

I N D E X

	PAGE
Summons	1
Complaint	2- 8
Agreement of Sale (attached to Complaint)	4- 8
Answer	8-10
Reply	11-12
Agreed State of Facts	12-13
Conclusions	14-17
Judgment	17-18
Notice and Grounds of Appeal	19-21

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SUMMONS.

(Filed Sept. 10, 1927.)

STATE OF NEW JERSEY, TO LOUIS ESTES AND CORLOTTA
ESTES: 10

You are summoned to answer the annexed complaint of Charles H. Ryan in
(Seal) an action at law in the Cape May County Circuit Court.

And take notice that unless you file your answer to said complaint with the clerk of the said Circuit Court at Cape May Court House within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and a judgment be entered against you. 20

Witness, W. Frank Sooy, Esquire, Judge of the Cape May County Circuit Court at Cape May Court House, this third day of September, A. D. 1927.

A. C. HILDRETH,
Clerk.

GEORGE R. GREIS,
Attorney.

COMPLAINT.

(Filed Sept. 10, 1927.)

CAPE MAY COUNTY CIRCUIT COURT.

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CHARLES H. RYAN, <i>Plaintiff,</i> v. LOUIS ESTES and CORLOTTA ESTES, <i>Defendants.</i>	}	Action at Law. Complaint.
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Charles H. Ryan, residing in the City of Pleasantville, County of Atlantic and State of New Jersey, complains and says that:

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1. On or about April 26, 1926, the defendants, Louis Estes and Corlotta Estes, were the owners of certain lands and premises situate in the City of Sea Isle City, County of Cape May and State of New Jersey, known as lots numbers 1, 2, 9 and 10 in block 60A, according to the tax map of the said City of Sea Isle City, N. J.

2. By written agreement, dated April 26, 1926, a true copy of which is hereto attached and made a part hereof, the defendants did agree to sell to this plaintiff and this plaintiff did agree to buy all those

certain lots of land situate in the City of Sea Isle City, N. J., known as lots numbers 1, 2, 9 and 10 in block 60A according to the tax map of the City of Sea Isle City, N. J., for the price or sum of six thousand (\$6,000.00) dollars.

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3. Under the terms of the aforementioned agreement, this plaintiff did on the 26th day of April, 1926, pay over to the defendants the sum of six hundred (\$600.00) dollars as deposit on the lands and premises hereinbefore mentioned and it was therein agreed that final settlement should be made at the offices of one M. M. Sofronev, #10 S. Landis Avenue, Sea Isle City, N. J., on or before July 26th, 1926, provided the necessary title searches could be obtained by that date, and in the event they could not be so obtained, final settlement extended until such searches could be obtained.

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4. The aforesaid agreement of sale specifically provided that the title to the premises should be a marketable title, free and clear of all encumbrances and that defendants should tender unto this plaintiff, a plain warranty deed conveying such title at the time of final settlement or in the event such title could not be given, then the deposit moneys returned to the plaintiff by the defendants.

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5. The defendants did not, on the 26th day of July, 1926, date of settlement as aforesaid, have a marketable title, free and clear of all encumbrances to the premises hereinbefore described but the same were subject to an encumbrance in the form of a mortgage given by one Marcus Fry to Hermann Weigmann, dated February 28, 1888, and to the best of this plaintiff's knowledge and belief the said encumbrance has never been removed but remains in full force and effect as an encumbrance against the lands and premises.

6. Defendants did not, on the 26th day of July, 1926, nor have they at any time since, tendered to this plaintiff, a plain warranty deed as provided by the agreement of sale heretofore mentioned.

7. Plaintiff has been informed and verily believes that the defendants have, since the 26th day of July, date of settlement as aforesaid, conveyed the premises herein described unto third persons, notwithstanding the aforementioned agreement of sale
10 wherein they agreed to sell unto this plaintiff.

8. Plaintiff is entitled to the return of deposit moneys amounting to six hundred (\$600.00) dollars under the terms of the aforesaid agreement and although demand has been made on the defendants by the plaintiff for the return of the said deposit monies, they have wholly failed and refused to return the same.

20 Wherefore, plaintiff demands of the defendants the sum of six hundred (\$600.00) dollars together with lawful interest thereon from the 26th day of April, 1926, and costs of suit to be taxed.

GEORGE R. GREIS,
Attorney of Plaintiff.

30 THIS AGREEMENT, MADE THE 26th day of April, A. D. 1926.
Between Louis Estes and Corlotta Estes, his wife, of Philadelphia, Pa., of the first part, hereinafter called the "SELLER," and Charles H. Ryan, of Pleasantville, Atlantic County, New Jersey, of the second part, hereinafter called the "BUYER."
Witnesseth, That the "SELLER" agrees to sell and convey and the "BUYER" agrees to buy all those

certain lots, tract, or parcel of land and premises situate in the City of Sea Isle City, County of Cape May and State of New Jersey, more particularly described as follows: all those certain lots of land situate on the east side of Landis Avenue bounded by Spencer Street on the North side and Cowper Street on South side and known as lots No. 1-2-9 and 10 of Block 60 A Sea Isle City, N. J., for the price or sum of Six Thousand Dollars, under and subject to the following terms and conditions: 10

1. A first payment of Six Hundred Dollars, receipt of which is hereby acknowledged by the "SELLER."

2. The balance of the purchase price shall be paid in the following manner: Twenty-Four Hundred Dollars in cash at settlement and the party of the first part to take back a purchase money mortgage for \$3000 for a term of 2 years.

at the time of final settlement, which shall be made at the office of M. M. Sofrony at No. 10 South Landis Avenue, Sea Isle City, N. J., on or before July 26th, 1926, or the deposit Six Hundred Dollars made herewith, at the option of the "SELLER," may be applied on account of the purchase price or be forfeited as liquidated damages to the "SELLER," and not as a penalty, 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
30 obtained.

3. The title to the premises shall be free and clear of all encumbrances, including municipal liens and assessments, except municipal improvements in the course of construction and not assessed, obvious easements, usual restrictions running with the land,

as excepted by all title companies in Sea Isle City and shall be a marketable title, and the "SELLER" shall tender a Plain 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 settlement and possession shall be given the "BUYER" at settlement.

10 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 "SELLER."

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.

20 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:

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

(signed)

Louis Estes (L. S.)

Corlotta Estes (L. S.)

Charles H. Ryan (L. S.)

Signed, sealed and delivered

30 in the presence of

(signed)

M. Sofroney

STATE OF NEW JERSEY }
CAPE MAY COUNTY } SS.

BE IT REMEMBERED, That on this 26th day of April in the year of our Lord one thousand nine hundred and Twenty-Six before me, a Notary Public in and for the State of New Jersey personally appeared Louis Estes and Corlotta Estes his wife who I am satisfied are the grantors mentioned in the above deed or conveyance, and I having first made known to them the contents thereof they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed. All of which is hereby certified. 10

(signed) Maurice Sofroney (Seal)

Endorsed on back. Louis Estes to Charles Ryan.

Received in the Clerk's Office of Cape May County,

N. J., at Cape May C. H., on the day of at

o'clock M. and recorded in Book No. of 20

Deeds, pages

A. C. Hildreth,
Clerk.

[ENDORSED.]

Service of the within summons and complaint acknowledged this 6th day of September, A. D. 1927.

Charles K. Landis, Jr.,
Attorney for Defendants.

ANSWER.

(Filed Sept. 10, 1927.)

CAPE MAY COUNTY CIRCUIT COURT.

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CHARLES H. RYAN,
Plaintiff,
 v.
 LOUIS ESTES and CORLOTTA
 ESTES,
Defendants.

Action at Law.
 Answer.

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Louis Estes and Corlotta Estes of the City and County of Philadelphia and State of Pennsylvania, defendants, say that:

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1. Paragraph 1 of the complaint is admitted.
2. Paragraph 2 of the complaint is admitted.
3. That part of Paragraph 3 is admitted which says that plaintiff did on the twenty-sixth day of April, 1926, pay over to the defendants the sum of six hundred (600) dollars as deposit according to the written agreement of that date to which paragraph 2 refers. Any other part of paragraph 3 is denied except as it appears to be a true and correct statement according to said written agreement mentioned.

4. Paragraph 4 is denied except as it appears to be a true and correct statement according to said written agreement mentioned.

5. Paragraph 5 is denied. Defendants say that the form of mortgage therein mentioned was dated February 4, 1888, and recorded February 28, 1888, in the Cape May County Clerk's office in Book No. 26 of Mortgages at page 232, and provided that the same shall be null and void and of no effect if the said Marcus Fry, for the term of four years and six months from the date of said mortgage, should well and sufficiently save, keep harmless and indemnify the said Herman Weigmann, his heirs, executors, and administrators, of and from two certain judgments entered against Martha A. Blakeman in the Cape May County Circuit Court, one on June 18, 1870, for \$135.69, and the other on February 16, 1872, for \$155.72, besides interest and costs; and of and from all actions, suits, payments, costs, charges and damages, for or by reason thereof. Said judgments and mortgage are void according to the Statutes of Limitation and in such case made and provided which are hereby pleaded.

6. Defendants admit paragraph 6 but say they were always ready, willing, and able to convey the premises to plaintiff by deed according to the terms of said agreement of sale and that the deed was not tendered because of the plaintiff's default and because, about July 30, 1926, plaintiff notified defendants that he, the plaintiff, would not accept the deed and that he, the plaintiff, demanded the return of the deposit monies mentioned in said agreement of sale, unless defendants should consent to an extension of the time of settlement to which defendants did not consent.

7. Defendants admit that since July 26, 1926, and after plaintiff's default and his notice to defendants as stated in paragraph 6, to wit, on March 2, 1927, they sold and conveyed the said land and premises to others than the plaintiff.

8. Defendants deny that plaintiff is entitled to the return of said deposit monies. They admit that plaintiff demanded the return of said deposit monies as stated and explained in paragraph 6 of this answer.

FIRST DEFENSE.

1. The mortgage mentioned in paragraph 5 of the complaint and in paragraph 5 of this answer is not an encumbrance upon said lands and premises according to the Statute in such case made and provided, it being more than twenty years since the entry of the judgments mentioned in paragraph 5 of this answer and since said mortgage was to have become due; said statutes of limitation being hereby pleaded.

CHARLES K. LANDIS, JR.,
Attorney for Defendants.

REPLY.

(Filed Sept. 15, 1927.)

CAPE MAY COUNTY CIRCUIT COURT.

CHARLES H. RYAN, <i>Plaintiff,</i>	}	Action at Law. Reply.
v.		
LOUIS ESTES and CORLOTTA ESTES, <i>Defendants.</i>		

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Plaintiff, replying to the answer filed by the defendants in the above-entitled matter, says that: 20

1. He denies that the judgment and mortgage in question are void according to the statute of limitations as set forth in paragraph five of the defendants' answer.

2. He denies that on July 30th, 1926, he did notify the defendants that he would not accept a deed to the property in question as set forth in paragraph six of the defendants' answer. 30

REPLY TO FIRST SEPARATE DEFENSE.

Plaintiff, replying to the first separate defense filed by the defendants, herein says:

1. He denies that the mortgage in question is barred by the statute of limitations as set forth by the defendants in their first separate defense.

GEORGE R. GREIS,
Attorney for Plaintiff.

AGREED STATE OF FACTS.

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(Filed Dec. 5, 1927.)

CAPE MAY COUNTY CIRCUIT COURT.

CHARLES H. RYAN,
Plaintiff,

v.

20 LOUIS ESTES and CORLOTTA
ESTES,
Defendants.

Action at Law.
Agreed State of
Facts.

30 The said plaintiff and defendants, by their respective attorneys, hereby agree that the following facts are admitted and that the issues raised by the pleadings shall be argued and submitted on said facts, to the determination of his Honor, William F. Sooy, Judge of said Cape May County Circuit Court, without a jury, sitting at such time and place as he may fix for the purpose; reserving to each of said parties objections to any admitted facts as evidence in like manner as if any proper objection had been made upon offer of proof of such facts upon trial of said issues, and also re-

serving to each of said parties the right to non-suit or directed verdict and to appeal from the final judgment to be rendered upon said issues as aforesaid.

1. The copy attached to complaint, is a true copy of the contract between the parties upon which this action is founded; the buyer having paid the sum of \$600 to the sellers as therein stated and as alleged in paragraph 3 of the complaint.

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2. No payment has been made by the buyer other than said first payment of \$600, and tender has not been made by either party to the other; the sellers have not tendered a deed and the buyer has not tendered the balance of purchase monies. On March 2, 1927, the sellers sold and conveyed the said land and premises to others than the plaintiff.

3. The form of the mortgage mentioned in paragraph 5 of the complaint is as stated in paragraph 5 of the answer. At the time of settlement, the sellers had such title as they agreed to convey except as said mortgage then appeared to be an encumbrance of record without having been noted by the clerk as cancelled, satisfied, or discharged. Defendants admit the fact of record as above stated but do not admit that said mortgage or said record thereof appeared to be an encumbrance according to law and the statutes of limitations in such case made and provided. In two pages each signed.

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Dated December 1st, 1927.

CHARLES K. LANDIS, JR.,
*Attorney and of Counsel with
Defendants,*

GEORGE R. GREIS,
Attorney of Plaintiff.

CONCLUSIONS.

(Filed Feb. 23, 1928.)

CAPE MAY COUNTY CIRCUIT COURT.

10 CHARLES H. RYAN,
Plaintiff, }
 v. } Action at Law.
 LOUIS ESTES, *et al.,* } Conclusions.
Defendants. }

20 GEORGE R. GREIS, Esq., for plaintiff.
 CHARLES K. LANDIS, JR., Esq., for defendants.

Sooy, J.:

Plaintiff sues to recover a deposit in the sum of \$600, with interest, which deposit represents the "down money" paid under the terms of a written agreement between plaintiff and defendant, whereby defendant agreed to sell and convey to plaintiff certain premises in Sea Isle City.

30 The case is submitted to me on the pleadings and an agreed state of facts.

It appears that under the terms of the agreement of sale plaintiff agreed to pay for the property to be conveyed the sum of \$6000, and that settlement was to have been made on July 26, 1926, and that the title was to be free and clear of encumbrances and "shall be marketable" and that, in the event

that such title cannot be as above, then this deposit shall be returned to the "buyer." Time was stated to be the essence.

On the day fixed for settlement plaintiff did not tender the balance of cash money due on that date nor did the defendant tender a deed for the property and, on that date, there was of record against the property a mortgage which will be hereinafter the subject of discussion. On March 2, 1927, defendant conveyed the property to another.

10 Defendant resists the plaintiff on these grounds:
 "Defendant cannot recover, not having tendered the balance of the purchase monies at settlement, unless tender were excused by the inability of the seller to perform."

I fully agree with the principle of law, and the cases cited as authorities are applicable, but it will be noticed that the agreement *sub judicie* provides not only that defendant will convey "free and clear," &c., but also a "marketable title," and, upon failure or inability so to do on the day of settlement, will return the deposit. 20

"To excuse tender or to show his right to recover, the burden of proof is upon the buyer to show the seller's inability to perform."

In the case cited under this point, it will be noticed that marketability of the title was not in question.

The last point relied upon by defendant is, "The mortgage in question did not appear to be an encumbrance at the time of settlement." 30

Plaintiff says that there appeared of record on and prior to the date of settlement a certain mortgage, bearing date February 4, 1888. This mortgage was given to indemnify the mortgagee in the sum of one thousand dollars, if, for a period of 4 years and 6 months from its date, the mortgagor,

"does and will sufficiently save, keep harmless and indemnify" the mortgagee from two certain judgments therein recited, the one dated January 18, 1870, the other February 16, 1872.

The principal of this mortgage became due, if it did become due at all, on August 4th, 1892, four years and six months after February 4th, 1888, so that a period of over 30 years has since elapsed.

10 It does not appear before me, by stipulation or otherwise, whether there was a default in the condition of the mortgage, or whether the principal or interest or any part of either principal or interest was, at any time, paid or demanded, but it does appear that no action could now be taken, by *scire facias*, or otherwise, to revive the two judgments and that they are barred by the statute.

20 The right to foreclose, in the absence of a showing of payment on account of principal or interest, within twenty years of the filing of the bill is also barred, but, if payments have been made within that period, the statute was tolled as of the time of such payments.

Was this mortgage an encumbrance justifying plaintiff in refusing to take title to the premises as being free and clear and as being marketable? And could defendants, on the day of settlement, convey by the kind of title agreed upon? If defendants could not so convey they have agreed, by their written undertaking, to return the deposit.

30 Marketable means "saleable." A title such as to make it reasonably certain that it will not be called into question in the future so as to subject the purchaser to the hazard of litigation with reference thereto. The only way the purchaser could procure the cancellation of the mortgage would be by pursuing the statutory remedy, at an expense, and subject to the production of the required

proof. This, in my opinion, plaintiff was not obliged to do under his agreement.

It is true that if some complainant should start foreclosure proceedings, an allegation would have to appear in the bill of a payment within twenty years, but plaintiff is not bound to risk the hazard of such a proceeding or of the possibility thereof. It was incumbent on the defendants to take such steps as might be necessary to cancel the mortgage of record, if it was in position to be cancelled. 10
Uncancelled it was a cloud on the title and rendered the property not marketable.

Judgment for plaintiff for \$600, with interest from date of default.

JUDGMENT.

(Filed Mar. 8, 1928.)

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CAPE MAY COUNTY CIRCUIT COURT.

CHARLES H. RYAN, <i>Plaintiff,</i>	}	Action at Law. Judgment.
v.		
LOUIS ESTES and CORLOTTA ESTES, <i>Defendants.</i>		

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This action having been tried before Hon. W. Frank Sooy, Judge of the Cape May County Circuit Court on January 23d, 1928, without jury, on the pleadings, agreed state of facts, and briefs, and it

2. Because, on the decision of said Cape May County Circuit Court in said action at law, said judgment was entered in favor of said Charles H. Ryan, plaintiff-respondent, and against said Louis Estes and Corlotta Estes, defendants-appellants, in a sum of damages and costs, and said Cape May County Circuit Court erred in its said decision and judgment.

10 3. Because said judgment should have been that the complaint of said plaintiff-respondent be dismissed and that said defendants-appellants recover of said plaintiff-respondent their costs to be taxed.

4. Because at the time of settlement, said defendants-appellants, as sellers, had such title to the land in question as they agreed to convey by their contract, a copy of which contract is attached to said complaint.

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5. Because it was admitted and agreed in writing between the parties as an agreed state of facts, by their respective attorneys, that defendants-appellants, as sellers, had, at the time of settlement, such title as they agreed to convey by said contract except as a certain mortgage then appeared to be an encumbrance of record in form as stated in paragraph 5 of the answer to said complaint, as follows: "Defendants say that the form of mortgage therein mentioned was dated February 4, 1888, and recorded February 28, 1888, in the Cape May County Clerk's Office in Book No. 26 of Mortgages, at page 232, and provided that the same shall be null and void and of no effect if the said Marcus Fry, for the term of four years and six months from the date of said mortgage, should well and sufficiently save, keep harmless and indemnify the

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said Hermann Weigmann, his heirs, executors, and administrators, of and from two certain judgments entered against Martha A. Blakeman in the Cape May County Circuit Court, one on June 18, 1870, for \$135.69, and the other on February 16, 1872, for \$155.72, besides interest and costs; and of and from all actions, suits, payments, costs, charges and damages, for or by reason thereof": Said defendants-appellants admitting the fact of record as above stated but not that said mortgage or said record thereof appeared to be an encumbrance according to law and the statutes of limitations in such case made and provided. 10

6. Because said mortgage was not an encumbrance, and notwithstanding said mortgage remained of record without having been noted by the county clerk as cancelled, satisfied, or discharged, the right of entry upon the mortgaged lands was barred by said statutes and the proof thereof by said record was readily available to the plaintiff-respondent as purchaser of said land, title to which was therefore marketable. 20

CHARLES K. LANDIS, JR.,
Attorney for and of Counsel with
Defendants-Appellants.

[ENDORSED]

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Service of the within notice and grounds of appeal is hereby acknowledged this 14th day of March, A. D. 1928.

George R. Greis,
Atty of Pltff.-Respondent.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

CHARLES H. RYAN,
Plaintiff-Respondent,

v.

LOUIS ESTES and CORLOTTA ESTES,
Defendants-Appellants.

ACTION AT LAW.

ON APPEAL FROM CAPE MAY COUNTY CIRCUIT COURT
TO THE COURT OF ERRORS AND APPEALS OF THE
STATE OF NEW JERSEY.

BRIEF FOR DEFENDANTS-APPELLANTS.

STATEMENT.

This action was submitted and tried without a jury upon the pleadings and agreed state of facts (pages 12-13).

Plaintiff-Respondent demands \$600 with interest, being the amount of his first payment on contract to purchase from defendants-appellants certain

lands at Sea Isle City, Cape May County, New Jersey, for the price of \$6000. At the time of settlement, July 26, 1926, time being expressly the essence of the contract, the buyer did not then or thereafter, tender the balance of the purchase monies. On March 2, 1927, the sellers sold and conveyed said land and premises to others than the plaintiff-respondent. It is admitted (Agreed State of Facts, State of Case, page 13, line 22, &c.) that at the time of settlement, the sellers had such title as they agreed to convey except as a certain mortgage made by Marcus Fry, a former owner, to Hermann Weigmann and unsatisfied of record, appeared to be an encumbrance, defendants-appellants admitting the fact of record but not that said mortgage appeared to be an encumbrance according to law or the statutes of limitations; said mortgage being in form as stated in paragraph 5 of the answer (State of Case, page 9, lines 5 to 21, incl.) as follows: "Defendants say that the form of mortgage therein mentioned was dated February 4, 1888, and recorded February 28, 1888, in the Cape May County Clerk's Office in Book No. 26 of Mortgages at page 232 and provided that the same shall be null and void and of no effect if the said Marcus Fry, for the term of four years and six months from the date of said mortgage, should well and sufficiently save, keep harmless and indemnify the said Hermann Weigmann, his heirs, executors, and administrators of and from two certain judgments entered against Martha A. Blake-man in the Cape May County Circuit Court, one on June 18, 1870, for \$135.69, and the other on February 16, 1872, for \$155.72, besides interest and costs; and of and from all actions, suits, payments, costs, charges and damages, for or by reason thereof."

POINT I.

DEFENDANT CANNOT RECOVER, NOT HAVING TENDERED THE BALANCE OF PURCHASE MONIES AT SETTLEMENT, UNLESS TENDER WERE EXCUSED BY THE INABILITY OF THE SELLER TO PERFORM.

The agreement of the seller to tender a deed and of the buyer to pay the balance of purchase monies are "concurrent or dependent covenants, and not those called independent, where each party must rely on the promise and not on the performance of the other."

Ackley v. Richman, 10 N. J. Law 304. This is recognized as the general rule in *Bernstein v. Kohn*, 114 Atl. 543, 96 N. J. Law 223, with the exception, excusing tender by the buyer if the seller be unable to perform.

POINT II.

TO EXCUSE TENDER OR TO SHOW HIS RIGHT TO RECOVER, THE BURDEN OF PROOF IS UPON THE BUYER TO SHOW THE SELLER'S INABILITY TO PERFORM.

Meyer v. Madreperla, 53 Atl. 477, 68 N. J. Law 258.

POINT III.

THE MORTGAGE IN QUESTION DID NOT APPEAR TO BE AN ENCUMBRANCE AT THE TIME OF SETTLEMENT.

The mortgage dated February 4, 1888, was for a term of 4 years 6 months and thereby matured August 4, 1892.

The statute of limitations applies to a foreclosure suit in equity and the right to foreclose ceases when the legal right of entry is barred by 20 years. *Rau v. Doremus*, 139 Atl. 170, and cases there cited.

The mortgage purports to have been given to indemnify against judgments respectively entered on June 18, 1870, and February 16, 1872.

The presumption of payment arising from lapse of time (20 years) removes the effect of the mortgage as an encumbrance in the absence of any proof explaining or excusing the delay. *Wallace v. Coward*, 79 N. J. Eq. 243, 81 Atl. 739.

At the time of the contract here in question, the judgments could not have been revived by *scire facias*. *Twist v. Woertz*, 127 Atl. 578; and there could not possibly be any recovery against the premises under the terms of the mortgage.

In *Bondy v. Percival*, 99 N. J. Law 309, 123 Atl. 873, plaintiff's action about the year 1923 was to recover a payment made by him on contract to purchase lands, the contract being for a conveyance of the property free from encumbrances, plaintiff claiming the right to recover because of mortgages made in 1851 and 1857 remaining uncanceled of record. A direction of verdict for plaintiff was reversed by this Court which, in its opinion by the

Chief Justice, said, "Under the law as it exists in this State, a mortgage vests in the mortgagee no estate whatever in the land. It merely gives him a right of entry on breach of the condition relating to payment mentioned in the instrument and, under the sixteenth section of our statute of limitations, the mortgagee's right of entry is barred unless exercised within 20 years next after the breach of the condition upon which it accrued. When the bar of the statute is complete, the estate of the mortgagor is freed from any imperfection created by the mortgage. *Blue v. Everett*, 56 N. J. Eq. 455, 457, 39 Atl. 765.

Applying the doctrine of the cited case to the facts now before us: If it be assumed that, when the title to the lands which were the subject of the agreement devolved upon Phoebe Mills, on October 20, 1886, these mortgages were each of them existing encumbrances thereon, and that each of the holders thereof had a right of entry on the mortgaged premises should the condition for payment be broken subsequently, that right ceased to exist, at the latest, 20 years after that date; that is, on October 20, 1906. Thereafter, by force of the statutory limitation, she held the lands free from any claim which might be attempted to be enforced against her as owner by a holder of either of these mortgages, and by her conveyance to the defendants, they stand in her shoes so far as the enforceability of these mortgages against the lands conveyed is concerned."

POINT IV.

THE SELLERS HAD SUCH TITLE AS THEY AGREED TO CONVEY.

By agreed state of facts (State of Case, page 13, lines 22 to 25, incl.) it was admitted that "the sellers had such title as they agreed to convey except as said mortgage then appeared to be an encumbrance of record."

The conclusions of the trial Judge were that the presumption of payment after 20 years might be overcome by proof of payments made within that period thus subjecting the purchaser to the hazard of litigation with reference thereto and because of such hazard the title was not marketable, the contract being for a title, not only free and clear of encumbrances, but for a marketable meaning "saleable" title.

But there could not possibly be any proof of payments in this case, because said mortgage was not to secure the payment of money but to indemnify against certain judgments as to which the conclusions of the trial Judge state "it does appear that no action could now be taken, by *scire facias* or otherwise, to revive the two judgments and that they are barred by the statute." (State of Case, page 16, lines 13 to 16, incl.)

But this Court has held, as hereinafter quoted, that the statute will render a title marketable where the proofs are readily available. In this case all proofs are by record, readily available, whether said judgments had not been revived.

The agreed state of facts rests the action upon the statute which raises a presumption by which the

burden of proof is cast upon the plaintiff-responder who rests upon the same state of facts in which there is nothing against the presumption. In *Potter v. Lumsden*, 93 N. J. Eq. 476, 117 Atl. 31, this Court affirmed the decree for the reasons, stated in opinion of the Court of Chancery, that title by adverse possession is marketable if proofs of the adverse possession are as available to the buyer as to the seller, in which the Court said: "No evidence was offered on the part of the defendant to controvert or even to cast doubt upon the accuracy or reliability of the evidence to show possession by complainant and his predecessors, who claimed to own the 7.86 acre tract since 1865, and I must therefore find that, under *Comp. Stat. p. 3169, para. 16 and 17*, the right of any person claiming title adverse to complainant is barred, but, before holding that complainant's proof in this suit of title by adverse possession is a sufficient answer to defendant's refusal to take title, I should consider the principle laid down by this Court that, when the validity or marketability of title depends upon facts outside the public records, a vendee should not be forced to take the title unless the necessary proofs are available to him when he may have future need of them. A doubt as to validity of title which can avail to defeat the vendor's claim to specific performance, must be reasonable and, so far as it depends on contingent events and uncertain fact, their occurrence or existence must be fairly probable. There is clear and uncontroverted evidence in this case of more than 55 years of actual possession by complainant and those through whom he claims ownership, and I can see no reasonable apprehension that proof of possession and occupancy, similar to that presented in this case, will not be as available to defendant as it was to

complainant. Defendant may not be able to produce the same witnesses, but the statutes limiting actions for the possession of lands will continue to run, and the facts to show adverse possession for the necessary period will always be at hand. *Day v. Kingsland*, 57 N. J. Eq. 134, 41 Atl. 99, and *Barger v. Gery*, 64 N. J. Eq. 263, 53 Atl. 483, are cases similar to the instant case and in which this Court decreed specific performance. I am therefore of the opinion that, under the proofs before me, the defendant's refusal to perform his contract, on the ground that complainant's title to the 7.86 acre tract is not good and marketable, is not well founded."

Most respectfully submitted,

CHARLES K. LANDIS, JR.,
*Of Counsel with Defendants-
Respondents.*

NEW JERSEY COURT OF ERRORS
AND APPEALS.

CHARLES H. RYAN,
Plaintiff-Respondent,

v.

LOUIS ESTES and CORLOTTA ESTES.
Defendants-Appellants.

ACTION AT LAW.

ON APPEAL FROM CAPE MAY COUNTY CIRCUIT COURT
TO THE COURT OF ERRORS AND APPEALS OF THE
STATE OF NEW JERSEY.

BRIEF FOR PLAINTIFF-RESPONDENT.

STATEMENT.

This action was submitted and tried without a jury upon the pleadings and agreed state of facts (pages 12-13).

On the 26th day of April, 1926, by a written Agreement of Sale which Agreement of Sale was in the usual form, the Plaintiff-Respondent did agree to

or without it in cases where it is waived or excused, rescind the contract and recover back in an action at law what he has paid on it." Citing *Meyer v. Madreperla*, 68 N. J. L. 258, 266, 53 Atl. 477; *Weimar v. Fath*, 43 N. J. L. 1; *Buttoro v. Whalen*, 64 N. J. L. 461, 45 Atl. 981; *Gilbert v. Trustees*, 59 N. J. L. 160, 35 Atl. 1121, and *Mangonaro v. Kare*, 84 N. J. L. 408, 87 Atl. 94. The Court continued, "there may be some cases where equity would refuse relief to a vendor on account of doubtful features of title that nevertheless would not support a rescission by vendee and a suit for recovery back of purchase money paid; but if there be a substantial defect, the vendee may rescind and recover back his payments and interest if the title has not passed" citing with approval *Moore v. Appleby*, 108 N. Y. 237, 15 N. E. 377 (lack of proper parties in a partition suit); *Fruhauf v. Bendheim*, 127 N. Y. 587, 28 N. E. 417 (outstanding privilege of renewing a lease) and *Simon v. Vanderveer*, 155 N. Y. 377, 49 N. E. 1043 (filed Lis Pendens and Complaint stating a good cause of action although unfounded in fact).

The Supreme Court of this State in the case of *Llyod v. Weinstock*, 135 Atl. 65, held where vendor was unable to convey a good and marketable title, the purchaser was entitled to return of the money paid by him on account of the purchase price.

POINT II.

SELLERS AT THE TIME OF SETTLEMENT DID NOT HAVE SUCH TITLE AS THEY AGREED TO CONVEY, THE TITLE BEING UNMARKETABLE.

In the contract of sale in question, the sellers covenanted to convey to the purchaser a marketable title, free and clear of all encumbrances (State of Case, page 5, lines 33, etc.) and it is admitted in the Agreed State of Facts (State of Case page 13, lines 22, etc.) that at the time of settlement there appeared of record in the Clerk's Office of the County of Cape May a certain mortgage as stated in paragraph five of the Answer (State of Case page 9, lines 5 to 21 inclusive) covering the premises in question, which mortgage is not noted as cancelled, satisfied or discharged.

The Trial Judge concluded that the sellers did not at time of settlement have a marketable title in that the only way in which the purchaser could procure the cancellation of the mortgage would be by pursuing the statutory remedy at an expense and this he was not obliged to do under his agreement.

In the case of *Simpson v. Klipstein*, 89 N. J. Eq. 543, 105 Atl. 218, this Court held "under a contract to convey real estate 'by a good and marketable title, free and clear of all encumbrances' the vendor is bound to have and tender a title free from encumbrances and dependent for its validity upon no doubtful questions of law or fact, the title must be such as to make it reasonably certain that it will not be called into question in the future so as to subject the purchaser to the hazard of litigation with reference thereto" citing *Vreeland v. Blauveltdt*, 23 N.

J. Eq. 483; *Methodist Episcopal Church v. Rober-son*, 68 N. J. Eq. 431, 58 Atl. 1056; *Van Riper v. Wickersham*, 77 N. J. Eq. 232, 76 Atl. 1020, and it was further held by this Court in the case of *Tillotson v. Gesner*, 33 N. J. Eq. 313, "the purchaser should have a title which shall enable him not only to hold his land, but to hold it in peace, and if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value," and this ruling was followed by the Court in the later case of *Doutney v. Lambie*, 78 N. J. Eq. 277, 78 Atl. 746.

Vice Chancellor Lewis in the case of *Pasternack v. Alter*, 95 N. J. Eq. 377, 123 Atl. 885 held "the principle adopted by Courts of Equity in matters of specific performance is that they will not compel a purchaser to take a title of which there is a reasonable doubt, and such doubt is held to exist if the purchaser desiring to sell the lands, would be adversely affected by such doubt."

This Court, in *Bier et al v. Walbaum, et ux*, 131 Atl. 888, speaking through Justice Black held "marketable means salable," and in *Pasternack v. Alter*, supra, Vice Chancellor Lewis held that the defective description of the property in question, among other defects, rendered the title unmarketable because a cautious subsequent purchaser of the premises would exact of the prospective vendee, the rectification of the defective description which would, in all probability, require a suit to quiet title.

Applying the legal principles cited above to the case at bar, it is clear that at the time of settlement the sellers could not convey to the purchaser a marketable or salable title. Not only is it reasonably probable that the purchaser would be subject to the hazard of litigation, the existence of which the

Courts have held would render the title unmarketable, but it is certain that litigation would be necessary to remove the mortgage from record for as pointed out by the Trial Court, "the only way the purchaser could procure the cancellation of the mortgage would be by pursuing the statutory remedy, at an expense, and subject to the production of the required proof" and it is submitted that the purchaser was not obliged to purchase a law-suit. Certainly the marketability or salability of the property in this case is seriously impaired, for should the purchaser here desire to sell the premises in question, no ordinarily cautious subsequent purchaser would purchase the property without first requiring the purchaser in this case to remove the mortgage in question from record.

The case of *Potter v. Lumsden*, 93 N. J. Eq. 476, 117 Atl. 31 is to be distinguished from the case before the Court in that, in that case the Court held that under Compiled Statutes, page 3169, Section 16 and 17, the right of any person claiming title adverse to the claimant was barred and therefore a reasonable hazard of litigation did not exist, likewise in the case of *Day v. Kingsland*, 57 N. J. Eq. 134, 41 Atl. 99, and *Barger v. Gery*, 64 N. J. Eq. 263, 53 Atl. 483, no reasonable hazard of litigation existed.

POINT III.

THE MORTGAGE IN QUESTION APPEARED TO BE AN ENCUMBRANCE AT THE TIME OF SETTLEMENT.

In the case of *Blue v. Everett*, 56 N. J. Eq. 455, 39 Atl. 765, and the cases therein cited it was held that a lapse of twenty years after a mortgage has become due within which there has not been either payment

or demand of the principal and interest, or part thereof or entry by the mortgagee into possession of the mortgaged premises; will raise a presumption that the mortgage has been satisfied, although in fact it has not been paid.

It will be noted that in the cases cited above there was positive evidence either in the pleadings or from extrinsic evidence that no payment of principal or interest was made, for a period of twenty years or more. It is necessary in order to give rise to the presumption of payment that it appear either from the pleadings or from extrinsic evidence that no payment of principal or interest has been made for twenty years for in the case of *Depew v. Colton*, 60 N. J. Eq. 454, 46 Atl. 728 this Court held that where a mortgagor made interest payments to a mortgagee within twenty years prior to an action to foreclose though more than that time had elapsed since the maturity of the mortgage debt, such action was not barred by the Statute of Limitations and in the case of *Magee v. Bradley*, 54 N. J. L. 326, 35 Atl. 103, it was held "the presumption does not act like a statutory limitation but as a rule of evidence as well as a rule of public policy."

The case of *Bondy v. Percival*, 99 N. J. L. 309, 123 Atl. 813 is to be distinguished from the case at bar. In that case there was evidence submitted at the trial to the effect that no interest or part payment of principal had been made for a period of twenty years after the title vested in one Phoebe Mills in October 1886 and it was upon this fact that the Court applied the presumption of payment after twenty years. In applying the doctrine to the facts in the case, Chief Justice Gummere applied them particularly to the proof in the case and only so far as that proof extended, namely from the time title

was taken by the said Phoebe Mills in October, 1886 for a period of twenty years thereafter or until October, 1906. There were three mortgages in question in the case, the first of which fell due April 1, 1857, the second August 1, 1857 and the third in installments, the first installment falling due August 26, 1867 and the second August 26, 1872. It will be noted that the period of twenty years did not run from the respective due dates of these mortgages according to the Chief Justice's opinion because there was no proof that payments on account of principal and interest had not been made prior to the time title vested in Phoebe Mills.

In the case before the Court it does not appear either from the pleadings or from extrinsic evidence that no payment has been made on account of the principal and interest of the mortgage in question for a period of twenty years, therefore the presumption of payment does not arise and the mortgage being of record and unsatisfied at time of settlement was an encumbrance upon the property.

POINT IV.

THE BURDEN OF PROOF IS UPON THE VENDOR TO PROVE THAT HIS TITLE IS GOOD BEYOND A REASONABLE DOUBT AND WILL NOT EXPOSE THE DEFENDANT TO LITIGATION.

Doutney v. Lambie, 78 N. J. Eq. 277, 78 Atl. 746, citing Fry on Specific Performance.

The case of *Meyer v. Madreperla*, 53 Atl. 477, 68 N. J. L. 258 is to be distinguished from the case under consideration. It will be noted that in that case marketability of title was not in question.

POINT V.

TENDER OF THE BALANCE OF THE PURCHASE MONEY BY THE PURCHASER AT THE TIME OF SETTLEMENT IS EXCUSED WHERE THE SELLER IS UNABLE TO PERFORM.

Where a vendor is unable to perform at the time agreed upon for the passing of the title, tender of performance by the vendee is not required in order to enable him to rescind and to sue his vendor for a breach of contract. *Reutler v. Ramsin*, 91 N. J. L. 264, 265, 102 Atl. 351; *Caporale v. Rubine*, 92 N. J. L. 463, 105 Atl. 226; *Bernstein v. Kohn, et al*, 96 N. J. L. 223, 114 Atl. 543; *Naugle v. McVoy*, 96 N. J. L. 515, 115 Atl. 393; 39 Cyc 1422.

POINT VI.

DEPOSIT MONEYS COULD NOT BE CONSIDERED FORFEITED AS LIQUIDATED DAMAGES UNTIL TENDER OF DEED WAS MADE BY SELLER.

Where the seller agreed to tender a deed and the Buyer to pay the balance of purchase moneys, the covenants are concurrent or dependent and not independent; *Ackley v. Richman*, 10 N. J. L. 304; *Bernstein v. Kohn*, 96 N. J. L. 223, 114 Atl. 543.

Sergeant Williams who was cited with approval by the Court in the case of *Ackley v. Richman*, supra, in his note to *Pordage v. Cole*, 1 Saunders 230, says "where two acts are to be done at the

same time, as where A covenants to convey an estate to B on such a day, and in consideration thereof, B covenants to pay A a sum of money on the same day, neither can maintain an action without showing performance of, or an offer to perform, his part."

The terms of the contract of sale in question specifically provided "the seller shall tender a plain warranty deed...at the time of the final settlement." It is admitted in the Agreed State of Facts (State of Case page 13, lines 14 and 15) that the sellers did not tender a deed at the time set for settlement and it does not appear that tender was excused by the purchaser's inability to perform. From the authorities cited above it therefore appears that the sellers could not maintain an action against the purchaser. And it is submitted that if the sellers could not maintain an action against the purchaser until tender, they could not consider the deposit moneys under the contract in question forfeited as liquidated damages without first making tender of a deed to the purchaser.

The Sellers are not now in a position to tender a deed to the purchaser because as admitted in the Agreed State of Facts (State of Case page 13, lines 16 to 18 inclusive) on March 2, 1927 they conveyed the property in question to others than the purchaser. Therefore by their inability to tender performance, they are precluded from considering the deposit moneys forfeited and failing in this they cannot retain such moneys.

Most respectfully submitted.

GEORGE R. GREIS,
Of Counsel with Plaintiff-
Respondent.