$20,000.00 now standing against the said premises, payable within one year from the first day of March, 1926, and a second mortgage of \$10,000.00 to be placed against the said property for a period of one year from April 1, 1926, and a payment of \$23,000.00 in cash. The said mortgages to bear six per cent interest per annum, and the said deed to be delivered at the office of Frank Voigt, Esq., Seventh and Market Streets, Camden, New Jersey, on April 1, 1926. A true copy of the said written agreement is annexed hereto and made a part hereof.

3. The said Jacob Fine paid to the complainants instalments amounting to the total sum of \$5,000.00 in accordance with the terms of said agreement in writing.

4. On April 1, 1926, the said Jacob Fine was not

prepared to carry out the said contract, and offered to pay the complainants the sum of \$500.00 additional over and above the purchase price if the complainants would postpone the said settlement to May 1, 1926, to which offer the complainants agreed.

5. On May 1, 1926, complainants duly attended the office of Frank Voigt, Esq., at Seventh and Market Streets, Camden, New Jersey, with a special warranty deed conveying the land and premises herein referred to to the said Jacob Fine, duly executed and acknowledged by the complainants, for the purpose of delivering the said deed to the said Jacob Fine, upon performance by him of his said several undertakings. The defendant, however, failed to appear at the said time and place for the purpose of making final settlement; nor has the defendant ever appeared to carry out the terms of the agreement, nor tendered the purchase money specified therein nor the said additional sum of \$500.00.

6. The complainants have ever been ready and willing, and now tender themselves ready and willing to perform their part of the agreement, and on being paid the said purchase money together with \$500.00, plus interest on said sums, to convey the said lands and premises to the said Jacob Fine by a special warranty deed duly executed and acknowledged by the complainants.

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

1. That Jacob Fine, who is the defendant in this suit, may answer this bill of complaint, and each statement therein made.

2. That the said Jacob Fine may be compelled by decree of this Court specifically to perform the said agreement with the complainants, and to pay the complainants the remainder of the said purchase money as in and by the said agreement provided, with interest from the time that the said purchase money ought to have been paid, together with \$500.00, and to execute, acknowledge and deliver the mortgage required by said agreement, upon the de-  
 10 livery of a special warranty deed to defendant, executed by the complainants as in the said agreement provided.

3. That in case the said Jacob Fine should, within the time limited by this Court, fail and neglect upon the tender of said deed to perform the said agreement as aforesaid, then and in that event the balance of said purchase money together with the said additional sum of \$500.00 and interest and costs,  
 20 may be and become a lien upon the said lands and premises in favor of the complainants, and that the said lands and premises may be sold under direction of this Court for the satisfaction of such lien, and in case deficiency should arise upon the said sale, that the said defendant may have an order by this Court to pay the said deficiency together with interest and costs, and that complainants may have such other and further relief as may be just.

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

T. PHILLIPS BROWN,  
 LOUIS B. LEDUC,  
*Solicitors for and of Counsel  
 with Complainants.*

THIS AGREEMENT, made the twentieth day of October, A. D. 1925.

BETWEEN Charles Van Buren, of the Borough of Merchantville, County of Camden, and State of New Jersey, and Mable S., his wife, of the first part, hereinafter called the "SELLERS" & Jacob Fine, of the City and County of Camden, and State of New Jersey, party of the second part, hereinafter called the "BUYER."

WITNESSETH, That the "SELLERS" agrees to  
 10 sell and convey and the "BUYER" agrees to buy all that certain lot, tract, or parcel of land and premises situate in the Borough of Merchantville, County of Camden, and State of New Jersey, more particularly described as follows:

BEING known as Merchantville Garage, 21 West Park Ave., Merchantville, together with the stock and fixtures now on said premises.

for the price or sum of FIFTY-EIGHT THOUSAND dollars under and subject to the following  
 20 terms and conditions.

1. A first payment of FIFTEEN HUNDRED Dollars receipt of which is hereby acknowledged by the "SELLERS."

2. The balance of the purchase price shall be paid in the following manner:

On October 23, 1925, \$1500.00 shall be paid, \$1000.00 within thirty days from the date hereof; \$1000.00 within sixty days from the date hereof; and the balance to be secured by a first mortgage of  
 30 \$20,000.00 now standing against said premises, payable within one year from the first day of March, 1926; and a second mortgage of \$10,000.00 to be placed against said premises for a period of one year from April 1, 1926; and the payment of \$23,000.00 in cash.

at the time of final settlement, which shall be made at the office of Frank Voigt, North-west corner of Seventh and Market Streets, Camden, New Jersey, on or before April 1, 1926, or the deposits of five thousand dollars made herewith, at the option of the "SELLERS," may be applied on account of the purchase price or be forfeited as liquidated damages to the "SELLERS," and not as a penalty, provided that the necessary title searches can be  
 10 obtained from any first class New Jersey title Company by that date. Should there be any delay, not the fault of the "BUYER" in the procuring of such searches, the time for the final settlement shall extend until such searches can be obtained.

3. The title to the premises shall be free and clear of all incumbrances including municipal liens and assessments, except municipal improvements in the course of construction and not assessed, obvious easements, usual restrictions running with  
 20 the land ..... and shall be a marketable title, and the "SELLERS" shall tender a special warranty deed conveying such title at the time of the final settlement, or in the event that such title cannot be as above, then this deposit shall be returned to the "BUYER."

4. All adjustments shall be made as of ..... and possession shall be given the "BUYER."

30 5. The "BUYER" shall pay for searches and all other expenses excepting the preparation of the deed and the necessary revenue stamps attached thereto, which shall be paid for by the "SELLERS."

6. This agreement shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

7. Time is the essence of this agreement.

8. This contract includes all fixtures and appurtenances permanently attached to the building or buildings on the land herein described and also specifically the following items:

9. It is agreed by and between the parties hereto that this agreement shall not be recorded, and the Register of Deeds of Camden County is hereby authorized to refuse to record the same.

IN WITNESS WHEREOF, The parties hereto have  
 set their hands and seals the day and year first above  
 written. 10

Charles Van Buren L. S.  
 Mabel S. Van Buren L. S.  
 J. Fine L. S.  
 ..... L. S.

Signed, sealed and Delivered )

in the Presence of )

Frank Voigt )

20

30

AMENDED ANSWER.

(Filed April 1, 1927.)

IN CHANCERY OF NEW JERSEY.

10 Between  
 CHARLES VAN BUREN, *et al*,  
           Complainants,  
           and  
 JACOB FINE,  
           Defendant.

  } On Bill, &c.  
   } Amended Answer.

20 The defendant hereby amends his answer filed in  
 the above cause by having the same read as follows:  
 Defendant, Jacob Fine, of the City and County of  
 Camden, State of New Jersey, says:

1. That he has no knowledge or information suffi-  
 cient to form a belief as to the allegations of para-  
 graph one of the bill.

30 2. Defendant admits the execution of an alleged  
 agreement, a copy of which is annexed to the com-  
 plainants' bill.

3. Defendant admits the payment to the complain-  
 ants of the sum of \$5,000.00.

4. Defendant denies paragraph four of the bill  
 of complaint.

5. Defendant admits that he did not attend at the  
 office of Frank Voigt, Esquire, on May 1, 1926; and  
 that he did not tender the purchase money specified  
 in the alleged agreement or any other sum; but as  
 to the balance of paragraph five, defendant has no  
 knowledge or information upon which to form a  
 belief thereof.

6. Defendant has no knowledge or information  
 upon which to form a belief of paragraph six of the 10  
 bill.

FIRST DEFENSE.

1. On April 28, 1926, the complainants instituted  
 an action in the Supreme Court of the State of New  
 Jersey, based upon a breach of the same alleged  
 agreement as is sought to be enforced in this suit,  
 claiming damages from this defendant for the non- 20  
 performance thereof.

2. By reason of the institution of said action in  
 the said New Jersey Supreme Court, complainants  
 irrevocably elected to pursue their legal remedy, and  
 are precluded from seeking the relief prayed for in  
 this suit.

SECOND DEFENSE.

1. The said alleged or pretended agreement is  
 void under the Statute of Frauds of the State of  
 New Jersey for the reason that it is vague, indefin-  
 ite, uncertain and contradictory as to the time of  
 settlement, such time being made indefinitely con-

tingent upon the procuring of searches and further that time is stated to be in the contract as the essence of the contract, when, for the reasons aforesaid, no time for performance is definitely fixed; and further that the said contract does not state by whom the said searches are to be procured; and further that the contract does not state by whom the second mortgage of \$10,000.00 was to be created or what the terms of the said second mortgage were to be.

THIRD DEFENSE.

1. The said alleged agreement is incapable of specific enforcement against this defendant because it is vague, indefinite, uncertain and contradictory as to the time of settlement, such time being made indefinitely contingent upon the procuring of searches; and further that time is stated to be in the contract as the essence of the contract, when, for the reasons aforesaid, no time for performance is definitely fixed; and further that the said contract does not state by whom the said searches are to be procured; and further that the contract does not state by whom the second mortgage of \$10,000.00 was to be created or what the terms of the said second mortgage were to be.

30

FOURTH DEFENSE.

1. The said premises were subject to easements for the erection and maintenance of electric light, telegraph and telephone poles and wires along Park Avenue in front of said premises, which easements

were not obvious; and complainants are, therefore, unable to transfer a title, free and clear of all encumbrances, as provided for by the said alleged agreement.

FIFTH DEFENSE.

1. Prior to the execution of the said alleged agreement, the complainants, through their agent, for the purpose of procuring defendant to enter into the said agreement, falsely and fraudulently represented to defendant that complainants were doing a gross yearly business of not less than \$60,000.00 from the garage business, which was being conducted upon the said premises; and defendant believing the said false and fraudulent representations, and relying thereon, executed the said agreement.

20

2. That after the execution of the said agreement defendant discovered that the said representations were false and fraudulent, and that complainants were doing a gross yearly business of approximately \$7,000.00.

3. By reason thereof complainants do not come into this Court asking for relief with clean hands.

30

COUNTER-CLAIM.

By way of counter-claim exhibited against the complainants, defendant says:

1. That he adopts the allegations of the first to

fifth defenses, inclusive, as part of this counter-claim, so far as the same are pertinent hereto.

Defendant is without remedy at law, and therefore prays:

I.

10 That the complainants may answer this counter-claim and each statement contained herein.

II.

That the said alleged or pretended agreement may be set aside, cancelled and declared null and void for the reasons aforesaid.

III.

20

That the complainants may be decreed by this Honorable Court to return the said sum of \$5,000.00 paid by him to the complainants as a deposit on account of the purchase of the premises described in the bill of complaint, together with interest thereon.

IV.

30

That this defendant may be decreed to have a lien upon the said lands and premises for the sum of \$5,000.00, paid by him to the complainants as aforesaid; and that defendant may have proper process issuing out of this Honorable Court for the purpose of enforcing such lien.

AARON HEINE,  
*Solicitor for Defendant.*

[ENDORSED]

I hereby consent to the filing of the foregoing amended answer.

T. Phillips Brown,  
*Solicitor for Complainants.*

10  
REPLY AND ANSWER TO COUNTER-CLAIM.

(Filed April 7, 1927.)

IN CHANCERY OF NEW JERSEY.

Between  
CHARLES VAN BUREN, *et al,* }  
Complainants, }  
and }  
JACOB FINE, }  
Defendant. }  
On Bill, &c. 20  
Reply and Answer to  
Counter-Claim.

30  
Complainants' reply to the amended answer filed by the defendant in the above-entitled cause, is as follows:

30  
Complainants, Charles Van Buren and Mable S. Van Buren, his wife, residing in the Borough of Merchantville, County of Camden, and State of New Jersey, hereby join issue in the allegations contained in the six separate paragraphs of defendant's answer.

ANSWER TO FIRST DEFENSE.

1. Complainants admit that an action was commenced in the New Jersey Supreme Court, between the above parties, based, as alleged, upon a breach of the agreement herein sought to be enforced.

10 2. Complainants submitted to a voluntary non-suit in said action, in the New Jersey Supreme Court, before the same was tried, and before any action, or adjudication, was made in said action, and complainants deny that they thus irrevocably elected to pursue their legal remedy, and deny also that they are at this time precluded from seeking the relief prayed for in the bill of complaint filed in this cause.

20 ANSWER TO SECOND DEFENSE.

Complaints, herein, deny the allegations contained in the second defense of defendant's answer, and allege that said agreement is neither vague, indefinite, uncertain, nor contradictory as to the time of settlement.

ANSWER TO THIRD DEFENSE.

30 Complainants deny the allegations contained in the third defense of defendant's answer.

ANSWER TO FOURTH DEFENSE.

Complainants deny that the easements, if any, re-

ferred to in the fourth separate defense, preclude them from conveying a title free and clear of encumbrances, as contemplated in said agreement.

ANSWER TO FIFTH DEFENSE.

Complainants deny the allegations contained in the fifth defense of the answer filed herein.

10

ANSWER TO COUNTER-CLAIM.

Complainants deny the allegations contained in the counter-claim filed herein.

T. PHILLIPS BROWN,  
*Attorney for Complainants.*

20

30

AMENDMENT TO REPLY.

(Filed May 20, 1927.)

IN CHANCERY OF NEW JERSEY.

10 Between  
 CHARLES VAN BUREN, *et al*,  
           Complainants,  
           and  
 JACOB FINE,  
           Defendant.

} On Bill, &c.  
 } Amendment to Reply.

20 Application being made on the part of the complainants to amend the reply filed in the above cause and sufficient ground appearing therefor:

It is, on this 20th day of May, 1927, on motion of T. Phillips Brown, solicitor of the complainants, ordered that the reply and answer to counter-claim, filed in the above cause, be amended by striking out the answer to the first defense and substituting therefor the following:

30 1. Complainants admit that on or about May 1, 1926, a summons and complaint, of which the following is a true copy, were served upon the defendant: The State of New Jersey to Jacob Fine:

(Seal) You are summoned to answer the annexed complaint of Charles Van Buren, and Mabel S. Van Buren in an action at law in the New Jersey Supreme Court at Trenton.

And take notice that unless you file your answer to said complaint with the Clerk of the said Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, William S. Gummere, Chief Justice of the Supreme Court at Trenton, this twenty-eighth day of April, nineteen hundred and twenty-six.

Charles F. Wise, 10  
 Clerk.

T. Phillips Brown,  
 Attorney.

NEW JERSEY SUPREME COURT.  
 CAMDEN COUNTY.

Charles Van Buren,  
 and Mabel S. Van  
 Buren,                    } Action at Law. 20  
                           } Plaintiffs,  
                           }                    } Complaint.  
                           }                    }  
                           } v.  
 Jacob Fine,  
 Defendant.             }

Plaintiffs, residing in the Borough of Merchantville, County of Camden and State of New Jersey, say that:

1. On or about the twentieth day of October, 1925, they entered into a certain contract with the defendant for the purchase of a property known as the Merchantville Garage, 21 West Park Avenue, Merchantville, N. J., together with stock and fixtures then of said premises, for the purchase price of \$58,000.00, final settlement to be made not later than April 1, 1926. 30

2. A copy of the contract is attached hereto and made a part of this complaint.

This agreement, made the Twentieth day of October, A. D. 1925,

Between: Charles Van Buren, of the Borough of Merchantville, County of Camden, and State of New Jersey, and Mabel S., his wife, of the first part hereinafter called the "SELLERS," and JACOB FINE, of the City and County of Camden, and State of New Jersey, party of the second part, hereinafter called the "BUYER." Witnesseth, That the "SELLERS" agrees to sell and convey and the "BUYER" agrees to buy all that certain lot, tract, or parcel of land and premises situate in the Borough of Merchantville, County of Camden and State of New Jersey, more particularly described as follows: BEING known as Merchantville Garage, 21 West Park Avenue, Merchantville, together with the stock and fixtures now on said premises

10

20

for the price or sum of FIFTY-EIGHT THOUSAND Dollars, under and subject to the following terms and conditions:

1. A first payment of FIFTEEN HUNDRED Dollars, receipt of which is hereby acknowledged by the "SELLERS."

2. The balance of the purchase price shall be paid in the following manner:

30

On October 23, 1925, \$1500.00 shall be paid; \$1000.00 within thirty days from the date hereof; \$1000.00 within sixty days from the date hereof; and the balance to be secured by a first mortgage of \$20,000.00 now standing against said premises, payable within one year from the first day of March, 1926; and a sec-

ond mortgage of \$10,000.00 to be placed against said premises for a period of one year from April 1, 1926; and the payment of \$23,000.00 in cash.

at the time of final settlement, which shall be made at the office of Frank Voigt, Northwest Corner of Seventh and Market Streets, Camden, New Jersey, on or before April 1, 1926, or the deposits of five thousand dollars made herewith, at the option of the "SELLERS," may be applied on account of the purchase price or be forfeited as liquidated damages to the "SELLERS," and not as penalty provided that the necessary title searched can be obtained from any first-class New Jersey title company by that date. Should there by any delay, not the fault of the "BUYER" in the procuring of such searches, the time for the final settlement shall extend until such searches can be obtained.

10

3. The title to the premises shall be free and clear of all incumbrances, including municipal liens and assessments, except municipal improvements in the course of construction and not assessed, obvious easements, usual restrictions running with the land..... and shall be a marketable title, and the "SELLERS" shall tender a special warranty deed conveying such title at the time of the final settlement, or in the event that such title cannot be as above, then this deposit shall be returned to the "BUYER."

20

30

4. All adjustments shall be made as of..... and possession shall be given the "BUYER".....

5. The "BUYER" shall pay for searches and all other expenses, excepting the prepara-

tion of the deed and the necessary revenue stamps attached thereto, which shall be paid for by the "SELLERS."

6. This agreement shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

7. Time is the essence of this agreement.

10 8. This contract includes all fixtures and appurtenances permanently attached to the building or buildings on the land herein described and also specifically the following items:

9. It is agreed by and between the parties hereto that this agreement shall not be recorded, and the Register of Deeds of Camden County is hereby authorized to refuse to record the same.

IN Witness Whereof, The parties hereto have set their hands and seals the day and year first above written.

20 Charles Van Buren. L. S.  
..... L. S.  
J. Fine. L. S.  
..... L. S.

Signed, Sealed and Delivered  
in the Presence of

30 3. Although the plaintiffs have ever since and are still ready, willing and able to tender a good, legal and sufficient special warranty deed, the defendant has ever since and still refuses to perform the contract.

Therefore, the plaintiffs bring this action and demand as damages the sum of \$53,000.00 together with interest and cost of suit.

T. Phillips Brown,  
Attorney for Plaintiff.

2. While said summons and complaint were supposed to have been issued out of the Supreme Court of New Jersey, as a fact the summons were signed by Charles F. Wise, the Clerk of Camden County, and were never filed in the office of the Supreme Court Clerk.

3. Subsequently, the defendant, Jacob Fine, gave notice of a motion before Honorable Frank S. Katzenbach, to strike out said complaint on the ground that the same did not disclose a good cause of action in that it did not set forth any damages arising from the alleged breach of the contract set forth in the complaint filed therein. 10

4. After the notice to dismiss the complaint was given, the plaintiffs in said action at law submitted to a voluntary non-suit, and the said action at law was dismissed and terminated.

5. Complainants never authorized the institution of any proceedings to be brought against Fine in any court based upon a claim for damages for a breach for the non-performance of the contract referred to in the amended answer of the defendant. 20

6. The instructions given by the complainants to their attorney were to start proceedings against Fine to compel him to perform the terms of the contract and to take the property sold thereby to him and never knew that the suit to recover damages was instituted until after the same was started. 30

7. Complainants deny that by reason of the facts stated herein they irrevocably elected to pursue their legal remedy and are now precluded from seeking the relief prayed for in the above-entitled cause.

T. PHILLIPS BROWN,  
Attorney for Complainant.

[ENDORSED]

We consent to the filing of the above order, but reserve the right to make any motion addressed thereto or to the amendment comprehended thereby.

Aaron Heine,  
Solicitor of Defendant.

10

FURTHER AMENDMENT TO ANSWER.

(Filed July 11, 1927.)

IN CHANCERY OF NEW JERSEY.

20

Between  
CHARLES VAN BUREN, *et al*,  
Complainants,  
and  
JACOB FINE,  
Defendant.

On Bill, &c.  
Further Amendment  
to Answer.

30

Defendant hereby further amends his answer filed in the above cause, by adding the following defenses:

SIXTH DEFENSE.

1. Complainants are in gross laches in not asserting their alleged or pretended rights under the alleged or pretended agreement for more than six months after the time for the performance thereof.

2. By reason thereof, complainants have no standing in this court to ask for specific performance of such alleged or pretended agreement.

AARON HEINE.

REPLY TO FURTHER AMENDMENT  
TO ANSWER.

(Filed July 11, 1927.)

10

IN CHANCERY OF NEW JERSEY.

Between  
CHARLES VAN BUREN, *et ux*,  
Complainants,  
and  
JACOB FINE,  
Defendant.

On Bill, &c.  
Reply to Further  
Amendment to  
Answer.

20

The complainants deny the allegations in the further amendment to the defendant's answer.

T. PHILLIPS BROWN,  
Solicitor for Complainants.

30

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

10 Between  
 CHARLES VAN BUREN and  
 MABEL S. VAN BUREN,  
 his wife, }  
 Complainants, } On Bill, &c.  
 and }  
 JACOB FINE, }  
 Defendant. }

20 July 11-13, 1927.

LEAMING, V. C.

30 LEWIS STARR, Esq., for complainants.  
 D. TRUEMAN STACKHOUSE, Esq., and AARON HEINE,  
 Esq., for defendant.

The Court: Judge Starr, do you represent the complainant?

Mr. Starr: I am associated with Mr. Brown, representing the complainant.

The Court: And you are trying to make Mr. Fine keep his promise?

Mr. Starr: We are making that effort. Has your Honor read the files? 10

The Court: Yes, about three different pleadings for each side.

Mr. Starr: That is right. It seems to me, from my knowledge of the situation, the burden is on the defendant to show why this contract should not be specifically performed. The contract is admitted, the default is admitted, and the question is whether they are to be relieved by anything set up in the answer. 20

Mr. Stackhouse: It seems to me the burden is upon the complainant to show —

The Court: I am willing to hear the proof any side up that counsel wants. It all goes in the grind.

Mr. Starr: I noticed after I looked at the file there has been an amendment filed by the defendant setting up laches, and here is a denial of that. 30

The Court: Still another?

Mr. Starr: Yes.

The Court: Are you sure both of you have all the pleading you want?

Mr. Stackhouse: I hope so, Vice Chancellor.

The Court: Because I should be sorry to see either of you suffer for the want of pleadings in this case. What do you reply?

10 Mr. Starr: Just deny there is any laches. I offer in evidence, if the Court please, the contract dated October 20, 1925, between the two complainants and Jacob Fine.

(Said contract offered in evidence and marked Exhibit C1.)

The Court: Are the signatures admitted, Mr. Stackhouse?

20 Mr. Stackhouse: The signatures are admitted, yes, sir.

The Court: All right, let it be filed.

Mr. Stackhouse: If the Court please, with reference to Judge Starr's statement that the burden is upon us, it seems to me that in view of the fact that we haven't admitted anything, except in our failure to attend at the time of settlement, it seems to me  
30 there is some burden upon the part of the complainants because they have to show they were there ready and willing.

The Court: If Judge Starr has anything more to offer I am willing to hear it.

FRANK VOIGT, SWORN.

By Mr. Starr:

Q. Did you represent Mr. Van Buren in this contract of sale with Fine?

A. Yes, sir.

Q. What do you know with respect to the preparation of a deed from the Van Burens to the Fines and the attendance at your office on the first of April, 1926? 10

A. At that time I had Mr. Van Buren and his wife execute a deed which was in my possession and at the office and at the time appointed in the contract we were there ready to go through with the contract.

The Court: By that you mean April 1, 1926?

20

The Witness: Yes, sir.

The Court: And the place named in the contract is?

The Witness: Northwest corner 7th & Market Street.

The Court: At your office?

The Witness: Yes, sir. 30

The Court: And that is the place you referred to?

The Witness: Yes, sir.

Q. Were you there personally?

A. Yes, sir.

Q. And were the complainants, Mr. and Mrs. Van Buren, there?

A. No, Mrs. Van Buren wasn't there but Mr. Van Buren was there.

Q. Did Mr. Fine attend?

A. No, sir.

Q. Did anybody representing him attend?

10 A. No, sir.

Q. Were you ready at that time to make settlement if he had come there?

A. Yes, Mr. Van Buren was there ready to make settlement.

The Court: Have you got the deed you had executed?

20 The Witness: I haven't been able to find it, I think it was sent to Judge Starr's office, but I can't seem to locate it. However, the deed was prepared by me and acknowledged by the parties before me.

Mr. Starr: I don't think I have the deed, because the papers I had are in this file and the deed isn't there.

Q. You have made a search for the deed, have you?

30 A. Yes, sir, made a search this morning when I discovered you hadn't it with you.

Mr. Starr: I had a file that Mr. Brown gave me but it did not contain the deed.

Cross-examination.

By Mr. Stackhouse:

Q. Mr. Voigt, you say this deed to which you have made reference was executed by both Mr. and Mrs. Van Buren?

A. Yes, sir.

10

By the Court:

Q. Acknowledged by both of them?

A. Yes, sir.

Q. Before you?

A. Before me, yes, sir.

Q. And was for the property named in this agreement?

A. It was a special warranty deed pursuant to the contract—now, I can't say that because I just don't recall that, I wouldn't want to testify to that because I don't remember. 20

By Mr. Stackhouse:

Q. Now, settlement was to be made by the allowance of a first mortgage of \$20,000 then standing against the premises?

A. Yes, I think that was the agreement.

Q. Which was payable within one year from the first day of March, 1926; is that correct? 30

A. Yes.

Q. Did you know at the time of settlement there was also a mortgage made by Mr. and Mrs. Van Buren to the First National Bank of Merchantville for \$9,000?

A. I knew there was a mortgage, yes, but I knew an arrangement was to be made with the bank to

take care of that mortgage so that the property could be conveyed to the Fines.

Q. At the time of settlement, which you say was April 1st?

A. April 1st.

Q. Did you have that mortgage there cancelled?

A. No, I had no dealings with the mortgagee at all; Mr. Van Buren made his own arrangements.

10 Q. So at the time of settlement there was not only a mortgage for \$20,000.00 on the property but also a mortgage for \$9,000.00?

A. That is correct, yes.

Q. And so far as you personally know, no arrangement had been made to cancel the \$9,000.00 at the settlement?

A. There had been no arrangement made by me but I was assured by Mr. Van Buren there would be no difficulty.

20 Q. I am speaking about what you personally know.

Mr. Starr: There is nothing in the answer setting up that as the reason for non-performance, the question of the existence of that mortgage.

Mr. Stackhouse: It is up to the complainant, it seems to me, to show that they were able to perform on the day.

30 The Court: There is no question pending.

Mr. Stackhouse: There seems to be considerable argument.

Q. Do you know when this \$20,000.00 mortgage was due?

A. No, I don't, Mr. Stackhouse.

The Court: Was there enough cash due that day to pay off that mortgage?

The Witness: Over \$23,000.00 in cash.

The Court: Then it doesn't cut any ice at all.

Q. Mr. Fine did not come to the settlement?

10

A. No, sir.

Q. Mr. Voigt, aren't you mistaken with reference to the date as to whether it was April 1st or May first?

A. No, sir.

Q. For the purpose of refreshing your memory, I call your attention to an allegation in the bill that on May 1st, 1926, complainant attended at the office of Frank Voigt.

A. That is an error, presumably, because the date in the contract is April 1st, and that is the date we were prepared to make settlement; subsequent to that there was some extension given by Mr. Van Buren in which I had no hand at all and knew nothing of.

20

Q. Subsequent to which?

A. April 1st.

Q. Did you have any hand in preparing this bill?

A. No, only perhaps in furnishing Mr. Brown with information he might ask for.

Q. Did you furnish him with the information set forth in paragraph four to the effect that on April 1st, 1926, Jacob Fine was not prepared to carry out the contract and offered to pay the complainants the sum of \$500.00 additional over and above the purchase price if the complainants would postpone

30

the settlement to May 1, 1926, which offer the complainants agreed to?

A. I don't know whether I did or whether Mr. Van Buren gave him that information.

Q. Isn't that the true state of affairs?

A. It seems to be coupled with what I have already said about April 1st, Mr. Fine not appearing, and later Mr. Van Buren making some arrangement to extend it to May 1st; that seems to fit in with  
10 what that paragraph said.

Q. You think you were mistaken, don't you, that the time of complainants coming to your office to make settlement was May 1st instead of April 1st?

A. No, because the matter was of so much importance we followed the contract to the letter and purposely had the deed prepared on the day mentioned in the agreement.

20

CHARLES VAN BUREN, SWORN.

By Mr. Starr:

Q. Mr. Van Buren, you are one of the complainants in this matter, are you?

A. Yes, sir.

Q. Do you remember being at Mr. Voigt's office on the 1st of April, 1926?

30

Q. Had you, before that time or at that time, executed the deed, together with your wife, for this property?

A. That was done on the first of April, that day.

Q. The first of April?

A. Yes, sir.

Q. Did Mr. Fine appear and make settlement?

A. No, sir.

Q. Were you in readiness at that time to make settlement?

A. Yes, sir.

Q. Something has been said about a mortgage to the bank in Merchantville; explain what that situation was, please?

A. That was a \$10,000.00 note originally secured by a second mortgage, but that doesn't amount to  
10 \$9,000.00 now, it is \$5500.00 now.

Q. In April how much was it?

A. Around \$5600.00.

Q. And what arrangements had you made with the bank in reference to the payment of that mortgage?

A. I arranged to pay it out of the cash I was to receive, to pay it off.

Q. How much cash were you to get?

A. \$23,000.00.

Q. The first mortgage on the property was due when?  
20

A. That is still running.

Q. What was the date of it, do you know?

A. I can't tell you just exactly the date.

Q. Were you in readiness on the first of April to make settlement?

A. Yes, sir.

Q. Did you have any talk with Mr. Fine either before that time or after that time with reference  
30 to an extension?

A. Why, after the second payment Mr. Fine and his son came to the house and said if the mortgages were not arranged differently they wouldn't be able to settle for it, and finally they agreed to pay me a deposit if I extended it for a month and they would pay 6% interest for the month, which I did.

Q. That is one of the instalments?

A. The third instalment.

Q. Of how much?

A. \$1,000.00. I received \$1500.00 in Mr. Voigt's office, and another \$1500.00 a few days later, and then this other \$1000.00. The final payment of the \$1000.00 they came to the garage and said that they wouldn't go through with it unless I gave them an extension of 2 months, which I did.

10 Q. Did they make any promise to you with reference to the payment of something on account?

A. They said they would pay an additional \$500.00 on the first of April, and I gave them a statement to that effect and I wanted Mr. Lipsitz, who was representing Mr. Fine, to sign it, and he said there wasn't any occasion to; if he didn't show up on the first of April that automatically cancelled the contract.

Q. Was Mr. Fine there at that time?

20 A. Yes, sir.

Q. On the first of April did they come with the \$500.00 for the two months' extension?

A. No, sir.

Q. Have they ever paid you any additional money?

A. No, sir.

Q. Have they made any demand for a deed or anything of that kind?

A. No, sir.

30 Q. Have they ever been to see you, I mean Mr. Fine?

A. Not until after we started the suit.

Cross-examination.

By Mr. Stackhouse:

Q. Mr. Van Buren, did you furnish Mr. Brown, the solicitor in this matter, with the information with reference to the time of settlement as to whether it was April 1st or May 1st, 1926?

A. Why, Mr. Brown had the agreement.

Q. Was this time you attended in Mr. Voigt's office April 1st? 10

A. Yes, sir.

Q. So the agreement never really was extended, was it?

A. No, because they didn't pay the additional \$500.00 they were supposed to pay on that day.

Q. Do you know Mr. Louis Fine, the son of Mr. Jacob Fine?

A. Yes, sir.

The Court: The extension was not to take effect unless they paid \$500.00 on that day? 20

The Witness: Unless they paid the additional \$500.00, yes, sir.

Q. Didn't you, at some time previous to the day of settlement, have a conversation with Mr. Louis Fine with reference to this matter?

A. One Sunday they came to the house, yes, sir.

Q. Both he and his father? 30

A. Yes, sir.

Q. And isn't it true that at that time they asked you to simply let them out of the deal and to keep the deposit?

A. No, sir.

Q. Did they ever ask you to do that?

A. They asked me that after the suit was brought, they came out and said, "Why don't you keep the deposit money and let it go at that?"

Q. When you say the suit do you mean this present suit in the Court of Chancery?

A. Yes, sir.

Q. Or do you mean the Supreme Court suit?

A. I mean this suit here, as far as I know.

10 Q. Can you fix the time when that conversation took place?

A. Why, I don't know the exact date but I think it was in the month of August, I believe.

Q. The month of August, 1926?

A. Yes, sir.

Q. To the best of your recollection that was the month, sometime during that month, when you had this conversation with Mr. Fine and his son?

A. That was with Mr. Lipsitz and his son.

20 Q. I understood you to say it was Mr. Fine and his son?

A. No, Mr. Fine and his son were out to the house in January.

Q. January, 1926?

A. Yes, sir.

Q. Last January a year ago?

A. Yes, sir.

30 Q. When this conversation took place with reference to retaining the deposit was with Mr. Lipsitz and young Mr. Fine?

A. Yes, sir.

Q. And this took place in August, 1926?

A. I think it was in August, I wouldn't say for sure about the date or month.

By the Court:

Q. This extension you have testified to that you were to make providing they paid \$500.00 on April 1st was with Mr. Fine, or someone else?

A. No, that was with Mr. Fine.

Q. But the conversation at your house was not with Mr. Fine?

A. That was with Mr. Fine and his son. This conversation he is speaking about them letting the 10 deposit being dropped was a later thing. They mixed up the two things there; the son and the father came to the house first and asked for the re-arrangement of the mortgages.

By Mr. Stackhouse:

Q. When was that?

A. January.

Q. 1926?

A. Yes, sir; then they asked for an extension of 20 a month on an additional deposit, that is, they were to pay \$1500.00, and another \$1500.00, and two \$1000.00 deposits after that.

Q. That arrangement was not carried out?

A. Yes, I extended it a month and they added 6% for the month.

Q. To when?

A. That would bring it into February, they paid me nothing January.

Q. Extended for the time of the payment of the 30 additional deposit?

A. Yes, sir. Where they spoke about me keeping the deposit and having the matter drop was in August, that was after the final deposit money had been paid.

Q. And that conversation was had with Mr. Lipsitz and young Fine?

A. Yes, sir.

By the Court:

Q. At that conversation, with reference to the \$500.00 payment, when was that?

A. There has never been any conversation about that except this one I am referring to in August, where they spoke about dropping the deposit and letting it go.

Q. When was your conversation with them to the effect if they paid \$500.00 on April 1st you would extend the time for performance?

A. That was made in March; they dropped a month there on the payment. I got \$1500.00 at Mr. Voigt's office, another \$1500 ten days later, and the next \$1000.00 would come in January and that was paid in February, and that would make the other \$1000.00 to come in March, and that was when the extension was made, was in March.

Q. Now, do I understand you right, that the terms of the extension were that on April 1st when final payment was to be made they were to pay \$500.00 additional if they wanted an extension?

A. No, April 1st was supposed to be the settlement; they had already paid all their deposit money, and the last check I got of their deposit money was when I gave the extension.

Q. What was the extension, I want to be sure about that?

A. I don't know exactly how I worded it.

Q. You mean an extension after April 1st?

A. Yes.

Q. How was it?

A. I said, "I hereby grant you an additional extension of two months on the original contract provided, however, that an additional \$500.00 is paid April 1st, 1926."

By Mr. Stackhouse:

Q. Mr. Van Buren, that arrangement was in writing, wasn't it?

A. Yes, sir.

Q. That is your signature, isn't it?

A. Yes, sir.

Q. "I hereby agree to extend to Mr. J. Fine an additional extension of 60 days on the settlement of the Merchantville Garage, 21 West Park Avenue, Merchantville, New Jersey, from date of the original agreement, provided, however, that an additional deposit of \$500.00 is made on April 1st, 1926. Charles Van Buren."

The Court: He quoted that pretty well from memory.

Q. That \$500 arrangement was never carried out, was it?

A. No.

Mr. Starr: I will offer that.

(Said paper offered in evidence and marked Exhibit C2.)

Q. Mr. Van Buren, you say that Mr. Lipsitz represented Mr. Fine?

A. I said that.

Q. Is that what you did say, that he represented Mr. Fine?

A. No, I didn't say that.

Q. What connection did Mr. Lipsitz have?

A. I don't know what connection he had with Mr. Fine, I only know he was there with Mr. Fine about the purchase of the garage.

Q. Didn't you ever give Mr. Lipsitz any kind of an agreement employing him as a broker, an agreement paying him 5% on the sale of this property?

10 Mr. Starr: I object.

The Court: I don't see its relevancy at this time, but if counsel thinks it will have a bearing, I think we had better let it in.

A. Yes, I did.

Q. So Mr. Lipsitz was to act as your agent, wasn't he, for the sale of the property?

20 Mr. Starr: If the Court please, I object. The agency may be in writing, and if that is so that would control the relationship between the witness and Lipsitz; he can't —

Mr. Stackhouse: I won't question this witness along this line any further; I think I can supply that later.

30 Q. Coming back to this conversation between you, Mr. Lipsitz, and young Mr. Fine in August, 1926, didn't you state to them, or rather to Mr. Fine, in response to the suggestion that you keep the deposit and let the matter drop that you wouldn't do so but you were going to get all the money out of it you could?

A. No, sir.

Q. You didn't make that statement?

A. No, sir.

Q. Now, did you make any effort to sell this property to anybody else?

A. I called Mr. Lipsitz up and gave him the name of a man by the name of Mr. Towanski.

Q. But you did attempt to make a sale either personally or through an agent?

Mr. Starr: I object, immaterial and irrelevant. 10

The Court: You mean recently?

Mr. Stackhouse: After the date fixed for the settlement.

Mr. Starr: It is immaterial and irrelevant, it seems to me.

Mr. Stackhouse: After the time fixed for settle- 20  
ment?

The Court: I will overrule it, I don't think it cuts any ice.

Mr. Stackhouse: May I be heard on that?

The Court: You may have an exception, let us get along. I don't think it cuts any ice; if it does we will come back to it. I don't recall any defense of that nature, but if it becomes essential we will come back to it. 30

By Mr. Starr:

Q. Mr. Van Buren, Mr. Stackhouse refers to suits in connection with the time you had the conversation

with Mr. Lipsitz and young Mr. Fine. Did you know at that time of the suit they were talking about?

A. I supposed they were talking about this specific performance, that is all I knew of.

Q. Did you know a suit had been brought in your name against the Fines in the Supreme Court for damages?

A. No, sir, I did not.

10 Mr. Stackhouse: I object, as immaterial.

The Court: My recollection is that it is set up as a defense, isn't it?

Mr. Stackhouse: The suit itself is set up as a defense, yes, but the question directed to this witness is whether he knew of such a suit, I don't think that makes any difference.

20 The Court: I think it is material, I will let him answer as to whether he knew there was a suit pending.

Mr. Stackhouse: That is evidently not the law in this case.

30 The Court: It is at this moment; I will admit it as evidence in the case and I will look at your authorities later. I would like to see any authority that says a suit brought in my name without my knowing it would have any effect on me. Is there such a case?

Mr. Stackhouse: I think I can satisfy your Honor there is such authority.

By Mr. Stackhouse:

Q. When did you first consult Mr. Brown with reference to this matter, Mr. Brown or Mr. Voigt?

A. I can't tell you just exactly when that was.

Q. When did you have any conference with either Mr. Brown or Mr. Voigt with reference to the institution of proceedings against Mr. Fine?

The Court: This present one?

10

Q. Any proceeding at all?

A. I imagine that was about the 1st of April or near there, because I asked him what could be done in the matter with regard to having the settlement made.

Q. Very shortly after the settlement fell through, as you say?

A. Yes, sir.

Q. It was then you authorized him to proceed to 20 take proceedings against Mr. Fine?

A. Yes, sir.

Q. Some time during the month of April?

A. I imagine it was then; I don't know just when it was.

Q. But very shortly after the settlement was to have taken place?

A. Yes, sir.

Q. And you then instructed them generally, didn't you, to take proceedings against Mr. Fine? 30

A. I asked Mr. Voigt—I did most of my dealings with him—I didn't meet Mr. Brown until sometime after.

Q. You knew Mr. Brown was associated with Mr. Voigt and acting for him?

A. Yes, but I didn't know Mr. Brown until I talked to Mr. Voigt about it.

Q. When did you first meet Mr. Brown, sometime during the month of April?

A. I don't know just when that was.

Q. But it is a fact, isn't it, you left the matter with them for such proceedings as seemed to be appropriate?

A. I left the matter for specific performance, as far as I knew, that is all I knew of.

10 Q. When did you first learn of this term, specific performance?

A. When did I learn of that term? It was quite prevalent all winter.

Q. All the winter of 1927 or 1926?

A. 1926.

Q. Why was specific performance talked about so much during 1926?

A. I don't know.

Q. You don't know why it was talked about?

A. No.

20 Q. It was just talked about without any reason for it?

A. I never asked any reasons why it was talked about; I know there was such a thing as specific performance, and that is what I wanted done.

Q. Mr. Van Buren, who told you that you could get specific performance under that contract?

A. Why, I consulted Mr. Voigt and asked him what could be done in regard to the matter and that was —

30 Q. That was after the time fixed for settlement?

A. Yes, sir.

Q. And it was then Mr. Voigt told you you could get specific performance; is that true?

A. Yes, sir.

Q. And he also told you you might institute an action for damages, didn't he?

A. Not to my knowledge; I never heard anything about a damage suit.

Q. You asked Mr. Voigt, didn't you, what you could do with reference to the matter?

A. Yes, sir.

Q. Did Mr. Voigt tell you the only thing you could do was to institute suit for specific performance?

A. I guess he did; I didn't hear anything about a damage suit. 10

Q. If I understand you rightly, Mr. Voigt told you that was the only thing that could be done?

A. I said it must have been, because he didn't say anything about damage suits.

Mr. Starr: If the Court please, I think, in order that the record may be straightened out, in view of Mr. Voigt's testimony and the date May 1st, 1926, in the 5th paragraph, I move to amend and make that April 1st, 1926, that being the day they met at 20 the office for settlement.

Mr. Stackhouse: What did you say?

Mr. Starr: I want to amend the 5th paragraph, making it April 1st instead of May 1st. We rest.

COMPLAINANT RESTS.

## THE CASE FOR THE DEFENDANT.

LOUIS FINE, sworn.

By Mr. Stackhouse:

Q. Mr. Fine, do you recall having a conversation  
10 in August of 1926, with Mr. Van Buren, with respect  
to this transaction?

A. Not in August.

Q. When was it, earlier than that?

A. Yes, sir.

Q. You are the son of Jacob Fine, the defendant  
in this suit?

A. Yes, sir.

Q. Can you say how much earlier than August  
it was?

20 A. Six weeks to two months earlier than August.

Q. You mean by that it was in June or July?

A. Yes.

Q. What was the purport of that conversation?

Mr. Starr: If the Court please, I assume that  
this conversation would be substantially the same  
as that testified to by Mr. Van Buren and I object as  
being immaterial and irrelevant and not an issue  
in this case, not raised by the pleadings.

30 The Court: We will not hear it unless it is in  
issue; go ahead with it, I haven't gotten into it yet.

The Witness: I went with Mr. Lipsitz to see Mr.  
Van Buren and we saw him at the garage, that is,  
the place of business, and we spoke to him; that is  
when he started the suit for damages, and we said

to Mr. Van Buren and told him we were willing to  
drop the \$5000.00 we had paid as a deposit if he  
was willing to stop suit, and he answered me and he  
said, "No, I am going to cause you a lot of trouble  
and I am going to try to get all the money I can out  
of this thing because I have made other arrange-  
ments in a different type of business."

Q. Was there any discussion of the suit for dam-  
ages having been brought? 10

A. With Mr. Van Buren?

Q. Yes.

A. No, we did not.

Cross-examination.

By Mr. Starr:

Q. Were you there at the suggestion of your  
father; that is, did you go to see Mr. Van Buren at  
the suggestion of your father? 20

A. I did.

Q. Did your father know you were going to make  
that proposition to him that he should accept the  
deposit money and call the matter off?

A. He did.

Q. That proposition was made by you to Van  
Buren at your father's suggestion; is that right?

A. Mr. Lipsitz made the statement; I think we  
both put the proposition to him. 30

Q. Your father knew what you were going there  
for?

A. Yes, sir.

Q. And he agreed to the proposition if Van Buren  
would accept the \$5000.00 the whole contract would  
be declared off; is that right?

A. Yes, sir.

CHARLES VAN BUREN, recalled.

By Mr. Stackhouse:

Q. Mr. Van Buren, will you state what the gross income from this garage was during the year 1925?

A. Why, it is around \$32,000.00.

Q. What was the gross income during 1926?

10 A. Well, I don't know, unless I look at my book, and my book only goes up to April, 1926.

Q. Have you got your book with you?

A. Yes, sir.

Q. Will you produce it, please?

A. That only goes up to the 1st of May.

Q. It covers, however, 1925?

A. Yes, sir.

Q. What was the gross income up to May 1st, did you say, of 1926?

20 A. I have it here from the 1st of January, 1926, that is \$31,000.00.

The Court: To when?

The Witness: To January 1st, 1926.

The Court: From January 1st, 1926, to when?

The Witness: From 1925, January, to January  
30 1st, 1926.

Q. That shows a gross income of how much?

A. \$31,004.76.

The Court: \$31,004.71?

Q. And the gross income from January 1st, 1926, to the time the books stopped?

A. That is \$8,686.48.

Mr. Starr: Eight thousand what?

The Witness: \$8,686.48.

Q. And the books stop when?

A. The first of May.

Q. 1926?

A. Yes, sir.

Q. How is it it stops there?

A. Because I expected that the sale would be consummated at that time.

Q. Didn't you keep any books of account from May 1st, 1926?

A. Yes, but I haven't got it entered into this ledger.

Q. Have you got those with you?

A. No, sir, they haven't been totalled up.

Q. You were subpoenaed to bring them, weren't you?

A. I was subpoenaed to bring this book showing the totals gross, yes.

Q. Gross for 1925 and 1926; that is true, isn't it?

A. I haven't got the gross from April on, because I had just the books in the office there and they are not totalled up to put it in.

Q. Did you get a copy of this subpoena, Mr. Van Buren?

A. Yes, I guess it is the same thing.

Q. It tells you to bring all the books and documents showing the gross and net income for the Merchantville Garage for the years 1925 and 1926, doesn't it?

A. I suppose that is what it is.

Q. And you only have the books showing the income for a portion of 1926?

A. Gross income up to May 1st.

Q. You have nothing with you that shows the income for the balance of the year?

A. No.

Q. What proportion of that gross income would you say was net income?

10 A. I really can't tell you just what it would be, it would run around 30%, I would imagine.

Mr. Stackhouse: It seems to me, if the Court please, the witness has been subpoenaed to bring the documents here and we should have an opportunity to know what the net income was for 1925.

The Witness: It is here, 1925.

20 The Court: Haven't you anything to show the net income?

The Witness: No, sir.

The Court: Doesn't the book show the expenses?

The Witness: Yes, that is all in here, what has been purchased and spent, it is all through the book here, cost of oil for the month of January, cost of gas, cost of supplies.

30 The Court: Haven't you anything that carries them out so you can tell him what the operating expenses were, how they totaled each month?

The Witness: These are totaled each month.

Mr. Stackhouse: Is there a question pending?

The Court: No, he says they are all there in the book but they are not added up.

The Witness: They are totaled in here for each month.

Q. For 1926?

A. But they are not totaled up to put into concrete form. 10

Q. How long will it take to find out how much that was?

A. It will take some time.

Q. You made up an income tax return, didn't you, for 1926?

A. Yes, sir.

Q. It was necessary to total them then, wasn't it?

A. What?

Q. It was necessary to total the receipts at that time? 20

A. Yes, I made a total, not separately, I made it collectively, I took the total amount I spent and the amount I took in.

---

WILLIAM LIPSITZ, sworn.

By Mr. Stackhouse:

30

Q. Mr. Lipsitz, during the year of 1926 were you a licensed real estate broker in Camden?

A. Yes, sir.

Q. Were you engaged at that time in the procuring of buyers and in the sale of property for owners?

A. Yes, sir.

Q. In Camden County?

A. Yes, sir.

Q. As part of that business did you come into contact with Mr. Van Buren?

A. Pardon me, I must correct that, I was in Atlantic City at the time where my office was.

The Court: Speak up.

10

The Witness: I was in Atlantic City that year, 1926; in 1925 my office was in Camden.

Q. At any time prior to the 20th of October, 1925, did you have any dealings with Mr. Van Buren, Charles Van Buren, who was just on the stand here?

A. Yes.

Q. With reference to the Merchantville garage?

A. Yes, sir.

20 Q. Did Mr. Van Buren authorize you to act as his agent?

A. Yes, sir.

Q. In the sale of that property?

A. The sale of that property and the property across the way at the same time.

Q. Was that conversation in writing?

A. In writing, yes, sir.

Q. Have you the writing with you?

A. I believe I have left it at home.

30 Q. Did you try to find it at my request?

A. I have, yes.

Q. Were you able to find it?

A. No, I was not.

Q. Was that on a printed form?

A. On a printed form.

Q. Witness is shown a printed form the first line

which reads, "I hereby authorize William Lipsitz to act as my agent in selling premises"—and I ask if that is the form that was used?

A. Yes, sir, that is the form.

Mr. Stackhouse: This is not filled in, Judge Starr.

Mr. Starr: Apparently a paper of that kind was signed by Mrs. Van Buren.

10

Q. Can you tell from your memory, Mr. Lipsitz, how the blanks there were filled in?

A. What I can recall that it was filled in for the Merchantville Garage and his property across the way, we filled in on this line, and he guaranteed to pay 5% for the sale.

Q. And that was signed by Mr. Van Buren?

A. Yes.

Q. Was that prior to the 20th of October, 1925?

20

A. Yes, sir.

Q. Do you know about when it was?

A. If I can recall it must have been either—about 60 days prior to that time.

Mr. Stackhouse: I ask that this be marked Exhibit D1.

Q. In consequence of that employment did you attempt to secure a buyer for this property?

30

A. I did.

Q. Did you succeed in interesting Mr. Jacob Fine in the proposition?

A. Did I what?

Q. Did you succeed in interesting Mr. Jacob Fine in the proposition?

A. I did.

Q. In making that sale were there any statements made by you as to the income from the garage?

A. Yes, sir.

Mr. Starr: Wait a minute, I object, if the Court please. That is a conversation between this witness and Fine, and apparently there is no justification for any representations made by the witness as the record now stands.

10

The Court: Is there anything in the contract which by any possibility justifies representations of that kind?

Mr. Stackhouse: I would say so, the contract reads, "I hereby authorize William Lipsitz to act as my agent in selling the premises" leaving a blank there for an appropriate description of the premises, "And agree to pay blank per cent" which I believe was 5% "To the above named William Lipsitz as compensation for all services rendered."

20

The Court: You can go into that question of false representation. I am not prepared at this time to state that is or is not competent. I should rather incline against it, but I don't feel at all sure. I doubt whether a general agency of that kind would include the making of a representation of income that would bind the principal by its being false unless it is traced to the principal. If you can trace it to what the principal told him, all right.

30

Mr. Stackhouse: I was coming to that in a minute.

The Court: I will admit it. I have got to pass

on it finally, eventually, and I will let it all go in and endeavor to reach a conclusion about it. It is not an easy thing to determine. My present impression would be against it unless you connect it up by tracing it to the principal. Ordinarily a principal is not bound—he doesn't authorize an agent to make false representations, but he may authorize him to repeat what he has told the agent. However, I will not undertake to pass upon that now. Go ahead.

Q. In making that sale were there any statements made by you as to the income from the garage?

10

A. Yes, sir.

Q. Did you, previous to your dealings with Mr. Fine, did you have any conversation with Mr. Van Buren with reference to the income from the garage?

A. Yes, sir.

Q. What statement, if any, did Mr. Van Buren make to you with reference to the income from the garage?

A. Mr. Van Buren has told me at that time that he is depositing nearly \$200.00 daily and around four to five hundred dollars on a Monday morning.

20

The Court: \$200.00 a day?

The Witness: Around \$200.00 a day and about four to five hundred dollars on a Monday morning.

Q. Mr. Lipsitz, what was the occasion of Mr. Van Buren making those statements to you, why did he tell you that?

30

Mr. Starr: I object to that unless something was said in the course of the conversation, this witness cannot characterize what was in Mr. Van Buren's mind.

The Court: Give the whole conversation.

Q. Tell the entire conversation, as nearly as you can remember, between you and Mr. Van Buren with respect to the income of this garage.

A. Mr. Van Buren has told me that his income or other receipts runs around the neighborhood of \$200.00 daily and about four to five hundred dollars he deposits on a Monday morning; he also stated to me that it was a good paying garage and it was a good bargain and sale and if I could get a buyer for it that the buyer would be perfectly pleased and satisfied, and I promised I should do all I can.

Q. Was there anything said to Mr. Van Buren at that time to indicate to him that you were going to tell a prospective buyer about the income from the garage?

Mr. Starr: I object to that.

The Court: Yes, he will have to tell the conversation without any suggestions.

Q. Was there any further conversation with reference to the income from the garage?

A. Whether I shall use this conversation?

Q. No, you go ahead and tell everything that was said at that conversation?

A. At that conversation I simply promised Mr. Van Buren I should try my best to get a buyer and that ended our conversation at that time.

Q. This statement as to the income, was or was not that made in response to an inquiry by you?

A. What?

Mr. Starr: I think we are entitled to have the conversation, if the Court please.

The Court: I think this witness ought to be able to reproduce the conversation, he is an intelligent

witness. Can't you remember anything more that was said, or is that all there was to it?

The Witness: I don't remember whether we spoke anything else in regard to this particular subject or the sale of the garage, but I do remember promising Mr. Van Buren I would do my utmost to see about getting a buyer for it.

Q. How did the conversation with reference to the gross income or the income from the garage start?

A. How did it? Upon my request, as I was interested to know the article I am going to sell, how I can recommend it to a prospective buyer, and how interesting it would be for a buyer to buy it from me, and it was most important to me at that time.

Q. You say that was at your request?

A. At my request.

Q. In what way did you request Mr. Van Buren to give you that information?

A. I asked whether Mr. Van Buren can give me an idea of the volume of business that place is doing.

The Court: Gentlemen, I don't know how it is with you, but I am tired, I think I have done a day's work, and if it is satisfactory to counsel I will finish the case tomorrow morning.

Mr. Stackhouse: It is satisfactory to me.

Mr. Starr: Could your Honor make it Wednesday morning, I am due in the United States District Court before Judge Bodine, tomorrow.

The Court: All right.

(At this point an adjournment was taken until Wednesday, July 13, 1927, at 10 o'clock A. M.)

Camden, N. J., July 13, 1927.

(Trial of the cause resumed pursuant to adjournment, on the above date, at 10 o'clock A. M.)

10 WILLIAM LIPSITZ, resumed.

By Mr. Stackhouse:

Q. Mr. Lipsitz, after Mr. Van Buren made this statement to you in reference to the gross income of the garage property in Merchantville did you make any effort to sell the property then?

A. I did.

Q. Did you approach Mr. Fine?

20 A. I quoted to Mr. Fine—feeling what I understood —

The Court: Tell him what you did.

The Witness: I told him, Mr. Fine, this is a good paying proposition and it looks as if it was a good buy, owing to the income of it it is an inducing thing to buy, that is the very words I spoke to Mr. Fine, and finally I induced him on the income of it, which I recommended him to buy this property as it would  
30 be a good paying proposition.

Q. Did you have any conversation with Mr. Fine with reference to the gross income of the garage?

A. I did.

Q. What did you tell him in reference to that?

Mr. Starr: I make the objection, if the Court please, it is immaterial and irrelevant in this issue unless it be established—I will withdraw the objection, he has already testified of his conversation with Van Buren.

The Court: Answer the question.

The Witness: I told him that the garage is doing business around \$80,000.00 a year and it is well worth the money he is asking for it. 10

Mr. Stackhouse: Have you got the contract there, Judge Starr?

Q. Witness is shown a duplicate of contract between the complainant and the defendant, the original of which has heretofore been marked as an exhibit in this case, and is asked if he was present when that contract was signed? 20

A. Whether I was present when this contract was signed? Yes, sir.

Q. Now, this conversation which you had with Mr. Fine with reference to the income of the garage property, was that had with him before or after the contract was signed?

A. Before the contract was signed, yes, sir.

Q. The same day, or how long before?

A. Oh, it has been some time. I had been trying to induce Mr. Fine in this matter for quite several weeks or so. He did not decide upon it immediately but finally, considering the matter rightly, he finally decided to buy it. 30

Mr. Starr: I object to that statement.

The Court: That "Considered the matter

rightly" is purely voluntary and may be stricken out.

Q. But he did not buy it right away?

A. No, sir, he did not buy it right away.

Q. And this statement with reference to the income, if I understand you rightly, was made several weeks before the deal was finally consummated?

A. Yes, sir.

10

Mr. Starr: I object.

The Court: What is the fact as to that, how long before the contract was signed were these statements made by you touching the income?

The Witness: That is something I can't recall, just exactly, it might have been several weeks, it might have been a month, I haven't kept a record of it.

20

The Court: Does it appear what date the contract was signed?

Mr. Starr: Dated the 20th of October, 1925, I think.

Mr. Stackhouse: The 20th of October, 1925?

30

The Court: Does that help you at all, the contract is dated October 20, 1925.

The Witness: It might have been somewhere along the latter part of September or the early part of October, more likely it was during October.

The Court: Never mind when it was likely.

The Witness: It is two years back and I can't recall the date of it.

Q. Mr. Lipsitz, I asked you the other day whether you were a licensed broker in 1926?

A. Yes, sir.

Q. Were you a licensed broker in 1925?

A. Yes, sir.

The Court: Where is your place of business? 10

The Witness: My present place of business?

The Court: At that time and up until now.

The Witness: In that time, 1925, 454 Kaighn Avenue; 1926 it was in Atlantic City.

The Court: Both in New Jersey?

20

The Witness: What is that?

The Court: New Jersey?

The Witness: Yes, sir, always in New Jersey.

Q. Mr. Lipsitz, do you remember any conversation which you had or in which you were present with Mr. Van Buren in the summer of 1926 with reference to this matter?

30

A. Yes, sir.

Q. Where did that conversation take place?

A. That took place in the garage with Mr. Van Buren.

Q. This particular garage?

A. This particular garage, yes, sir.

Q. Did you go out there voluntarily, or at his request?

A. I went out at the request of Mr. Fine, Mr. Fine came to me and told me he was being sued for damages.

Mr. Starr: I object.

The Court: Never mind, you have answered.

10 Q. You went out in consequence of a conversation that you had with Mr. Fine?

A. Yes, sir.

Q. Don't tell what the conversation with Mr. Fine was, but what the conversation with Mr. Van Buren was.

A. Mr. Fine told me —

20 Q. Don't tell what Mr. Fine said, but if you repeated to Mr. Van Buren anything that Mr. Fine said you may tell that.

A. You mean the conversation with Mr. Van Buren, is that it?

Q. Yes.

A. I asked Mr. Van Buren whether he was not satisfied with the \$5000.00 he has received and why he wanted to sue for damages —

The Court: Why he wanted what?

30 The Witness: Why he wanted to sue for damages, Mr. Fine told me it was a case of a suit for damages pending, and I told Mr. Van Buren at the time, asked him whether he wasn't satisfied with the \$5000.00 he received, why he should also sue for damages.

Q. What reply did he make to that question?

A. What?

Q. What reply did he make to that question?

A. Mr. Van Buren at the time answered me, said, "I am not satisfied with the \$5000.00, I am going to get all I can to teach him a lesson."

Q. Who opened the conversation?

A. Who what?

Q. Who opened the conversation?

A. Why, I opened the conversation.

Q. In what way did you approach him in that 10 conversation?

A. I just asked him whether he wasn't satisfied with the \$5000.00 he already got and why he should sue for damages to try to get more money out of that man.

Q. Is that the first thing you said?

A. That is the first thing I said.

Q. Was there anyone with you?

A. Why, Mr. Fine, Junior, this Mr. Louis Fine 20 was with me at the time.

The Court: Is that the son of the defendant?

The Witness: The son of the defendant.

Q. The young man that was on the stand here on Monday?

A. The same young man.

Q. Mr. Lipsitz, was there any further conversation with reference to this matter with Mr. Van 30 Buren at that time?

A. Oh yes, I asked Mr. Van Buren to let up on that suit for damages as I thought he had enough, I repeated it, I asked him pleadingly to let up on the suit for damages that he had enough out of those people, and he told me there was nothing doing, he was going through.

Q. Is that the only conversation you had with him?

A. At that time.

Q. I am speaking now at that time or any other time?

A. I can't recall of any other.

Q. And this conversation took place, as nearly as you can recall, when?

A. That, I believe, was sometime along June,  
10 whether it was the early part or the middle of June  
—somewhere around that time, as I kept no record.

The Court: 1927?

The Witness: 1926. Whether it was June or August I don't remember, but it was somewhere along the middle summer or early summer.

Cross-examination.

20

By Mr. Starr:

Q. Mr. Lipsitz, how long have you been in the real estate business?

A. About 3 years.

Q. 3 years now?

A. Yes.

Q. That was in 1924 you started, is that it?

A. 1925.

30

Q. What?

A. 1925.

Q. You started in 1925?

A. Yes, sir.

Q. In what month of the year did you begin operating in real estate?

A. I don't remember.

Q. What?

A. I don't remember.

Q. Can't you give us any idea of the time of the year it was?

A. No.

Q. What business had you been in before that?

Mr. Stackhouse: Objected to as immaterial.

The Court: I think it is all right; it is harmless,  
at any rate. I think it is competent. It may be  
something that would reflect very materially on  
the witness' credibility. 10

Mr. Stackhouse: The fact remains he has produced a contract of agency and whether he was in the real estate business or whether he was not —

The Court: I think it is proper examination. As some lawyers do, very much to my discomfort, they begin at their birth and come down. I don't know  
why, I have no explanation to it, except Judge Wes-  
cott would begin at the birth of a witness and bring  
him down to the last minute, it would take him  
half of the day to review his past history, and I  
never could find any way to shut it out. 20

The Witness: In the delicatessen business.

Q. In Camden?

A. Yes, sir.

Q. How long had you known Mr. Fine in 1925? 30

A. How long have I known him? I have known Mr. Fine ever since 1915.

Q. What was his business in 1925?

A. 1925?

- Q. Yes.  
 A. Retired.  
 Q. What had been his business, do you know?  
 A. Retired.  
 Q. Did he ever have any business?  
 A. Yes, sir.  
 Q. What was it?  
 A. In the baking business, a baker.  
 Q. While you were in the delicatessen business weren't you a customer of his?  
 10 A. That is, when he was in the baking business at one time.  
 Q. You have been very friendly, haven't you, for years?  
 A. Yes, sir.  
 Q. Had you ever been engaged in business with him in any way?  
 A. Why, yes.  
 Q. What was that business in which you were engaged jointly?  
 20 A. Why, on many occasions which I can't recall, I have kept no record of it.  
 Q. In what business were you engaged with him jointly?  
 A. What?  
 Q. In what business were you engaged with Mr. Fine jointly?  
 Mr. Stackhouse: Are you referring to a partnership?  
 30 Q. I am trying to find out from this witness—  
 A. In various transactions.  
 Q. You and Mr. Fine had speculated in real estate, hadn't you?  
 A. On certain occasions, yes.

- Q. How long had you been doing that?  
 A. Why, perhaps a few months.  
 Q. When did you begin?  
 A. Why, during the summer of 1925.  
 Q. You had an interest in this Merchantville garage, hadn't you?  
 A. In the sale of it, yes, sir.  
 Q. No, as a purchaser with Mr. Fine?  
 A. I had a part interest, yes, sir.  
 Q. What interest had you in the purchase of the garage?  
 10 A. What interest?  
 Q. Yes, sir.  
 A. One-third.  
 Q. And Mr. Fine had how much?  
 A. Two-thirds.  
 Q. And how much of the five thousand dollars that was put on account of the purchase price did you pay?  
 A. One-third.  
 Q. So you put \$1600.00 in this proposition?  
 20 A. And a little over.  
 Q. Now, when did you first become acquainted with Van Buren?  
 A. Why, that was in the early summer of 1925.  
 Q. Could you give us the month?  
 A. I cannot.  
 Q. Let me see if I can refresh your recollection. You drive a Peerless car?  
 A. That is right.  
 Q. And you were in the habit of having the work done on your car by the foreman who was formerly down in the New Jersey Auto Company?  
 30 A. That is right.  
 Q. And he subsequently went to Merchantville and became employed by Mr. Van Buren?  
 A. Yes, sir.

Q. And you became acquainted with him by taking your car out to his garage?

A. Yes, sir.

Q. Can you tell when that was?

A. I can't recall, as I kept no record of it.

Q. And you asked him whether he knew whether there were any good buys in real estate in Merchantville, didn't you?

A. Selling, at that time I was doing nothing but selling, a brokerage business.

10 Q. Didn't you ask him if he knew of any bargains in real estate in Merchantville, put it that way?

A. No, I did not, I simply asked Mr. Van Buren whether he owned that building and whether he is satisfied there and whether he would consider selling it, and Mr. Van Buren said, "Yes, I would sell this building, and I also have got a piece of property across the way I would sell."

20 Q. He told you about the property across the way which was owned by him and Mr. Wolcott?

A. At that time.

Q. And that is the way the conversation started?

A. Yes.

Q. You say he signed an authorization to you?

A. Yes, sir.

Q. To sell this property?

A. Yes, sir.

30 Q. Isn't it a fact he only signed one authorization?

A. He signed two.

Q. He signed one with reference to the other property?

A. One for the garage and another one at a different rate of commission for the one across the way on Maple Avenue.

Q. Were they both signed at the same time?

A. At the same time.

Q. Now, between the first time when you and he spoke about selling this property until the 20th of October, 1925, when the agreement was signed how many times did you see Mr. Van Buren?

A. It has been quite often, I can't say.

Q. How many times did you see him?

A. I can't say that.

Q. Did you go to the garage to see him or hunt him up somewhere else? 10

A. I have seen him, see, at occasions when I did not have to see him, to put my motor up or get gas.

Q. How many times between the day you first saw him and had the conversation about the property and when the contract was signed on the 20th of October did you see him and have a conversation with him with respect to this property?

A. I can't answer you.

Q. How soon after you had the talk with Mr. Van Buren in the first place did you see Mr. Fine? 20

A. How soon after?

Q. Yes.

A. Why, it might have been a good bit after because I tried to interest and get a good many others before I thought of Mr. Fine.

Q. Tell us the names of the others?

A. I can't tell that because I tried to interest hundreds of them, I was talking to everybody about it.

Q. You don't mean that, that you talked to everybody about the property? 30

A. Everybody that I felt as though would be interested as a buyer, not a baby or a woman, but everybody I felt who would be a buyer I tried to interest in that property and the property across the way.

Q. About how many people?

A. I can't tell.

The Court: Can't you name one or more; it seems to me you might remember one and that might give us some light on the subject.

The Witness: I offered the proposition to Nathan Friedenberg.

10 The Court: Give us his address so we can find him if we need him.

The Witness: 458 Kaighn Avenue.

Q. Anybody else?

A. I can't recall.

The Court: Did you tell Mr. Friedenberg what the income on the property was?

20 The Witness: Mr. Friedenberg was not interested.

Q. Then you did not tell him?

A. I didn't tell him anything, he told me he wasn't interested in the garage.

Q. Did you tell anybody else to whom you were offering the property what the income was?

30 A. I told many people, and it is very likely I told Mr. Friedenberg. I told him the income but it is so far back I don't know whether he remembers it or not.

Q. When was it you first spoke to Mr. Fine about the property?

A. When was that?

Q. Yes.

A. It might have been a month before I sold it to him.

Q. Is that a pure guess or are you giving the best of your recollection?

A. I am not guessing anything, I am giving it to the best of my ability.

Q. From the time you first saw Mr. Fine and offered this property to him until the contract was signed was how long?

A. I can't tell.

10 Q. Did Mr. Van Buren give you a price on this property when you first saw him?

A. Yes, sir.

Q. What was the price?

A. \$50,000.00.

Q. And was that in the conversation when you first saw him about it?

A. That was in the conversation.

Q. Did you tell Mr. Fine what the proposition was?

A. I didn't see Mr. Fine at that time.

The Court: I would like to know whether the statement of Mr. Van Buren about the income on the property was on the first occasion when you saw him?

The Witness: On the first occasion.

Q. You only had one conversation with him about the income, didn't you?

A. One conversation.

Q. Now, when you first spoke to Mr. Fine about the property what did you say to him, give us your best recollection of the conversation.

A. Mr. Fine had told me—

Q. I didn't ask that, what did you say to him?

A. I told him that there was a good garage, good paying, it has got a nice income, and it looks to me as if it was a good buy, worth the money.

Q. Is that all you told him?

A. I might have told him some other words but I can't recall.

Q. Give us the rest of the conversation.

A. I can't recall.

Q. What you have now stated is all you can remember?

10 A. I spoke on those lines.

Q. I want the words, if you can give it.

A. The words I cannot repeat, it is impossible.

Q. Can you give us the substance of the conversation?

A. No, I kept no stenographer for it.

Q. When did you make up your mind to go into this proposition and become a one-third owner?

A. Upon the request of Mr. Fine after it was bought.

20 Q. After it was bought?

A. After it was bought.

Q. And you had no arrangement with him before?

A. Absolutely nothing before.

Q. Before the contract was signed?

A. Absolutely not.

Q. Why did Mr. Fine ask you to go in and become partners?

A. I can't say.

30 Q. How soon after it was bought did you agree to go in and become a one-third owner?

A. Before the time the next payment was made.

Q. \$1500.00 was paid at the time the contract was entered into, was any portion of that your money?

A. No, sir, not the first payment.

Q. The next payment was within 3 days afterward, did you contribute anything to that?

A. No, sir.

Q. The contract is dated the 20th of October, and \$1500.00 was to be paid on the 23rd of October, did you contribute any portion of that money?

A. No, sir.

Q. When did you first pay any money into it?

A. The first two payments were supposed to be one payment, and the next payment was following some time later, the contract has got that.

Q. The third payment was 30 days?

10

A. Well, it was during that 30 days.

Q. That you agreed to go in?

A. I can't say sure it was during the 30 days, or during the following payment, but it was between one of the payments.

Q. How much did you put into it then?

A. One-third.

The Court: Can't you remember the amount you paid, you can perhaps tell the time if you remember the amount. 20

The Witness: It was \$1600 and something—well, it was the exact one-third.

Q. One-third of \$5000.00?

A. One-third of \$5000.00.

Q. Did you pay it by check?

A. How did I pay it?

Q. Did you pay Fine by check?

A. I gave him a note. 30

Q. What was the amount of your note?

A. It was sixteen hundred and some dollars.

Q. Have you paid the note?

A. I have taken care of it, yes.

Q. Have you paid it?

A. Not all.

Q. Have you paid any of it?

A. Yes, sir.

Q. How much?

A. I think there is somewhere around between four and five hundred dollars, I have \$475.00 still due on that.

Q. You had a conversation with Mr. Van Buren in relation to a readjustment of the mortgages, didn't you?

A. I did.

Q. And Mr. Fine was present?

A. Yes.

Q. You requested Mr. Van Buren should change the terms of the contract and rearrange the amount, due date, or maturity of the mortgages, didn't you?

A. Yes, sir.

Q. Did you tell Mr. Van Buren then you were interested in this purchase?

A. I did.

Q. What?

A. I did tell him.

Q. You told Mr. Van Buren you were interested as a purchaser in this property?

A. Yes, sir.

Q. When did you tell him that?

A. I told him that on several occasions and Mr. Van Buren said he had nothing to do with me, he had everything to do with Mr. Fine. Mr. Van Buren told me that Mr. Fine told him I had nothing to do with it.

Q. Did you have anything to do with the employment of the lawyers in this case to get back the \$5000.00?

A. No, sir.

Q. Will you tell us how much is still due on that note of yours for \$1600.00?

A. The Parkside Trust Company could tell you that very easily.

Q. I am asking you?

A. I can't recall.

Q. And you were the one that personally made the request to Mr. Van Buren that there be an extension from April to June?

A. Yes.

Q. And it was then agreed that would be done if you paid the \$500.00 on the first of April?

A. That is right.

Q. Did you have any talk with Mr. Fine about that suggestion, did he ask you to make an arrangement of that kind?

A. Yes.

Q. Do you know why he wanted the matter adjourned for 2 months?

A. Why?

Q. Yes, did he tell you why he wanted it done?

A. Why?

Q. Why he wanted the postponement from April 1st to June 1st.

A. Because he couldn't raise the money.

Q. You weren't in a position to go on with the contract on the first of June?

A. Not at that time.

The Court: The 1st of April, you mean.

Mr. Starr: The 1st of April, I mean.

Q. And that is the reason why you did not appear at Mr. Voigt's office for the purpose of making a settlement?

A. Yes.

Q. When you bought this property it was right

at the top of the real estate boom in Camden County, wasn't it?

A. Yes.

Q. And after you made the contract there was a slump?

A. Yes, sir.

Q. And the boom had been punctured on the 1st of April, 1926, that is right, isn't it?

A. Yes, sir.

10 Q. Mr. Lipsitz, when did you ascertain that the gross income from this property was approximately \$7000.00?

A. Approximately how much?

Q. \$7000.00.

A. \$7,000.00 or \$70,000.00?

Q. \$7,000.00.

A. The gross income on the property?

Q. The gross income from this garage was approximately \$7000.00 a year?

20 A. \$7,000.00?

Q. Yes.

A. I never learned of that. \$7,000.00 a year?

Q. That is what I am asking you.

A. I never heard of that.

Q. Now, after you say you had the conversation with Mr. Van Buren did you ascertain from any source what the income was?

A. Yes.

Q. From whom did you get that information?

30 A. I had resold that garage once—

Mr. Starr: I move that that be stricken out as not responsive to my question.

Mr. Stackhouse: I think that is introductory.

The Court: That expression may be relevant.

Q. How did you ascertain what the income was?

A. I had resold that garage once.

Q. When?

A. That was after Mr. Fine had bought it.

Q. When, can't you give us dates?

A. How can I give you dates, do I have to remember distinctly the minutes and days?

Q. I am not asking the minutes.

A. I resold it a month or 6 weeks later after Mr. Fine bought the garage, I resold it to a Philadelphia party. 10

Q. And the name?

A. The broker was Mr. Frankle, recommended to me by Mr. Frankenstein; Mr. Frankenstein is on Magnolia Avenue, 1200 block.

Q. In Philadelphia?

A. In Camden.

Q. Did you have a contract in writing for the sale of the property?

A. It wasn't sold yet, no deposits given, but I had it sold on condition that we were about to get together and draw the contract. 20

Q. That was a month or six weeks after October?

A. Yes.

Q. That is the best recollection you have as to time?

A. Yes, sir.

Q. In what way did you ascertain what the gross income was from that transaction?

A. I had made a statement one time in my store to someone about that garage, what a large income that garage has had, which I said was between seventy and eighty thousand dollars, and Mr. Frankenstein was in my store at the time and overheard the conversation and he comes to me and tells me he thinks he knows of a party who wants to buy 30

that garage, as a man is looking for one, and I said, "All right, get busy and bring me that customer," so he went to Philadelphia and brought me a real estate broker by the name of Frankle, and Mr. Frankle and I went out and looked the place over, and I showed him around, and he was impressed with it, and he wanted to know if that was really the volume of the business, and I said, "That is what Mr. Van Buren told me," and he said, "I think I have a man who wants one."

10

The Court: Are you giving now the conversation this man had with Mr. Van Buren?

The Witness: No, but that is following. So this man, Mr. Frankle, brought the buyer over from Philadelphia to my place of business and the three of us went out to that garage, it was sometime in the evening.

20 Q. What month?

A. If I can recall right it was during the month of November.

Q. 1925?

A. 1925.

Q. Did you go out?

A. We went out, the three of us together, to look the place over.

The Court: Was Mr. Fine with you?

30

The Witness: No, Mr. Fine was not with me, it was Mr. Frankle, this prospective buyer and myself, and we looked the place over, and the man was impressed with it, and I received word from Mr. Frankle the following morning and he said the man was very much impressed with it and he thinks

there is going to be a deal there in about a week. Later Mr. Frankle advises me—tells me that this man has been around once more at the place to look over the place once more and he found Mr. Van Buren on the premises there and he had a conversation with him regarding the income of the place and Mr. Van Buren had told him a ridiculously low figure, which wasn't anywheres near to the figure I stated, and therefore the man tells me we have lost the sale, that the man is not interested anymore on account of the income. 10

Q. And that is the only information you had with reference to the income?

A. No.

Q. You didn't make any inquiry of Mr. Van Buren after that, did you?

A. No, sir—yes, I did, I retract that, I did.

Q. When?

A. That was shortly afterwards. 20

Q. When, can't you give us a date?

A. It might have been a week or it might have been two weeks.

Q. In the month of November, was it?

A. It was following that occurrence, yes.

Q. What was the conversation?

A. I asked Mr. Van Buren what was the reason to tell the man such a small income and discourage him, and Mr. Van Buren said, "It is ridiculous, I couldn't have said that, the man misunderstood me, my gas alone amounts to twice as much as that does, that is ridiculous, the man misunderstood me, I never made such a statement to him," that is what Mr. Van Buren told me. 30

Q. Did you make any other inquiry?

A. I did not.

The Court: Can you remember the amount that this man told you that Mr. Van Buren said the income was?

The Witness: Mr. Van Buren told me his gas—

The Court: What did this man tell you that Mr. Van Buren told him the income was?

The Witness: I believe Mr. Van Buren told him  
10 the income was around \$17,000.00.

Q. How much?

A. \$17,000.00 a year.

Q. This man told you that Van Buren said to him that the income was \$17,000.00 a year?

A. Yes.

Q. What price were you asking for the garage of these people in Philadelphia?

A. What price was I asking at that time?

20 Q. Yes.

A. Why, I was asking \$65,000.00 or \$60,000.00, I don't remember; I would have taken the price I had paid for it then.

Q. You don't remember the price?

A. I can't remember, it was only verbally and I can't recall.

Q. You were acting for whom in trying to sell this property?

A. I was acting all the time for Mr. Fine.

30 Q. You hadn't bought into it then, had you?

A. Well, I don't recall whether it was before I went into it or shortly afterwards, I can't say.

Q. You weren't sufficiently interested to remember whether or not you were interested in the property at that time?

A. It is two years back and I can't remember all

incidents; I never felt I would have a lawsuit about it.

Q. Did you explain to Mr. Fine why this chap from Philadelphia wouldn't buy?

A. Yes, sir.

Q. You told him he learned that the income was not as represented?

A. Yes, sir.

Q. You told him also that Mr. Van Buren had told this man in Philadelphia the income was \$17,-  
10 000.00, you told him that?

A. Who?

Q. Mr. Fine.

A. Yes, I told Mr. Fine.

Q. You say that was in November, 1925?

A. I didn't say November.

Q. What did you say?

A. It might have been November or December.

Q. How much money did you put into this prop-  
osition after you ascertained that fact?

A. After what? 20

Q. After you ascertained there had been misrepresentation as to the gross volume of business how much money did you put in it?

A. Nothing.

Q. You didn't put any more money in it?

A. No, sir.

Q. How much more money did Mr. Fine put in it?

A. I don't know.

Q. Don't you know when Mr. Fine made the 3rd 30  
payment?

A. The record shows that.

Q. I am asking you.

A. I have a record of that, I can't answer that.

Q. The \$1000.00 which was paid in 60 days was not made on time, was it?

- A. I know \$1000.00 had been deferred one month.  
 Q. Was that the first or second thousand dollars?  
 A. I don't remember that, but I know \$1000.00 had been deferred 30 days.  
 Q. When was it eventually paid?  
 A. It was one of the payments.  
 Q. When?  
 A. I don't know.  
 Q. In what month?  
 10 A. I don't know.  
 Q. Was it paid after the 1st of January, 1926?  
 A. I can't commit myself.  
 Q. When you and young Mr. Fine went to see Mr. Van Buren you said to Mr. Van Buren, or young Mr. Fine said in your presence, "I see you are going to go after us under the agreement," didn't you?  
 A. I haven't said that.  
 Q. Did young Fine say it in your presence, isn't  
 20 that the way the conversation started?  
 A. No, sir, I don't recall that.  
 Q. Isn't that the way the conversation started?  
 A. I don't recall that. If you want me to repeat my words what I said to Mr. Van Buren I will repeat it easily.  
 Q. Mr. Lipsitz, the answer in this case alleges that shortly after the execution of the agreement, referring to the October agreement, defendant discovered that said complainants were only doing a  
 30 gross yearly business of approximately \$7000.00, do you know where the information came from which is contained in this answer?  
 A. No, sir, not the \$7000.00, \$17,000 but not \$7000.00, that is wrong.  
 Q. You never furnished the information to these lawyers which is incorporated in the answer?  
 A. I didn't furnish them the information, no, sir.

- Q. When you came to sign up for this property you took Mr. Fine out to Merchantville and then you and Fine and Van Buren came down to Mr. Voigt's office in Camden?  
 A. Yes, sir.  
 Q. And the contract was signed in Mr. Voigt's office?  
 A. Yes, sir.  
 Q. That was on the 20th of October, 1925?  
 A. Yes, sir.  
 Q. And you offered to Mr. Van Buren \$50,000.00  
 10 for this property while you were in Merchantville, didn't you?  
 A. Yes, sir.  
 Q. Now, if you say that was his price why didn't he accept it?  
 A. Because he changed his mind, he wanted more money.  
 Q. That was the reason?  
 A. Yes.  
 Q. And you came down to Mr. Voigt's office and  
 20 you were there practically the whole day dickering with this figure?  
 A. No, we were dickering for weeks before, sometime before about this property, beginning at \$50,000.00, and then Mr. Van Buren stretched his price over \$50,000.00, and when we came to Mr. Voigt's office he was asking sixty and sixty-five thousand dollars.  
 Q. I am asking about the dickering in Mr. Voigt's  
 30 office, confine your answer to that. Isn't it a fact, that you offered, or rather, Fine was there and you did the talking and you offered \$50,000.00 for the property?  
 A. \$55,000.00 we offered at the garage.  
 Q. You never offered \$50,000.00?

A. Way before we offered less than \$50,000.00.

Q. You offered \$55,000.00, didn't you?

A. That is the last offer at the garage.

Q. I am speaking of Mr. Voigt's office, what was the offer there?

A. \$55,000.00, and we kept on dickering, and Mr. Van Buren kept on going up every minute, seeing we wanted it, and he kept on going up, and he finally raised it to fifty-eight, and finally agreed on \$58,000.00.

10 Q. At that time weren't you representing Mr. Fine?

A. Yes, sir.

Q. And you were endeavoring to get the property for Mr. Fine as cheaply as you could?

A. Absolutely.

Mr. Stackhouse: May it please the Court, this is the defendant and he is not able to speak the English language and there seems to be no interpreter  
20 that we can lay our hands on, no official interpreter who is able to interpret.

The Court: You never can get them unless you order them in advance.

Mr. Stackhouse: There doesn't seem to be one. I have a young man from my office if Judge Starr is willing to let him act in that capacity.

30 The Court: Counsel may proceed.

Mr. Stackhouse: I have just been called on the telephone, may I be excused for a moment?

The Court: Yes.

WILLIAM LIPSITZ, recalled.

By Mr. Stackhouse:

Q. You testified on Monday that this contract of agency you had with Mr. Van Buren you thought was home?

A. Yes, sir. 10

Q. Did you make an effort to find it?

A. I did make an effort to find it but I did not find it.

Cross-examination.

By Mr. Starr:

Q. Did you find the other one for the big house across the street?

A. I didn't find either one of them, I had the two  
20 of them together.

SAMUEL N. MILLER, SWORN.

By Mr. Stackhouse:

Q. Mr. Miller, what business are you in?

A. Real estate broker. 30

Q. How long have you been in that business?

A. For myself, or all together? Since 1907 for others and myself.

Q. Were you connected with a real estate concern since 1907?

A. Yes, sir, with the exception of the time I was in the service.

- Q. That was when?  
 A. 1917 to 1919.
- Q. How long have you been in business for yourself?  
 A. Why, since 1919.
- Q. Where is your office?  
 A. 548 Federal Street.
- Q. Where was your office in 1925 and 1926?  
 A. October, 1925, we moved to 548 Federal Street;  
 10 previous to that it was in the Van Russ Building.
- Q. You were a licensed broker, and still are?  
 A. Yes, sir.
- Q. Are you engaged in representing parties in the selling of real estate for the last 3 years?  
 A. Yes, sir.
- Q. Have you had occasion to observe the values in the real estate market in Camden County during that time?  
 A. To a great extent, yes.
- 20 Q. Now, there was a so-called boom in real estate, wasn't there, which occurred several years ago?  
 A. Yes, there was.
- Q. About what time did that occur?  
 A. Why, the summer of 1925 until the end of the Fall of 1925.
- Q. When did the boom become punctured, as you might say?  
 A. It became ruined the spring of 1926.
- Q. Now, with respect to this ruined boom was that a local condition or one which was general?  
 30 A. I think it was general.
- Q. Would it have affected property in Merchantville as well as property in Camden?  
 A. From reports it affected property in nearly every section of the country.
- Q. Now, with respect to properties in Camden County and especially with respect to properties in

Merchantville, would you say there was or was not any increase—or rather put it this way—that there was any change in values from April 1st, 1926, until October of that year.

Mr. Starr: If the Court please, I object, as immaterial and irrelevant, I don't see where it has any significance whether there is any rise or fall in the value of property after the first of April and before October. 10

The Court: I think the last witness in answer to your own question said the boom bursted in the fall of 1925.

Mr. Starr: He is talking about April 1st, 1926, and October 1st, 1926.

The Court: What is it you want to show?

Mr. Stackhouse: I have pleaded, and one of our defenses is laches. There was, evidently, according to the records of this Court, no action taken from the time of the day fixed for settlement, April 1st, 1926, until the issuance of the subpoena in this Court on the 14th of October, 1926. Now, the rule is that a party must pursue his remedies diligently, and save, if possible, the other party to the contract from as much loss as possible, and if they waited a period of six months to take any action and there was a decrease in value—it may be entirely pertinent because— 20 30

The Court: I think it is competent.

The Witness: There has been a decided decline in property values from April 1st, 1926, to October 1st of the same year, that is, generally.

Cross-examination.

By Mr. Starr:

Q. Mr. Miller, the real estate market in 1926 broke in the spring, didn't it?

A. Well, in the general acceptance of the real estate business they always figure there is a lull in the fall and winter and they figure the reopening again in the spring, and there was no reopening, that is all I can tell you from my experience.

Q. Wasn't there a decided break in the market independently of the fact that the activity was not resumed in the spring of 1926?

A. Yes, there was a decided break in the market because nobody would consider anything anymore.

Q. When did that happen?

A. We expected the market to open in the spring and it didn't open, you couldn't get anybody to buy.

Q. There was no material change say between the first of March or the first of April and the balance of 1926, was there?

A. During 1926 the trend seemed to be going downward from the inflated prices that were reached in 1925.

Q. That condition started to exist when the activity was not resumed?

A. Yes, sir.

Q. That was in the spring, March and April, 1926?

A. Yes, around the spring we had expected the market to open.

Q. There was no material decrease in the values except there was no activity?

A. There was no activity. The decrease was probably in those properties where a man had increased it during the boom and he felt the decrease.

Mr. Stackhouse: Now, if the Court please, we are back again on this question of the defendant. I went to the Prosecutor's office to see whether I could get an interpreter there and they said they didn't have any Jewish interpreter, never had occasion to use one, and, as they put it, there wasn't any such animal. I have offered the services of one of the students in my office, Mr. Cotton, who is competent, but I don't know if Judge Starr has gone so far as to object.

10

Mr. Starr: If you say he will be thoroughly impartial and will accurately interpret the answers of the witness I will take your word for it.

Mr. Stackhouse: I can assure you of that.

(At this point Charles C. Cotton was sworn in as an interpreter.)

20

JACOB FINE, sworn.

By Mr. Stackhouse:

(Through interpreter.)

Q. Mr. Fine, you are the man who is being sued in this case, aren't you?

A. Yes.

30

Q. Mr. Fine, I show you a signature, J. Fine, to this contract, dated October 20, 1925, and ask you if that is your signature?

A. Yes.

Q. Do you know Mr. Lipsitz, Mr. William Lipsitz?

A. Yes, I know him.

Q. Did you have any dealings with him with reference to this Merchantville Garage?

A. No, when I bought it I bought it myself.

Q. Did you have any dealings with Mr. Lipsitz with reference to this contract?

A. No, I bought that separately by myself.

Q. I don't believe he understands the purport of the question. Mr. Fine, who talked to you first about buying this garage?

A. Mr. Lipsitz.

Q. When was that or how long before you signed the contract was that you talked to Mr. Lipsitz?

A. A few weeks, a couple of weeks, I don't exactly remember.

Q. Did he make any statement to you about the income of the garage at that time?

A. He told me it takes in about seventy-five thousand or eighty thousand dollars a year.

Q. Was that before you put your name on that paper?

A. Yes, otherwise I would not have bought it.

Q. What business were you in, Mr. Fine, at the time this paper was signed?

A. No business at all at the time he signed this contract.

Q. Are you retired?

A. Retired.

Q. What was the last business he was in prior to that?

A. I was in the baking business.

Cross-examination.

By Mr. Starr:

Q. When did Mr. Lipsitz first speak to you about the Merchantville Garage?

A. I don't remember.

Q. What month?

A. I can't remember the month.

Q. Now, the contract is dated the 20th of October, 1925, was it in the same month?

A. I don't know.

Q. Now, what did Mr. Lipsitz tell you the first time he talked to you about the property?

A. He told me it makes between \$75,000.00 and \$80,000.00 a year and it is a good buy.

Q. Is that all he said?

A. That is all, aside from that I don't remember.

Q. You don't remember any of the other parts of the conversation with Lipsitz on that occasion?

A. That is the only thing.

Mr. Stackhouse: Mr. Voigt, I served Mr. Brown with a notice to produce the summons and complaint.

Mr. Starr: I have it.

Mr. Stackhouse: I want to offer in evidence the summons and complaint—the summons in the Supreme Court case of Charles Van Buren and Mabel S. Van Buren against Jacob Fine, the summons being issued April 28, 1926, and ask that it be marked as Exhibit P3.

Mr. Starr: If the Court please, I suppose this is perfectly competent as a bit of evidence, but it is a rather peculiar—

The Court: Can't you stipulate? There is no dispute.

Mr. Starr: No, let it go in evidence.

10 The Court: Can't you stipulate that suit was brought for damages on a certain date and what subsequently was done?

Mr. Stackhouse: I have a certified copy of all subsequent proceedings.

Mr. Starr: I have, too. Let the original summons go and put in a certified copy of what happened with the case in the Supreme Court, is that satisfactory?

20

Mr. Stackhouse: Yes.

The Court: Will you state generally, for my benefit, what was done?

30 Mr. Stackhouse: I have noticed one thing here, my certified copy—rather, let me preface that by saying that what happened to this matter was, not that I think it is particularly important under the law, a motion was made to strike out the complaint and that motion prevailed, it prevailed on the ground that the complaint did not allege a cause of action in that penal damages were demanded when the contract stated liquidated damages. I notice there is a consent to the filing of that order by T.

Philips Brown, Attorney for the plaintiff, which does not appear on Judge Starr's copy.

The Court: One set of copies seems to have the endorsement and the other does not.

Mr. Stackhouse: They are different in some other respects, too.

Mr. Starr: I don't understand that. The 26th 10 day of July, on motion of Aaron Heine, ordered that the complaint filed in the within cause be dismissed as it does not allege a cause of action, with costs to the defendant, signed by Judge Katzenbach, and my copy has, "I hereby consent to the filing." Mine has, "Entered July 26, 1926, on motion of Aaron Heine," and the copy Mr. Stackhouse has has, "I hereby consent to the filing of the order, T. Philip Brown."

Mr. Stackhouse: Mr. Brown, you did consent to 20 it?

Mr. Brown: I was aware of it.

Mr. Stackhouse: Didn't you sign the consent?

Mr. Brown: I believe I did.

Mr. Stackhouse: Undoubtedly this appears on the Supreme Court Record or it wouldn't be there, and 30 through some mistake it was left out of here. I think we had better put this one in. I ask that this be marked an exhibit on behalf of the defendant.

(Said paper offered in evidence and marked Exhibit D4.)

Mr. Starr: The third paragraph of the complaint reads as follows, "Although the plaintiffs have ever since and are still ready and willing to tender a good, legal and sufficient special warranty deed the defendant has never since and still refuses to perform the contract, therefore the plaintiffs bring this action and demand as damages, the sum of \$53,000.00 together with interest and costs of suit"—that was the balance due on the contract. The summons was served and never filed, the summons was attested by Mr. Brown as attorney for the plaintiffs and originally signed by Charles F. Wise, Clerk, and the paper which I have in my hand the name of Wise is erased. Now, subsequently, Mr. Heine, who represents the defendant, although the paper itself states he is representative of the plaintiff, gave notice of a motion to strike out the complaint—

20 The Court: When was that?

Mr. Starr: On the 31st of May, 1926. It was served on the 19th of May, 1926, and a notice was given for May 31st, 1926, before Judge Katzenbach to strike out the complaint because Mabel S. Van Buren was named as one of the plaintiffs and the notice stated that the reasons to be urged for the motion were that the action is based on an agreement in which Mabel S. Van Buren is made one of the parties, but to which agreement the said Mabel S. Van Buren did not affix her signature and for that reason did not become one of the parties to the agreement. Then there was a continuance—wait a minute—there was a continuance to the 14th of June, 1926, another continuance until the 26th of July, all these continuances being consented to by the attorneys for the respective parties. Now,

on the 26 of July an order was signed by Judge Katzenbach, consented to by Mr. Brown, in which the complaint filed in the within cause is dismissed as it does not allege a cause of action, with costs to the defendant, then on the 14th of February, 1927, Judge Katzenbach signed an order for judgment to be entered for costs in favor of the defendant Fine against Van Buren for \$21.85, and on the 16th of February, 1927, a judgment was entered against the plaintiffs in that suit, being the two Van Buren, in favor of Jacob Fine, in the sum of \$21.85. 10

Mr. Stackhouse: Apparently the motion to dismiss was made on one ground and the dismissal actually took place on another.

Mr. Starr: That is what happened, according to the record.

The Court: And this suit was brought, apparently, October 5, 1926? 20

Mr. Stackhouse: As I understand it, it was brought on the 14th of October. It is true the bill was filed on the 5th of October, but that is not the bringing of suit.

Mr. Starr: This contract was made in 1925 to be fulfilled the 1st of April, 1926. On the 28th of April the suit was brought by Mr. Brown, that suit was finally dismissed July, 1926, and this bill was filed in October, 1926, that is the state of the record. 30

CHARLES VAN BUREN, recalled.

By Mr. Stackhouse:

Q. Mr. Van Buren, have you occupied this garage ever since it was built?

A. No, sir.

Q. Did you build it?

10 A. No, sir.

Q. Have you any idea how much it cost to build it?

Mr. Starr: I object, immaterial and irrelevant.

Mr. Stackhouse: I think it is material from this standpoint, if the witness knows that a large portion of its value might consist of its income producing possibilities—it might cost only \$1000.00 to build  
20 and if it would sell for \$58,000.00—

The Court: You might introduce anything you choose to establish its value.

Q. When did you buy it?

A. 1922.

Q. How much did you pay for it?

A. \$40,000.00.

30 Mr. Starr: Do you think that is competent, what he paid for the property in 1922? It seems to me it is utterly immaterial.

The Court: It would be ordinarily, Judge Starr, but the trouble is in suits for specific performance there are so many doctrines laid down touching

the propriety of granting the remedy, and one of those is that the bargain should not be unconscionable, should not be a hardship, should not work an injustice, and this testimony tends to establish—it may not aid very much—but it tends to establish that the price charged for this garage was beyond reason and that the contract for that amount ought not to be enforced.

Mr. Starr: There is no suggestion in the pleadings that is the ground of defense. 10

The Court: I am not sure it is necessary, I think the element of fairness is the underlying element in the case. I will let him introduce the value. He answered the question.

The Witness: \$40,000.00.

The Court: 1922, that was? 20

The Witness: Yes, sir.

Q. Was there a garage business, a garage on there at that time?

A. Yes, sir.

Q. Who carried it on previous to the time you took charge of it?

A. Mr. Carey.

Q. You took it over as a going concern at that time, did you? 30

A. Yes, sir.

Q. And operated it ever since?

A. Yes, sir.

Q. And the amount which you paid, which you said was \$40,000.00 in 1922, was or was not that

based upon the value of the business as well as the garage?

A. No, I just bought the garage as was, I never went into any details about it, I just bought it.

Q. It was doing some considerable at that time, wasn't it?

A. I don't know just what they were doing, I never saw the books, and I knew Mr. Carey and I took his word for it.

10 Q. You took his word for what the amount of business being done was?

A. He never said what amount it was doing.

Q. When you say you took his word for it what do you mean by that?

A. I mean for the business, that it would be all right.

Q. In other words, you took Mr. Carey's word for it that it was a good paying business?

A. Yes.

20 Q. So that was a factor in the purchase of the property in 1922, that is true, isn't it?

A. I suppose you would call it a factor, I was interested in buying it, that was the main thing, I didn't go into any details or look over the books, or anything like that.

Q. You knew Mr. Carey very well?

A. Yes, sir.

Q. And you trusted him when he told you it was a good paying business?

A. Yes, sir.

30 Q. Mr. Van Buren, have you any objection to Mr Voigt and Mr. Brown telling the Court what happened between you and them with reference to your instructions to commence the suit against Mr. Fine?

A. No, sir.

No cross-examination.

FRANK VOIGT, recalled.

By Mr. Stackhouse:

Q. When did you first come into contact with Mr. Van Buren with reference to this matter, Mr. Voigt?

A. On the day the contract was signed, October 20th.

Q. And did you represent him from that time on? 10

A. May I tell it, Mr. Stackhouse—that is to say, I represented him, and that is a situation and I will tell it, and if you don't want to hear it I will stop, but in order to tell you clearly just what happened, after this contract was signed from time to time Mr. Van Buren would tell me as to what was doing, and along in the course of it he said, "I don't believe these fellows are going to go through with this contract," and then it came down to just before the last payment, and I parked my car at Mr. Van Buren's, and one morning I was in there and he told me he had given these men an extension, and I said, "Did you keep a copy of it?" and he said, "No," and I said, "What did you say in it?" and he read it to me, that is, he repeated it as well as he could remember it, and I said it sounded all right, "I think that is all right," and I said, "You be to the office on the day appointed in the event they don't go through with it and we will be ready to make settlement," and I prepared a deed and had it executed and ready and Mr. Van Buren came at the time mentioned in the contract. Now, after that happened, Van Buren said, "Well, they didn't show up, now what can I do?" and I told Mr. Van Buren that under that contract they could be compelled to perform, so I just don't recall when it came to the point where he wanted action in the matter, or how short-

ly afterwards, but when he did I was engaged. I had been in the real estate boom, too, and I was very busily engaged at that time, and I turned the matter over to Mr. Brown—

Q. You were making more money out of the real estate boom than you were out of the law?

A. Yes, sir, I was. I had been turning lots of things over to Tom Brown, this one thing in particular, I said, "Tom, this is a good one, I have given  
10 you a lot of dead ones, but this is one worth your while, these people have fallen down on their contract and I want you to make them perform."—I won't say I used those words, but there was nothing in my mind but a bill for specific performance, and then I was out of touch with the thing, it was entirely up to Tom, and I supposed that the matter was proceeding along. Van Buren would ask me how it was coming along—

Q. You told him Mr. Brown was handling it for  
20 you?

A. Yes, I think I did, yes, I think I did, I am pretty sure, and he asked me how the matter was coming along and I told him, and I was under the impression all the time that Tom Brown had filed a bill, and the first I knew there wasn't a bill filed is when Tom Brown told me there was some motion over before Judge Donges, and I was puzzled, I said, "What is he doing in the matter?"—I knew it was a Chancery matter and I was puzzled, and I  
30 said, "Tom, what is the idea?" and then I recall Mr. Heine getting into the matter and I went up in the air, I said, "My gosh, we don't want that, we want a bill for specific performance, that isn't what we want." Well, I told Tom to consent to dismissing this suit so as we could file a bill, and that I understood was done, and then I was informed that

a bill had been filed and we were proceeding along. Now then, during that time Van Buren—I didn't tell Van Buren about this suit because I felt very rough about it, I felt as though—I wasn't acting as his attorney, but I was responsible, so much so when the bill was presented to Van Buren for costs which he didn't know about I paid them out of my own pocket, because I felt I was morally due to do that, and finally I learned that Tom had filed a bill, and the thing came on down to date. 10

Q. You do say, however, you told Mr. Van Buren that you had passed the matter over to Mr. Brown to look after for you?

A. I probably did, and I think I must have said that, I must have said that Mr. Brown is attending to it.

Q. When you were talking to Mr. Van Buren did you tell him that the only thing that he could do was to make the people take the property?

A. No. Mr. Stackhouse, you will understand I  
20 want to be very fair in the matter and tell exactly what it was, but I can't tell I said that, that was the only thing, but the one thing I had in my mind and the only thing Van Buren ever talked to me about was to make them take it off his hands.

Q. I hardly think what was in the witness' mind—

A. Probably so, probably I am testifying poorly, but I only intend—

Q. When you were talking to Van Buren, Mr. Voigt, you knew there should be either an action  
30 for damages or an action to make them take it?

A. Did I know it?

Q. Yes.

A. I think I would know it, I am not so expert on that, but I think I would know that.

Q. And you would advise your client accordingly?

A. Yes, sir.

Cross-examination.

By Mr. Starr:

Q. Mr. Voigt, how soon after the first of April, 1926, did you receive instructions from Mr. Van Buren to start something against Fine?

A. Judge, I can't tell how quickly it was; the thing was this, he was hopeful that they would go through with it.

10 Q. This suit Mr. Brown brought was on the 28th of April and the time for performance of the contract was the 1st of April?

A. Yes.

Q. Was it between those dates you received instructions from Mr. Van Buren to proceed?

A. Yes, sir.

Q. What were they?

A. The instructions were to make them take it.

20 Q. Did you ever receive any instructions from Mr. Van Buren to bring a suit for damages?

A. Absolutely not.

Q. Now, on the 20th of October, 1925, I understand you to say you were present when this contract was signed?

A. Yes, sir.

Q. And Mr. Fine, Lipsitz, Van Buren and yourself were there?

A. Yes, sir.

30 Q. How long did negotiations continue in your presence until the contract was actually signed up?

A. It was a whole afternoon, I think it was perhaps 2 o'clock—it might have been one—say two o'clock, and it took up the whole afternoon.

Q. State generally in your own way what happened.

Mr. Stackhouse: With respect to the settlement?

Mr. Starr: No, this day, the 20th of October, 1925.

Mr. Stackhouse: If the Court please, this is not cross-examination.

The Court: I think you had better call him, Judge Starr.

Mr. Starr: I am perfectly willing to do that. 10

The Court: Have you anything more?

Mr. Stackhouse: No.

The Court: You can call him for your witness.

Mr. Stackhouse: I have one more witness.

The Court: Stand aside, Mr. Voigt. 20

T. PHILIPS BROWN, sworn.

By Mr. Stackhouse:

Q. Mr. Brown, you are the attorney of record in this Supreme Court suit? 30

A. Yes.

Q. Was that suit brought by any talk with Mr. Van Buren personally?

A. No, sir, it was not.

Q. You got your instructions from Mr. Voigt?

A. Yes, Mr. Voigt called me on the phone and I

went over to the office, as I understand it, he said, "Here is a contract, Mr. Fine fell down on it, go to it," that is as nearly as I can recall, and it wasn't uncommon that I should start suit without the other parties being there.

Q. You were associated with Mr. Voigt in a number of matters?

A. Yes, sir.

10 Q. He was busy at that time trying to make some money in real estate?

A. Yes, sir.

Q. And you went to it by instituting this Supreme Court suit?

A. That is correct.

Q. And the record shows what eventually happened?

A. Yes.

Cross-examination.

20 By Mr. Starr:

Q. When did you first see Mr. Van Buren?

A. That was out at the Convention Hall, the occasion was the West Jersey Hospital benefit card party.

Q. When was that?

A. I don't know the exact date, I believe that was around February or March.

30 Q. What year?

The Court: The suit was brought in 1926.

The Witness: It must have been in 1927, it was after the Supreme Court Action had been brought and pending.

The Court: It was dismissed July, 1926, was it after that?

The Witness: Yes, it was in February of 1926.

The Court: 1926 or 1927?

The Witness: 1927, if the Court please.

Q. After you brought the suit in Chancery?

10

A. After the suit was filed in Chancery.

Q. You knew nothing about him except the fact Mr. Voigt had turned the papers over to you?

A. After I had prepared and served the original summons and complaint in the Supreme Court action and before I had filed the same I was informed from Mr. Voigt's office that Mr. Fine was negotiating with Mr. Van Buren to effect a settlement, and consequently I did not file it with the Clerk of the Supreme Court, and then the next point came on Mr. Heine's motion, and all that time I did not see Mr. Van Buren.

20

Q. Did you receive any instructions from Mr. Voigt to bring a suit for damages against Fine?

A. No, sir, there was nothing said which action should be brought, it was merely my own idea.

Q. Why did you bring the suit for damages?

A. I looked over the contract, and I seen the \$5,000.00 had been paid, there was quite a large amount involved, I knew he had fallen down on the contract, and I thought that an action for damages, without giving it very much thought, was the proper remedy.

30

Q. Was that based upon anything that Mr. Voigt told you?

A. Nothing, whatsoever.

Q. Or your own determination?

A. Absolutely, it was.

Q. When was Mr. Van Buren advised by you that a suit for damages had been started and had been dismissed?

A. He was never advised, we never had any dealings until I met him at Convention Hall.

Q. Was that merely socially?

A. Yes, and it happened to be mentioned I was  
10 the attorney in this transaction.

Q. Your business relations with Mr. Van Buren, were they carried on exclusively with Mr. Voigt?

A. Entirely.

Q. I show you Exhibit D3 which is the summons and complaint, the name of the Clerk seems to have been erased, can you explain about that?

A. No, I wasn't interested, because at the time I did not file it because I was advised from Mr. Voigt's office that negotiations were pending that  
20 would probably result in a settlement, and consequently I disregarded it, I kept it in my office.

Q. You don't know how the name of the clerk came to be erased?

A. I don't know how it was put on or erased.

The Court: If it was never filed how can the Supreme Court Clerk give a certified copy?

Mr. Starr: No, there is no certified copy of it in  
30 the records that I have, the record which I have is confined exclusively to the motions that were made to dismiss this complaint which was never filed.

The Witness: I would like to make another statement, Judge Starr. I see in here it states May 1st,

that is merely a typographical error, because I filed this on the 28th of April, it should have been April 1st rather than May 1st.

Q. You subsequently consented to the dismissal of the Supreme Court action?

A. I did.

Q. You were in communication with Mr. Voigt from time to time about the motion to strike out?

A. Yes.

Q. You consented pursuant to his suggestion or with his understanding?  
10

A. Yes.

Q. Then you filed the bill for specific performance on the 5th of October?

A. I am not quite sure of the date.

Q. Why wasn't the bill filed immediately after?

A. I was in Ocean City during the month of August.

Q. Away on your vacation?  
20

A. And I returned the 10th or 11th of September, the week after Labor Day.

Mr. Starr: Have you finished?

Mr. Stackhouse: Yes.

The Court: Do you rest now?

Mr. Stackhouse: Yes.  
30

## COMPLAINANT'S REBUTTAL.

FRANK VOIGT, recalled.

By Mr. Starr:

10 Q. Mr. Voigt, please detail what happened on the 20th of October, 1925, in your office in the presence of Mr. Lipsitz, Mr. Fine, Mr. Van Buren and yourself when this contract dated that day was executed?

20 A. Mr. Van Buren and Mr. Fine and Mr. Lipsitz came to the office and Mr. Van Buren told me what they were there for, that these people had offered him \$55,000.00 for his garage, and he said, "It is not enough," he said "If they will come up to my price I want a contract drawn, they seem to want it pretty badly, and I want \$58,000.00, that is my price, and I won't take anything else." Mr. Lipsitz would tell Mr. Fine—

The Court: How did you and Mr. Fine get along, he doesn't seem to speak English.

30 The Witness: Mr. Lipsitz, I never talked to Mr. Fine, neither did Mr. Van Buren, Mr. Lipsitz did the interpreting and they would talk together, and finally, sometime during the afternoon, they came up \$1000.00 and Van Buren said, "No," and then again they came up another \$1000.00, and then there was a long period of waiting between, a talk between Mr. Fine and Mr. Lipsitz, and finally they came up to the \$58,000.00, and then we drew the papers.

Q. The papers were drawn in your office and signed that day?

A. Right there.

Q. Who did the talking for Mr. Fine?

A. Mr. Lipsitz.

Q. Will you state whether or not he endeavored to have Mr. Van Buren accept the \$55,000.00?

A. Yes, Mr. Lipsitz was very insistent on trying to get him all along, each step if it was \$56,000.00 he argued with Mr. Van Buren, and Mr. Van Buren 10 just sat there and shook his head.

No cross-examination.

The Court: I would like to ask Mr. Voigt one other question. While they were negotiating in your office did you hear anything said touching the income of the property?

The Witness: Not one single thing, no, sir. 20

CHARLES VAN BUREN, recalled.

By Mr. Starr:

Q. Mr. Van Buren, when did you first have any talk with Lipsitz about this garage property of yours in Merchantville? 30

A. I imagine it was about a month or so before this agreement was made.

Q. What was the talk between you and him on that occasion?

A. He asked me if I knew of any good buys around, and I spoke to him about the house across

the way Mr. Wolcott and I had, and I mentioned to him about the Inn which had already been purchased and sold—

Q. About what?

A. The Inn, just the general course of conversation, and he said, "What about your garage, is that for sale?" and I said, "Anything I own is for sale if I get what I want for it," and that is how the conversation started.

10 Q. Now, continue, give us the conversation as you recall it, as you recollect it.

A. Well, I don't know, there was just a lot of talk, I don't know just what it was about.

Q. Had you been acquainted with Lipsitz before that time?

A. He had been there on several occasions to get his car fixed and I got acquainted with him that way.

20 Q. You had no business dealings with him before that time?

A. No.

Q. At that time was there any discussion between you and Lipsitz in reference to the yearly income from the garage?

A. Absolutely none.

Q. Did you tell him at that time in response to a question which he put to you that you were depositing about \$200.00 every day, \$400.00 on Saturday?

30 A. I did not.

Q. As the result of the conduct of the business of the garage did you tell him that?

A. No, sir.

The Court: His statement was, giving it exact, "I am depositing \$200.00 every day and four to

five hundred dollars on Monday morning," that is the testimony.

Q. You have heard what the Vice Chancellor said, did anything like that occur?

A. Absolutely no, no figures of any kind mentioned.

Q. Did you tell him you were depositing \$200.00 daily and four to five hundred dollars on Monday morning? 10

A. No, sir.

Q. How many times did you see Lipsitz about—cross that out—he said something about your signing an authority for him to act as your agent in the sale of this property, what have you got to say as to that?

A. I never signed any contract for the sale of that garage, I signed one of these forms I saw there, but what I did sign was for the house across the street. 20

Q. You never signed one for the garage?

A. Not to my knowledge.

Mr. Stackhouse: I object to that because it is already in evidence that the contract was signed, it was admitted by counsel the contract was signed.

The Court: If it was I don't remember it. I remember they introduced the evidence but I don't remember it came by admission. 30

Mr. Stackhouse: It did come by admission, I handed the blank form over—

Mr. Starr: What I said was this, I was under the impression that the contract for the garage had

been signed, but this morning Mr. Van Buren said his recollection was—

The Court: If you are mistaken you can withdraw the stipulation and you can make your proof on that if you still claim there was not one. He says he was under a misapprehension.

Mr. Stackhouse: If the Court please, I proved a  
10 contract in writing between Mr. Van Buren and Mr. Lipsitz, an agency contract, but I did not have the original here.

The Court: You introduced the printed form and Judge Starr said that was correct.

Mr. Starr: I understood it was.

The Court: Now you say you are mistaken?

20

Mr. Starr: Yes.

The Court: Then you ought not to be bound by it if you were mistaken. You can produce your evidence on that. This witness should not be bound by Judge Starr's inadvertence in that respect, you ought to be privileged to withdraw your stipulation.

30 Q. What do you mean by that, not to your own knowledge?

A. I don't ever recall the signing of any contract for the garage, because it was signed up with Tucker at the time for \$60,000.00.

Q. You had given Tucker authority at that time?

A. For \$60,000.00, yes, and I know I shouldn't sign two agreements for one place.

Q. You did sign one of these forms?

A. Yes, sir, and that was for the big house.

Q. That was the house you were talking about with Lipsitz?

A. Yes, sir.

The Court: What price did you give at the beginning?

The Witness: To Mr. Lipsitz?

10

The Court: Yes.

The Witness: I told him I had it signed up with Tucker for \$60,000.00.

Q. He said you offered to sell it for \$50,000.00 on that occasion, is that a fact or not?

A. No, sir, I did not, it was up for \$60,000.00 with Tucker.

Q. When had you signed the agreement with  
Tucker? 20

A. I think that was about 6 or 9 months before this other thing came up.

Q. Well, now, after that occasion which you had this talk with Lipsitz, how many times did you see Lipsitz with reference to this business until October 20, 1925, when the contract was signed?

A. I guess on about 2 or 3 occasions he came in to get some work done.

Q. Was there any discussion about this garage  
property? 30

A. Never any discussion at all.

Q. When did you know that Lipsitz had Mr. Fine in tow as a possible buyer for the property?

A. The first payment was made at Mr. Voigt's office and the next payment 10 days later.

Mr. Starr: Read the question.

The Witness: I know when they went there and wanted—

Q. You don't understand the question. When did you first know that Lipsitz proposed to sell that property to Fine?

A. Oh, I didn't know who he was going to sell it to, I didn't even know he was going to sell it until he brought Mr. Fine there.

Q. When did he bring Mr. Fine to you?

A. About 2 weeks before the contract was signed.

Q. What was the talk upon that occasion?

A. There wasn't very much talk about it, he just brought him in and had him look over the place and asked me if it would be all right for him to walk around, and he went back and went around and there was no conversation between me and Fine about it.

Q. Was there anything said about the income of the garage?

A. Absolutely none.

Q. When did you next hear from Mr. Fine?

A. The time he came out to make the contract, that day.

Q. Mr. Lipsitz brought Fine out there?

A. Yes, sir.

Q. What was the talk?

A. Mr. Lipsitz wanted to get it for \$50,000.00 and I told him I couldn't sell it for that, that I had it signed up with Mr. Tucker for sixty.

Q. What did you mean by having it signed up with Tucker?

A. You sign one of these real estate forms.

Q. Had you sold it to Tucker or given him authority to sell it?

A. To sell it.

Q. State what the conversation was.

A. And he finally agreed to give me \$50,000.00 and I went down to Mr. Voigt's office, the three of us, then they finally agreed—

The Court: Did they finally agree on \$50,000.00?

The Witness: They offered \$50,000.00 at first and they agreed to give me \$55,000.00 before we left the garage.

Q. So the negotiations were \$55,000.00 before you went to Mr. Voigt's office?

A. Yes, and when we got to Mr. Voigt's office they eventually agreed to give me \$58,000.00.

Q. How long were you there negotiating?

A. I would say from half past one to five o'clock, I think the rest of the stenographers were leaving the office.

Q. On that day at Merchantville before you went to Mr. Voigt's office was there any talk between you and these two gentlemen with reference to the income from the garage?

A. No, sir.

Q. When you reached Mr. Voigt's office was there any talk about income?

A. No, sir.

Q. Mr. Van Buren, Mr. Lipsitz has testified he had a talk with you in October in which he stated a gentleman had been there inquiring about the income of the garage, did you have any conversation with Lipsitz about that?

A. No, sir, I never saw anybody in there, that is, to talk to me about any purchase of the garage.

Q. What did you tell Lipsitz, if anything?

A. I told him where he might sell it and gave him a prospect, a man by the name of Tolcinski.

Q. Did you ever see anybody out in the garage?

A. No.

Q. Did anybody ever come to you after you made the contract with Fine in October, 1925, and inquire as to the income from the garage?

A. No, sir.

Q. Did Mr. Lipsitz at any time after the contract was made and before the first of April ask you why it was you had told this prospective buyer that the income was \$17,000.00 annually?

A. I never heard any conversation like that.

Q. Never told anybody that?

A. No, sir.

Q. Did you have any conversation later on with Lipsitz?

A. I did not.

Q. What is your regular business, do you have a trade or profession of any kind?

A. No, sir.

Q. You have been operating this garage since 1922?

A. Yes, sir.

Q. Occupation before that time?

A. I was in the garage business before that.

Q. Who made the request of you that the payment of one of these installments of the contract should be deferred?

30 A. The first one was made by the son of Mr. Fine, on a Sunday they came to the house and asked if it could be put over for a month.

Q. The first installment after the initial payment of \$1500.00 under the terms of the contract was to be payable on October 23, 1925, when was that paid and who made payment?

A. Mr. Fine.

Q. Mr. Fine, or was somebody else with him?

A. Mr. Fine and Lipsitz came to the garage and gave me that \$1500.00.

Q. When was it, as a matter of fact, actually paid?

A. The first two payments were made on time, it was the 3rd payment.

Q. The 3rd payment of \$1000.00 within 30 days, when was that actually paid?

A. Paid in 60 days.

Q. Can't you give us the actual time it was paid?

A. It was supposed to be paid the 23rd of December and it wasn't paid until January.

Q. The first payment is 30 days, that would make it November 20, 1925?

A. Then it was December 20, 1925.

Q. Who made that payment?

A. Mr. Fine and Mr. Lipsitz.

Q. That is, the old gentleman?

A. Yes.

Q. Was there anything said at that time why he needed the additional time?

A. Absolutely none.

Q. The next installment is \$1000.00 to be paid within 60 days from October 20, when was that paid?

A. That was paid the month—it must have been paid the 20th of January.

Q. Was there anything said upon that occasion?

30 A. Yes, sir, they said, "We are here with the final deposit money but unless you give us an extension of 3 months we won't pay the final deposit, we will let it drop," so we did some dickering around, I asked \$1000 for an extension of one month and finally we agreed to give an extension of 2 months and \$500.00 to be paid on April 1st.

Q. And that is the paper you signed?

A. Yes, sir.

Q. Let me have the paper, Mr. Heine, please. Paper is dated January 20, 1926, and that is when they gave you the \$1000.00?

A. Yes, sir.

Q. Did they give you any interest on the deferred payment?

A. 6%.

10

The Court: And that calls for the last payment—

Mr. Starr: An extension for 60 days upon the payment of \$500.00 on the first day of April.

Q. When did you know for the first time that Fine was trying to avoid the contract on the ground of false representations made by Lipsitz to him?

A. I never found that out until we came in court here.

20

Q. At any of these negotiations you had with Lipsitz and Fine, was there anything said by either of them as to statements made by you in reference to the income of the garage?

A. No, sir.

Q. Was it ever mentioned?

A. No, sir, never mentioned.

Q. Now, with respect to the interview between you, Lipsitz and young Fine after the suit for damages was brought, do you remember when that happened?

30

A. I believe it was in August.

Q. State what happened.

A. They came in and said, "We see you are going after us on the contract," and I said that I was and they said, "Why don't you let it drop, keep

the \$5000.00 and let it go at that," and I told them I didn't want to do that, I wanted the sale to go through as the contract called for, that is all I remember saying.

Q. Now, at that time did Lipsitz claim or make any statement to you that there had been any misrepresentation as to the income from the property?

A. No, sir.

Q. Did you say at that time you were going to get all the money you could out of it?

10

A. I did not, I said I was going to let the proceedings go on as they had started.

Q. What did you understand had been started?

A. I understood that specific performance had been started.

Q. Did you ever come in contact with Mr. Brown and give him any instructions as to the sort of suit to be brought?

A. No, sir.

Q. What did you tell Mr. Voigt?

20

A. I went down there and consulted with him as to what was the logical thing to do and he suggested specific performance and I suggested that was the thing to pursue, of course.

Q. When did you know the suit for damages had been brought instead of a suit for specific performance?

A. About two days after we were in your office, the 23rd of May.

The Court: What do you mean by the 23rd of May, 1927?

30

The Witness: Yes, sir.

Q. Did you know until you had seen me the 23rd of May, 1927, that a suit for damages had been

brought instead of a bill filed for specific performance?

A. No, sir, I did not know a thing about it.

Q. Did you ever pay Lipsitz any money as agent for this property?

A. No, sir.

Q. Did he ever make any demand on you for commissions?

A. No, sir.

10

Cross-examination.

By Mr. Stackhouse:

Q. Mr. Van Buren, this property is a brick, one story structure, isn't it?

A. Yes, sir.

Q. About how wide are the walls on each side?

A. I don't know, I imagine they must be around 20 feet.

20

Q. And 20 feet high?

A. Yes, sir.

Q. Built in the form of a rectangular, isn't it?

A. Yes, sir.

Q. And fronting on Park Avenue in Merchantville pretty nearly opposite the stand pipe?

A. Yes, sir.

Q. In front of the building there are two small stores, rather, a store on one side and a small office on the other?

30

A. Yes, sir.

Q. And in the rear of the building there is a work room, isn't there?

A. A repair shop.

Q. What?

A. A repair shop.

Q. And is that partitioned off from the rest of the garage?

A. Yes, sir.

Q. About how large is that repair shop?

A. I think it is around 50 feet, something like that, 50 feet square.

Q. How deep is the garage?

A. The garage—I don't know just how deep that is.

Q. Would you say it is about 200 feet long, would 10 you say?

A. I wouldn't like to say exactly because I never measured it or know just what it is.

Q. Can't you give any idea at all?

A. No, I can't.

Mr. Stackhouse: Judge Starr, I have a survey of this but I haven't got the surveyor here, I don't know whether you will want to admit that. I am only going to use it as an illustration. 20

Mr. Starr: Let Mr. Van Buren see it and if he says it is correct I haven't any objections.

Q. I show you a piece of tracing cloth on which there is a drawing, "Survey of plan of property in Merchantville, New Jersey, Walter H. MacNamara, Civil Engineer," dated, "June 21, 1926," and ask whether you would concede that that is approximately a correct delineation of the lot and the garage? 30

A. Well, I suppose the survey is correct, if it is, that is right.

Q. I haven't the surveyor here and I haven't attempted to prove the survey by the surveyor.

A. What is this?

- Q. That is the lot.  
 A. What is the length of that?  
 Q. That doesn't seem to be delineated.  
 A. I would say 200 feet.  
 Q. I would say 200 feet on this line and 225 on that line.  
 A. That is about right.  
 Q. What kind of a roof does it have on it?  
 A. Slag roof.  
 10 Q. Have you had any experience with building?  
 A. Have I?  
 Q. Yes.  
 A. No, sir.  
 Q. You don't know what it would cost to build this place?  
 A. I haven't any idea, no.  
 Q. What is property 200 feet in depth along Park Avenue selling for, do you know?  
 20 Mr. Starr: I object on the grounds stated before.  
 The Court: I doubt whether it is cross-examination. Let him answer if he knows.  
 The Witness: I haven't any idea of real estate values there.  
 Q. You would say this, wouldn't you, that the value of this property depended almost entirely upon its value as a going concern as a garage?  
 30 Mr. Starr: Objected to as irrelevant and immaterial.  
 A. No, I wouldn't say that because business property is valuable, they are at a premium right now,

there aren't many business sections and they have had several ordinances against extending it.

Q. When you say a business property you mean the ground as business property?

A. Yes.

Q. Would you say if there was no garage on this ground it would be worth \$58,000.00?

A. I couldn't tell you just what it would be worth, it would all depend on what it wanted to be used for.

Q. If it was used as a garage, as it is used for, it would be worth more than the vacant ground?

A. Yes.

Q. So a very considerable portion of the value of that ground grows out of the fact it is being used for a garage, that is true?

A. No, I say the ground is valuable, too, very valuable.

Q. Not as valuable as with the garage on?

A. No, it is more valuable with the garage on it.

Q. And more valuable as being operated as a garage and being sold as a going concern, that is true, also?

A. It would be more valuable with the business on there.

Q. So that the business in your making a sale of it was a factor on arriving at the price, wasn't it?

A. It wasn't any factor to me, I was there running the place, but it might have been a factor to the ones who purchased it, I don't know.

Q. You said you had a contract with Tucker's real estate office for the sale of this property?

A. \$60,000.00.

Q. And that contract was entered into a number of months before this deal was made with Fine?

A. Yes, sir.

Q. How long was that contract to run for, do you know?

A. I think it ran for 6 or 8 months, something like that.

Q. At the time you commenced negotiating it had then expired, hadn't it?

A. Well, they expire in 3 months if you give written notice; I had never given any written notice.

Q. Never given Tucker any written notice?

10 A. Not until after.

Q. Afterwards, meaning when, after what?

A. I don't know just when I gave him that notice, I think it was after—I don't know when that was. I suppose it was after Mr. Lipsitz came along.

Q. After Mr. Lipsitz came along then you gave notice to Tucker that his agency was terminated, is that correct?

A. Yes, sir.

20 Q. And that was done because you were dealing with Mr. Lipsitz in reference to the property?

A. Yes.

Q. You say you had no written agreement with Mr. Lipsitz to pay him any commission?

A. I did not.

Q. You say you did not have any agreement?

A. I did not.

The Court: You didn't have any commission agreement with Mr. Lipsitz?

30 The Witness: No, sir.

The Court: Why was he to bother himself with it?

The Witness: Because I told him I was already

signed up with Tucker, that is why I didn't sign that contract of his.

Q. You knew Mr. Lipsitz was attempting to get a purchaser for the property, didn't you?

A. I didn't know that until he came along with Mr. Fine. I know that he said if I got the price I wanted I would sell it, but I didn't know whether he was working on it or not until Mr. Fine came along. 10

Q. Well, now, you were in the court room the other day when I presented the blank form to Mr. Lipsitz when he was on the stand, you were sitting over at that table with Judge Starr, weren't you?

A. I think I was sitting back there on that bench.

Q. Sitting near Judge Starr?

A. No, I was sitting on the bench, the first row.

Q. Isn't it a fact when Judge Starr took that form out of my hand he came and showed it to you and asked you about it? 20

A. Yes, sir.

Q. And acting on that he said that is the kind of a contract you signed?

A. That is right.

Q. And you made no effort to dissent, at that time?

A. I didn't sign it for the garage, it was for the house.

Q. You made no effort to contradict Judge Starr at that time? 30

A. No, sir.

Q. And you didn't do it until you were brought back here on the stand the 2nd time, that is true?

A. I said I didn't sign the contract for the garage, which I didn't, I don't recall of ever signing a contract for the garage.

Q. You didn't say that when Judge Starr asked you that on Monday.

A. I said I signed the contract, I didn't specify whether it was for the garage or the house.

Q. There is no suit here involving the house.

A. No, but I recall I did not sign it for the garage.

Q. There was lengthy examination on Monday as to the agency, wasn't there?

A. Not so long, the whole thing was about an hour  
10 Monday.

Q. When did you give this notice to Tucker, do you know?

A. I can't tell you just when that was.

Q. Less than a month before the 20th of October?

A. Yes.

Q. Less than a month?

A. Yes.

Q. Now, notwithstanding the fact your contract with Tucker had not terminated on the 20th of Octo-  
20 ber, you went ahead and made a contract with Fine to sell him the place?

A. I must have done that if it was in between those dates.

Q. Mr. Van Buren, you say positively you never authorized Mr. Lipsitz to interest himself in the sale of this place at all, verbally or in writing?

A. I positively did not, outside of the fact that anything I had I would sell if I got what I wanted for it.

Q. Didn't he ask you then whether you would sell  
30 the garage?

A. He asked me then if I would sell it.

Q. And he asked you the figure?

A. Yes, and I told him I had it signed with Tucker for \$60,000.00.

Q. The reason you told him that was to tell him what price you wanted for it?

A. I told him I wanted \$60,000.00 for it.

Q. Didn't he say he would try to get a buyer for it?

A. He said he would work on it.

Q. And if he worked on it he would get the usual commission, of course?

A. I suppose he would.

Q. So you knew after that he had gone from you with the idea of working on a sale for the property?

A. He said he would work on it, I didn't know  
10 what he would do after he got out of there.

Q. You don't know of any other sales on Park Avenue along there of property near your place of an unimproved property approximately this size?

A. No, I do not.

By Mr. Starr:

Q. You still have title to this property, have you?

A. Yes, sir. 20

Q. You are in a position to convey the property to Mr. Fine in case the Court decrees specific performance?

A. Yes, sir.

## DEFENDANT'S REBUTTAL.

WILLIAM LIPSITZ, recalled.

By Mr. Stackhouse:

Q. Mr. Lipsitz, you were asked on Monday  
10 whether there was a written agreement entered into  
between you and Mr. Van Buren with reference to  
the sale of this Merchantville garage?

A. Yes.

Q. Was there such an agreement entered into?

A. Yes, sir.

Q. Did you also have one for the sale of the prop-  
erty across the street on Maple Avenue?

A. I had an agreement for the property across  
the street for a commission basis of 3% and the  
20 agreement for the commission on the garage on the  
basis of 5%, they were both executed at the same  
time.

Q. The present rate for resident property is 3%,  
5% for business property?

A. 5% for business property and 3% for the resi-  
dential house across the way.

Q. And that was in the form that was presented  
here the other day and marked as an exhibit?

A. In that form.

30 Q. You say you have made a search for the con-  
tract?

A. I have made a search for it and unfortunately  
I can't find it as yet; perhaps I may find it, I shall  
look for it, but unfortunately I haven't found it as  
yet.

Cross-examination.

By Mr. Starr:

Q. Mr. Lipsitz, were there separate contracts for  
the garage and the big house or all in one contract?

A. What?

Q. Were there separate contracts with you for  
each, the garage and the other building, or were  
they all in one contract? 10

A. Two separate contracts.

Q. When did you last see the garage contract?

A. What?

Q. When did you last see the garage contract?

A. When did I last see the garage contract? I  
don't remember.

The Court: Where did you see it last?

The Witness: In my home. 20

Q. Have you an office or do you practice your  
real estate operations in your home?

A. I have an office in Atlantic City.

Q. How much time do you spend in Atlantic City?

A. I had an office in Atlantic City which I gave  
up.

Q. How much time did you spend in Atlantic  
City?

A. Close on to a year, 1926 I spent in Atlantic  
City. 30

Q. All of 1926?

A. The biggest part of it outside of what little  
time I was up home attending to my private busi-  
ness.

Q. In the spring of 1926?

A. I was in Atlantic City.

Q. Do you have a place where you keep these contracts of authority to sell?

A. Yes, sir.

Q. Did you look there for the two Van Buren contracts?

A. Yes, sir.

Q. Did you find either of them?

A. No, sir.

10 Q. Did you know that Tucker had an outstanding agreement for this property when you first talked to Mr. Van Buren?

A. Absolutely not, not at that time, no, sir.

Q. Any time?

20 A. Yes, sir, later on at the time they signed the contract, when we were completing the agreement, at that time Mr. Van Buren called my attention to it that he had got an agreement with Mr. Tucker, and I asked him how long that agreement had been in effect and he said, "It has been in effect recently and it hasn't run out and I believe I will have to give Mr. Tucker his commission whether I sell it to you or not."

Q. When was that?

A. The date the contract was signed.

Q. Was that in Mr. Voigt's presence?

A. Whether it was before we went to Mr. Voigt's office or whether it was in Mr. Voigt's office I just can't exactly recall, but this was the day Mr. Van Buren had told me about it.

30 Q. You had not reached any agreement before you went to Voigt's office?

A. No, but he told me about the contract he had with Tucker in regard to giving him the authority to sell this garage, that was the first day I ever found out or understood that Mr. Van Buren had given it to anyone else.

Q. That conversation had to do with the garage?

A. About the garage.

The Court: And he told you that before you went to Mr. Voigt's office or afterward?

The Witness: That very same day, I can't recall whether it was shortly before we went or whether it was at his office, but it was that very same day.

10 Q. Why was it you had this talk with Van Buren about the Tucker contract when you did not reach any agreement with Fine until you went down to Mr. Voigt's?

20 A. If I recall this right, Mr. Van Buren had come to an agreement with us for \$55,000.00 for the garage and he said, "Let's go to the attorney's and we will fix it up," and we all went there and while there Mr. Van Buren said, he said, "I will have to get more money out of you because I have got an agreement with Tucker, I have got to give him his commission, and I must get more money out of you."

Q. That was Mr. Voigt's office?

A. That was very likely.

Q. Can't you answer that?

A. No, I don't remember, I don't falsify myself.

Q. You say you had come to a bargain with Mr. Van Buren for \$55,000.00 before you went to Voigt's office?

30 A. Yes, Mr. Van Buren agreed upon \$55,000.00 before getting the papers fixed up.

Q. So when you reached Mr. Voigt's office you understood there was an agreement between Fine and Van Buren to sell the property for \$55,000.00?

A. Yes, sir.

Q. What happened down there to hold up these negotiations for 3 or 4 hours?

A. Mr. Van Buren said he had to give Mr. Tucker a commission and he felt Mr. Fine is to pay that.

Q. Did that occur after you reached Mr. Voigt's office?

A. I will not say that, whether it was before we got into the office or not, I can't say, but it was after we left the garage.

Q. Didn't you say a moment ago when you reached Voigt's office you had agreed on \$55,000.00?

10 A. When we left the garage, leaving the garage.

Q. And there had not been any change in that until you reached Mr. Voigt's office?

A. No.

Q. And the price was \$55,000.00?

A. Supposed to be, yes, sir.

Q. After you reached Voigt's office then there was a discussion, the result of which was an agreement, a contract in writing for \$58,000, is that right?

20 A. Yes, sir.

Q. You were satisfied the talk about the Tucker agreement was in Mr. Voigt's office?

A. I won't say that, we might have spoken on the outside by the time we reached there, but that was spoken about.

Q. Did you sit on the doorstep and discuss this contract before you went into Mr. Voigt's office?

A. I won't say that.

30 Q. Did you discuss it on the street before you went in to Mr. Voigt's office?

A. I can't say that.

By the Court:

Q. You do say, however, that the increase of the additional \$3,000.00 from \$55,000.00 to \$58,000.00 was on account of Tucker's commission?

A. That is what he insisted upon.

Q. Didn't you think it worth while in order to save that \$3,000.00 to find out whether he could be released from Tucker and save you \$3,000.00, it was a very short distance from Tucker's office, wasn't it?

A. Mr. Van Buren had put the proposition to me stating the price as \$55,000.00 providing Mr. Fine will pay the difference on the commission with Mr. Tucker, the commission rate with Mr. Tucker ac- 10  
cordingly was supposed to be anywhere from four to five thousand dollars if Mr. Fine had taken that over, therefore, Mr. Fine and Mr. Van Buren began to dicker about the price, they didn't want to know about Mr. Tucker at all, and I acted as authority for Mr. Fine and I didn't know anything until Mr. Fine finally consented to go as high as \$58,000.00.

Q. It seems to me if I had been the purchaser and the price had been agreed upon as \$55,000.00, I would have said to Mr. Van Buren if he wanted me 20  
to pay \$3,000.00 more in order to cover Tucker's fees, "Go over to Tucker's office and see if he won't surrender his contract and save us \$3,000.00," wouldn't that have been a sensible thing to have done?

A. Yes, but Mr. Van Buren was changing his mind every second, and he felt we were about wild about it and he kept going up, and later on he even changed his mind about Tucker's commission, just wanted a flat rate. We tried him in every possible 30  
way.

Q. Were you to get commission on the \$58,000.00, including Tucker's commission?

A. I don't know what commission Tucker got.

Q. Were you to get a commission on the entire \$58,000.00?

A. Would I?

Q. Were you to?

A. I was supposed to get commission on it.

Q. Your contract is not here, excepting what you have told us about it, and I am asking you whether under the terms of your contract as you remember it you would have been entitled to commission on the full \$58,000.00?

A. Yes, the full \$58,000.00.

10 By Mr. Starr:

Q. Did you ever make any claim on Mr. Van Buren for any commission?

A. I asked Mr. Van Buren what about my commission.

Q. When did you do that?

A. Sometime after the agreement was drawn.

Q. When, can't you give us some date?

A. No, sir, I can't, sometime shortly afterwards, 20 it might have been a week, or two, a month, it might have been a couple of days, but it was after we drew the agreement, less than a month I made the suggestion about the commission and Mr. Van Buren said, "There will be no commission paid by me until final settlement."

Q. That is what he said?

A. Yes, sir.

Q. You never brought any suit?

A. I couldn't have brought any suit.

Q. Why not?

30 A. Because I felt as though I could claim no commission until the final settlement was made.

By the Court:

Q. Judge Starr asked you while on the witness stand before to fix the date when you first learned

that \$17,000.00 was the income on that property or that Mr. Van Buren had so represented it to somebody else, a man you had sent there. Have you since been able to fix that date?

A. No, I haven't been able to fix that date.

Q. Can't you recall when it was you found this new purchaser to whom you were going to sell?

A. It appears to me it might be in January.

Q. The date might be important and might not, but I think we ought to try to fix it if we can. Now, 10 can't you fix it?

A. It appears to me it was during January and I tried to investigate it as near as possible, I tried to investigate it —

Q. Can't you remember how many installments had been made at the time?

A. At that time?

Q. Yes.

A. I believe there was one, the first installment made of \$3,000.00. 20

Q. How much?

A. I don't recall whether the \$4,000 installment had been made at that time or not, I think there was one \$3,000 installment made.

Q. \$5,000 was paid altogether?

A. Altogether \$5,000.00.

By Mr. Starr:

Q. The \$3,000.00 you mean was the \$1,500.00 the 30 initial payment and \$1,500.00 on the 23rd of October, that made the \$3,000.00 that you say had been paid before you got the information?

A. It appears to me that way.

Q. So the two payments of \$1,000.00 each were made after you had that information?

A. I think that is about as near right, but it might be the \$4,000.00 had already been paid.

Q. Didn't you say this morning that you knew from this friend in Philadelphia or this prospective buyer that Mr. Van Buren had stated the gross income was \$17,000.00 in November, 1925, didn't you say that this morning?

A. If I said it in November I will have to be excused, because I kept no data or record. It couldn't have been in November.

10 Q. Didn't you say that this morning?

A. I might say it isn't, it might have been in November.

Q. Can't you remember now what you said this morning?

A. Yes, I remember lots of things.

Q. You said it was November?

A. I can't comment on dates because I positively don't know dates.

20 Q. Didn't you say that this morning?

A. If I said it I don't commit myself to it, I am not responsible for dates, I kept no record of it and I am not going to lie about this matter.

The Court: I have the impression he was uncertain, I think he named November but I think he said he was uncertain.

The Witness: I am very uncertain about dates.

30

FRANK VOIGT, recalled.

By Mr. Starr:

Q. Did you hear the testimony of Mr. Lipsitz as to what occurred on the 20th of October, 1925, when the contract was signed?

A. Yes, sir.

Q. Was there anything said in your presence and 10 in the presence of these other gentlemen with relation to the increase of the purchase price from \$55,000.00 to \$58,000.00 on account of any money that Mr. Van Buren would be obliged to pay Tucker?

A. No, sir.

Q. Was there any discussion about a Tucker contract?

A. No, sir, absolutely nothing.

Cross-examination.

20

By Mr. Stackhouse:

Q. Was there anything to indicate to you that any price had been agreed upon between them before they got to your office?

A. No, Van Buren said, "These fellows want to buy my property and they have offered me \$55,000.00 for it." I was familiar with the fact the property had been on the market for \$60,000.00 because I was trying to sell it, and then Mr. Lipsitz and Mr. Fine 30 sat down and talked, and they talked in Jewish and came back and talked back and forth. The negotiations were left to them, I had no part in that, except I was there and stayed there and went in and out of the office.

Q. The negotiations between them were practically all in Jewish in your office?

A. Yes, sir, except when Mr. Lipsitz and Mr. Van Buren talked. I couldn't tell what the matter was, all I knew there was a difference in price and they were getting there gradually, and when I came back it would be up a thousand dollars.

Q. Did Mr. Van Buren state he had agreed to sell it to them for \$55,000.00?

10 A. No, I wouldn't say whether he did or not, Mr. Stackhouse, I don't know that.

CHARLES VAN BUREN, recalled.

By Mr. Starr:

20 Q. Mr. Lipsitz has said you and Mr. Fine had agreed on the price of \$55,000.00 before you went to Mr. Voigt's office on the 20th of October, 1925, is that a fact or not?

A. No, that is the price quoted to me at the garage and we went down to Mr. Voigt's office and we came to the other figure.

Q. When you were in Mr. Voigt's office was there any discussion about a Tucker contract?

A. No, sir.

30 Q. Did you tell Mr. Lipsitz at that time you were willing to sell it for \$55,000.00 but that you were obligated to Tucker on a previous contract or authority to sell and you wanted him to pay Tucker's commission?

A. No, sir.

Q. Is that the reason the price was advanced to \$58,000.00?

A. No, sir.

Q. Was there any discussion about Tucker's contract in Mr. Voigt's office that day?

A. No, sir.

Q. Mr. Lipsitz testified after this contract was made in October, 1925, he had some talk with you about the collection of commission, was there any discussion of that kind?

A. No, sir.

Q. Did he ever talk to you about commission? 10

A. No, sir.

Q. At any time?

A. Never.

Cross-examination.

By Mr. Stackhouse:

Q. What did you go to Mr. Voigt's office for?

A. To have him draw up the agreement of sale.

Q. You say there had been no agreement of any kind? 20

A. There had not.

Q. With respect to the sale of this property?

A. There had not been.

Q. That is what you said.

A. That is what I say to you, he suggested \$55,000.00 and I said, "We will go down to Mr. Voigt's office and talk it over."

Q. You didn't go down to draw an agreement, simply to talk it over? 30

A. Talk it over, and if they came to the figure eventually make up an agreement.

Q. Was this in the garage you were talking at first?

A. Yes, sir.

Q. Before you went to Mr. Voigt's office?

A. Yes, sir.

Q. Why couldn't you have talked it over just as well in the garage?

A. I suppose it could have been but I just wanted to go to Mr. Voigt's.

Q. There wasn't any object of going to Mr. Voigt's office unless an agreement was to be drawn, was there?

A. There was an object to me, yes.

10 Q. You said a few moments ago you went there to Mr. Voigt's office to have an agreement drawn?

A. Yes, the reason I went there was to get legal advice and have the agreement the way it should be made.

Q. What agreement do you refer to, the agreement which you had made verbally or some agreement which you were going to make?

20 A. It must have been an agreement we were going to make, because they offered \$55,000.00, and I knew I wouldn't sell for that. I knew that before I went there.

Q. Did you tell them you wouldn't sell for that?

A. No, I didn't tell them I would, I said since they offered me \$55,000.00 we will go down and see Mr. Voigt.

Q. In other words, you gave them the impression you were going down to Mr. Voigt's office to have an agreement drawn for \$55,000.00.

A. I don't know whether they took that impression or not.

30 Q. If someone had said that to you and acted that way you would have gotten that impression?

A. I would have thought the man was somewhere near the figure, yes.

Q. You would have thought the man was somewhere near the figure, yes.

*Order Permitting Complainant to Amend 141  
Bill and for Taking Additional Proof*

A. No, I wouldn't have, no.

Mr. Starr: I think that is our case.

Mr. Stackhouse: I have nothing further.

BOTH SIDES REST.

10

ORDER PERMITTING COMPLAINANT TO  
AMEND BILL AND FOR TAKING  
ADDITIONAL PROOFS.

(Filed July 28, 1927.)

IN CHANCERY OF NEW JERSEY.

20

62/73

Between CHARLES VAN BUREN, <i>et als</i> , <i>Complainants</i> , and JACOB FINE, <i>Defendant.</i>	}	Order Permitting Complainant to Amend Bill and for Taking Additional Proofs.
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30

New application being made therefor:

It is, on this 28th day of July, 1927, as of July 21, 1927, ordered that complainant have leave to amend his bill of complaint, setting up an agreement with respect to the stock in the garage, which was the

subject-matter of the sale, and to take additional proofs in relation to such allegation.

E. R. WALKER,  
C.

Respectively advised,  
E. B. LEAMING,  
V. C.

10

AMENDMENT TO BILL OF COMPLAINT.

(Filed July 15, 1927.)

IN CHANCERY OF NEW JERSEY.

62/73

20

Between  
CHARLES VAN BUREN, *et als*,  
Complainants,  
and  
JACOB FINE,  
Defendant.

Amendment to Bill of  
Complaint.

Due application being made therefor:

30 It is, on this 15th day of July, 1927, on motion of  
T. Phillips Brown, solicitor of the complainant, or-  
dered that the bill of complaint in the above cause  
by amended by adding the following paragraphs:

7. Within a few days after the 20th day of Octo-  
ber, 1925, when the agreement of sale above referred  
to was made between the complainants and the de-

fendant, Jacob Fine, the parties to said contract agreed that the complainant, Van Buren, should continue in the occupancy of the lands and premises above described and operate the business being conducted therein, and in the ordinary course of business, sell the stock and make use of the fixtures in said garage at the time said contract of sale was made, with the understanding and agreement made between them that for all stock sold, after the making of said agreement and up until the time of settlement for the said garage property, new stock should be replaced by the said Van Buren, either before or at the time when the said defendant made settlement for the said property, or that an allowance would be made, at the settlement in payment of the purchase price, for any stock sold and not replaced, or any fixtures missing. In pursuance of said agreement, the complainant, Van Buren, made an inventory of all of the stock on hand at the time said agreement was made, and has replaced that which has been sold, or is now able and willing to replace, at the settlement, the stock then on hand and subsequently sold. All of the fixtures on said premises at the time such contract was made are now in the possession of the said complainant and located on the premises ready to be delivered upon settlement.

E. R. WALKER,  
C.

Respectively advised,  
E. B. LEAMING,  
V. C.

30

ADDITIONAL TESTIMONY TAKEN AUGUST  
10, 1927, BEFORE FRED W. ALBERT,  
MASTER IN CHANCERY.

Mr. Stackhouse: Make a notation, please, that  
the testimony which is proposed to be introduced  
under the proposed amendment to the bill is taken  
10 subject to the objection of counsel for the defendant.

CHARLES VAN BUREN, recalled.

By Mr. Starr:

Q. Now, after the contract between you and Mr.  
Fine was signed on the 20th day of October, 1925,  
20 did you have any conversation with Mr. Lipsitz in  
the presence of Mr. Fine with respect to the stock  
and fixtures in the garage?

A. The following day.

Q. Answer that yes or no.

A. Yes.

Q. When did that conversation occur?

A. The following day after the agreement was  
signed they came out and asked about the stock,  
asked me how much I had on hand, and I told them  
between three and four thousand dollars worth, and  
30 they said, "Is there any way to determine that?"  
and I said, "You can take an inventory if you want  
to," and Mr. Lipsitz said, "How long will that  
take," and I said, "That will take a couple of days."  
"Well," he said, "We can't bother with that, that  
would take too long, supposing you lock the stock-  
room up and don't use it," and I said, "I can't do

that, either, I have six months to stay here and all  
my equipment is in there for repairing tubes and  
tires and I have to use it but," I said, "You can take  
the inventory," and he said, "No, we won't do it,"  
he said, "You look like a nice fellow to us and we  
will take you at your word for whatever is there and  
if you say there is that much stock there we will take  
your word for it and whatever you sell you can buy  
and replace and go along," and I said, "That is sat-  
isfactory to me if it is to you," and he said, "All 10  
right, we will leave it go that way."

Q. Is that all the conversation you had?

A. That is all. There was a lot of talk in between  
but that is all there was about the stock.

Q. Did you lock up the stockroom?

A. No, I did not, I couldn't lock it up.

Q. Now, go ahead, just state what you did in pur-  
suance of that conversation?

A. The following day I thought it would be better  
to take an inventory for my own protection and 20  
benefit, and Mr. Eattock, I called him up, and he and  
I took the inventory, he called them off and I wrote  
them down and priced them up, that was the follow-  
ing day after they talked about it.

Q. You say Mr. Fine was there the next day after  
the contract was signed when you had the conversa-  
tion with Mr. Lipsitz?

A. Yes.

Q. Now, did you make a record of the inventory?

A. Yes, I made a record of it.

Q. And are these sheets which I show you, 30  
marked, "1, 2, 3 & 4," a record of the stock that was  
in the stockroom when you made the inventory?

A. That is the record of the stock in there when  
the inventory was made that day.

Q. Explain the method you pursued in making the  
inventory?

A. I got sheets of paper and he called them off and as he called them off I wrote them down; I have been in the garage business for some time and I knew the parts and accessories.

Q. And are these sheets the ones you wrote on?

A. Yes, sir.

Q. Who counted the various items of the stock?

A. Mr. Eattock.

Q. How large is this stockroom?

10 A. I imagine a room about this size.

Q. Well, can't you give us about the dimensions?

Mr. Stackhouse: A room about 18 feet square.

The Witness: About that, 18 by 20; it is longer than it is wide.

Q. Did you put down the prices of the various articles?

20 A. Yes, the prices there are all the retail prices; that is, I didn't take my bills and make the wholesale price on them, that would take a lot of time to do that.

Q. Will you say whether or not you put down on these sheets of paper the number, quantity, and various items of stock that were read out to you by the other gentlemen?

A. Yes, sir.

Q. Did you know the retail prices at which you were selling the various items of stock?

30 A. Yes.

Q. And these sheets correctly give the retail prices of the various items of stock?

A. Yes, sir.

Mr. Starr: I offer this in evidence.

Mr. Stackhouse: The offer is objected to.

(Said piece of paper marked Exhibit T1, August 10, 1927.)

Mr. Stackhouse: Add to that objection, please, that it is objected to on the ground that it is immaterial, incompetent, irrelevant, and relates to a transaction which was outside of the contract in suit, and further, to a transaction which did not take place in the presence of the defendant. 10

Mr. Starr: He has already said that Mr. Fine was there.

Mr. Stackhouse: Not at the time of the taking of this inventory.

Mr. Starr: I see.

Mr. Stackhouse: Since the complainant has testified the inventory was not made in the presence or with the co-operation of the defendant. 20

Q. After the inventory was made, what did you do with respect to the stock that was inventoried there?

A. As I sold it I replaced it.

Q. What was the general nature of the stock on hand?

A. Tires, tubes, and bolts, nuts, tire repair outfit, and things like that. 30

Q. Would you say whether or not they were specially made or standard stock?

A. No, of standard stock.

Q. And from your knowledge of the garage business, could they be replaced without any difficulty?

A. Yes, sir.

Q. What was said at this interview with respect to the fixtures in the garage?

A. They were to take the fixtures as they were; they looked them over to see what they were.

Q. At the conversation the next day after the contract, was there anything said about the fixtures?

A. No.

Mr. Stackhouse: I object to that as immaterial  
10 and irrelevant.

Q. What was the general nature of the fixtures in the garage at the time the contract was made?

Mr. Stackhouse: Objected to on the same ground.

A. There was a desk, a chair, filing cabinet, safe, a Burroughs adding machine, that is the office equipment. There was a stationary air pump in the shop,  
20 there was a lathe, a drill press, and two vises and benches.

Q. Does that cover all the fixtures?

A. Yes.

Q. Are those fixtures there or have you gotten rid of them.

A. No, they are all there.

Q. No changes made in the fixtures at all.

A. No changes at all.

Q. Was anything said at this interview the following day after the contract was made with reference to what would occur at the time of settlement with reference to the stock that was missing or any excess of stock?  
30

Mr. Stackhouse: Objected to on the same ground.

A. Why, we arranged whatever was missing I would make up.

Q. Now, after that did you make sales from the stock in the ordinary course of business?

A. Yes, sir.

Q. Did you dispose of any of the stock except in the ordinary course of business?

A. No, sir.

Q. Can you say whether or not from time to time you made replacement of the stock?

A. Yes, at the time the inventory was made there might have been five articles of one thing and when I ordered I might have ordered a couple of dozen  
10 and at some times there were more articles there then than there were at the time of the inventory.

Q. In case a decree be made in this case for the transfer of the garage property, and the stock and fixtures, will you be able to turn over to Mr. Fine the same quantity of stock and fixtures that were in there at the time the sale was made?

A. Yes, sir.

Q. I am speaking in there as of October 20, 1925.  
20

A. Yes, sir.

Q. All the various articles mentioned in this inventory could be replaced, could they?

A. Yes, sir.

Cross-examination.

By Mr. Stackhouse:

Q. Mr. Van Buren, this contract of October 20, 1925, includes in the price all of the stock and fixtures that were then on the premises, doesn't it?  
30

A. Yes, sir.

Q. What was the idea of putting down the price on this inventory?

A. That would be the only way to determine the amount that I had there, if it wasn't priced I could not tell.

Q. You could determine, for instance, there were ten mazda bulbs without putting down the price, couldn't you?

A. I could in my own mind; I know in my own mind they would be worth \$10.00.

Q. Well, it wasn't necessary, was it, to put down the price in order to determine the quantity?

A. It would be in order to make the inventory complete; I just put it down there because I knew  
10 the prices and I totaled the amount up to know what I actually had there.

Q. As a matter of fact, the question of price had nothing to do with it, did it?

A. Nothing to do with what?

Q. With the contract.

A. It would have to be determined what the value of the stock was and the only way you could do it was to price it.

Q. You had already made a contract a day or  
20 two before, the 20th day of October, 1925, to sell the Merchantville Garage with all the stock and fixtures then on the premises, that is true, isn't it?

A. Yes.

Q. Now, whether there had been one hundred dollars worth of stock and fixtures or whether there had been one hundred thousand dollars worth it would have made no difference, would it?

A. I don't know just what you mean, whether it would have made any difference.

30 Q. Would it have made any difference to your obligation to transfer them?

A. Well, I don't suppose it would.

Q. Well, with that in mind what was the object of putting down the price?

A. I did not have that in my mind at that time, I just have it in mind now; it was natural for me to put the price alongside the quantity that I had.

Q. Have you any way of telling how many of these various items appearing on this inventory were sold between the 20th of October, 1925, and the date fixed for settlement?

A. No, I haven't got any idea of it.

Q. How many tires did you usually buy at a time?

A. It all depended on whatever I was out of; if I got out of 30x6½, six at a time, two or three of the larger sizes.

Q. Now, isn't it a fact, that at the time of settle-  
10 ment in April, 1926, that the stock as appearing upon this inventory differed quite a little bit from what was there in October, 1925?

A. No, it didn't differ so much. As I said before, as I sold things—I might have five there at one time and I might buy them by the dozen and it might have amounted to the same thing, I don't know.

Q. You say that would apply to the various quantities of tires also?

A. Yes, sir. I might be out of some size and have  
20 more of other sizes.

Q. Coming down to the time of settlement in April, 1926, did you attempt to make any inventory at that time to see what was on the premises by way of stock or fixtures?

A. No.

Q. Or to check up and see whether the same items or approximately the same items in stock and fixtures were there at that time?

A. No.

Q. So far as you are able to tell you are depend-  
30 ent, and were dependent at that time, entirely on your memory as to whether the same amount of stock or fixtures were there, that is true, isn't it?

A. No, I figured if they were going to go through with the sale they would naturally take an inven-

tory and check up or else take my word that I had replaced them, which they said they would do.

Q. You were not anxious to give the man more than you had contracted to give him, were you?

A. I don't know as I was anxious, but I wanted to give them the equivalent. Whatever the things were I duplicated I wanted to give them.

10 Q. Take, for instance, one item I see here, five 30x3½ U. S. Royal Cords, do you know whether they were sold or not in the intervening period between the date of the contract and the date of settlement?

A. I can't say off hand, but if I sold them I replaced them, but with six.

Q. Do you remember distinctly having replaced say 5 tires with 6 tires?

A. No, I don't remember those particular ones, but I say, 30x3½, I would buy in six lots, I wouldn't buy one, two, three, like I would the larger sizes.

20 Q. 32x3½ Empire Cord, quantity of one, do you know whether that was sold or not?

A. That is still there.

Q. Three 30x3 Michelin Fabric, do you know whether you sold them or not?

A. I suppose I did and replaced them.

Q. Replaced them with three?

A. Three of those, they are an odd size, they don't make them anymore, 30x3.

Q. How soon after you made the sale did you make the replacement?

A. The replacement of what?

30 Q. Of the items that you have sold.

A. Why, whenever it was necessary to replace them, when I was out of them I would order them again.

Q. Did you refer to this inventory to see how many you had at that time?

A. No, that did not interest me, that stuff comes in certain quantities, like valve insides, you can't buy five boxes of those, you just buy them by the hundred, a little carton.

Q. After you made this inventory what did you do with it?

A. What do you mean?

Q. What disposition did you make of it?

A. What do you mean, where did I put it, or keep it? 10

Q. Yes, where did you keep it?

A. I kept it in the safe.

Q. Did you show it to Mr. Fine?

A. No, I didn't show it to Mr. Fine, they were satisfied to take my word, I did not think it was necessary to show it to them.

Mr. Stackhouse: I move that the latter part of that answer be stricken out.

20 Q. Now, you attended at Mr. Voigt's office at the time of settlement in April?

A. Yes.

Q. Did you have this inventory with you at that time?

A. I don't know whether I did or not; I had all these papers together and I imagine it was in there with them.

30 Q. Did you have anything in the nature of a bill of sale for the various items of stock and fixtures at the time of settlement ready for delivery to Mr. Fine?

A. A bill of sale for accessories?

Q. Yes.

A. I had cancelled checks to show I had paid for them.

Q. Did you sell any of the fixtures in the meantime?

A. No, sir.

Q. Is it a fact, Mr. Van Buren, that everyone of these items that you made a sale of you replaced either by an equal or a greater quantity?

A. Yes, sir.

Q. But it is true, is it not, at the time the contract was drawn and this stipulation was made as to the stock and fixtures then on the premises known as the Merchantville Garage there was no attempt  
10 then to ascertain what this stock and fixtures were between you and Mr. Fine?

A. They didn't come to find out what was there, they didn't appear to make settlement at all.

Q. I am speaking of the time the contract was drawn.

A. The time the contract was made?

Q. Yes.

A. No, they left that to me, they trusted me to that; as I said before, they said they would leave  
20 it to me, whatever I had there they would expect I would replace or make an adjustment at the settlement of it.

Q. Did you say this inventory was made the next day after the contract was executed?

A. No, the contract was executed on the 20th, the 21st is when I had the conversation and the following day is when I took the inventory.

Q. Now, Mr. Van Buren, you say that Mr. Fine told you that he was satisfied with whatever you said would be there at the time of settlement in the  
30 way of stock and fixtures?

A. No, Mr. Lipsitz told me that through Mr. Fine, they talked it over, I couldn't understand what Fine was saying and he couldn't understand me and Mr. Lipsitz did.

Q. He acted as kind of an interpreter, did he?

A. Yes.

Q. And Lipsitz informed you in English that Fine was satisfied that whatever you said was there by way of stock and fixtures?

A. Yes, sir.

Q. Now, Fine or Lipsitz didn't know what was there, did they?

A. I don't suppose they did.

Q. They didn't take any inventory?

A. No, they didn't take any inventory.

Q. Then isn't it true, Mr. Van Buren, that this  
10 inventory was taken so that you might be sure you wouldn't transfer any more than what was there at the time rather than any less?

A. I took it simply because I did not want to have any trouble at the settlement to know what I had there, and I didn't want them to claim that I had stuff there that I didn't have there.

Q. They didn't know what was there?

A. Yes, but when you deal with a person you sort  
20 of take the character of the person.

Q. As a matter of fact, they had no means of knowing what was there except what you told them?

A. Yes.

Q. And they said they were satisfied to take your word for it?

A. Yes.

Q. You are perfectly certain that this conversation which took place between you and Mr. Lipsitz and Mr. Fine took place after the agreement was  
30 signed?

A. I am positive it took place the next day.

Q. Whose handwriting is this inventory in?

A. Mine.

Q. There is a notation on this inventory, Mr. Van Buren, one column says "Net price" and the other says "gross price," what are the meanings of those terms?

A. Net means the price of one particular article and the gross means the combined amount; one bulb is \$.30, and if there are ten you will see in the gross column it is \$3.00.

Q. What was the idea of putting down the net and gross price in this inventory?

A. It is just natural if you have one bulb at \$.30 and if you have ten you will put down \$3.00.

Q. Neither you or Fine were interested in the  
10 question of price, were you?

A. No, but as I said, it was just natural to go along and fill it out in order to get the total amount.

Q. Why was it so natural under these circumstances to do that?

A. I wanted to satisfy myself as to what was there in actual money and I wanted to do that before the settlement came.

Q. To satisfy yourself you had not sold it too cheap, in other words?

20 A. That might be, yes.

Q. You satisfied yourself you got a good price for it, didn't you?

A. I don't think so, you don't find a garage usually carrying that much stock on hand.

Q. What was the total of it?

A. It is between three and four thousand dollars.

Q. That pencil notation at the top of the sheets represents the total of each sheet?

30 A. Yes. That is a pretty good stock for a garage of that size to carry.

Q. Why were these totals made in pencil on each sheet and the balance of the sheet in ink.

A. Well, I will tell you the reason why. The lead pencil marks there is the inventory I took in December, 1925, the two inventories being taken so close together, I had to take an inventory for my

own benefit in 1925, that I just simply put them down in lead pencil so I would not have to make all new sheets, I used that same inventory.

Q. I understand by that you made two inventories?

A. No, I made one in October and I just copied from that for my December.

Q. What was the object of making an inventory in December?

A. In order to compute my income tax. 10

Q. In the column after the word "quantity" there is a series of lead pencil figures following the figures in ink, what do they indicate?

A. Those are the quantities I had on hand in December. You can see by that there are more of some articles there than there were of others at that time.

Q. When you speak of December, Mr. Van Buren, do you mean December, 1925, or 1926?

A. 1925. 20

Q. Two months after this?

A. Yes.

Q. Now, some of these figures indicate that there were a lesser quantity of different items of stock in December, 1925, than there were in October, 1925; when were those replacements made if they were replaced?

A. And there are some figures which indicate there were more there in December, 1925, than in October. 30

Mr. Stackhouse: I move that that answer be stricken out. Repeat the question.

(Question repeated.)

A. I can't tell the exact date.

Q. Well, in December, 1925, taking one small item for instance, you knew you had seventeen less five inch blowout patches than you had in October.

A. 17 less. How many did I have in December?

Q. You had, according to this inventory, 24 in October and 7 in December.

A. I probably bought those in between time, I replaced those more than once, because they go pretty fast.

10 Q. When you came up to the time of settlement in April did you attempt to take another inventory?

A. No.

Q. Or check up to see how many you were short or over?

A. No, sir.

Q. On the stock?

20 A. No, sir. I figured on making settlement according to the amount of stock I had on hand at the time they bought it.

Q. But you had no means of knowing whether you had more or whether you had less unless you checked up on the inventory which you took as you say in October?

A. If I was buying a place I would check it up to see whether it checked up with that.

Q. Mr. Van Buren, it was your duty to deliver under that contract what was there in October, wasn't it?

30 Mr. Starr: I object to that, that is conclusive. Go ahead and answer it.

Q. I will withdraw that question and reframe it. You knew in April, 1926, that under your agreement that you were to deliver the stock and fixtures which were on the premises in October, 1925, didn't you?

A. I knew they were to be delivered or adjusted at settlement, I knew that.

Q. Now, when you say adjusted you mean if there was a shortage there you would make up the shortage?

A. Make good the adjustment, or if there were more there it would be adjusted, that was my understanding I had with Lipsitz and Fine.

Q. Did that understanding arise from anything they said to you? 10

A. It arose in the conversation I had the first time that they would take my word at whatever was there.

Q. Now, you knew, however, at the time of settlement it was up to you to deliver whatever was there in October, or its equivalent?

A. Yes, sir.

Q. And yet you took no means of finding out whether you were short or long on the stock and fixtures? 20

A. I expected them to come and check it up.

Q. You said a few minutes ago they were willing to take your word for it; now did you take any means of ascertaining what you were to deliver to them?

A. No, I did not.

Q. You didn't care to take their word for it?

A. No, they agreed to that, to take my word, and that is why I took the inventory.

Q. You did not take any inventory in April? 30

A. No, they didn't make any effort to settle so it wasn't necessary to make an effort to find out what I had on hand.

Q. But you were there for the purpose of settling and transferring the property?

A. Yes, sir.

Q. And in order to transfer the stock and fixtures

it would be necessary for you, for your own protection, to know what you were transferring wouldn't it?

A. Yes.

Q. Now you didn't know in April, 1926, what relation the stock and fixtures bore to what was there in 1925, October, did you?

A. I did not.

10 Q. Any more than when you took this inventory, in December, 1925, you knew what relation the stock and the fixtures bore to the stock and fixtures in October, did you?

A. No.

Q. The reason you went over your stock in December was to find out whether you had less or more at that time for the purpose of computing your income tax, that is true, isn't it?

A. Yes, sir.

20 Q. You wanted to keep out of trouble with the government?

A. Yes, sir.

Q. But you weren't so anxious of keeping out of trouble with Fine, were you?

A. No. I did not want to have any trouble with him, that is the reason I took the inventory; if it had been necessary I would have turned him over the inventory and whatever I had in there to keep peace rather than have a lot of trouble about it.

30 Q. Why didn't you turn over to him the inventory?

A. Because he wasn't interested in it.

Q. Interested in what? Why didn't you turn the inventory over to him as soon as you made it?

A. He didn't seem to be interested in the inventory at all, he was satisfied to take my word for it.

Q. As far as you know up to the time you went

down to Mr. Voigt's office for settlement he was still willing to take your word for what was there as far as the stock and fixtures was concerned?

A. As far as I knew.

Q. Yet you had no means of telling him what was there?

A. No, but he was satisfied to take what was there and have the inventory adjusted at the settlement for the full amount.

Q. How would you have been able to arrive at 10 that at the time of settlement?

A. I was satisfied to do that. If there was going to be any trouble about it he knew how to get there and he could have come out. I told him the figures I had there, I told him between three and four thousand dollars, now, any figures he had gotten between those figures would have been all right.

Q. Did he tell you it would be all right?

A. He left it to me, he told me it would be all right. I said, "There is between three and four 20 thousand dollars in stock," and he said, "We will take your word for it."

Q. Do you know what these items actually figured up to?

A. As a whole?

Q. Yes.

A. I don't know the exact price, but I know there is between three and four thousand dollars worth of stuff there.

Q. When you say three or four thousand dollars 30 do you mean sales price or cost price?

A. Sales price.

Q. How do you arrive at that?

A. Arrive at the sales price?

Q. Yes.

A. Because they are all listed there.

Q. These all represent the sales price?

A. Yes, the retail price.

Q. How do you arrive at the sales price, is that simply an arbitrary figure which you fix?

A. No, some of these prices are advertised prices like Champion Spark Plugs today are advertised at \$.60 and that is the price I sold them at.

Q. Take for instance two items of 33x4½ U. S. Royal Cord Tires, \$33.45.

A. That was the price list put out by the U. S. Company at that time.

Q. What was the cost price?

A. I can't tell you offhand.

Q. There was nothing to prevent you selling under this price, was there?

A. No.

Q. When you told Mr. Fine that you had between three and four thousand dollars worth of fixtures and stock there, did you tell him that was based on the sales price or the cost price?

A. The sales price.

Q. Did you tell him that?

A. Yes, I did tell him that.

Q. Did you tell him that through Mr. Lipsitz?

A. Yes.

Q. And this was on the day following the day the contract was made?

A. Yes, the 21st of October.

Q. Why was the sales price rather than the cost price used as the basis of arriving at the value?

A. That is the handiest way to do it, you deal with the retail price every day and you don't with the wholesale.

Q. Now, suppose that at the time of settlement Mr. Fine, whom you say was willing to take your word for what was on the place, had asked you to tell him how much of this stock was there would

you have been able to sit down and written out a complete inventory of what was there?

A. Yes, sir.

Q. From memory?

A. No, sir, not from memory, I would have known there was approximately the same amount in value and the difference was to be adjusted.

Q. In other words, you would have given him approximately what was there but not exactly what was there?

A. Yes.

Q. So that in order to give anywhere near an accurate account it would be necessary for you to take another inventory at that time, wouldn't it?

A. To give the exact amount?

Q. Yes.

A. Yes.

Q. In other words, you would have taken another inventory the way you took an inventory in December for income tax purposes, in order to find out whether you were delivering exactly or approximately the same amount?

A. Yes, I would if I wanted to get it exact, but he was to take my word for it.

Q. But you had no means of telling him your word?

A. I was supposed to tell him it was all there and he was to take my word.

Q. But you might have been mistaken?

A. Yes, and I might have been giving him too much.

Q. And on the other hand, there are a number of items you might have been giving him too little of, too.

A. I am talking about the gross amount. There are some items there, more of some items than there would have been at the time of the inventory.

- Q. And some less?  
 A. Some were less and some were more.  
 Q. But you had no means of telling within five hundred dollars or one thousand dollars, did you?  
 A. I did.  
 Q. Of what was there in April, 1926?  
 A. Yes, I did.  
 Q. Without taking an inventory?  
 A. Without taking an inventory, yes, sir.  
 10 Q. Now, Mr. Van Buren, have you any means of telling how much less or more in the aggregate there was in stock in the Merchantville Garage in December, 1925, than there was in October, 1925?  
 A. Yes, I can tell you; I can't tell you right now, you could get it from that paper.  
 Q. Do you want to refer to it?  
 A. Yes, if you have an adding machine.  
 Q. I haven't, I didn't bring mine with me.  
 A. There is one particular article on bulbs, in  
 20 October, \$162.39 worth, in December, \$231.37 worth.  
 Q. That is not my question, Mr. Van Buren; I said, have you any means of telling how the aggregate of the stock in December differed from what it was in October when you took the first inventory?  
 A. Yes, I have. If you want me to add these all up I can do it.  
 Q. When you checked up this inventory in December for income tax purposes did you use the cost price or sales price on that?  
 30 A. No, that was always figured on the sales price.  
 Q. Sales price for income tax purposes?  
 A. Yes.  
 Q. In other words, you used the same figures on that inventory for the purpose of computing your income tax?  
 A. Yes.  
 Q. And that represents the sales price?

- A. Yes. That is the way I have always taken it and I guess it balances, doesn't it?  
 Q. Who did you have working for you between October, 1925, and April, 1926, who had to do with the sales of stock?  
 A. Why, myself, and a couple of other fellows.  
 Q. Boys there in the garage?  
 A. Yes, boys. I can't tell you their names because they come and go every couple of weeks.  
 Q. Would they have any means of checking up 10 on the stock that was sold?  
 A. Would they?  
 Q. Yes.  
 A. No, I can check that up myself.  
 Q. Do you check that up at the end of every day?  
 A. I could, yes.  
 Q. Did you?  
 A. No, I did not, I have a register that designates accessories, tires, tubes, oil, storage, wash and polish, and as the deposit is made it is all separated. 20 So much of that money that is taken in for gas is rung up on the gas ticket.  
 Q. Where did they get their prices from, the people making the sale?  
 A. A lot of them are on the boxes.  
 Q. Suppose they were not?  
 A. The majority of the things are marked on the label.  
 Q. Are the tires marked?  
 A. No, I had a price list pasted up, it was given 30 to me by the tire company.  
 Q. Did you use this inventory as a means of designating sales prices in that period between October and April?  
 A. No, I took it from the sales price, which is either on the box, or they have printed forms which have the amounts on.

Q. Take bulbs, for instance, do they have the sales price on them?

A. Yes, they are all listed.

Q. Did they have them on the boxes?

A. They are advertised, you see them advertised three for a dollar now.

Q. How did the boys who were making the sale of bulbs get their prices for the sales price?

A. They would get them from me themselves, unless they observed. I had to mark a lot of things  
10 so they would know.

Q. You weren't always there, were you, when sales were being made?

A. No, I went out for lunch and supper.

Q. Did you have some one running your shop for you?

A. Do I now? They rent it.

Q. Do you rent the garage out now?

A. No, just the shop.

20 Q. I am speaking of the period between October and April.

A. It was rented out.

Q. Who was it rented to?

A. This man right here in back.

Q. What is his name?

A. Mr. Eattock.

Q. When you speak of the shop do you mean the repair shop?

A. The repair shop in the back of the garage.

30 Q. What kind of an arrangement did you have with him as to rental, did he have a yearly lease?

A. No, monthly.

Q. Had you notified him to deliver possession in April?

A. I did, yes, sir. He was around there enough to see what was going on and knew a sale had been made, supposedly made, and he was naturally look-

ing out for his own interest; I guess I told him when it was to be sold, and that is all there was to that.

Q. He was still in possession in April at the time you went to Mr. Voigt's office for settlement, wasn't he?

A. Yes, sir.

Q. You had not served any written notice on him to terminate his tenancy three months before the settlement, had you?

A. I did not serve any written notice, no. Lipsitz 10 wanted him in there, he also mentioned that in his conversation.

Q. I move that that be stricken out. Were there any sales out of the stock made between the 20th of October and the time you took this inventory two days after the making of the contract?

A. There were a few sales, yes.

Q. What did they amount to, do you know?

A. I don't know offhand, I suppose they ran around three or four dollars, maybe. 20

Q. This computation which you made shows that there was \$348.15 worth more in December.

A. Yes.

Q. You simply make that statement, practically, in answering the question I asked you a few minutes ago.

A. What was that?

Q. I asked the difference between the inventory in October and the inventory in December, it simply became a matter of computation according to these 30 figures.

A. Yes.

Q. Can you tell me the names of the employees who were working for you between October, 1925, and April, 1926?

A. No, I can't tell you exactly, because if I did it

would be guessing. These boys would stay for a month, some a couple of weeks, and it is hard to keep them and it is hard to get them.

Q. How many did you have at the time?

A. Two helpers.

Q. Who were making sales of stock?

A. Yes, sir.

Q. Do you know the names of those who were there on the 20th of October, 1925?

10 A. No, I can't tell you exactly.

Q. Have you any record of who was there?

A. No, I have not.

Q. You did not keep their names?

A. No.

Q. How long did they stay, do you know?

A. I don't know, they might have stayed a couple of weeks, or a month, I can't tell.

Q. And then you hired two more?

A. No, they might overlap the other.

20 Q. When they finally both left you you hired two more helpers, hired one at one time and another at another time?

A. There were never two out at one time.

Q. Never had two helpers at one time?

A. I was never without one at any time; in other words, I was never there alone.

Q. Don't you know the names of any of these boys who were there?

A. I could give you a whole list of names; one boy's name was Cox.

30 Q. What was his first name?

A. William.

Q. Where did he live?

A. He lived in Merchantville.

Q. Whereabouts, do you know?

A. No, I don't know. Another fellow's name was Ewan, I don't know where he lived.

Q. What was his first name?

A. I don't know what his first name was, we just called him Ewan.

Q. Did he live in Merchantville?

A. Somewhere on Browning Road, he was up from Virginia, a southern fellow.

Q. Who else?

A. I think there was a fellow by the name of Sweeney; another fellow by the name of Esposito.

Q. Where did Sweeney live, Merchantville? 10

A. He lived in Pensauken.

Q. Do you know Sweeney's first name?

A. No.

Q. Do you know what Esposito's first name was?

A. His name was Tony.

Q. Where did he live?

A. On the other side of the track.

Q. What do you mean?

A. Chapel Avenue, over in that Italian settlement. I had three different Italian fellows over 20 there, we used to call them spaghetti.

Q. Any other fellows you can think of?

A. A fellow from Maple Shade, but I don't know what his name is now.

Q. Anybody else?

A. That is all I can think of right now; I have had a lot of them.

Mr. Starr: I ask that this computation made by Mr. Van Buren showing the total of the inventory in October and December be marked as an exhibit. 30

(Said papers marked P2, August 10, 1927.)

Mr. Stackhouse: I don't suppose I can object to that, it is in answer to my question.

By Mr. Starr:

Q. Mr. Van Buren, you have spoken of the sales price being used in making up this inventory, what do you mean?

A. That is retail prices, anybody who comes in is charged that.

Q. The amount at which you sold the various articles?

10 A. The amount at which I sold them.

Q. Now, Mr. Eattock, you say he was a tenant; how long had he been there prior to October, 1925?

A. I believe he came there in the month of April.

Q. How long did he continue?

A. He was there until December, 1926.

Q. Now, you mentioned the fact in answer to a question put by Mr. Stackhouse that Mr. Lipsitz wanted him to remain; did you have any conversation with Mr. Lipsitz and Fine in relation to Mr.

20 Eattock?

A. They asked me what arrangements I had there at the shop and I told them I was renting it out to him and Mr. Lipsitz always came there with his work, it seems he follows him around because he likes the kind of work he does, apparently, and he asked me—

Mr. Stackhouse: Who are you speaking about now?

30 The Witness: Mr. Eattock, the man who rented the retail shop.

Mr. Stackhouse: He asked you?

The Witness: No, Mr. Lipsitz.

Mr. Stackhouse: Was Mr. Fine there at the time?

The Witness: Yes.

Mr. Stackhouse: Were you speaking in English, you and Mr. Lipsitz?

The Witness: Yes, that is the only way I can speak.

Mr. Stackhouse: I wish I could speak some other language.

The Witness: So do I.

Q. Tell the conversation in the presence of Fine.

A. He wanted to know whether Ed would be willing to continue there and I said I supposed he would.

Q. When was the conversation, do you recall?

A. That was the day they were out about the inventory, the following day.

Q. Now, had you had any intimation from Mr. Fine, or Mr. Lipsitz, or the son of Mr. Fine prior to the first of April that they were not going on with the sale, did you talk with anybody about it?

A. I had heard something about it.

Q. From what source had you heard it?

A. I have a junk man who came in there and he told me they did not intend to go through with it.

Q. Did you have any talk with Lipsitz or Fine about not going through with it?

A. They told me they had some settlements coming off and unless I made this extension of two months they would not be able to go through with the sale.

Q. You knew that on the 1st of April, 1926?

A. Yes, sir.

EDWARD EATTOCK, SWORN.

By Mr. Starr:

Q. Mr. Eattock, what is your trade or profession?

A. Automobile repairing.

Q. And did you know Mr. Lipsitz?

A. I have known Mr. Lipsitz for four, five or six  
10 years.

Q. Have you done any work for him?

A. Yes.

Q. Were you a tenant under Mr. Van Buren in the Merchantville Garage?

A. Yes.

Q. What part of the shop had you?

A. The repair shop that was in the rear.

Q. When did you go there first?

A. April 1st, 1925.

20 Q. How long did you continue there?

A. December, 1926.

Q. Now, after October, 1925, had you any talk with Mr. Lipsitz about his being interested in the purchase of the garage?

A. No, he didn't say anything to me personally about it, no, that is, he didn't make any remark to me in reference to it.

30 Q. Now, I show you Exhibit P1, the sheets marked A, B, C, D, and E, which Mr. Van Buren has identified as the inventory, what did you do, if anything, as to the preparation of that inventory?

A. Well, I believe I called all the material off in that place for Mr. Van Buren to copy down.

Q. Who requested you to assist in making the inventory?

A. Mr. Van Buren was the one who asked me to

help to take it, I was familiar with the parts and the names of the parts.

Q. How long have you been in the automobile repair business?

A. 12 or 15 years.

Q. Now, just explain what you did with respect to your part of the preparation of the inventory?

A. All I done was to call the material off and Mr. Van Buren copied it down, the different parts, counted each individual part.

Q. That is, you made the count? 10

A. Yes.

Q. Will you say whether or not you made the count accurately and correctly?

A. Yes, I did.

Q. Did you call out to Mr. Van Buren the numbers of the various articles you found there?

A. Yes.

Q. Where was Mr. Van Buren when he wrote the amount down?

A. He couldn't be any further than three yards  
20 from me.

Q. Were all of you in the same room?

A. Yes, there is a counter about 6 foot long there and I was going around in the different bins calling out the stock.

Q. And are these the five sheets of paper on which Mr. Van Buren wrote down what you called off in your presence.

A. Yes, I saw Mr. Van Buren tear these sheets out of a book there, these are the ones he had. 30

Q. Did you examine the papers themselves after you called out the quantities and Mr. Van Buren had written down those quantities on these papers?

A. Yes, I looked over the whole thing.

Q. Did you overhear any of the conversation be-

tween Mr. Lipsitz and Mr. Fine and Mr. Van Buren before this inventory was made?

A. I heard Mr. Lipsitz say to close the stock room; I just happened—

Mr. Stackhouse: I object to any conversation between Mr. Lipsitz and Mr. Van Buren.

Mr. Starr: What was the question, please?

10

(Question repeated.)

Mr. Stackhouse: I do not object to Fine; I will withdraw the objection.

Q. Was Mr. Fine there?

A. Yes.

Q. What conversation did you hear?

A. I heard Mr. Lipsitz say to Mr. Van Buren to close the stockroom up, and naturally I was interested because I didn't know when I had to get out, I was only a monthly tenant, and I was only six or seven feet from him, and I overheard that remark, and that is about all I heard, and I asked Mr. Van Buren afterward why—

Q. I don't want the conversation between you and Van Buren. Can you give us the date when that occurred?

A. Not to be accurate, it was the latter part of October.

30 Q. That is all you heard upon that occasion?

A. Yes.

Q. When after that conversation was this inventory made?

A. Why, I believe it was taken the next day, or the following day, I can't say for sure.

Cross-examination.

By Mr. Stackhouse:

Q. How do you fix that as the latter part of October?

A. Naturally, after the 20th.

Q. How do you fix it?

A. It was coming near the end of the year and I thought probably if it was winding up at the end 10 of the year I would have to get out, I didn't know the date of the agreement, and I thought probably I would have to move and I was on the lookout for something else.

Q. You were a monthly tenant?

A. Yes, but I could get out at any time, I could take my trade anywhere I went.

Q. You didn't have to get out without legal notice, did you?

A. I didn't know anything about it, in fact, I 20 didn't have any signed agreement from month to month.

Q. Was this inventory made in ink at the time?

A. He wrote it down with ink, a fountain pen.

Q. Did you help him make the inventory in December?

A. No, I did not, I did not do any of the stock taking in December.

Q. Are you there now, Mr. Eattock?

A. No, sir.

Q. You got out, I think you said, in December? 30

A. I went back on a position I had before as foreman for the Collings Carriage Company.

ADDITIONAL TESTIMONY TAKEN OCTOBER  
3, 1927, BEFORE FRED W. ALBERT,  
MASTER IN CHANCERY.

WILLIAM LIPSITZ, recalled.

10 By Mr. Stackhouse:

Q. Mr. Lipsitz, you were already a witness in this case, weren't you?

A. Yes, sir.

Q. Do you recall in connection with this contract between Mr. Van Buren and Mr. Fine, what, if anything, was said with respect to the stock and fixtures in the garage in Merchantville?

20 A. Yes, I recall at the time of going over several parts of the agreement, this particular part, stock and fixtures, was mentioned and Mr. Fine felt the place should be locked up and the stock and fixtures shall remain intact until the time of settlement, but Mr. Van Buren didn't feel it was the proper thing for him to do to have the place locked up, he could use some of the accessories in the place to sell daily and finally by mutual agreement it was understood and agreed between Mr. Fine and Mr. Van Buren the place was to be left open provided an inventory be taken and Mr. Van Buren to keep an accurate  
30 account of what is going out and what was sold, and what he would replace would be well enough and what he wouldn't replace would be adjusted by taking an inventory, but he was not to touch any of the fixtures at all.

Q. Did this conversation take place before or after the contract?

A. That was before.

Q. Who was to take the inventory?

A. Who was to take the inventory—why, Mr. Van Buren.

Q. What was he to do with the inventory, if anything, after he took it?

A. Of course, turn it over to Mr. Fine.

Mr. Starr: I move that be stricken out, it is not in response to any conversation. 10

Q. Was this any part of a conversation between Mr. Van Buren and Mr. Fine?

A. Yes.

Q. Was there anything said at that time in this conversation what was to be done with the inventory?

A. The inventory should be given to Mr. Fine.

Q. Was there anything said at that time between the parties, Mr. Fine and Mr. Van Buren, as to how a comparison was to be made in the stock as it existed at the time of settlement with that as it existed at the time of the making of the contract? 20

A. Do I understand it right, you mean how the stock was to be replaced?

Q. If it was the result of any arrangement between Mr. Van Buren and Mr. Fine how was it to be ascertained what stock was on the place at the time of settlement?

A. What stock it was, to what amount? Why, the amount was never certain, no inventory was  
30 taken at that time.

Q. Did you ever see any inventory?

A. I did not, no.

Q. Of the stock and fixtures?

A. No, I did not.

Q. Now, was there anything said between Mr. Fine and Mr. Van Buren as to how they were to find out what stock and fixtures were there at the time of settlement?

A. It was stated plainly an inventory would be taken in the first place and an inventory in the end, and where there was a shortage or more stock, and if there was a shortage, this should be adjusted accordingly, it was to be adjusted at the time of settlement.

10 Q. Do I understand there was one inventory or two inventories to be made?

A. Two, one at the first place and one at the final.

Q. Did Mr. Van Buren state to Mr. Fine he was to produce an inventory at the time of settlement?

A. That was the understanding at that time.

Q. Was that the understanding made by reason of a statement made to Mr. Fine?

A. It was made to Mr. Fine at the time in my presence.

20 Q. Young Mr. Fine was there at the time, was he?

A. Well, I don't recall that he was or not, it seems to me that he was but I don't recall.

Q. Mr. Fine, Sr., does not speak English, does he?

A. No, he does not.

Q. Did you communicate the purport of the conversation to him?

A. I did.

30 Q. When Mr. Van Buren made the statement in English?

A. I explained to him everything and it was thoroughly satisfactory to Mr. Fine to go through on those conditions.

Q. Did you ever see any inventory either at the time of settlement or at the time of the making of the contract?

A. I have never seen any.

Q. I am speaking of the inventory of stock and fixtures.

A. I have never seen any.

Cross-examination.

By Mr. Starr:

Q. This conversation which you say occurred respecting the inventory happened at what place? 10

A. In the garage.

Q. On what day was it?

A. That was before the agreement was drawn.

Q. How long before?

A. Shortly before.

Q. Can't you give us some idea when it was?

A. No, I cannot.

Q. What?

A. I cannot.

Q. Do you know whether it was one day or ten days? 20

A. I can't say.

Q. Were you in the garage the day after the contract was signed?

A. I don't recall.

Q. Were you there the next day, the second day?

A. I can't recall.

Q. Do you remember having the contract signed in Mr. Voigt's office?

A. I was there at the time.

Q. Was there any conversation in Mr. Voigt's office in relation to the inventory of stock? 30

A. I can't recall that.

Q. Will you say whether there was or was not?

A. I can't recall that, I will not say yes or no.

Q. Do you know how long it was before the day when you went to Mr. Voigt's office to have the con-

tract signed that you saw Mr. Van Buren at the garage?

A. How long before I seen Mr. Van Buren at the garage?

A. I saw Mr. Van Buren at the garage the day the agreement was signed, the very same day.

Q. How is that?

A. The very same day.

Q. Morning or afternoon?

10 A. Afternoon.

Q. When before that?

A. When before that? I can't recall.

Q. You don't know how many days it was?

A. I can't say.

Q. Did you talk about an inventory on the day the contract was signed?

A. Yes, sir.

Q. On the day the contract was signed?

A. On the day.

20 Q. Before you went to Mr. Voigt's office?

A. Before we went to his office.

Q. Now, did you have any talk with Mr. Van Buren about the inventory after the contract was signed?

A. No.

Q. No conversation whatever?

A. No conversation whatever.

Q. Did you ever ask him to show you any inventory?

30 A. I did not.

Q. Did you ask him whether he had taken any inventory?

A. No, I had no interest at the time.

Q. What do you mean by that?

A. I had no interest to ask him, it was up to Mr. Fine to do the asking.

Q. You were the spokesman for Mr. Fine?

A. At the time before the agreement was drawn.

Q. Weren't you spokesman for him after the agreement was signed?

A. No. Not in that particular case, I had occasion some time later on the payments being made, but that was concerning payments only.

Q. You became interested in the contract?

A. Some time later.

Q. Did you ever ask Mr. Van Buren to show you any inventory he had made?

10

A. I did not.

Q. Did you ever ask him whether he had made an inventory in accordance with the arrangement?

A. I did not.

Q. At any of the times that you were there with Mr. Fine after the contract was signed, either of the times, did you ask him whether an inventory had been made?

A. No, sir.

Q. You say Mr. Fine wanted the garage, that is, 20 the storeroom of the garage, closed, locked up?

A. He did, yes.

Q. And that occurred before?

A. Before the agreement was signed.

Q. Before he went down to Mr. Voigt's office?

A. Yes, sir.

Q. And that had come about before any agreement as to the terms?

A. Yes, sir.

Q. After you became interested in the purchase, 30 representing yourself, did you ever inquire of Van Buren to ascertain whether he had made an inventory?

A. I did not.

A. Did you ever make any request of Mr. Van Buren that the inventory which you say was to be made should be turned over to Fine?

A. I did not.

Q. Did you attend Mr. Voigt's office on the day when the settlement was supposed to have occurred?

A. Yes, sir.

Q. Did you make any inquiry for an inventory then?

A. I don't recall.

Q. What do you mean by that?

A. I can't recall whether I did or not. I can't  
10 recall that the inventory was spoken of at that time in the office.

Q. Will you say to the best of your recollection whether it was mentioned or not?

A. That I can't say, because I don't recall.

Q. And you don't recall making any request of Mr. Van Buren to furnish an inventory at the time of settlement?

A. At no time.

Q. You were not ready to go on with the settle-  
20 ment at Voigt's office when settlement was supposed to go through, were you?

A. Wasn't ready to go what?

Q. On with the settlement.

Mr. Stackhouse: Objected to as not cross-examination.

The Witness: Who, I?

Q. Either you or Fine?  
30

A. Wasn't ready to go on to settle?

Q. To make this settlement?

A. At that time?

Q. Yes.

A. I would say there was no question of talk of settlement at that time, we were just going into it then.

Q. I am speaking of the time when you were supposed to make the settlement at Mr. Voigt's office, I think it was the first of March, or the first of April, I don't remember the exact date, but there was no talk about an inventory then at that time, was there?

A. No.

Q. You didn't make any demand on Mr. Van Buren for an inventory then?

A. At Voigt's office?

Q. You understand the question, don't you? 10

A. I don't want to actually indicate something I don't understand thoroughly, I want to know exactly what you mean by being ready for settlement. You mean at a time it was due to go through?

Q. Yes.

A. We were not ready.

Q. Did you attend Mr. Voigt's office on that day?

A. No, sir.

Q. And Mr. Fine did not come there?

A. That I don't know. 20

Q. Between the time the contract was executed and the day when the settlement was supposed to take place did you ever make any demand on Mr. Van Buren for an inventory?

A. No.

Q. Did you tell Mr. Van Buren on the day the contract was signed before you went into Voigt's office that Mr. Fine wanted the storeroom closed?

A. Did I tell Mr. Van Buren why?

Q. Why Fine wanted the storeroom closed? 30

A. I didn't say anything along that nature, Mr. Fine wanted that closed.

Q. Did you repeat that to Mr. Van Buren?

A. Yes.

Q. What did Mr. Van Buren say?

A. He said he couldn't close the store; he needed it to sell the stuff there.

Q. Wasn't that after the contract was signed?

A. Before.

Q. You had not come to any agreement before you got to Mr. Voigt's office?

A. Oh, yes, the agreement was reached.

JOSEPH FINE, recalled.

10 By Mr. Stackhouse: (through interpreter.)

Q. Mr. Fine, you are the party who is being sued here?

Mr. Starr: He nodded his head yes.

Q. You testified over in court, didn't you?

A. Yes.

20 Q. Do you remember when the agreement with respect to this garage in Merchantville was made between you and Mr. Van Buren?

Mr. Starr: I object to that question because it doesn't indicate whether it was an oral agreement or whether the question refers to the executed agreement.

30 Q. Strike that question out, it might be a little bit confusing. You remember signing an agreement with Mr. Van Buren, don't you, Mr. Fine?

A. Yes.

Q. With respect to this garage in Merchantville?

A. Yes.

Q. Which was handed to the Court at the trial?

A. That is the agreement.

Q. Do you remember at or about the time that

this agreement was signed having any talk with Mr. Van Buren about the stock and fixtures?

A. All this happened before the agreement was signed.

Q. Was Mr. Lipsitz there?

A. Yes.

Q. And the conversation or the talk was between Mr. Lipsitz and Mr. Van Buren, wasn't it?

A. Yes.

Q. Did Mr. Lipsitz after he talked to Mr. Van Buren talk to you at the same time? 10

A. The same time, but he spoke to me in Jewish.

Q. What, if anything, did Mr. Lipsitz say about the stock and fixtures in the garage?

A. They talked about closing the room so Mr. Van Buren said not to close it because he had to sell it, because he would make a record, he would make a writing. All this was done before the agreement was signed.

Q. This writing which he was to make of the stock and fixtures what was he to do with that? 20

A. He was to mark down what he sold; he wanted that paper so he should know at the end of the period how much money he had spent.

Q. When you say period what do you mean?

A. They wanted to close the whole thing entirely but he said this wouldn't do, Van Buren said this wouldn't do, so he would sell the stock but he would make a record of it.

Q. Did he say when he would make a record of it? 30

A. I don't know. He didn't talk to me, I didn't talk to him about that.

Q. Who talked to him about it?

A. Lipsitz.

Q. How were you to know how much stock and fixtures was left at the time of settlement?

Mr. Starr: I object to that because it does not comprehend any conversation between the parties, it is a conclusion of the witness.

The Witness: Lipsitz said he would see everything was written down, but I haven't seen anything yet.

10 Q. Was there anything said by Mr. Van Buren at or about the time the contract was signed as to how you were to know what stock and fixtures were there at the time of settlement?

A. He said nothing.

Cross-examination.

By Mr. Starr:

Q. Mr. Fine, do you speak English?

20 A. No.

Q. Do you understand English?

A. A little, little, it is nothing.

Q. Did you have any conversation with Mr. Van Buren at any time except through Mr. Lipsitz?

A. Only through Mr. Lipsitz and Mr. Lipsitz explained to me.

Q. In what place did this conversation occur respecting the stock and fixtures?

30 A. In the garage at Merchantville, we talk in the garage in Merchantville before the agreement was made.

Q. How long before the agreement was made?

A. I don't remember.

Q. The same day or several days before?

A. A couple of days—exactly I can't remember.

Q. You don't remember how many days it was before?

A. No, I can't.

Q. How many times did you go out to the garage with Mr. Lipsitz before the contract was actually signed in Mr. Voigt's office?

A. Several times.

Q. Did you go to the garage after the contract was signed in Mr. Voigt's office?

A. No, after that I went home.

Q. I don't mean the same day, but any time after the contract was signed did you go out to the Merchantville garage?

A. When the payment had to be made I went out.

Q. How soon after the contract was signed did you go out there the first time?

A. I can't remember the exact day.

Q. Was it the next day?

A. I don't remember.

Q. Was it the second or third day after the contract was signed you went out?

A. I can't remember, I am an elderly man and I can't remember.

Q. Did you ever ask Mr. Lipsitz to get from Mr. Van Buren a list of the stock that was on hand at the time that the contract was signed?

A. I never asked Lipsitz.

Q. At any time after the contract was signed in Mr. Voigt's office up to the time when settlement was supposed to have been made did you ask Mr. Lipsitz to get from Mr. Van Buren an inventory of the stock?

A. No, I didn't ask him.

Q. Did you ask Mr. Van Buren or request Mr. Lipsitz to ask Mr. Van Buren whether he had made an inventory of the stock on hand at the time the contract was made?

A. After the agreement we did not talk about that.

Q. Who do you mean, you didn't talk with Mr. Van Buren or Mr. Lipsitz?

A. There was only one thing talked about.

Q. I move that be stricken out, I want an answer to the question.

A. That is all we talked about, closing the stock room and Van Buren said they shouldn't close it but leave it open.

10 Mr. Starr: Repeat the question, please.

(Question repeated.)

The Witness: Before the agreement that is the only thing we talked about. I didn't ask him because I can't talk to him, Lipsitz did that himself.

Q. Repeat the question again. I will change it. Did you talk with Mr. Lipsitz about Mr. Van Buren making an inventory or a list of the stock on hand?

20 A. I didn't talk to Mr. Lipsitz.

EXHIBIT D1.

I hereby authorize William Lipsitz to act as my agent in selling the premises..... and agree to pay .....per cent. to the above said William Lipsitz, as compensation for all services rendered in the sale of the above property or land, provided however, 10 such sale was effected through the office of said William Lipsitz.

I also agree to serve notice to the above said William Lipsitz in case the sale of the above property is to be discontinued.

.....(Seal)  
.....(Seal)

Signed, sealed and delivered this..... day of.....192 .

In the presence of ..... 20  
Witness.....



on this contract was brought by complainant against defendant and dismissed prior to the present suit for specific performance. This is urged as a waiver, by election, of the remedy now sought.

There appears to be no dissent to the general doctrine that in order that the commencement of an action at law or a suit in equity, which is not prosecuted to judgment or decree and which results in no benefit to the prosecuting party or detriment 10 to the defendant, shall have the effect to bar any other remedy the prosecuting party may have, the remedies must proceed from opposite and irreconcilable claims of right, and must be so opposite or inconsistent that a party cannot logically assume to follow one without renouncing the other. But in the application of this well-recognized rule to actions at law and suits in equity growing out of contracts for the sale of land the courts of our several States are not in entire harmony. In an extended note to 26 20 A. L. R., p. 111, most of the authorities are collected. It will be observed that nearly all of the adjudications in specific performance cases have arisen in suits by vendees, and the uniform inquiry of the several courts has been to ascertain whether the prior discontinued suit should be said to be an affirmation or disaffirmance of the contract. An action by the vendee against his vendor to recover the payments he has made on account of his contract of purchase appears to have been almost uni- 30 formly regarded as a disaffirmance of the contract and an irrevocable repudiation of all obligations under it, and in consequence a bar to a subsequent suit for specific performance, even though the action has been discontinued and no estoppel has arisen through benefit to the plaintiff or detriment to the defendant. But where the prior discontinued action

by the vendee against his vendor has been for the recovery of damages for non-performance of his contract the preponderance of authority appears to be to the effect that such an action being based upon the contract is in affirmance of it and in consequence is not such a repudiation of the vendee's obligations under it as will be operative as a bar to a suit for specific performance in the absence of benefit to the plaintiff or detriment to defendant having arisen by the prior discontinued action for damages, but some 10 courts have held the prior discontinued action for damages so far in disaffirmance of the contract as to be operative as a bar to a subsequent suit for performance, irrespective of any element of estoppel. In *Harrington v. Hubbard*, 2 Ill. 570, the vendee brought an action of covenant under his contract to recover damages and also an action of assumpsit to recover back the part of the purchase money paid; he then dismissed both actions and filed a bill for specific performance. The Court held the action of 20 assumpsit to recover back the purchase money paid operative as a bar, but suggested that the action of covenant for damages might not be a bar because based upon the contract. In this State it has been authoritatively determined that an action by a vendee against his vendor to recover back the deposit money is a disaffirmance of the contract and in consequence a repudiation of all obligation of the vendee under the agreement, and though discontinued is operative as a bar to a subsequent suit by the 30 vendee for specific performance. *Claron v. Thommessen*, 96 N. J. Eq. 650; *Matun v. Fay*, 98 N. J. Eq. 377. No adjudication in this State has been brought to my attention touching the operative effect of either a vendee's or vendor's action for damages. In *B. Holding Co. v. DuBois* (N. J. Ch.), 136

At. Rep. 518, a vendor was denied specific performance because he had repudiated his obligation to convey both by letters and by a defense to an action by the vendee in which defense the vendor claimed he was excused from performing.

The action at law, which the vendee now claims as a bar to the present vendor's suit for specific performance, is not easily classified by any recognized nomenclature. The complaint alleged the execution of the contract on the day of its date and attached a copy and specifically made it a part of the complaint. The complaint then averred as follows: "Although plaintiffs have ever since and are still ready, willing and able to tender a good, legal and sufficient special warranty deed, the defendant has ever since and still refuses to perform the contract. Therefore the plaintiffs bring this action and demand as damages \$53,000 together with interest and cost of suit." A clause of the attached contract provided for the final cash payment to be made "at the time of final settlement, which shall be at the office of \* \* \* \* on or before April 1, 1926, or the deposits of \$5000 made herewith at the option of the sellers, may be applied on account of the purchase price or be forfeited as liquidated damages to the sellers, and not as a penalty." It appears that \$5000 had been paid and the \$53,000 named as damages was the unpaid part of the purchase price. A motion was made by the vendee, defendant in the Supreme Court, to dismiss the complaint, and the following adjudication was there made:

"Motion to dismiss the complaint filed in the above-entitled cause having been made by Aaron Heine, Esquire, attorney for defendant, on the ground that said complaint does not allege a cause of action, in that penal damages are de-

manded by plaintiff where the contract stipulates liquidated damages; and no cause appearing to the contrary:

It is, on this 26th day of July, 1926, on motion of Aaron Heine, Esquire, attorney for defendant, ordered, that the complaint filed in the within cause be dismissed as it does not allege a cause of action, with costs to the defendant.

Frank S. Katzenbach, Jr.,

Justice of the Supreme Court.

I hereby consent to the filing of the above order.

T. Phillips Brown,  
Attorney for Plaintiff."

It also appears that to the original complaint, which was entitled in the Supreme Court, there was attached a summons for defendant to appear in the Supreme Court; but that summons bore the signature of the county clerk and not that of the clerk of the Supreme Court; which complaint and summons were served on defendant. While that does not appear to have been made the ground of the motion to dismiss, it discloses the anomalous situation of an action at law without a valid summons and with a complaint that set forth no cause of action. (It must be here assumed that the complaint set forth no cause of action since that was the specific determination of the law court and became the law of the case: *Headly v. Leavitt*, 65 N. J. Eq. 748; *Gallagher v. L. & B. Eagle Brewing Co.*, 86 N. J. Eq. 188.) It would, therefore, seem that to invoke the doctrine of election of remedies in such circumstances, something more than the anomalous proceeding referred to might well be required, and a search appropriately made touching the real atti-

tude of the vendor. His testimony is that he wanted the sale enforced and so directed his solicitor and did not know that any other remedy had been sought by his solicitor. Although a litigant is ordinarily bound by the selection of remedies by his solicitor, yet insofar as the mental attitude and purpose of the vendor is concerned it is reasonably apparent that his purpose throughout was to compel his vendee to perform the contract. And referring to the

10 complaint it will be found that it specifically averred the past and present willingness and ability of the vendor to convey in accordance with the terms of the contract. Accordingly, the complaint which was filed in behalf of the vendor, insofar as it can be appropriately regarded as a pleading, was not only based upon the contract and sought the recovery of the unpaid part of the purchase price, but also tendered vendor's willingness to perform, and in that

20 view cannot logically be said to have been in repudiation of it. I am also convinced that even though an action for damages brought by a vendor against his vendee for breach of his contract in failing to perform may be said to be a rescission or irrevocable repudiation of the contract by the vendor and in consequence afford a bar to a subsequent vendor's suit for specific performance—which may well be doubted—yet in the circumstances of the case as herein narrated the doctrine of election of remedies cannot be logically or reasonably enforced against

30 complainant by defendant herein.

It also is urged by way of defense that the agreement is indefinite in that it provides a specific date for final payment and settlement, and then adds: "provided that the necessary title searches can be obtained from any first-class New Jersey title company by that date. Should there be any delay, not

the fault of the buyer, in the procuring of such searches, the time for settlement shall extend until searches can be obtained." It is not claimed that there was any inability to procure title searches or that this clause resulted in any misunderstanding or disagreement or in any way contributed to non-performance; the claim is that it renders the contract of sale unenforceable because of a possible necessity of extension of the time for performance to a date not definitely named. On the contrary, the pro-

10 vision does definitely define a contingent extended period for performance, terminating when the searches can be obtained. There is no rule requiring certainty as to time of performance which can be properly isolated from the equitable reasons on which it is based. I find no infirmity in a beneficial provision of that nature.

It is also urged by defendant that the agreement is indefinite in its failure to clearly define who is to execute the second mortgage which is to form a part

20 of the purchase price. There reasonably can be no misunderstanding of that provision of the agreement; it must be read in the light of the ordinary conduct of reasonable men under the circumstances and clearly contemplates that the purchaser is to secure the amount named by the execution of the second mortgage there referred to, payable one year from the day of settlement.

It is further objected that the contract included personal property then on the premises without a

30 specific enumeration of the chattels. The testimony of complainant is that on the day following the execution of the contract a suggestion was made by defendant that the stock-room containing the personal property be locked up until settlement day, and that upon complainant explaining the impracticability of that course, defendant agreed to per-

mit sales to be made and stock replaced and accept complainant's accounts and make the necessary adjustments at settlement; accordingly, complainant thereupon caused a complete inventory of the personal property to be made. That inventory has been offered in evidence. The testimony for the defense does not radically differ from this except in one respect; defendant and Lipsitz say that that conversation occurred the day before the contract was signed, and add that complainant was to make the inventory and turn it over to defendant, and was to make another inventory at settlement and an adjustment then was to be made for any deficiencies of stock on hand, and that no inventory has been handed to defendant.

I think this variance in the testimony of the parties immaterial. The contract was an entire contract for the sale of improved real estate and the chattels therein, and there appears to be no doubt of the power and duty of the Court to enforce such a contract by decree of specific performance in behalf of either party to it, when that course appears to be equitable and just. Nor can it be deemed essential that an inventory of the chattels be annexed to the contract if the chattels referred to in the contract are ascertained with certainty. In the present case the accuracy of the inventory of the chattels which has been put in evidence cannot be reasonably doubted. Nor can it be doubted that the parties contemplated that the business should continue until the purchaser paid the balance of the purchase price and an allowance then made to him for any chattels that had been used and not replaced. Not only was that course in the interest of both parties, but both now agree that that course was to be pursued. But without any testimony of that agreement it is entirely clear that that course was pur-

sued with the entire acquiescence of both parties. It is also entirely clear that neither any thought of uncertainty touching the chattels, which were in the premises at the time the contract was made, nor any thought of uncertainty touching what chattels, if any, had been used and not replaced, in the slightest degree entered into the failure of defendant to perform. His failure to perform was because he wished to escape the burden of performance, and no equitable element can now be found in this after-thought as an excuse for non-performance. In such circumstances the proper practice is for a master to ascertain what chattels, if any, have been used and are not now replaced, and a just allowance made as originally contemplated. This is not a modification or reformation of the written contract; the acquiescence of both parties in that plan of operation and contemplated adjustment equitably binds them both to it.

Laches on the part of the complainant is claimed. From the time for performance until this time, complainant has, in my judgment, done everything in his power to induce defendant to perform his contract of purchase. Some time was consumed in negotiations of settlement and some delay arose from the abortive attempt of an attorney to sue at law and later bring this suit; but I find no unreasonable delay attributable to complainant and no delay prejudicial to defendant; the delay has been due to defendant's wrongfully seeking to escape his contractual liability.

A reference may be made to a Master to ascertain what allowance, if any, should be made to defendant on account of any depletion of stock in trade. Upon the coming in of the Master's report, a decree of specific performance will be advised.

Submitted: November 9, 1927.

Determined: November 18, 1927.

## MASTER'S REPORT.

(Filed December 18, 1927.)

## IN CHANCERY OF NEW JERSEY.

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Between CHARLES VAN BUREN, <i>et als</i> , <i>Complainants</i> , and JACOB FINE, <i>Defendant</i> .	}	On Bill, Etc. Master's Report.
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*To the Honorable Edwin Robert Walker, Chancellor  
of the State of New Jersey:*

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In pursuance of the order of this Court made in the above-entitled cause on the fifth day of December, A. D. 1927, whereby it was referred to me, Frank A. Mathews, Jr., one of the Masters of this court, to ascertain and report what stock and fixtures which were in and around the lands and premises described in the complainants' bill at the time of the making of the said contract referred to therein, have been used and have not been replaced, and what allowance, if any, should be made to the defendant on account of the depletion of said stock and fixtures; the said allowance to be made as of

the time when the inventory of the same is made, and to cover the market value of the same as of that time:

I respectfully report that I have been attended by Lewis Starr, Esq., of counsel with the complainants, and D. Trueman Stackhouse, Esq., of counsel with the defendant, and that I have taken testimony in the said matter, which is hereto annexed, making part of this, my report, and that I have considered the matters so referred to me by the said order. 10

I certify and report that the said counsel of the complainants produced before me inventory of merchandise taken the day after the agreement of sale referred to in the bill of complaint was signed, said inventory having been marked Exhibit P1 in the testimony originally taken in this cause, and was marked by me Exhibit P1 on behalf of the complainants; and that said counsel of the complainants produced before me paper containing resumé of the totals of items of said inventory, which said paper was marked Exhibit P2 in the testimony originally taken in this cause and was marked by me as Exhibit P2 on behalf of the complainants; and that said counsel of the complainants also produced before me inventory of fixtures in the premises referred to in the bill of complaint in this cause made on Saturday, December 10, 1927, and the same was marked by me Exhibit P3 on behalf of the complainants; and that the said counsel of the complainants further produced before me an inventory of merchandise in said premises made on December 10, 1927, which was by me marked Exhibit P4 on behalf of the complainants. 20 30

I further find and report that there have been no fixtures of said premises used which have not been replaced and that no allowance should be made to

the defendant on account of the depletion of any of said fixtures.

I further find and report that there have been used and have not been replaced stock and merchandise in and around the lands and premises described in the complainants' bill in the amount of \$1415.67.

10 And I further find and report that there should be made to the defendant on account of depletion of said stock and merchandise, an allowance of \$1415.67, being the market value as of the time when said inventory was made, to wit, December 10, 1927, of the stock and merchandise in and around the lands and premises described in the complainants' bill used and not replaced.

All of which is respectfully submitted this seventeenth day of December, A. D. nineteen hundred and twenty-seven.

FRANK A. MATHEWS, JR.,  
Master in Chancery of New Jersey.

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## DEPOSITIONS BEFORE MASTER.

## IN CHANCERY OF NEW JERSEY.

Between	}	10
CHARLES VAN BUREN, <i>et als</i> ,		On Bill, Etc. Depositions Before Master.
<i>Complainants,</i>		
and		
JACOB FINE, <i>Defendant.</i>		

Depositions taken in the above-entitled cause by 20  
and before me, Frank A. Mathews, Jr., a Special  
Master in Chancery of New Jersey, at the offices of  
Starr, Summerill & Lloyd, Esqs., S. W. corner  
Fourth and Market Streets, Camden, New Jersey, at  
2.00 o'clock in the afternoon, December 12th, 1927,  
in pursuance of an order of reference made in this  
cause and dated the fifth day of December, 1927, and  
in the presence of Lewis Starr, Esq., of Starr, Sum-  
merill & Lloyd, of counsel with the complainants,  
and D. Trueman Stackhouse, Esq., of counsel with 30  
the defendant, pursuant to due notice of said hear-  
ing.)

CHARLES VAN BUREN, one of the complainants, a witness produced in their behalf, being duly sworn according to law, on his oath deposes and says:

Judge Starr: I offer in evidence Exhibit P1, which was proven in one of the hearings in this case and introduced in evidence before the case was finally decided, the same being an inventory that was  
10 taken on the twenty-second of October, 1925.

Mr. Stackhouse: I don't object to the offer any further than I have already indicated—that it is not relevant to the case because it tends to vary the contents of the written agreement.

(The said paper is admitted in evidence, subject to the foregoing objection, and is marked Exhibit P1.)

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By Judge Starr:

Q. Mr. Van Buren, I show you Exhibit P1 and wish you would please tell the Master what that represents.

A. This represents the inventory that was taken the day after the agreement of sale was signed.

Q. Were those articles in the garage at Merchantville at the time the inventory was taken?

30 A. Yes, sir.

Q. How was this inventory taken?

A. By another man and myself. He called them and I put them down and priced them up at retail prices.

Judge Starr: I offer paper marked Exhibit P2 at the other hearing.

Mr. Stackhouse: My objection to that goes to the same extent as the other.

(Said paper is admitted in evidence, subject to the foregoing objection, and is marked Exhibit P2.)

By Judge Starr:

Q. Have you recently made an inventory of the stock and fixtures at the garage? 10

A. Yes.

Q. When was that made?

A. Yesterday.

Q. Yesterday was Sunday. Was it made Sunday or Saturday?

A. It was made Saturday.

Q. I show you a sheet marked "Sheet No. 1." Is that the inventory of fixtures there enumerated—the inventory of last Saturday?

A. Yes. Complete list of things there when the 20 inventory was made last Saturday.

Judge Starr: I offer that in evidence.

Mr. Stackhouse: I want the opportunity to cross-examine. Can I do that now?

Judge Starr: Just as you please.

Cross-examination.

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By Mr. Stackhouse:

Q. You have referred here to one steam heating plant in the garage. What kind of a steam heating plant is that?

- A. Steam.
- Q. I know. Is there a boiler?
- A. Yes.
- Q. Radiators?
- A. Yes.
- Q. Was that in there at the time the original inventory was made?
- A. Yes; always has been.
- Q. Isn't that part of the building?
- 10 A. Well, I suppose it is part of the building. You could take that away and still leave the building.
- Q. I understand that. But was that put in there when the garage was erected?
- A. I don't know whether it was or not. It was in there when I bought it.
- Q. And part of the ordinary operation of the plant there, wasn't it?
- A. Yes.
- Q. Did that heat the two stores there, too?
- 20 A. Yes, heated the entire place.
- Q. In other words, it was a general heating plant there for the entire building?
- A. Yes.
- Q. The garage, work-room and the two stores in the front?
- A. Yes. The fire buckets and extinguishers I put there since.
- Q. I am not asking about that now. These radiators were connected by pipes to the boilers?
- 30 A. Yes.
- Q. Hanging on the wall or set on the floor?
- A. Hanging on the wall.
- Q. Practically all wall radiators?
- A. Yes.
- Q. The pipes at some points run through the walls of some of the rooms—partitions or something of that kind?

A. Yes. All connected up throughout the entire garage.

The Master: What is the purpose of this line of cross-examination?

(Here occurred some conversation off the record.)

Mr. Stackhouse: May I ask, Judge Starr, if the object of including this steam heating plant is to ask for an allowance in addition? 10

Judge Starr: No. I expect to prove that list of fixtures—or rather the fixtures shown by the exhibit were there at the time the contract was made. In other words, that there has been no change in the fixtures.

(Said paper is admitted in evidence and is marked Exhibit P3.) 20

Further direct examination.

By Judge Starr:

Q. Now, calling your attention to Exhibit P3, will you say whether or not there has been any change in the fixtures from the time the contract in this matter was made until you made the inventory Saturday?

A. No. The only change is the addition of fire 30 buckets and fire extinguishers which I put in in order to reduce the insurance rate. Twenty-five buckets and five extinguishers.

Q. They were not there when the contract was made?

A. No.

Q. And they are there now?

A. Yes.

Q. Outside of the buckets and extinguishers has there been any change in the number of fixtures in the garage from the time the contract was made until you made the inventory Saturday?

A. No.

10 Q. Did you make an inventory of the merchandise and stock on hand Saturday?

A. Yes, made that on Saturday.

Q. How was that made?

A. Another man and myself. He called them off and I put them down.

Q. Did you make a memorandum of the articles of stock on hand?

A. When? Saturday?

Q. Yes.

A. Yes.

20 Q. Is this the record? (Showing witness papers.)

A. Yes. These are also at retail price, but prices are reduced considerably than what they were then. Tires are cheaper now and other things are cheaper now than then.

Q. Does this paper which I have shown you accurately show the stock on hand when you made the inventory on Saturday, and the prices given are the retail prices as of that time?

A. Yes, sir.

30

Judge Starr: I offer that in evidence.

Mr. Stackhouse: The only objection is the same objection as made to the others.

(Said paper is admitted in evidence, subject to said objection, and is marked Exhibit P4.)

By Judge Starr:

Q. Can you say whether or not the retail value of these articles were the market value as of the time you made the inventory last week?

A. Yes, sir.

Q. Taking these two inventories marked Exhibits P1 and P4 today, were the same methods adopted in making the inventories?

A. Yes.

10 Q. Were the same methods used and carried out?

A. Yes.

Q. Same methods used in fixing prices?

A. Yes, the same.

Q. They represent the market prices at the time the various inventories were made?

A. Yes.

Q. Have you totalled up the market value of the inventory of stock as shown by the Exhibit P4, and if so, what is the amount of it?

A. P4 is \$2,278.13.

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Mr. Stackhouse: What is the amount of the original?

Judge Starr: Thirty-seven hundred dollars. A difference of about fifteen hundred dollars in your favor.

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Cross-examination.

By Mr. Stackhouse:

Q. You say that after the sale was made, some time—subsequent to the time the sale was made, you put in some fire extinguishers and fire buckets?

A. Yes.

Q. How many extinguishers were there?

10 A. About—I put in five of those Pyrenes and one tall one—I don't know what you call it.

Q. How much did they cost?

A. I don't know what they cost now. I would have to look it up.

Q. Have you included those in any of these inventories?

A. That is included in the fixtures.

Q. Then the twenty-two fire buckets—what did they cost apiece?

20 A. I couldn't tell you what they cost, either. I got those about three months ago.

Q. Was it necessary to put those in?

A. Not necessary. I could have paid more insurance if I wanted to.

Q. In other words, they were put in to reduce your insurance?

A. Yes.

Q. You didn't have to put them in if you wanted to pay a higher rate of insurance?

30 A. Yes.

Q. You couldn't tell me what they amounted to?

A. No, I couldn't tell you. I would have to get the bills. They are included as fixtures and not in my inventory of merchandise for sale.

Q. Is there any way you can ascertain that?

A. The price of these here?

Q. The price of the fire buckets and extinguishers.

A. Yes.

Q. Haven't got your bills with you?

The Master: How is this relevant under this order of reference?

(Here occurred some conversation off the record.)

Judge Starr: We make no claim for the price 10 paid for the fire buckets and the extinguishers.

Mr. Stackhouse: I don't think I have anything more.

(Mr. Stackhouse states that he will not require any further proof of the inventories and that there is no question about Mr. Van Buren's qualifications as to the testimony of prices.)

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I do hereby certify that the foregoing depositions were taken by me personally stenographically as said depositions were given and I know that they accurately represent the said testimony.

FRANK A. MATHEWS, JR.,  
Master in Chancery of New Jersey.

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ORDER CONFIRMING MASTER'S REPORT.

(Filed December 27, 1927.)

IN CHANCERY OF NEW JERSEY.

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Between CHARLES VAN BUREN, <i>et als</i> , <i>Complainants</i> , and JACOB FINE, <i>Defendant</i> .	}	Order Confirming Master's Report.
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Upon reading and filing a report dated the 17th day of December, 1927, made by Frank A. Mathews, one of the Masters of this court, and notice of application to confirm the report having been given, and the said application coming on to be heard in the presence of D. Trueman Stackhouse, of counsel with the defendant, and Lewis Starr, of counsel with the complainants, and no cause appearing why the said report should not be confirmed:

30 It is, on this 27th day of December, 1927, ordered that the said report be and the same hereby is in all matters and things confirmed and allowed.

E. R. WALKER,  
C.

Respectfully advised:  
E. B. LEAMING, V. C.

DECREE FOR SPECIFIC PERFORMANCE.

(Filed December 27, 1927.)

IN CHANCERY OF NEW JERSEY.

10

Between CHARLES VAN BUREN, <i>et als</i> , <i>Complainants</i> , and JACOB FINE, <i>Defendant</i> .	}	On Bill, Etc. Decree for Specific Performance.
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This matter coming on to be heard on bill, answer, replication and proofs in the presence of T. Philips Brown, solicitor for and Lewis Starr, of counsel with the complainants, and Aaron Heine, solicitor for and D. Trueman Stockhouse, of counsel with the defendant, and the Court, after reading the pleadings and considering the testimony of the respective parties and argument of counsel made thereon, being of the opinion that the complainant is entitled to the relief prayed for, and that the said defendant should be required to specifically perform the contract made between him and the complainants, as set forth in said bill, but that meantime a reference go to a Master to ascertain what stock and fixtures, which were in and around the premises described in

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complainants' bill at the time of the making of the contract, as referred to therein, have been sold or used and have not been replaced, and what allowance, if any, should be made to the defendant, on account of the said depletion of the stock and fixtures.

10 And it further appearing that in pursuance thereof, an interlocutory decree and order of reference for the purpose aforesaid was entered on the 6th day of December, 1927, directed to one Frank A. Matthews, Jr., one of the Masters of this Court.

And it further appearing by report dated the 17th day of December, 1927, made by said Master, which said report has been duly confirmed by an order of this Court, that the said defendant, Jacob Fine, is entitled as an allowance on the purchase price mentioned in said contract of the sum of one thousand four hundred fifteen dollars and sixty-seven cents, as and for the depletion of the said stock and fixtures, and that the sum in cash to be 20 paid by defendant upon the performance of said contract is twenty-one thousand five hundred eighty-four dollars and thirty-three cents.

And it further appearing to the satisfaction of the Court that the complainants were, on the 20th day of October, 1925, the owners of

"ALL that certain lot or tract of land and premises, lying and being in the Borough of Merchantville aforesaid, more particularly described as follows:

30 BEGINNING in the Northwesterly line of Park Avenue at a distance of 151.82 feet Northeastwardly from the Northwest corner of Maple Avenue and Park Avenue, said point being a corner to lot #3 as shown on plan of lots of the estate of Alexander G. Cattell, deceased, and running thence (1) North along the West

line of lots #3 and parallel with Centre Street 290.52 feet to a point in the South line of land now or late of Collins and Pancoast, thence (2) East and parallel with the Camden and Burlington County Railroad 52.35 feet to line of land now or late of Marie Fuch's, thence (3) South along said Fuch's land and parallel with Centre Street 261.12 feet to point in the Northwesterly line of Park Avenue, thence (4) Southwest along the Northwest line of Park Avenue 60 feet 10 to place of beginning. BEING Lot #3.

And it further appearing that the complainants and defendant entered into an agreement in writing on the said 20th day of October, 1925, wherein and whereby the said complainants agreed to convey the said lands and premises and stock and fixtures contained therein, as set forth in said agreement, on or before the first day of April, 1926, and the defendant agreed to buy said lands, premises, stock 20 and fixtures and pay therefor the sum of fifty-eight thousand dollars, by a first payment of fifteen hundred dollars made on the day of the execution of said agreement, and the second payment of fifteen hundred dollars to be made on the 23rd day of October, 1925, and a further payment of one thousand dollars to be made within thirty days from the date of said agreement, and a further payment of one thousand dollars to be made within sixty days from the date thereof, and the balance to be secured by a 30 first mortgage of twenty thousand dollars, then standing against said premises, payable within one year from the first of March, 1926, and a second mortgage of ten thousand dollars, to be placed against said premises for a period of one year from April 1, 1926, and the payment of twenty-three thou-

sand dollars in cash, at final settlement, as provided by the terms of said agreement.

And it further appearing to the satisfaction of the Court that the defendant, while he paid five thousand dollars on account of said purchase price, did not otherwise perform said agreement for sale on the first day of April, 1926, nor any time thereafter, but that he has refused and failed to perform and carry out the same then or at any other time, although the complainants have always been ready, willing and able to comply with the terms of said agreement on their part.

And the Court being of the opinion that the complainants are entitled to the specific performance of said agreement, as prayed for by them in their bill of complaint:

It is, on this 27th day of December, 1927, on motion of T. Philips Brown, solicitor of the complainants, by EDWIN ROBERT WALKER, Chancellor of the State of New Jersey, ordered, adjudged and decreed, and the said Chancellor, by virtue of the power and authority of this Court, does hereby order, adjudge and decree that the said agreement, mentioned in said bill of complaint, be in all things specifically performed by said defendant on the 18th day of January, 1928, at the hour of ten o'clock in the forenoon, at the office of Hon. C. V. D. Joline, Esquire, a Master in Chancery of New Jersey, at his office, Temple Building, in the City of Camden, County of Camden, and State of New Jersey, under the supervision of said Master, and that the defendant at that time and place pay to the complainants the sum of twenty-one thousand five hundred eighty-four dollars and thirty-three cents, cash, and at the same time and place the defendant shall make, execute and acknowledge, in due form of law, and de-

liver to the complainants a mortgage on the said lands and premises herein described, securing the payment of the sum of ten thousand dollars, to be dated the said day of performance, as herein required, payable forthwith upon the delivery, at the same time and place by the complainants, to the defendant, of a special warranty deed to be dated the same day, duly executed and acknowledged by the complainants, conveying to the said defendant the said lands, and premises herein described, and said stock and fixtures, free and clear of all encumbrances, including municipal liens and assessments, except municipal improvements in the course of construction and not assessed, obvious easements and the usual restrictions running with the land, also excepting a mortgage now existing on the said lands and premises for twenty thousand dollars, payable within one year from the first day of March, A. D. 1926.

And it is further ordered, adjudged and decreed that if, at the time and place, hereinbefore mentioned, the said defendant shall fail and neglect to pay the sum of money as herein mentioned, and deliver the mortgage herein described, duly executed and acknowledged, upon the tender of said deed, the aforesaid sums of thirty-one thousand five hundred eighty-four dollars and thirty-three cents, composed of the balance of twenty-one thousand five hundred eighty-four dollars and thirty-three cents, due on the purchase price of said contract and of ten thousand dollars, the amount of the said mortgage to be executed by defendant, shall be and become and are hereby impressed as a lien upon said lands and premises, herein described, and stock and fixtures in favor of the complainants, to the end that the said lands and premises and stock and fixtures

may be sold, pursuant to law, to raise said amounts, together with the costs to be taxed, and in case a deficiency shall arise from such sale, the said defendant may be ordered, by this Court, to pay the same.

And it is further ordered, adjudged and decreed that upon the payment of the moneys aforesaid by the defendant, and the execution and delivery of the second mortgage above mentioned, the complainants shall surrender possession of the said lands and premises to the defendant, and deliver to him the stock and fixtures, which were in, around and on said lands and premises on the 10th day of December, A. D. 1927.

And it is further ordered, adjudged and decreed that the said defendant pay to the complainants the costs of this suit to be taxed, including a counsel fee of one hundred fifty dollars, which is hereby allowed the complainants.

And it is further ordered that a true but uncertified copy of this decree and of the taxed bill of costs be served upon the defendant within ten days from the date hereof.

E. R. WALKER,  
C.

Respectfully advised:  
E. B. LEAMING, V. C.  
A true copy.  
LEWIS STARR.

30

NOTICE OF APPEAL.

(Filed January 17, 1928.)

IN CHANCERY OF NEW JERSEY.

Between	}	On Appeal, &c. Notice of Appeal.
CHARLES VAN BUREN, <i>et al</i> ,		
<i>Complainants-Appellees,</i>		
and		
JACOB FINE,		
<i>Defendant-Appellant.</i>		

Defendant, Jacob Fine, hereby appeals from the final decree made in the above-entitled cause on December 27, 1927 (upon the advice of Honorable E. B. Leaming, Vice-Chancellor), and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

AARON HEINE,  
*Solicitor for and*  
D. T. STACKHOUSE,  
*Of Counsel with Defendant,*  
*Jacob Fine.*

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

D. T. STACKHOUSE,  
Of Counsel with Defendant,  
Jacob Fine.

STATE OF NEW JERSEY, }  
10 CAMDEN COUNTY, } ss.

MAY TROUT, of full age, being duly sworn according to law, on her oath deposes and says that:

On the 14th day of January, 1928, she served a copy of the within notice upon T. Phillips Brown, solicitor for the complainants-appellees, by leaving the same at his office between the hours of 10.00 A. M. and 4.00 P. M. on said day.

MAY TROUT.

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Sworn and subscribed before me this 16th day of January, A. D. 1928.

CARLTON W. ROWAND,  
Notary Public of New Jersey.

My commission expires August 1, 1932.

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PETITION OF APPEAL.

(Filed February 4, 1928.)

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

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Between  
CHARLES VAN BUREN, et al,  
Complainants-Appellees,  
and  
JACOB FINE,  
Defendant-Appellant. }  
On Appeal from  
Chancery.  
Petition of Appeal.

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

The petition of Jacob Fine, the appellant in the above cause, respectfully shows that:

1. Petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, upon the advice of Honorable E. B. Leaming, Vice-Chancellor, bearing date December 27, 1927, in a certain cause in said Court of Chancery, wherein Charles Van Buren and Mable S. Van Buren were complainants and your petitioner was

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defendant, in that the said decree adjudges as follows:

10 "That the said agreement, mentioned in said bill of complaint, be in all things specifically performed by said defendant on the 18th day of January, 1928, at the hour of ten o'clock in the forenoon, at the office of Hon. C. V. D. Joline, Esquire, a Master in Chancery of New Jersey, at his office at Temple Building in the City of Camden, County of Camden, and State of New Jersey, under the supervision of said Master, and that the defendant at that time and place pay to the complainants the sum of twenty-one thousand five hundred eighty-four dollars and thirty-three cents, cash, and at the same time and place the defendant shall make, execute and acknowledge, in due form of law, and deliver to the complainants a mortgage on the said lands and premises herein described, securing the payment of the sum of ten thousand dollars, to be dated the said day of performance, as herein required, payable forthwith upon the delivery, at the same time and place by the complainants, to the defendant, of a special warranty deed to be dated the same day, duly executed and acknowledged by the complainants, conveying to the said defendant the said lands and premises herein described, and said stock and fixtures, free and clear of all encumbrances, including municipal liens and assessments, except municipal improvements in the course of construction and not assessed, obvious easements and the usual restrictions running with the land, also excepting a mortgage now existing on the said lands and premises for twenty thousand dollars, payable within one

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year from the first day of March, A. D. 1926.

"And it is further ordered, adjudged and decreed that if, at the time and place, hereinbefore mentioned, the said defendant shall fail and neglect to pay the sum of money as herein mentioned, and delivered the mortgage herein described, duly executed and acknowledged, upon the tender of said deed, the aforesaid sums of thirty-one thousand five hundred eighty-four dollars and thirty-three cents, composed of the balance of twenty-one thousand five hundred eighty-four dollars and thirty-three cents, due on the purchase price of said contract and of ten thousand dollars, the amount of the said mortgage to be executed by defendant, shall be and become and are hereby impressed as a lien upon said lands and premises, herein described, and stock and fixtures in favor of the complainants, to the end that the said lands and premises and stock and fixtures may be sold, pursuant to law, to raise said amounts, together with the costs to be taxed, and in case a deficiency shall arise from such sale, the said defendant may be ordered, by this Court, to pay the same.

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"And it is further ordered, adjudged and decreed that upon the payment of the moneys aforesaid by the defendant, and the execution and delivery of the second mortgage above mentioned, the complainants shall surrender possession of the said lands and premises to the defendant, and deliver to him the stock and fixtures, which were in, around and on said lands and premises on the 10th day of December, A. D. 1927.

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"And it is further ordered, adjudged and de-

creed that the said defendant pay to the complainants the costs of this suit to be taxed, including a counsel fee of one hundred fifty dollars which is hereby allowed the complainants."

2. And petitioner appeals from the said decree of the Chancellor, which decree is as aforesaid, upon the ground that the same is erroneous in that the complainants in said Chancery suit, who are the appellees here, were not entitled to specific performance of the said agreement under all of the circumstances of the case; and that the Chancellor should have made a final decree dismissing the bill of complaint.

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

AARON HEINE,  
Solicitor for and  
D. T. STACKHOUSE,  
Of Counsel with Appellant.

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

30 ALEXANDER E. FRIDRICH, of full age, being duly sworn according to law, on his oath says, that he served the within petition of appeal upon T. Phillips Brown, solicitor for appellees in said cause, by leaving a true copy thereof at his office, 527 Cooper Street, Camden, New Jersey, on Thursday, Febru-

ary 2, 1928, between the hours of ten o'clock A. M. and four o'clock P. M.

ALEXANDER E. FRIDRICH.

Sworn and subscribed before me this 3rd day of February, 1928.

WM. CAPUTI,  
Notary Public.

ANSWER TO PETITION OF APPEAL.

(Filed March 5, 1928.)

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

CHARLES VAN BUREN, et al, }  
Appellees, } On Appeal from the  
v. } Court of Chancery.  
JACOB FINE, } Answer to Petition  
Appellant. } of Appeal.

The answer of Charles Van Buren, et al, the above-named appellees, to the petition of appeal of Jacob Fine, the above-named appellant:

These appellees, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto, nevertheless, admits that a decree was, on the 27th day of December, 1927, made and entered in the Court of Chancery

of New Jersey in the above-entitled cause, for the purposes of said petition mentioned, and as therein set forth but as to the substance and form of said decree these appellees beg leave to refer thereto when the same shall be produced.

These appellees are advised and believe that the said decree is agreeable to equity; and they pray that the same may be affirmed with costs to be taxed in favor of these appellees.

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STARR, SUMMERILL & LLOYD,  
*Solicitors for and of Counsel  
with Appellees.*

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11 MAY 1928  
H / Mr

## New Jersey Court of Errors and Appeals

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Between  
CHARLES VANBUREN, *et ux*,  
*Complainants-Appellees*,  
and  
JACOB FINE,  
*Defendant-Appellant.*

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ON APPEAL FROM CHANCERY.

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BRIEF FOR APPELLANT.

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### STATEMENT OF THE CASE.

This appeal is brought by the defendant below from the decree made against him by the Court of Chancery. The parties will be designated by their original appellation of "complainants" and "defendant;" and the parenthetical references are to the printed case.

This was a vendor's suit for the specific performance of an agreement made by the complainants with the defendant, by which the complainants agreed to sell to the defendant and the latter agreed to buy from the complainants a property in Merchantville, New Jersey, "being known as Merchantville Garage, 21 West Park Avenue, together with

the stock and fixtures now on said premises," the agreement being dated October 20, 1925 (p. 5). The agreed price to be paid for the property was \$58,000.00, of which \$5,000.00 was paid before the time fixed for settlement, April 1, 1926, the agreement stating that the "balance to be secured by a first mortgage of \$20,000.00 now standing against said premises, payable within one year from the first day of March, 1926; and a second mortgage of \$10,000.00 to be placed against said premises for a period of one year from April 1, 1926; and the payment of \$23,000.00 in cash at the time of final settlement."

It was testified on behalf of the complainants that they attended at the time and place of settlement but that the defendant did not put in an appearance (p. 28).

On April 28, 1926, a suit was commenced in the New Jersey Supreme Court by the complainants against the defendant to recover damages for an alleged breach of agreement (copy of summons and complaint included in the amendment to reply, pp. 16 &c.). This suit was dismissed by the Supreme Court on the ground that the complainant did not show a cause of action (copy of rule of Supreme Court dismissing complaint included in Vice-Chancellor's conclusions, p. 194).

The Chancery suit resulted in a decree in favor of the complainants, requiring the defendant to specifically perform the contract (pp. 215 &c.).

#### GROUND OF APPEAL.

The final decree is alleged to be erroneous for the following reasons:

1. That the complainants had elected, through legal proceedings, to retain the \$5,000.00 paid on

account of the purchase price as liquidated damages and forego their remedy of specific performance.

2. The agreement was void under the Statute of Frauds.

3. That the agreement was so indefinite that it could not be specifically enforced.

4. That the vendors were in laches in asserting their rights under the contract.

5. That the decree, in effect, rejected the counterclaim of the defendant, seeking the return of the \$5,000.00 deposit money.

#### BRIEF OF THE ARGUMENT.

**The complainants had elected to accept damages in lieu of specific performance.**

After providing for the making of certain payments prior to settlement on account of the contract price, and the giving of certain mortgages, the agreement (pp. 5, 6) stipulated for

"The payment of \$23,000.00 in cash at the time of final settlement, which shall be made at the office of Frank Voigt, northwest corner of Seventh and Market Streets, Camden, New Jersey, on or before April 1, 1926, or the deposit of five thousand dollars made herewith, at the option of the 'SELLERS' may be applied on account of the purchase price or be forfeited as liquidated damages to the 'SELLERS,' and not as a penalty \* \* \*"

It becomes necessary in this aspect of the case to ascertain the conduct of the complainants with respect to the remedies which they attempted to enforce.

On April 28, 1926, twenty-seven days following the date fixed for the settlement, an action was commenced in the Supreme Court of this State by the complainants against the defendant (p. 17). The complainant, which was served with the summons, set forth a verbatim copy of the contract (p. 18), which is also the subject of the instant suit and set up (p. 20, l. 26) the readiness, willingness and ability of the complainants to tender a good, legal and sufficient special warranty deed and the refusal of the defendant to perform the contract, laying their damages at \$53,000, together with interest and costs of suit; the complainants' reply filed in the instant case (p. 21) set up the fact that "the summons were signed by Charles F. Wise, the clerk of Camden County, and were never filed in the office of the Supreme Court Clerk."

A motion was made (p. 194) by the defendant to dismiss the complaint, and an order was entered in the Supreme Court upon the consent of the complainants' attorney, which order read as follows: (p. 194, l. 32.)

"Motion to dismiss the complaint filed in the above-entitled cause having been made by Aaron Heine, Esquire, attorney for defendant, on the ground that said complaint does not allege a cause of action, in that penal damages are demanded by plaintiff when the contract stipulates liquidated damages; and no cause appearing to the contrary;

It is, on this 26th day of July, 1926, on motion of Aaron Heine, Esquire, attorney for defendant, ordered, that the complaint filed

in the within cause be dismissed as it does not allege a cause of action, with costs to the defendant.

Frank S. Katzenbach, Jr.,  
Justice of the Supreme Court.

I hereby consent to the filing of the above order.

T. Phillips Brown,  
Attorney for Plaintiff."

The Vice-Chancellor, in his opinion (p. 195) refers to the above legal action as presenting, "the anomalous situation of an action at law without a valid summons and with a complaint that set forth no cause of action."

We are unable to see why the Vice-Chancellor concerned himself in any degree with the form of the summons. While it is true that it did not bear the signature of the Supreme Court Clerk, yet the parties to the action never in any way regarded this as being a factor. Possibly some advantage might have been taken of the circumstances had the defendant chosen to do so; and even under such circumstances it is probable that the Court would have permitted the summons to be amended; but we are not dealing with any such feature of the case. An action might have been instituted without any summons at all and the defendant by appearing and not objecting could not now be permitted to complain of the absence of the summons. Its only object is to bring the defendant into Court, and if that is accomplished by any other means the ends of justice are served.

Neither is it quite clear why the learned Vice-Chancellor should have considered (p. 195, l. 36), "that a search might be appropriately made touching the real attitude of the vendor." It is respectfully submitted on behalf of the defendant that the

attitude of the parties must be drawn from their actions and not from what seemed to be some secret intention locked up in their breasts and which was not otherwise made manifest at the time that such acts were committed. If this were not so any doctrine which might be invoked for the protection of a litigant, and which is evidenced by some act on his part, could be entirely obviated and overthrown by his being permitted to come into court and say that while on the face of matters his actions might bear one construction, yet his undisclosed intention was to do something entirely different; and applying this to the doctrine of election, by legal proceedings, such a defense could, under all circumstances, be rendered nugatory.

The Vice-Chancellor, in the early part of the case (p. 42, l. 28) indicated that he considered that a client was not bound by the act of an attorney in commencing an unauthorized suit. What he probably had in mind was that a client could not be bound by such action where the relationship of attorney and client did not exist. Such relationship, however, was definitely established, because it was testified by Mr. VanBuren, the complainant, that he consulted with Mr. Brown or Mr. Voigt about April 1st, and authorized them to take proceedings against Mr. Fine (p. 43) so that the relationship of attorney and client was conclusively established.

We submit that the rule is well settled that an attorney has authority, by virtue of his employment as such, in behalf of his client, to do all acts in or out of court necessary or incidental to the prosecution and management of a suit and which affect the remedy only and not the cause of action; and that the attorney's neglect is the neglect of the client.

*Hahn v. Loker*, 229, Mass, 363; 118 N. E. 661;

*Davidson v. Richmond*, 245 S. W. (Ky.) 1;

*Parker v. Boulton*, 135 Mo. App. 270; 113 S. W. 259;

*Beale v. Swasey*, 106 Me. 35; 75 A. 134.

See also 6 C. J. 641 and cases cited.

The rule is tersely stated by Judge Cooley in *Foster v. Wiley*, 27 Mich. 244, 249, as follows:

"When one puts his case against another into the hands of an attorney for suit, it is a reasonable presumption that the authority he intends to confer upon the attorney includes such action as the latter, in his superior knowledge of the law, may decide to be legal, proper and necessary in the prosecution of the demand, and consequently whatever adverse proceedings may be taken by the attorney are to be considered, so far as they affect the defendant in the suit, as approved by the client in advance, and therefore as his act, even though they prove to be unwarranted by the law."

This case was cited with approval in *Poucher v. Blanchard*, 86 N. Y. 256, and quoted in *Parker v. Home Mut. Bldg, etc., Assoc.*, 114 Ga. 702, 705, 40 SE 724;

*Barber v. Dewes*, 101 App. Div. 432, 434, 91 N. Y. S. 1059. (Aff. 184 N. Y. 548 mem, 76 NE 1089 mem.)

It is not, however, necessary to go out of our own State to get authority for this rule. In the case of *McDowell v. Perrine*, 36 E. 632, the Court said:

"Even where a party desires a certain course to be adopted and counsel pursues another

course, the party must abide by the acts of his counsel, however contrary to his wishes. Counsel stands in place of the client."

In the case of *Warner v. Warner*, 31 E. 549, the Court quoting Lord Ellenborough in *Hall v. Stothard*, 2 Chit. 267, said:

"The client must be bound by the conduct of his counsel, otherwise there would be no end of applications to the Court for new trials where the parties wished one course to be adopted and counsel took another. The parties must, nevertheless, abide by the acts of their counsel, however contrary to their wishes."

The Court, in the above case made the following comment: "The same views have been expressed in many other cases."

If the learned Vice-Chancellor is correct in what appears to be his conclusion that the litigant can adopt one course of action through legal proceedings and then finding that they have militated to his disadvantage, come into another court and state that his mental attitude was something entirely different, then it would seem to us that the very foundations of the administration of justice would be dangerously unstable.

Mr. Voigt, to whom the contract was first handed after the date of settlement had arrived and settlement had not been made, was quite clear in his testimony as to what actually happened. He testified (p. 100) that when he was approached by Mr. VanBuren with respect to some action to be taken by reason of the defendant's alleged default:

"I had been turning lots of things over to Tom Brown, this one thing in particular, I said; 'Tom, this is a good one. I have given

you a lot of dead ones but this one is one worth your while. These people have fallen down on their contract and I want you to make them perform'—I won't say I used those words, but there was nothing in my mind but a bill of specific performance, and then I was out of touch with the thing. It was entirely up to Tom, and I supposed that the matter was proceeding along \* \* \*

The first I knew there was not a bill filed was when Tom Brown told me there was some motion over before Judge Donges, and I was puzzled and said, —'What is he doing in the matter?' I knew it was a Chancery matter and I was puzzled and I said, 'Tom, what is the idea?' And then I recall Mr. Heine getting in the matter, and I went up in the air. I said, 'My gosh, we don't want that—we want a bill for specific performance. That isn't what we want.' Well, I told Tom to consent to dismissing this suit, as we could file a bill, and that I understood was done, and then I was informed that a bill had been filed and we were proceeding along.

Now then, during that time VanBuren—I didn't tell VanBuren about this suit because I felt very rough about it; I felt as though I was not acting as his attorney, but I was responsible so much so that when the bill was presented to VanBuren for costs, which he didn't know about, I paid them out of my pocket."

The association of Mr. Brown with Mr. Voigt was undoubtedly at Mr. VanBuren's sanction.

The following testimony was given by Mr. Voigt (p. 101, l. 11):

"Q. You do say, however, you told Mr. Van-

Buren that you had passed the matter over to Mr. Brown to look after for you?

A. I probably did, and I think I must have said that; I must have said that Mr. Brown is attending to it."

T. Phillips Brown, the attorney of record in the Supreme Court suit and the solicitor of record in the instant case, who has been referred to as "Mr. Brown" and "Tom Brown," testified as follows: (p. 103, l. 34.)

"Q. You got your instructions from Mr. Voigt?

A. Yes, Mr. Voigt called me on the phone and I went over to the office, as I understand it, he said, 'Here is a contract, Mr. Fine fell down on it, go to it,' that is as nearly as I can recall, and it wasn't uncommon that I should start suit without the other parties being there."

And on p. 104, l. 12:

"Q. And you went to it by instituting this Supreme Court suit?

A. That is correct."

On p. 105, l. 23:

"Q. Did you receive any instructions from Mr. Voigt to bring a suit for damages against Fine?

A. No, sir, *there was nothing said which action should be brought, it was merely my own idea.*

Q. Why did you bring the suit for damages?

A. I looked over the contract, and I seen the \$5,000.00 had been paid, there was quite a large amount involved, I knew he had fallen down on the contract, and I thought that an action for damages, without giving it very much thought, was the proper remedy."

Thus, there is no claim at any time that any action on the part of the complainants' attorneys interfered with or surrendered the complainants' cause of action; but merely invoked one remedy when possibly the client wished another remedy pursued; and, as a matter of fact, the word "remedy" was made use of in the testimony on a number of occasions.

It must, therefore, be conclusively assumed that the action of VanBuren's attorney in bringing a suit for damages was his own act, and that he must be bound by whatever consequences such an act entailed. It is grossly improbable that he ever instructed his attorneys to bring an action for specific performance, this being a term of technical meaning and one about which the minds of his own attorneys seemed to have been in considerable confusion.

Since, we submit, it must be assumed that the bringing of the Supreme Court suit was binding upon the complainants, it remains to consider the effect of the institution of such suit. As we have already stated, some capital was attempted to be made of the fact that the name of the County Clerk had been affixed to the summons instead of that of the Supreme Court Clerk; but inasmuch as the parties all dealt with the matter as a Supreme Court suit, any attempt to minimize the effect of the Supreme Court suit in this respect we submit is without merit.

The reports are replete with cases involving actions by vendee against a vendor, some of which comprehend an action by a vendee against the vendor to recover his deposit money and others for damages for a breach of the contract. The former class of cases have been held to work a repudiation of the contract and preclude any subsequent suit

for specific performance; while the latter class of cases have been held not to work a repudiation of the contract, unless persisted in until judgment, therefore exhausting all remedy on the contract, and such cases are held not to preclude a subsequent action for specific performance. Consequently the large number of cases which are reported involving the doctrine of election, give us very little assistance in determining the question which is presented in the instant case. Regard must be had to the form of the contract which sets forth that final settlement

“shall be made at the office of Frank Voigt, Northwest corner of Seventh and Market Streets, Camden, New Jersey, on or before April first, 1926, or the deposit of \$5000 made herewith at the option of the sellers, may be applied on account of the purchase price or forfeited as liquidated damages to the sellers, and not as a penalty” (p. 6).

This consequently presents a novel question. Whether it be true that the cases involving actions by a vendee against a vendor go on the theory that the vendee can not pursue an inconsistent remedy, having first elected to repudiate the contract by an action to recover the deposit, and afterwards attempt to reaffirm it by an action for specific performance, yet the instant case presents the question as to whether it is not possible for a vendor, in fact, under a contract in this form, to affirm the contract at one time, to the extent of retaining the deposit money as liquidated damages and be precluded from affirming it in a different form by an action for specific performance. It is entirely possible for a vendor to say to the vendee, under a contract such as the present one:

“You have broken your contract with me and I am going to keep your money as liqui-

dated damages under the terms of the contract.”

This would palpably be an affirmation of the contract, and yet we submit that it would preclude the vendor from afterwards bringing an action for specific performance.

“Where the terms of a contract provide for liquidated damages in the event of a breach and one of the parties serves notice that he will not proceed further and demands damages therein provided, it will constitute an election to pursue the remedy at law and will preclude a subsequent action for specific performance.”

20 C. J. 34.

The instant case differs from this only in the evidence of the intention of the vendor to follow this course and that evidence consists in his conduct in bringing an action in the Supreme Court.

It has been stated in several New Jersey cases that it is the institution of a suit that works the election and what becomes of it afterwards is immaterial.

*Foot v. Scarlett*, 4 A. R. 1924; 134 A. 865.

We submit, however, that it becomes of some importance to consider what happened in the Supreme Court in the present case. The complainants in the action at law, set forth the making of the contract with a verbatim copy thereof, and concludes with the following statement:

“Although the plaintiffs have ever since and are still ready, willing and able to tender a good, lawful and sufficient special warranty

deed, the defendant has ever since and still refuses to perform the contract. Therefore the plaintiffs bring this action and demand as damages the sum of \$53,000 together with interest and costs of suit." (p. 20.)

The amount of the damages claimed is immaterial since the vendor was entitled only to the liquidated sum set forth in the agreement. His action was brought to recover damages generally, laying them, as is not at all uncommon, at a higher amount than that for which recovery could be expected.

The ultimate decision of the Supreme Court upon the motion to strike out the complaint was, in effect, that the complainants having received all that they were entitled to in the way of damages, they were not entitled to proceed further with that particular suit. While in theory complainants were defeated in that action, in fact they were victorious, because the decision of the Supreme Court was, in effect, an award to them of damages to the extent of the liquidated sum. Or, in another aspect of the Supreme Court suit, the complainants elected by that means to take whatever damages they were entitled to under the contract and since these damages were liquidated, they elected to take the liquidated sum.

We respectfully submit that under the form of the contract in the instant case an election could be made without in any way repudiating the contract, but in fact might be made by affirming it.

If, however, the Court takes the view that the element of repudiation is inseparable from an election, still we think that the action of the complainants in bringing the Supreme Court suit is, if

looked at from that aspect, entirely in accord with such view-point. Inasmuch as the complainants were entitled only to the liquidated sum of \$5,000.00 set forth in the agreement by claiming damages in that suit which obviously could be only to the extent of what they were entitled to under the agreement, they might then be said to have elected to take those damages and consider the contract at an end which reprobation of the contract is grounds for denying the relief sought in this case.

As stated above nearly every case respecting election involves an action by a vendee against a vendor. However, the case of *B. Holding Co. v. DuBois*, 5 A. R. 507; 136 A. 518 was an action for specific performance by the vendor against the vendee and involves in part, some of the features of the instant case. We observe that in the cited case the form of the contract was apparently identical with the form of the contract which is the subject of the present suit, as will appear by comparison of the language of the contract in the cited case and that of the contract in the present case. In the cited case as in the instant case, the contract provided that upon default by the vendee the down money could, at the option of the vendor, be applied on account of the purchase price or be forfeited as liquidated damages and not as a penalty. The vendee did not make settlement on the day mentioned in the contract and some correspondence then passed between the parties which indicated an intention on the part of the vendor to repudiate the agreement. Later the vendee began a suit in the Supreme Court to recover the deposit on the ground that the complainants were unable to give a clear title, to which the latter joined issue and averred that it was ready and willing to perform at the time stipulated, or in a reasonable

time thereafter, but that the defendant had refused, and further that the contract for sale provided that time was of the essence of the agreement, and therefore the requests of the complainants to pass title, made subsequent to the date of performance, was not in accordance with the contract and the defendant was therefore excused from performing his undertaking set forth in the agreement.

The Court made reference to the correspondence, stating that complainants had conditionally repudiated the contract thereby and went on to say:

"It later in the suit at law pleaded that it was excused from performing because of the defendant's dereliction. It there, if not before, elected to reprobate performance of the contract and to retain the down money as liquidated damages, and to that election it is bound."

There is but little difference in principle between the cited case and the instant case. As a matter of fact, we submit that the circumstances in the present case present a much stronger case of election than the cited case. In the latter case the complainants were brought into the Supreme Court by its process and compelled to file an answer. In the instant case they went into the Supreme Court voluntarily and asked for damages, and being entitled only to the amount of the deposit as liquidated damages, thereby elected, on this view of the case, to consider the contract at an end and to retain the down money as damages and not to apply it on account of the purchase price.

We have the utmost respect for the attainments of the learned Vice-Chancellor, but it seems to us evident that the real point in this contention escaped him *i. e.*: that irrespective of whether the

bringing of the law suit was an affirmance or repudiation of the agreement, it did have the effect of an election under the agreement to take the sum therein mentioned as liquidated damages instead of applying it to the purchase price.

In addition to the above as bearing upon the question of election, we would respectfully call attention to Paragraph 9 of the agreement (p. 7), reading as follows:

"It is agreed by and between the parties hereto that this agreement shall not be recorded, and the register of deeds of Camden County is hereby authorized to refuse to record the same."

This stipulation in the agreement would seem to clearly indicate that complainants at no time had in their minds specific performance. The recording of the agreement obviously would be only for the benefit of the defendant and to prevent complainants from dealing with the property as their own. It is quite apparent VanBuren did not want to be placed in this position, but desired in advance to be relieved of the consequences of having the agreement recorded, thus evidencing his position as being trustee for the defendant, which would have had the effect, according to the Statute, of tying up the property for a period of three months after the date fixed for settlement.

Sec. 116 of the Conveyance Act, 2 C. S. N. J. 1573, provides that:

"Every agreement for the purchase or sale of any lands or real estate in this State, which hereafter shall be recorded, shall be absolutely void as against subsequent purchasers for value of said lands and real estate, unless the vendee, within three months after the date fixed in such

agreement for its consummation, or if no date shall be fixed in such agreement for its consummation, then within three months after the date of such agreement, shall commence suit for the specific performance of said agreement."

This Statute would obviously have the effect already attributed to it, viz; of encumbering the property for three months after the date fixed for settlement. This then left the complainant VanBuren free to deal with the property as his own without interference by Fine so far as the notice by the record was concerned; and, as a matter of fact, as will be hereinafter discussed, he did attempt to do this by offering the property for sale to a third party.

The complainants, VanBuren, on cross-examination (p. 41) underwent the following examination:

"Q. Now, did you make any effort to sell this property to anybody else?"

A. I called Mr. Lipsitz up and gave him the name of a man by the name of Mr. Towanski."

Further examination of this point was attempted to be directed as to whether VanBuren tried to make a sale after the date fixed for the settlement and the Court overruled this attempt (p. 41, l. 22).

It was plainly pertinent, inasmuch as, if after the alleged default the complainants dealt with the property as their own and attempted to dispose of it, it would be further evidence of an election to retain the deposit as liquidated damages, especially taken in conjunction with the other aspects of the case in this respect.

It is, therefore, respectfully submitted that the conduct of the complainants in this suit was con-

clusively that they had elected not to enforce specific performance but merely to retain the amount to which they were entitled as damages for the breach of the contract by the defendant; and on this ground alone the bill should have been dismissed.

#### AS TO THE STATUTE OF FRAUDS.

THE DEFENSE OF THE STATUTE OF FRAUDS WAS SET UP AGAINST THE SUIT, (p. 9, l. 30).

We can consider in conjunction with this (p. 10, l. 15), that the agreement lacks definiteness. The agreement was drawn on a blank form which has been commonly called the "Camden Real Estate Board Form" and has been the source of much dissatisfaction in nearly every case in which use has been made of it. The agreement provides for settlement on or before April 1, 1926,

"provided that the necessary title searches can be obtained from any first-class New Jersey title company by that date. Should there be any delay not the fault of the buyer in the procuring of such searches, the time for the final settlement shall extend until such searches can be obtained." (p. 6, l. 4.)

The contract in the instant case is very similar to the contract in *Tansey v. Suckoneck*, 98 E. 669; 130 A. 528, which provided that "title to be taken as soon as searches are made." This matter came on before Vice-Chancellor Foster on motion to strike out the bill, which motion was granted, the Vice-Chancellor remarking as one of his reasons

for granting the motion, that "no definite *time* or place is fixed for the passing of title." Vice-Chancellor Foster's opinion is not officially reported, and the above extract is taken from his memorandum opinion as filed in the above cause. While not binding, it is persuasive Vice-Chancellor Foster's action in striking out the bill was affirmed by the Court of Errors and Appeals as per the above citation.

It is not necessary, we submit, for counsel to refer the Court to the multitude of cases which hold that specific performance will not be decreed unless the contract is complete, certain and definite and leaves no features unsettled to be concluded by further negotiations or which leave any of the essential terms of the agreement in uncertainty.

In the case of *Heller v. Sweeny*, 2 A. R. 2403; 135 A. 264, the contract contained the following provision:

"The said title will close upon 10 days' notice after the securing of said building permit, or the refusal thereof by the Court."

The Court in commenting upon this said:

"There is no day certain in the instrument in consideration. The title was to close upon 10 days' notice after the securing of the building permit or the final refusing thereof by the Court. It will be observed that there was no stipulation as to how soon after this event, the ten days' notice shall be given. Does it mean immediately thereafter, or a month or three months thereafter?"

The uncertainty of the terms of the agreement in the instant case can be further appreciated by considering it in connection with Sec. 116 of the

Conveyance Act, *supra*. Obviously, in the agreement under consideration no definite date was fixed for closing the contract. It is equally apparent, this being the case, the complainants could not, even in the indefinite form in which the contract is drawn, commence a suit for specific performance within three months from its date. What then is the date fixed in the agreement for its consummation? Assuming that the agreement had been recorded within that time, when would subsequent purchasers be relieved from its operation? Not within three months from the date of the agreement, for obviously a suit would not lie before April 1, 1926. It is equally apparent that the three months mentioned in the Statute would not run from this latter date because the proviso as to searches renders absolutely nugatory the date which is attempted to be fixed in the contract for its closing. It is apparently one of the essential terms of the contract that its time for closing is vague, indefinite and uncertain. The language of the agreement, makes it clear that the proviso as to the procuring of searches renders absolutely nugatory any definiteness as to the date of settlement. The contract, therefore, is in effect that settlement shall be made when the necessary searches can be obtained, and that the time for final settlement shall extend until such searches can be obtained. At what time after the searches are obtained is settlement to be made? Is it to be made one hour after the searches are procured, or one day, one week, one month or a year? There is no obligation on any title company to furnish anyone searches. It is possible that the purchase might be blacklisted by all of the title companies of New Jersey for some reason and that none of them would furnish him with searches. This would then

indefinitely postpone the settlement until such time as some title company became insurgent and changed its attitude or some other title company was found, which did not belong to the combination, so that it is obvious that the time for settlement is so absolutely indefinite and dependent upon the action of a third party, not a party to the agreement, that there is no way by which the time for closing the contract can be definitely fixed.

It is just as indefinite and almost identical with the contract in *Tansey v. Suckoneck, supra*, which provided that, "title to be had as soon as searches are made;" and respecting which Vice-Chancellor Foster said:

"No definite time was fixed for the passing of title or for the delivery of the deed or for the completion of the cash payment of \$5000."

Neither does the fact that Paragraph 7 of the contract (p. 7, l. 1) provides that, "time is of the essence of this agreement," aid the situation; but on the contrary only adds to its indefiniteness. What time is referred to? Is it the first day of April, 1926? Or, is it the time to which the settlement is indefinitely extended, dependent upon the procuring of the searches? It is apparent that the date of settlement was never contemplated by the parties as being April 1st, 1926, because Paragraph 4 (p. 6, l. 27), states that, "all adjustments shall be made as of \* \* \* \* \* and possession shall be given the buyer," without mentioning any specific day, although a space is provided for the insertion of a specific date in the blank.

Superadded to this is a quite demonstrable element that one essential feature of the contract was left unsettled to be settled by future negotiation, viz; the time for the ultimate performance of the

contract. It is quite obvious that if searches were not obtained by the first day of April, 1926, then the parties must necessarily get together and agree upon a date for settlement, so that that part of the matter still rested in treaty between the parties.

With the above in mind, it is quite apparent there was never any proof that there was any default on the part of the defendant because there was no proof that the time for settlement had ever arrived.

We submit that the expression by the learned Vice-Chancellor (p. 197, l. 10);

"On the contrary, the provision does definitely define a *contingent* extended period for performance, terminating when the searches can be obtained;"

is practically its own answer, because the opinion states that the time for performance is *contingent* upon the happening of some event without fixing any definite time after the happening of such event when performance is to take place, and must necessarily rest in treaty between the parties as to when settlement was ultimately to take place. Again the agreement with reference to the payment of the balance of the purchase price, provides:

"The balance to be secured by a first mortgage of \$20,000, now standing against the said premises payable within one year from the first day of March, 1926, and a second mortgage of \$10,000 to be placed against said premises for a period of one year from April 1st, 1926."

The agreement is silent as to who is to place the second mortgage. It is reasonable to suppose that it was within the contemplation of the parties that the vendors were to place it and convey subject to it with an allowance of its amount against

the purchase price, or they may have contemplated that the vendee was to place the second mortgage and pay the proceeds as a part of the purchase price, or they may have considered that the second mortgage was to have been given by the vendee to the vendors to secure a part of the purchase price. There is, however, nothing in the case which clarifies the situation in this respect.

The agreement does not say who was to execute the second mortgage, or to whom it was to be executed, or when it was to be executed, either before or after the settlement.

The learned Vice-Chancellor decided that the agreement,

“must be read in the light of the ordinary conduct of reasonable men under the circumstances and clearly contemplates that the purchaser is to secure the amount named by the execution of the second mortgage there referred to.”

We respectfully submit that the contract does not reasonably bear this construction, and the Court in its decree erred by requiring the defendant (p. 218, l. 34) to

“make, execute and acknowledge in due form of law and to deliver to the complainants a mortgage on the said lands and premises herein described securing the payment of the sum of \$10,000.”

#### AS TO LACHES.

In the further amendment to the defendant's answer the defense of laches is set up (p. 22).

The law upon this subject is well settled as applying to suits for specific performance.

“A suitor for specific performance must show himself to have been at all times ready, desirous, prompt and eager to perform the contract on his part.”

*B. Holding Co. v. DuBois, supra.*

“Specific performance of a contract for the sale of lands will not be decreed where it appears that the buyer has unreasonably delayed either to do acts required to be done by him to complete the contract or to seek its enforcement, and during such delay a material increase in the value of the lands has taken place.”

*Meidling v. Trefz, 48 E. 638; 23 A. 824.*

“A bill for specific performance is addressed to the extraordinary jurisdiction of a Court of Equity to be exercised according to its discretion. The general rule is that he who seeks performance of a contract for the conveyance of land must show himself ready, desirous, prompt and eager to perform the contract on his part. Therefore, unreasonable delay in doing those acts which are to be done by him will justify and require a denial of relief. No rule respecting the length of delay which will be fatal to relief can be laid down, for each case must depend on its own peculiar circumstances. It is equally well settled that one who seeks specific performance of such a contract must institute his suit within a reasonable time and before any material change affecting the interest of the parties has taken place.”

*Meidling v. Trefz, supra.*

Assuming that the first day of April was the day definitely fixed by the contract for the settlement, the bill for specific performance was not filed until October 8, 1926; and the subpoena, which was the commencement of the equity suit, was not issued until October 14, 1926, a period of over six months after the date of settlement fixed by the agreement. The Supreme Court suit was finally disposed of on July 26th. Mr. Brown attempts to explain his inaction by saying that he went on his vacation in August. It does not appear in what part of August (p. 107, l. 18) he departed. He stated, however, that he returned on the 10th or 11th of September (p. 107, l. 21). There is no adequate explanation of why no action was taken between the 26th day of July and the indefinite date in August when Mr. Brown says he started on his vacation, or between the 11th day of September and the 8th day of October, when the bill was filed.

Examination of the bill (p. 1) will demonstrate that it was not an instrument presenting any complications in its drafting, and is simply in the ordinary form of a bill for specific performance, occupying probably half a dozen pages of typewritten matter, which, with the assistance of a stenographer, could have been drafted in an hour.

Applying the above authorities to the circumstances of the present case, we think it is demonstrable that the delay in bringing this specific performance suit resulted in a considerable change of the position of the parties. The agreement under consideration was made during the so-called "boom" in real estate, which, it was testified, lasted from the summer of 1925 until the fall of that year (p. 86, l. 24); and that the "boom" collapsed,

or at least such collapse was impending in the spring of 1926 (p. 86, ll. 7-22).

The case of *Meidling v. Trefz, supra.*, was a vendee's suit for specific performance, and the delay in that case resulted in a material increase in the value of the land. The instant case, however, being a vendor's suit, the conditions are reversed, and a material decrease in the value of the land would militate equally against the remedy which the complainant seeks to enforce.

In *B. Holding Co. v. DuBois, supra.*, the Court made the following statement:

"When the letters cancelling the contract were written, the speculative boom in real estate along the New Jersey coast was on, but by the time the non-suit was granted, it had collapsed. That accounts for the fact about and the present effort of the complainants to shift the loss to the defendant."

It would appear that the complainants' efforts in this respect, in the instant case, were almost the same in that they originally commenced the suit for damages and then realizing that the property was steadily decreasing in value owing to the collapse in the boom, endeavored to shift the loss to the defendant.

We submit that it is quite fair to assume that the time intervening between the date of settlement and the beginning of the present suit was consumed by the complainants and their attorneys in speculating as to what remedy they would pursue; but this is a situation to which Courts will not lend countenance. A suitor for specific performance must make up his mind and proceed immediately.

He can not speculate with the situation, and if a time should elapse during which a loss may be cast

upon a vendee by a depreciation in the meantime of the property in suit, this is a neglect for which he and not the vendee must suffer.

It is respectfully submitted, therefore, that the decree of the Court of Chancery should be set aside and reversed.

D. TRUEMAN STACKHOUSE,  
AARON HEINE,  
*Solicitors for and of Counsel with  
Defendant-Appellant.*

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

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Between  
CHARLES VANBUREN, *et ux.*,  
*Complainants-Appellees,*  
and  
JACOB FINE,  
*Defendant-Appellant.*

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ON APPEAL FROM CHANCERY.

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BRIEF OF APPELLEES.

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STATEMENT OF THE CASE.

The facts involved in this appeal are sufficiently stated in the brief of the appellant. Such additional facts as the appellee desires to draw attention to will be mentioned in the course of the argument.

Following the nomenclature adopted by the appellant, the parties will be designated in this brief by their original appellation "complainants" and "defendant."

The parenthetical references are to the printed case.

It is to be noted that the fifth ground of appeal, set forth in the brief of the defendant, is not considered in his argument, so will be omitted from this brief.

## BRIEF OF THE ARGUMENT.

## I.

The first ground of appeal raised by the defendant herein is to the effect that the complainants had elected, through legal proceedings in the Supreme Court, to retain the \$5,000 paid on account of the purchase price thereby foregoing their remedy of specific performance. The facts in connection with the purported election by the complainant are clear.

On April 28, 1926, Mr. Brown, purporting to act as attorney for the complainants, served certain papers on the defendant, copies of which papers appear in the amended reply of the complainants. (C. pp. 16 to 21.) The Court's attention is particularly drawn to the paper purporting to be a summons. This paper summoned the defendant to answer an action in the Supreme Court of New Jersey, and was witnessed in the name of the Chief Justice of that Court. It was, however, issued out of the office of the clerk of Camden County and attested with the name of Charles F. Wise. It is axiomatic that a suit in New Jersey is commenced when a writ is issued out of the office of the clerk of the Court or of the attorney acting as the agent or deputy of the clerk. Unless a summons is so issued, there can be and is no process.

*Whitaker v. Turnbull*, 18 N. J. L. 172 at 174.

It is, therefore, patent in this matter that no process was ever issued and no suit was ever started.

Whether or not such a summons could have been amended and the action thereby validated, is not in question here. The defendant has set up this summons and complaint as constituting an election on the part of the complainants, in that an action at law was thereby started. The complainants' position is that no action at law was started, for the reason that the summons was never issued under the seal of the Court or out of the office of the clerk of the Court. Since the errors in this process were never corrected, the suit never existed. In the absence of such suit, no election can be possibly evoked against the complainants.

In this connection, complainants desire to point out that there is no evidence that any other acts on the part of the complainants, excepting the serving of these papers, constituted an election. Obviously, the provision in the agreement that it should not be recorded, inserted at the time the contract was signed, was not an election to forego the right of specific performance. To hold otherwise would be to say that, by the signing of the contract, the complainants waived their rights under it. Nor does the examination (C. p. 41) throw any light on the point of election.

It is to be noted that the Vice-Chancellor, in his conclusion, found as a fact that Mr. Lipsitz became interested as a purchaser of the property a very few days after the contract was signed. (C. p. 191, l. 16.) In view of the difficulties of financing the purchase that the defendant was having, and the possibility of his falling down on the settlement, there can be no election worked out of Mr. Van-Buren's communicating the name of a possible repurchaser to the vendee, Lipsitz. Also, it is to be noted that there are no pleadings in the case, which set up any election, other than the institution of the suit in the Supreme Court.

It is also to be noted that the so-called complaint in the matter was never filed in the Supreme Court clerk's office and that we have the anomalous situation where a complaint was struck out, which had never been filed, in an action wherein no summons had been issued. There was no suit and, therefore, no election.

However, assuming that an action was started in the Supreme Court by the complainants against the defendant, such action did not constitute an election preventing the complainants from now seeking their remedy by a bill of specific performance in equity. A few references to the testimony show that Mr. Brown, who appeared as attorney of record in this Supreme Court action, acted entirely without authority from his clients, the complainants. Mr. VanBuren himself testified (C. p. 41, l. 34 to C. p. 45, l. 14) that he had ordered his attorney, Mr. Voigt, to proceed to compel the defendant to live up to his agreement and to enforce the contract by specific performance. Nothing was said at that time (April, 1926) which could have in any way implied that Mr. VanBuren was willing to take damages in place of performance. The testimony of Mr. Voigt (C. p. 100, l. 12 to C. p. 101, l. 10) shows that he assumed his instructions were to proceed with specific performance and that he had passed these orders along to Mr. Brown. It is also clear that Mr. VanBuren did not know that a suit for damages had been brought in his name, and had in no way approved of the suit. (C. p. 101, l. 20; C. p. 102, l. 18 and C. p. 119, l. 33.) It is likewise to be noted that there is no testimony in the case showing any authority given by Mr. VanBuren to Mr. Voigt in April, 1926, allowing the latter to employ Mr. Brown as counsel in the case. It merely appears that at some subsequent date, Mr. VanBuren was informed

that Mr. Brown was acting as his solicitor. In view of the fact that the election claimed by the defendant occurred on the 28th of April by the starting of the suit, it is submitted that Mr. VanBuren is in no way bound. The action was started by an attorney whom the testimony does not show to have been employed by or with the knowledge of the complainants at that time. Nor was this act of Mr. Brown's ever ratified, for as soon as Mr. Voigt ascertained what had happened, the case was immediately dismissed under his order and Mr. VanBuren knew nothing of it.

Furthermore, even assuming that Mr. Brown was duly constituted solicitor of the complainants at the time this action was taken, Mr. VanBuren was not thereby bound, in that he had given no authority to his attorney to start a suit for damages. His instructions were undoubtedly to compel the defendant to perform, and his attorneys had no authority whatever to waive this substantial right of their clients. There is a long line of cases in New Jersey to the effect that an attorney can bind his client only on customary matters as to procedure and litigation, but he cannot surrender any substantial right of his client without the latter's consent. In the case of *Howe v. Lawrence*, 28 N. J. L. 99, it was held that agreements made by attorneys concerning the conduct of an appeal in a case without the consent of the client, since a substantial legal right of the client was involved, was not enforceable.

Again in *Dickerson v. Hodges*, 43 N. J. Eq. 45, in connection with the filing of a disclaimer, the Court uses the following language:

"While an attorney or solicitor may make valid agreements relating to the conduct of a suit, yet even in such matters, he cannot surrender a substantial right of his client without his client's consent."

That is, even in matters relating to the conduct of a suit, no substantial right of the client can be surrendered without his consent. Whether such a substantial right be called a "remedy" or not, is immaterial.

The same rule is again upheld by the Court of Errors in the case of *Trenton St. Ry. Co. v. Lawlor*, 74 N. J. E. 828, at 831, and by the Supreme Court in the case of *Calloway v. Equitable Trust Co.*, 67 N. J. L. 44, and in the Court of Chancery in the case of *Strauss v. Rabe*, 97 N. J. Eq. 208, affirmed 98 N. J. Eq. 700.

It is respectfully submitted by the complainants that the cases and authority cited on behalf of the defendant in this connection are not applicable to the case at bar in that the question is already decided by the New Jersey authorities above set forth, and in that the defendant's authorities, from other jurisdiction, do not involve cases where substantial rights of the client were waived by the attorney.

The rule so tersely stated by Judge Cooley in *Foster v. Wiley*, 27 Mich. 244, cited by defendant, applied to a situation palpably different from that at bar. The client was there held liable in trespass for the taking of the plaintiff's property under an execution issued at the instance of the attorney in the normal course of the suit.

There was no question of waiving any of the client's substantial rights in the case nor were the client's orders disobeyed.

In the case of *Parker v. Home Mutual Building & Loan Association*, 114 Ga. 702, cited by the defendant, a new trial was granted where the mistake of counsel in the conduct of the trial caused a failure of justice. This case is thus in accord with the complainants' argument. To the same effect is *Green v. Farlow*, 138 Mass. 146.

We have very carefully examined the opinion of Vice-Chancellor Van Fleet in *Warner v. Warner*, 31 Eq. 549. It appears thereby that the decision reached has no pertinency to the question we are discussing.

It is only necessary to resort to and read the last paragraph of the Vice-Chancellor's opinion, which is as follows, to establish this to be fact, viz:

"This application, concisely stated, is this: the defendant, after having had the full opportunity given to him by the law to make his defense, and made such use of it as he thought necessary, and having been beaten, now says that, in consequence of his own laches and the misjudgment of his counsel, he did not make as strong a defense as he is sure he can make, if the Court will obliterate the past and allow him to start anew. The merits of his application as thus stated, present just the reason why it should not be granted. The application must be denied, and the petition dismissed, with costs."

The case of *McDowell v. Perine*, 36 N. J. E. 632, does not support the contention of the defendant that VanBuren is bound, by the bringing of a suit for damages, even if the suit was instituted in violation of his instructions. In the McDowell suit, the mistake occurred during the trial of the cause, and not in the character of the suit to be instituted. If any effect is to be ascribed to a client's instruction as to the form of legal proceedings, it is manifest that the plaintiff, in such proceeding, ought not to be bound thereby, unless the same is brought by his direction or with his knowledge or consent. In fact, as before stated, there never was any legal suit. The difference between this case and the instant case is pointed out by the Court in 36 N. J. Eq. at 636.

In any event, we contend that the bringing of such suit, with or without authority of the complainants, did not amount to such an election to adopt a remedy at law, so as to preclude the allowance of relief on the bill filed in the Court of Chancery for specific performance.

An action for specific performance and an action for damages are both based on an affirmance of a contract and are, therefore, consistent remedies. See 20 C. J., pages 15 and 16. Since they are so consistent, no question of the election arises.

*Balleisen v. Schiff*, 121 Appellate Div. 285;  
105 N. Y. Sup. 692;

*Marcus v. National, etc. Co.*, 127 Minn. 196;  
149 Northwestern, 197.

The doctrine of election applies only to inconsistent remedies. 20 C. J. 6.

The starting of a suit is not an election where the remedies are consistent. 20 C. J. 7.

*Connihan v. Thompson*, 111 Mass. 270;

*McMahon v. McMahon*, South Carolina 115  
S. E. 293.

The case of *Foote v. Scarlet*, cited by the defendant, being a case of rescission of the contract, is not in point.

There is also a very thorough note in 26 A. L. R. 111, setting forth the cases from other jurisdictions in this connection. Since the starting of a suit is an election only where the remedies are inconsistent, and since there is no inconsistency between different remedies, all of which are based upon the affirmance of the contract, there can be no election in this case.

It is submitted that the reference to 20 C. J. 34, in the brief of the defendant, is of no moment in

that the one case cited for the reference, to wit: *Sutton v. Miller*, 219 Ill. 462, contained a distinct repudiation of the contract by the vendee, whereby the vendor changed the tenants and otherwise altered his position.

Unfortunately, the points here involved have never been the subject of direct adjudication in New Jersey. The cases on election in this State are cases where the choice was between an action for specific performance and an action to recover back the deposit made. Clearly a purchaser in such a situation must make his election, since one action is based on the affirmance of the contract, while the other action is based upon its rescission. In the situation at bar, both actions taken on behalf of the complainants were based upon an affirmance of the contract. It is also to be noted that there is nothing in the testimony showing a change of position on the part of the defendant, because of any action taken by the complainants. There can, thus, be no doctrine of estoppel invoked against the complainants. Furthermore, complainants desire to draw the Court's attention specifically to the terms used in the complaint in the Supreme Court matter. (C. p. 17 through 20.) First the contract is set forth, then follows the averment that the complainants have ever since, and are still ready, willing and able to tender a good, legal and sufficient special warranty deed, and that the defendant refuses to perform the contract. Following that is a demand for damages in the sum of \$53,000, being the contract price, minus the deposit already received. Thus, by its terms, this complaint is clearly an effort to get specific performance of the contract in law. It failed because it was in law and not in equity, but to hold that it amounted to an election not to have specific

performance is to ignore entirely its expressed intention. The ultimate result of this anomalous action in the Supreme Court was not an adjudication of any kind upon the rights of the parties. The action at law, never sought for, or exhausted the legal remedy. It was finally dismissed by consent of both parties, apparently on the theory that no legal cause of action was set forth, since the complaint sought an equitable, rather than a legal remedy.

The defendant relies heavily in support of his position upon the recent case of *B. Holding Co. v. DusBois*, 5 A. R. 507, 136 Atl. 518. The report of the case includes in full two letters from the vendor to the vendee. In referring to these letters, the learned Vice-Chancellor states the situation as follows:

“The complainant is not entitled to the relief of specific performance. It conditionally repudiated the contract by its letter of December 14, 1925, and re-affirmed the repudiation in a second letter of December 30th, after which the condition came to pass and it reserved its right to adhere to its determination to cancel its contract in its letter of June 1, 1926.”

The complainant there clearly manifested an intention to be no longer bound to a performance of the contract and was, thus, precluded from his equitable remedy.

In the present case, absolutely no testimony was produced showing that the complainants ever, in any way, waived their rights to the contract, and the very wording of the complaint filed in the Supreme Court shows that, in fact, they were making an effort to compel the carrying out of the contract.

In the DuBois case, there was a repudiation of the contract, which amounted to a rescission. In the present case, there was no repudiation, but a suit based upon the existence of the contract itself.

In the last analysis, the complainants' position on the question of election comes to this. He, personally, did not elect to rescind this agreement, or to accept damages. On the contrary, he gave orders that the defendant be forced to carry out the contract, according to its terms. Whether or not he used the words “specific performance” is immaterial. His instructions to Mr. Voigt were clear. The error occurred between Mr. Brown and Mr. Voigt. The steps heedlessly taken by counsel to carry out these orders were technically incorrect. Such mistakes as counsel may have made, have not, in any way, been shown to have prejudiced the defendant, or to have misled him. None of the elements of an election are present.

This court is not an arena where counsel play a game of technicalities with the rights of their clients as stakes. It is most earnestly submitted that the complainants are entitled to their day in court on the merits of this contract, and that this Court of Chancery, in its high quality as a court of conscience, must grant them this right.

No authorities have been found holding that a suit brought in a man's name, without his knowing it, and against his orders, would preclude him from his remedy in this court.

## II.

## AS TO THE STATUTE OF FRAUDS AND UNCERTAINTY IN THE CONTRACT.

The defendant in his second ground of appeal has set up that this agreement was void under the Statute of Frauds and in his third ground of appeal sets up that the agreement was too indefinite to be specifically enforced. Both of these grounds are considered under one argument in his brief and so will be taken up together here.

It is to be noted that the authorities in the argument of the defendant in his brief under these points, support only the third ground of appeal and have very little bearing on the second ground, that is the Statute of Fraud.

The Statute of Frauds does not require every detail of the contract to be in writing. A mere memoranda containing the essentials of the bargain, which often omits the place of settlement and other details, is clearly sufficient for the purposes of the statute.

The cases holding that memoranda, far less specific than in the case at bar, to be sufficient are as follows: *Wollenberg v. Rynar*, 96 N. J. Eq. 38; *Celendano v. Blazejewski*, 98 N. J. Eq. 45 and *Franklin v. Welt*, 98 N. J. Eq. 602.

Without going further into the authorities, it seems clear that the Statute of Frauds requires only the essentials of the contract to be stated, in order to avoid fraudulent practices.

It is submitted that to allow the Statute to be set up here, would subvert its policy and defeat its very purpose. The Statute must not become a tool whereby a man can escape from a bad bargain after the market has fallen.

Aside from the Statute of Frauds, equity merely requires that the contract be sufficiently definite for the Court to frame a decree compelling its enforcement. There is no intrinsic necessity that every act to be performed be set forth in detail as to time and place.

It is submitted that this requirement of certainty should not be allowed to hamper equitable relief further than necessity requires. 3 Williston Contracts, paragraph 1424.

In view of this fundamental proposition that only reasonable certainty is required, there is no merit to the contention that the contract is void for uncertainty as to the time of settlement or procuring of searches.

The second paragraph specifically provided (C. p. 6) that final settlement shall be made on or before April 1, 1926, at a designated place. The agreement also unquestionably provides that the searches shall be ordered by the vendee because of the fifth paragraph in the agreement, which states that the buyer shall pay for all searches and expenses, except the preparation of the deed and the necessary stamps, which are to be paid for by the seller.

The statement of a second mortgage for \$10,000 to be placed against the premises for a period of one year from April 1, 1926, is manifestly a statement that the mortgage is to be a purchase money mortgage and to be executed by the vendee. The statement in the contract with reference to the first mortgage of \$20,000 is that the same is now standing against the premises and the irresistible inference is that where a second mortgage is to be placed by the buyer as a purchase money lien, he is to execute the same to the seller.

Where a contract is clear and definite, but certain provisions in regard to the mortgage to be given

back are not explicitly set forth, the Courts are able to supply the defects by reference to the ordinary conduct of reasonable men under the circumstances; a presumption arises that such customary conduct is called for by the contract. This doctrine is based on the obvious and clear intention of the parties to the contract.

*Cavanna v. Brooks*, 97 N. J. E. 329 (1925);

*Richards v. Green*, 23 N. J. E. 536 (Court of Errors 1872);

*Luczak v. Mariove*, 92 N. J. E. 377; Aff. 93 N. J. E. 501;

*Patterson v. Loiseauz Lumber Co.*, 92 N. J. E. 569 at 583. Reversed on other grounds 93 N. J. E. 446.

The attention of the Court is respectfully called to the terms of the contract specifically enforced in *South Jersey Furniture Co. v. Dorsey*, 95 N. J. E. 530 at 531; Aff. 99 N. J. E. 433.

In his brief, defendant relies almost entirely upon that provision in the agreement referring to the delay granted in case necessary title searches cannot be obtained by the first of April.

We submit that this provision is sufficiently definite to be specifically enforced in equity. It is, in fact, inserted for the benefit of the buyer in case, through no fault of his, the searches are not complete. As has been stated above, the duty of ordering searches is clearly cast on the vendee and this provision creates no uncertainty since it is his duty to get the searches and to make settlement upon their completion. This qualification of the date of April 1st, as the date of settlement, sets a future day, which is definitely ascertainable, to wit: the date of the procuring of the searches by the buyer, after using reasonable diligence. Certainly the

Chancery Court would find no embarrassment in framing a decree carrying out in a reasonable way these provisions of the contract. Actually this provision did not cause any uncertainty between the parties.

It is submitted that the case relied upon by the defendant of *Tansey v. Suckoneck*, 98 Eq. 669, is not in point. In that case the entire contract between the parties was as follows:

“Received, Newark, N. J., Tuesday October 28, 1924, from Heime Suckoneck, two hundred and fifty dollars on account of purchase price 100 x 100 S. W. corner Miller Street and Avenue C., Newark, for \$10,000 formal agreement to be executed and additional amount paid on November 7, 1924; title to be taken as soon as searches are made.

\$5,000 cash and \$5,000 mortgage.

H. Suckoneck,  
Michael J. Tansey.”

\$250.00

It is to be noted that the conclusion reached by the Court of Errors and Appeals in this matter is based upon the finding that the paper on its face was preliminary and not final. By its language, the paper indicated that other features left unsettled were to be settled by further negotiation. The bargain had not been completely determined between the parties. Such facts clearly differentiate the situation there before the Court and the instant case. The Court will never make the contract for the parties. Nor is the case of *Heller v. Sweeney*, 2 A. R. 2403, persuasive in this connection. A very careful reading of that case will show that such authority is not at all inconsistent with the doctrine for which we contend, to wit: that the time for settlement

being fixed as of the first of April, subject to an extension in case of delay, does not render such agreement incapable of enforcement. April 1st was the day of the defendant's default, since he has shown no delay in the searches.

In the Heller case, unlike the case at bar, the future day set was not ascertainable. It is also to be noted that the opinion of Vice-Chancellor Church in the Heller case upon being affirmed by the Court of Errors in 6 A. R. 41, was not passed upon in this connection. The affirmance was based purely upon the rights of the bona fide purchaser and no opinion was expressed upon the soundness of the views of the Vice-Chancellor regarding the definiteness of the contract.

It is submitted that the argument advanced by the defendant in regard to the possibility of the purchaser being blacklisted by all the first-class title companies of New Jersey is of no import. Such a possibility is practically unthinkable and if it did occur would not render the agreement indefinite.

The contract provides for the conveyance of the land to Fine; also that the property is to be sold subject to a first mortgage of \$20,000, then standing against the premises, and that a second mortgage be placed against said premises for a period of one year from April 1, 1926.

The argument of counsel for the defendant is that it was possible that there was, in the contemplation of the parties three contingencies, *i. e.*, that the vendor was to place the second mortgage and convey subject to it, with an allowance of this amount against the purchase money; that they intended that the vendee was to place the second mortgage and pay the proceeds as part of the purchase money, or that the second mortgage was to be given by the vendee to the vendor to secure a part of the purchase money.

It is perfectly apparent that neither the first nor the second contingency was ever thought of because the title was to be taken by the vendee and an allowance of \$10,000 to be made by reason of a second mortgage, to be placed against the property. This unquestionably seems that the vendee was to execute the second mortgage and pay the balance of cash, as provided by the terms of the contract, which, together with the deposit money, the amount of the first mortgage and the amount of the second mortgage, equals the entire purchase price of the property.

Manifestly in the absence of any other time being specifically designated, all adjustments were to be made as of the date for final settlement.

In conclusion on this point, the complainants submit that reasonable certainty is all that is demanded for the enforcement of this contract and that such requirement is fulfilled if the meaning of the contract, taken as a whole, is intelligible to the Court.

*Kann v. Wausau Abrasives Co.*, 85 N. H. 535; 129 Atl. Rep. 374, Citing 3 Williston Contracts, paragraph 1424;  
See *Bateman v. Riley*, 72 N. J. E. 316;  
*VanDoren v. Robinson*, 16 N. J. E. 256.

It is submitted that the contract in this case readily fulfills all the requirements as to certainty and that the belated attempt of the defendant to point out defects at this time is only an effort to escape from a bargain which he is unwilling to finance.

## III.

## AS TO LACHES.

A further ground for reversal, set up in this appeal by the defendant, is based on the claim that the complainant was guilty of laches in seeking to enforce specific performance of this contract. It is submitted by the complainant that the testimony shows that he was ready, desirous and eager to perform the contract on his part at all times, and that any delay on his part, either in the performance of the contract or in his efforts to force the defendant to perform the contract was entirely due to the defendant's failure to make the payments and carry out the terms of the contract. The testimony shows (C. p. 39, l. 12) that complainant, in his efforts to have the contract carried out at defendant's request, agreed to extend the time two months after April 1st, on certain terms. The testimony further shows, on the same page (l. 35) that defendant failed to carry out the terms of this extension. On April 27, 1926 (C. p. 91, l. 35) complainant started the action in the Supreme Court in this matter. This action was delayed by consent of counsel and not finally disposed of until July 26, 1926. Such delays, by agreement of counsel, cannot be charged against the complainant as laches.

*Schultz v. Pollock*, 139 Atl. Rep. 902, N. J. Chancery. (Not yet officially reported.)

It is also to be noted in this connection (C. p. 94, l. 1) that the complaint filed in the Supreme Court action by the complainants, specifically averred that the complainants had been, and were still ready, and willing, to carry out the terms of the contract. After

July 26, 1926, the testimony shows that the solicitor of the complainants went on his vacation and did not return until around the 11th of September, and that the bill was filed in this action on the 5th of October, 1926. (C. p. 107, ll. 10 to 20.) This testimony shows that during this very short period of delay, which was undoubtedly caused by the reason of vacations and the pressure of business upon the complainants' solicitor, that the defendant was pressing the complainants to drop the matter, which action complainants were unwilling to take, as they were, at that time, still trying to have the contract carried out. (C. p. 37, l. 32.) There is no testimony that defendant never repudiated the contract.

It is to be noted (C. p. 107, l. 19) that the solicitor of the complainants, was in Ocean City during the month of August, and did not return until the 10th or 11th of September. This shows clearly that there was no interval of time during which any action could have been taken from the termination of the Supreme Court litigation until the middle of September. In view of these facts, it is respectfully submitted that the complainant cannot be barred by laches for the following reasons:

In the first place, mere delay in enforcing a demand does not constitute laches, unless the delay has in some way prejudiced the rights of the other party.

*Farr v. Hauenstein*, 69 N. J. E. 740;  
See 36 *Cyc.*, 729 and 730.

In the present case, the delay on the part of the complainants has not been shown by the testimony to in any way prejudice the rights of the defendant. The decrease in value of the land was not in any way brought about by the complainants. In the absence of testimony showing that they lulled

the defendant to security, no prejudice to defendant's rights can be worked out of such a change. Particularly is this true, in view of the inability (C. p. 75) of defendant to perform.

*Nass v. Munzing*, 5 A. R. 459; 136 Atl. 344, Aff. 138 Atl. 922 (Court of Errors). Not yet officially reported.

It is to be noted that in the case cited by the defendant under this point, *Meidling v. Trefz*, 48 N. J. Eq. 638, there was a delay of two and one-half years in filing the bill, and facts that amounted to an equitable estoppel. Likewise, in *Holdings Co. v. DuBois*, 136 Atl. 518, the question of laches was not involved, as there was an election to repudiate the contract.

In the absence of a direct repudiation (as in the instant case) of the contract by the buyer, a delay in filing the bill for several months during a period of negotiation, does not make the complainant guilty of laches.

*Day v. Stokes*, 97 N. J. E. 378 at 382;  
See *Young v. Young*, 51 N. J. E. 491.

It is submitted that in the absence of evidence that the defendant rightfully relied upon the complainants' failure to bring specific performance, the complainants are not guilty of laches. Where there is no equitable estoppel operating to bar the complainants and where there is no evidence that defendant had reason to assume an acquiescence on the part of the complainants to a repudiation by the defendant, no doctrine of laches is involved.

See *Patterson v. Loiseaut Lumber Co.*, 92 N. J. E. 569, at 580.

Held that the delay of five months did not deprive purchaser of relief in equity.

*Hopp v. Bergdoll*, 285 Pa. 112; 131 Atl. 698.

It has even been held that a decree for specific performance is not barred by the statute of limitations where the defendant has made a payment on account within six years, and a suit for specific performance is maintainable as a real or mixed action for land within twenty years.

*Randolph v. General Investors Company*, 96 N. J. Eq. 227; Reversed on other grounds, 97 N. J. Eq. 493.

It has been held that where the complainant makes every reasonable effort to have the contract performed, a delay in bringing suit for specific performance does not amount to laches.

*Connelly v. Ward*, 2 M. 44; 123 Atl. 149, N. J. Chancery.

There certainly were no laches so far as VanBuren was concerned, because before April 27, 1926, he had given instructions to proceed against Fine because of the latter's failure to perform. Manifestly he is not chargeable with a few weeks' delay on the part of his solicitors, particularly after having given specific direction to proceed. There was only a period of about eight weeks from the time the suit in the Supreme Court was discontinued until the bill was filed in this cause, and at least half of that time was during the vacation months in the summer of 1926.

There is no support, in the testimony, for the claim that VanBuren is estopped from claiming specific performance by reason of an attempt to sell the property to somebody else, nor is any such defense raised in the pleading.

This is another one of the cases where a vendee buys property with the idea of an advancement of price and guesses wrong on the market. The only reason why settlement was not made on April 1,

1926, was because Fine and Lipsitz did not have the money. This was conceded by the latter when giving his testimony. (C. p. 75.) It now comes with pretty poor grace on their part, to contend that Van-Buren is guilty of laches. In view of the testimony referred to under Parts I and II of this brief, and in view of the peculiar character of the complaint in the Supreme Court action, it is obvious that complainants have persistently sought to enforce the contract. No inference that they ever waived in their attitude can possibly be drawn from the case. Such an inference would be grossly unfair.

Furthermore, it is submitted that the question of laches is largely one of fact, dependent upon whether or not the evidence shows an estoppel on the part of the complainant. Since the testimony in this case is abundantly sufficient to support the learned Vice-Chancellor's findings on the facts to the effect that the complainants are not guilty of laches, it is submitted that such findings cannot, on appeal, be reversed.

*Pittis v. Pittis*, 84 N. J. E. 506;

*Riddle v. Clabby*, 59 N. J. E. 573 at 583.

Since the complainants have made no election in this matter, since the agreement is of sufficient certainty to be enforced in Chancery and valid under the Statute of Frauds, and since the complainants have consistently been trying to enforce the contract and are not guilty of laches, it is respectfully submitted that the decree of Chancery should be affirmed.

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