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BILL OF COMPLAINT.

(Filed Nov. 28, 1929.)

IN CHANCERY OF NEW JERSEY.

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

The complainant, Charles W. Young, of the City and County of Philadelphia and State of Pennsylvania, respectfully shows that:

1. On November 7th, 1929, McLaughlan-Conover Company, a corporation of the State of New Jersey, entered into a certain contract in writing, a true copy of which is hereunto annexed and made a part hereof, whereby said company agreed to convey to the complainant in consideration of ten thousand (10,000) shares of the common stock of the National Land Value Refunding Co. of New York, Inc., a corporation of the State of Florida, by deed of warranty on forty-eight hours' notice, to be given by the Ocean City Title and Trust Company, a banking corporation of the State of New Jersey, having its principal place of business in the City of Ocean City, in said State, all those certain lots or tracts of land and premises, situate in the City of Ocean City, County of Cape May and State of New Jersey, described as follows:

Being lots Nos. 1-5-6-7-8-11-12-13-15-16-17-18 Section No. 712.

Being lots Nos. 1-2-3-4-5-6-7-10-11-12-13-14-15-16-17-18-19-20 Section No. 713.

Being lots Nos. 1-2-3-11-12-13-14-15 Section No. 714 all of Bayside Tract, McLaughlan-Conover Company. Also

Being lots Nos. 2128-2129-2130 Plan No. 3 McLaughlan-Conover Company, Ocean City Gardens, Ocean City, N. J.

2. That in accordance with the terms of said contract above referred to, the Ocean City Title and Trust Company gave forty-eight hours' notice to the complainant and to the defendant, McLaughlan-Conover Company, that settlement would be made at the office of the Ocean City Title and Trust Company at two P. M. on November 25th, 1929.

3. That the complainant presented himself at the Ocean City Title and Trust Company, on November 25th, 1929, at two P. M., in compliance with his agreement and in answer to the instructions of the Ocean City Title and Trust Company and presented himself as being ready and willing and able to comply with the terms of said contract and did then and there tender ten thousand (10,000) shares of the common stock of the National Land Value Refunding Co. of New York, Inc., and request a warranty deed from McLaughlan-Conover Company, as was required to be delivered by the terms of said contract.

4. The tender of said stock was made to the title officer of said Ocean City Title and Trust Company, as there was no other representative of the Mc-

Laughlan-Conover Company present and no one there to represent said defendant company and no deed prepared and executed from said defendant company to the complainant for the purpose of delivery in accordance with the terms of the aforementioned contract.

5. The complainant is desirous of obtaining a conveyance of the lands set forth in the contract above referred to.

6. That the McLaughlan-Conover Company has refused and still refuses to convey to the complainant the lands set forth in paragraph No. 1, in this bill of complaint and also set forth in the contract above referred to.

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

1. That McLaughlan-Conover Company, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

2. That the McLaughlan-Conover Company may be decreed to specifically perform the said agreement entered into by said McLaughlan-Conover Company with the complainant, the complainant tendering himself ready and willing and hereby offering to specifically perform the said agreement on his part.

3. That a writ of subpoena may issue, commanding said defendant to answer this bill of complaint and

to abide by such decree as this Court may make in the premises.

F. Stanley Kreps,
Solicitor for and of Counsel with Complainant.

This agreement made this 7th day of November 1929, between McLaughlan-Conover Company, a corporation of the State of New Jersey, party of the first part and Charles W. Young, of city and county of Philadelphia, state of Penna. party of second part.

Witnesseth, that in consideration of the sum of one dollar each to the other, paid in hand, the receipt of which is hereby acknowledged, that the party of the first part agrees to sell and the party of the second part agrees to buy all those lots or tracts of land and premises, situate in the City of Ocean City, County of Cape May, State of New Jersey, described as follows:

Being lots Nos. 1-5-6-7-8-11-12-13-15-16-17-18 Section No. 712.

Being lots Nos. 1-2-3-4-5-6-7-10-11-12-13-14-15-16-17-18-19-20 Section No. 713.

Being lots Nos. 1-2-3-11-12-13-14-15 Section No. 714 all of Bayside Tract, McLaughlan-Conover Company. Also

Being lots Nos. 2128-2129-2130 Plan No. 3 McLaughlan-Conover Company, Ocean City Gardens, Ocean City, N. J.

Subject to the following terms and conditions.

Title to the Bayside Tract lots shall be free and clear of encumbrance excepting for the taxes for 1929, which the party of the second part assumes.

Titles to the Ocean City Gardens lots shall be free and clear excepting a mortgage in the sum of $4750. now covering said lots. Accrued interest and 1929 taxes on said mortgage and lots to be represented in a note executed by the party of the first part, in favor of the party of the second part, for four months.

All of the foregoing property for and in consideration of ten thousand shares of the common stock of the National Land Value Refunding Co. of New York, Inc. Said stock now being in the name of Charles W. Young and stamped not to be transferred prior to December 1, 1929. No representation has been made as to the value of the said stock by Mr. Young.

Title to the above land shall be such as will be insured by the Ocean City Title and Trust Co. at their regular rates.

Settlement to be made on 48 hours notice by the Ocean City Title & Trust Company.

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

In Witness whereof, the parties hereto have set their hands and seals the day and year first above written.

McLaughlan-Conover Company.
(Sgd.) William McLaughlan.
President.
(Sgd.) Chas. W. Young (Seal)

Attest:
Ralph A. Buvinger. (Sgd.)
Secretary.
Witness:
Harry A. Neel. (Sgd.)

ANSWER.

(Filed Jan. 3, 1930.)

IN CHANCERY OF NEW JERSEY.

Between CHARLES W. YOUNG, *Complainant,* and MCLAUGHLAN-CONOVER COMPANY, *Defendant.*	On Bill for Specific Performance. Answer.

Defendant, a corporation organized under the laws of the State of New Jersey, answering the bill of complaint, says that:

1. It admits the execution and delivery of the writing set forth in paragraph one, and that the paper annexed to the bill is a copy of said writing.

It further admits the correctness of the description of lands as set forth in said paragraph. All the remaining allegations in said paragraph one are denied, and it is in particular denied that defendant agreed to convey said land to complainant by deed of warranty in consideration of 10,000 shares of the common stock of the National Land Value Refunding Company of New York, Inc., a corporation of the State of Florida, and defendant avers the truth to be that it never agreed to warrant said land or the title thereto in any respect, or to convey the same or to execute any deed conveying the same to any named grantee, and that at the time when said writing was executed and prior thereto, complainant represented to the defendant and induced defendant and its officers and agents to believe and act upon the said representation believing in its truth, that said corporation issuing the 10,000 shares of common stock aforesaid was a corporation organized under the laws of the State of New York, which representation was not true in fact and was material as affecting the consideration of said alleged agreement, and defendant and its said officers and agents were misled thereby.

2. Defendant denies that the notice of settlement alleged in paragraph two to have been given was in accordance with the terms of said writing, as alleged in said paragraph. On the contrary, defendant avers that such notice as was given of such settlement, was neither for the length of time, nor for the hour, alleged in said paragraph two.

3. Defendant is without knowledge nor has re-

ceived any information upon which it can rely in forming any belief whether complainant presented himself at the time and place and while there did or performed any of the acts or things alleged in paragraph 3, or not, and further answering said paragraph, defendant denies that complainant ever, at any time, tendered or offered to defendant, or any of its officers, or to any one authorized by it to accept the same, the shares of common stock mentioned in said paragraph, and expressly denies that complainant was at said time and place, ready or able to tender to or vest in defendant the title to or any assignable interest in said shares of stock, and was not entitled to demand of defendant or require defendant to deliver a warranty deed or otherwise convey said land to complainant.

4. Defendant has no knowledge nor any information upon which to found any belief touching the truth of the allegations in paragraph four, excepting the allegation that no deed was prepared and executed by defendant to complainant for the purpose of delivery, which defendant admits and which defendant avers it was not bound to do.

5-6. Defendant admits that it has refused and still refuses to convey said land to complainant and submits that the said complainant in procuring the execution of said writing was guilty of fraudulent representations and fraudulent concealment of facts material to the subject-matter of the said writing, and affecting the value of the consideration of said writing as to render his conduct in the transaction

inequitable and such as to cause this Court to deny the prayer of the bill for a decree of specific performance of said writing.

7. For further answer to the whole bill and to the equity thereof, defendant avers that it is informed and believes and states the truth to be that the said 10,000 shares of common stock of National Land Value Refunding Co. of New York, Inc., is without any value whatsoever; that its sole asset consists of a tract of meadow land located near Pleasantville, in the County of Atlantic, New Jersey, carried on its books and set forth in a statement of assets and liabilities issued by it as of the date of October 1, 1929, at a value of $214,000; that said land was conveyed or caused to be conveyed to said corporation by the complainant on or about July 5, 1929, at a fictitious price or consideration of $101,500, which alleged consideration was satisfied or taken care of as follows; that is to say, complainant gave credit at the price of $8.00 per share for:

$80,000	being 10,000 shares of common stock of the corporation.
2,500	an existing mortgage encumbrance on the land (since reduced to $2,000).
7,000	an existing mortgage encumbrance.
6,000	an existing mortgage encumbrance.
6,000	an existing mortgage encumbrance.

Said complainant acquired said meadow land by purchase from a corporation known as Schwartz-Oliver Co. by deed of conveyance, and made settlement therefor on or about August 25, 1928. The con-

sideration of said conveyance and the purchase price of said land was the sum of $20,000 and was paid and satisfied in the following manner, that is to say, by deducting from said price the aggregate of three mortgages—$6,000, $7,000, and $2,500=$15,500 subject to which the land was conveyed and $4,500 paid in cash at time of settlement. The transaction discloses that the complainant after acquiring and before title to said meadow land was vested in the said National Land Value Refunding Co. of New York, Inc., caused an additional mortgage of $6,000 to be placed thereon, out of which he was enabled to repay himself the $4,500 in cash paid by him at the time of his purchase, and also to retain an additional sum of $1500 in cash, wherefore said land is now encumbered by mortgages to an amount in excess of the price originally paid therefor by said complainant and beyond the present actual value thereof. Defendant therefore charges that said stock is valueless, that it was issued and is held by complainant fraudulently, without consideration and by collusion between said complainant and the directors and officers of said corporation, and is void in his hands, and that even though the said stock had not been issued without fraud or collusion, the same has no value whatever; the value of the land described in said writing and in the bill of complaint is at least $50,000 so that the consideration upon which the alleged agreement was to convey is so grossly inadequate and the value of said stock is so disproportunate to the value of the land of defendant as to shock the conscience of the Chancellor and move him to refuse all aid to the com-

plainant by a decree for specific performance such as prayed for.

JOHN RAUFFENBART,
Solicitor of Defendant.

DEFENSES.

The defendant on the hearing will urge and rely upon the following defenses to the bill of complaint.

I.

The writing is so indefinite, uncertain, incomplete and vague in substance and external form as to be incapable of specific enforcement.

II.

The consideration of the bargain or promise set forth in the writing is so grossly inadequate as to shock the conscience and render it unfair in an equitable sense to decree specific performance.

III.

The writing was procured and obtained by means of fraudulent statements and concealments touching facts so material to the subject-matter thereof as to induce a court of equity to refuse its aid to the

complainant and deny the remedy of specific performance.

JOHN RAUFFENBART,
Solicitor of Defendant.

REPLICATION.

(Filed Jan. 23, 1930)

IN CHANCERY OF NEW JERSEY.

Between CHARLES W. YOUNG, *Complainant,* and MCLAUGHLAN-CONOVER COMPANY, *Defendant.*	On Bill for Specific Performance. Replication.

The complainant, Charles W. Young, replies to the answer of the defendant and says that:

1. The complainant denies each and every allegation in said answer and joins issue on the answer of defendant.

F. STANLEY KREPS,
Solicitor of Complainant.

ORDER OF REFERENCE TO VICE-CHANCELLOR.

(Filed Feb. 26, 1930.)

IN CHANCERY OF NEW JERSEY.

Between
CHARLES W. YOUNG,
Complainant,
and
McLAUGHLAN-CONOVER COMPANY,
Defendant.

On Bill for Specific Performance.
Order of Reference.

This matter being opened to the Court by F. Stanley Kreps, solicitor of the complainant, and it appearing that John Rauffenbart, Esquire, solicitor of the defendant, has consented hereto.

It is, on this 26th day of February, 1930, the motion of F. Stanley Kreps, solicitor of the complainant, ordered that the above-entitled cause be referred to Hon. R. H. Ingersoll, one of the Vice-Chancellors of this Court, to hear the same for the Chancellor and to report thereon to him and to advise what order or decree should be made therein.

E. R. WALKER,
C.

I hereby consent to the entry of the foregoing order.

JOHN RAUFFENBART,
Solicitor of Defendant.

ORDER OF DESIGNATION.

(Filed March 5, 1930.)

IN CHANCERY OF NEW JERSEY.

Between CHARLES W. YOUNG, *Complainant,* and MCLAUGHLAN-CONOVER COMPANY, *Defendant.*	On Bill for Specific Performance. Order of Designation.

This matter being opened to the Court by F. Stanley Kreps, solicitor of the complainant, and it appearing that John Rauffenbart, Esquire, solicitor of the defendant, has consented hereto:

It is on this 5th day of March, 1930, ordered that the 6th day of May, 1930, at the hour of ten o'clock in the forenoon, at the Chancery Chambers in the Law Building in Atlantic City, New Jersey, be desig-

nated as the time and place for the hearing in the above-entitled cause.

R. H. INGERSOLL,
V. C.

I consent to the entry of the foregoing order.

JOHN RAUFFENBART,
Solicitor of Defendant.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between
CHARLES W. YOUNG,
Complainant,
and
McLAUGHLAN-CONOVER
COMPANY,
Defendant.

On Bill, &c.
Final Hearing.

Atlantic City, N. J., June 5, 1930.

TESTIMONY.

Before HON. R. H. INGERSOLL, Vice-Chancellor.

APPEARANCES:

For the complainant, F. STANLEY KREPS, ESQ., and EMERSON L. RICHARDS, ESQ.

For the defendant, JOHN RAUFFENBART, ESQ., and U. G. STYRON, ESQ.

Mr. Rauffenbart: If the Court please, I am asking for a continuance of this case on the ground that James A. Sooy, vice-president and treasurer of the National Land Value Refunding Company of New York, was subpoenaed to produce an agreement or agreements made by and between the National Land Value Refunding Company and Charles W. Young, the complainant in this case, respecting the issuance by the company to said Young of ten thousand shares of stock in consideration of the conveyance by said Young or Young's nominee to the company of certain land situated in Pleasantville, Atlantic County, New Jersey; also deed made to the company by Young's nominee, statement of settlement issued by the title company on conveyance to said land company as well as the minutes of the company showing the transaction, together with correspondence concerning same between Young and the company, and I was informed by Mr. Sooy yesterday that the time was too short for him to produce those things, but he would produce them if given a little time and they are essential to the defendant's case and the defense and I, therefore, ask for that continuance. Mr. Sooy is in the court room and if the Court would like to hear him on that ——

The Court: Suppose you put him on the stand.

JAMES A. SOOY, sworn.

Direct examination.

By Mr. Rauffenbart:

Q. Mr. Sooy, you are an officer of the National Land Value Refunding Company, are you?

A. I am president of it at this time.

Q. President of it?

A. Yes, sir.

Q. On June second you were served with a subpoena, were you not?

A. Late Monday evening.

Q. Of which that is the original?

A. Yes, I was served.

Q. That calls for the production of certain records of the company?

A. Yes, sir.

Q. Were you able to produce those in the time allotted?

A. I am not. The secretary is up in New England and he has charge of those things. I tried to get in touch with him and have been unable to do so.

Q. Could you produce them later?

A. Probably the next week or ten days, yes, sir.

Mr. Richards: If your Honor please, that doesn't seem to meet the situation. As I understood it, it isn't a question whether he can produce them, but whether or not, if produced, they mean anything. It seems to me that the testimony of this witness is

the question that is important. Now we can go into that to determine whether or not there is any occasion for having these records.

The Court: I think that should be.

Mr. Richards: I may admit them. I don't know. The matters may not be anything that will get us into any trouble.

The Witness: May I say a word, your Honor?

The Court: No; just answer the questions, please.

Mr. Rauffenbart: If the Court pleases, if Senator Richards will admit that the company had no other real estate except this particular piece of real estate which was conveyed by Young and that the consideration named in the deed was a false consideration and that the stock was without value, of course, why we are willing to go ahead, but ——

Mr. Richards: That is not the question.

Mr. Rauffenbart: But the only way I see we can show that is by the records of this company, knowledge necessarily that Young would have from the correspondence and from the agreements which he entered into.

Mr. Richards: If your Honor please, what I am willing to do is to have them ask questions, and, up to the point I object that the record should be

produced, it seems to me they are perfectly competent. This man may know of his own personal knowledge every question they are going to ask him without reference to any record, what I am talking about; not a question of admitting it.

The Court: If that is the position you take, of course, all we can do is to proceed with the trial of the cause until this witness is called.

Mr. Richards: That is my suggestion, if your Honor, please. I don't know that this witness is going to say anything that we can't permit him to say here, and there is nothing, up to this point, to show we will be embarrassed or the defense will be embarrassed.

Mr. Rauffenbart: I may ask him these questions.

By Mr. Rauffenbart:

Q. At the time of the negotiation between Young and the company were you in charge of those negotiations?

A. I hadn't heard tell of the company at that time.

Q. Who was?

A. In charge of the company?

Q. Yes.

A. H. Lincoln Beach.

Q. Is he an officer of the company now?

A. No.

Q. Is he available now?

A. No.

Q. You had no personal knowledge?

A. Pardon me. I say "No." You might possibly find him.

Q. You don't know where he is?

A. I don't know where he is personally.

Q. And you had no personal knowledge of the negotiations or transactions?

A. None whatever; never heard tell of it.

Q. So that that knowledge would have to come from those records, would it not?

A. Would have to come from the records.

Q. And you have become president of the company since when?

A. Since ——

Q. Recently?

A. February of this year.

Mr. Richards: If your Honor please, this is not hardly more intelligible. As pointed out, there is nothing yet that either substantiates or embarrasses their defense one way or the other.

The Court: I think you will have to proceed with your case unless you can show me where you are embarrassed by reason of the absence of these particular papers that you have subpoenaed him for, and that they are evidential in the case.

The Witness: Am I, your Honor, permitted to say anything, to ask you a question?

The Court: Counsel will have to attend to that.

The Witness: I haven't any counsel here. I am not represented by counsel. The company has a counsel and that is the point I want to ask whether I can't hire counsel; these fellows going to set up a bad story here, and I would like to have the counsel to defend me and the company, too.

Mr. Rauffenbart: We must have those records to prove those contentions, the records of the company telling us what this stock was, what it was issued for.

The Court: Gentlemen, I am inclined to agree Mr. Rauffenbart is entitled to have those papers here. Can those papers be produced by next Friday, week from tomorrow?

Mr. Rauffenbart: Yes.

The Court: You can produce them?

The Witness: Yes, sir.

The Court: I will continue the case then until next Friday morning. I understand you had a witness that you desired to produce?

CLINTON B. PRICE, sworn.

Mr. Richards: This contract is admitted and I want to offer it.

(Contract admitted and marked Exhibit C1.

Direct examination.

By Mr. Richards:

Q. Mr. Price, what is your business?
A. Title officer of the Ocean City Title and Trust Company.
Q. Was your company engaged to make a search of the title of some lots in Ocean City that are mentioned in the contract dated November seventh, 1929, between McLaughlan-Conover Company and Charles W. Young?
A. Yes.
Q. Who engaged you to make the search?
A. Mr. Charles W. Young.
Q. You made the search?
A. Yes.
Q. Reported to him the outcome of the search?
A. Yes.
Q. Now, as the result of that or any other instructions, did you notify McLaughlan-Conover Company that you would insure the title?
A. No, not that we would insure the title.
Q. Did you notify them of a day of settlement?
A. Yes.

Q. Have you got that notice?
A. I have a carbon copy of our letter to them.
Q. Is this the original?
A. Yes, it is.

(Letter offered, admitted in evidence, and marked Exhibit C2.)

Mr. Richards: We offer the typewritten part. There is a pencil memorandum at the bottom.

Q. At the time of the settlement did anyone representing the McLaughlan-Conover Company attend?
A. No one was there at that hour.
Q. Had Mr. Young been there previously?
A. Yes, he had.
Q. Had he left with you or did he leave with you any stock called for in this contract?
A. No.
Q. Did he tender the stock?
A. Yes.

Mr. Rauffenbart: I object, if the Court pleases, and ask that be stricken because it calls for a legal conclusion. I ask what was done.

The Court: Yes; what was done?

Q. Tell us what he did do then?
A. Well, he called during the morning of the day of the twenty-fifth and then about three o'clock in the afternoon he came in again and stated that he

was there in accordance with the settlement date, 1.30, which we had fixed at his request on the preceding Saturday, and while he was there he handed to me or tendered to me, representing the title company, four certificates of stock of the National Land Value Refunding Company of New York, numbers 236, 237, 238 and 239, each for twenty-five hundred shares, dated July 1, 1929, issued in the name of Charles Wood Young, which I thereupon returned to him.

Q. Are these the certificates?

A. Yes.

Mr. Richards: I want to offer those in evidence.

(Certificates received in evidence and marked Exhibits C3, 4, 5 and 6.)

Q. On that day or at any time subsequent thereto has anyone representing this company come to the Ocean City Title and Trust Company and offered a deed or otherwise offered to conform with this agreement of sale?

A. No.

Mr. Richards: I want to, if your Honor please, formally tender this stock to the defendants and to again demand the deed.

Mr. Rauffenbart: We turn them back to you.

Q. Did you confer with anybody, any officer of the McLaughlan-Conover Company at any time?

A. I have had conversations with both Mr. McLaughlan and Mr. Bouvinger.

Q. Who is Mr. McLaughlan?

A. President of the company.

Q. Who is Mr. Bouvinger?

A. Secretary.

Q. Did they at any time evince a request to convey the property to Mr. Young?

Mr. Rauffenbart: That is objected to.

The Court: I will sustain the objection.

Q. Did they say whether they would or would not convey the property in dispute?

Mr. Rauffenbart: I object, and I think that the time of the conversation, time should be fixed and should be asked then what was said.

The Court: Yes, you are entitled to have the time fixed as near as possible.

Q. At any time before the twenty-eighth, naming the date, did you have any conversation ——

Mr. Rauffenbart: There is nothing here to show the twenty-eighth had anything to do with the transaction.

Q. Twenty-fifth?

A. I don't recall when they were.

Q. Can you fix, as nearly as possible, the date of the conversation?

A. I wouldn't attempt to.

Q. Do you remember any that you had?

A. I don't remember.

Q. Did you have any conversation with either one of them on the twenty-fifth?

A. Not that I recall. They may have been in there, but I have no memorandum of it.

Q. Did they call you on the telephone that day?

A. I don't recall any.

Q. Subsequently to the twenty-fifth did you have a conversation?

A. Yes, I think there were some conversations afterward.

Q. Will you state what the conversations were?

A. I wouldn't attempt to. I didn't attempt to make any memorandum or to remember them. I have no particular recollection of what the discussion was.

Q. Well, they related to a transfer of this property, didn't they?

A. Yes.

Q. What I want to know is can you recall any conversation that you had in which either of these gentlemen said what they would or would not do in relation to the performance of this contract?

A. No.

Q. You don't recall that?

A. No.

Cross-examination.

By Mr. Rauffenbart:

Q. Mr. Price, was this letter mailed to McLaughlan-Conover Company?

A. Well, I put it in our outgoing mail, one of our clerks did. I assume it reached them.

Q. Through the mail it was sent?

A. Yes.

Q. You say that no one appeared at the office of the company at 1.30 on the twenty-fifth?

A. No.

Q. And you have no recollection of whether later in the day either Mr. McLaughlan or Mr. Bouvinger did call, you have no recollection, on that day?

A. I said I didn't think they did on that day.

Q. I understood you to say that they may have called?

A. They may possibly, but I don't recall that they did on that particular day.

Q. Now did Mr. Young have a deed with him at the time he called prepared for this property in question?

A. I don't think so. I don't recall any.

Q. You didn't see it?

A. I have no memorandum of it and I don't think he had any.

Q. Now what time did he get there?

A. He was there twice on Monday, the twenty-fifth, once in the morning and again in the afternoon.

Q. What did he do in the morning?

A. Some conversation about the condition of the title.

Q. Was that the extent of what he did in the morning?

A. Substantially, yes.

Q. What did he do in the afternoon at three o'clock?

A. He made this tender that I have recited.

Q. Did he leave the stock with you?

A. No.

Q. Were you authorized by the McLaughlan-Conover Company in any manner to accept this stock for them?

A. No.

Q. You didn't represent that company, did you?

A. No.

Q. There was nothing in the agreement which gave you the right to take it, was there?

Mr. Richards: I object to that.

The Court: Sustain the objection.

By the Court:

Q. Mr. Price, do I understand you have a memorandum of Mr. Young's appearance at your office on that day?

A. Yes, your Honor, the afternoon appearance.

Q. What I am wondering is why did you make a notation of his being there and make no notation of the other parties being there if they were there?

A. Well, I presume that were not there. No one

appeared on that day and he made this specific tender, so occurred to me I ought to make note of what he was tendering.

Q. You have no note of their appearing on that day?

A. None whatever.

By Mr. Rauffenbart:

Q. Mr. Price, are you the only man engaged in that title company office?

A. Oh, no.

Q. Are there others?

A. Quite a number.

Q. Was there any reason why it should come to you rather than someone else in the office?

A. Yes. I am in charge and I had had the preliminary conversations with Mr. Young and the McLaughlan-Conover Company, and I was the logical man to see.

By Mr. Richards:

Q. Do you remember these preliminary conversations that you had with the officers of the McLaughlan-Conover Company?

A. No, I do not, Senator.

Q. You just remember that you did have conversations?

A. Yes.

Q. Do you remember whether or not, when Mr. Young came in the second time on this day that you called up one of the officers of the McLaughlan

Company on the telephone or whether or not they called you?

A. I have no recollection of any conversation with them on that day.

By Mr. Rauffenbart:

Q. Do you personally know whether the letter was mailed to McLaughlan-Conover on that day?

A. I do not.

Mr. Richards: In regard to this notice it better appear upon the record that upon call it was produced by counsel for the defendant.

Mr. Rauffenbart: I produced it.

The Court: Is there any other testimony you desire to present at this time?

Mr. Richards: I think not as long as we have to come back we better do it all at once.

The Court: The matter will be continued a week from tomorrow morning at ten o'clock. All witnesses who have been subpoenaed to appear here must return on the thirteenth and, of course, the subpoena to Mr. Sooy to produce these papers is effective at that time.

Atlantic City, N. J., June 13, 1930.

(Trial of the cause resumed at 10.00 A. M.)

CHARLES W. YOUNG, sworn.

Direct examination.

By Mr. Richards:

Q. Mr. Young, you are the complainant in this case?

A. I am.

Q. You are the one who made this agreement which is marked Exhibit C1, which I show you?

A. Yes.

Q. Did the Ocean City Title and Trust Company make a search of the title?

A. They did.

Q. Did they notify—do you know whether or not they notified the McLaughlan-Conover Company of the day of settlement?

A. I do. They did.

Q. What day was that?

A. Oh, I believe it was Friday, but a day before the written notice went out Mr. Bouvinger and I met in the title company's office.

Mr. Rauffenbart: That is objected to as not responsive. The question was whether or not the title company notified.

A. They did.

Q. The question was when was the date of settlement or what was the date of settlement?

A. I haven't it here with me, the paper is there, but the point I want to say ——

Mr. Rauffenbart: I object to the point.

Q. There is no question. There was a day of settlement, was there?

A. Yes.

Q. Were you notified to be present?

A. I was.

Q. Were you present on that day?

A. I was.

Q. Was anybody there representing the defendant company?

A. No.

Q. Were you there more than once that day?

A. Yes, twice.

Q. When were you there the first time?

A. About ten-thirty in the morning, then went to McLaughlan-Conover's office from there.

Q. You were not asked that. Will you please answer my questions? You came back later on in the day to the title company, is that right?

A. Yes.

Q. When was that?

A. Between one-thirty and two o'clock.

Q. On your first occasion there who did you see at the title company?

A. The assistant to Mr. Price, who made the search or was in charge of the search.

Q. When you went back the second time who did you see?

A. Mr. Price, the title officer.

Q. On either occasion was there anybody there representing the McLaughlan-Conover Company to make the settlement?

A. There was not.

Q. In the interval between the time you first went to the title company to the time you came back did you see anybody, any official of the McLaughlan-Conover Company?

A. I did.

Q. Who did you see?

A. I saw, in the first instance, Mr. Bouvinger, the treasurer.

Q. Where did you see him?

A. In his office in Ocean City.

Q. Did you have any conversation with him relative to the settlement?

A. I did.

Q. What was it?

A. I says, "I am down here ready to settle." He says, "Come back to my office at one o'clock."

Q. Did he say anything about not settling at that time?

A. No.

Q. Did you go back at one o'clock?

A. I did.

Q. What did he say then?

A. He wasn't going to settle. Mr. McLaughlan was there at that time also.

Q. Who is he in the company?

A. He is the president.

Q. Told you they were not going to settle?

A. Yes.

Q. Did you request them to attend at the title company and make settlement?

A. I did.

Q. What did they say to that?

A. That they would not.

Q. Did they tell you why they would not settle?

A. They said something, I don't know why, but they made some remarks, and as quickly as I could I got out and went around to the title company.

Q. Did they give you any reason why they would not settle?

A. None that I remember.

Q. Just said that they did not intend to settle?

A. Did not intend to settle.

Q. Then you went back to the title company.

A. Went back to the title company.

Q. Did you tender to Mr. Price these certificates that have been marked C3, 4, 5 and 6?

A. I tendered ten thousand shares. I tendered and Mr. Price took the notes of the notes.

Q. Was there any deed there from McLaughlan-Conover Company at that time?

A. Mr. Price had told me there had been a deed for part of the property deposited there, whether there was any further deed I don't know.

Q. Why didn't he turn the deed over to you?

A. Nobody there to represent the other side, also

they had a phone conversation with him while I was there.

Q. Who had the phone conversation?

A. As I was going out of the office, after making the tender, he beckoned to me to come back, I was going into the general office, and I listened to one side of a conversation with somebody, presumably with somebody of the McLaughlan-Conover Company.

Q. Mr. Price called somebody in that company?

A. No, he called me back to listen to a conversation, thinking maybe they were coming; they had called him.

Q. Did he have somebody on the telephone when he called you back?

A. Yes, just as I was leaving.

Q. After you came back, after he beckoned you back did he call somebody on the phone or did he have somebody on the phone?

A. Had them on the phone.

Q. And he had a conversation over the telephone?

A. Yes.

Q. Part of which you heard?

A. Yes.

Q. You don't know whether that was with them, do you?

A. Except it was about this matter.

Q. Now on the day prior to the date of settlement did you see anybody representing the company?

A. No.

Q. Two days before did you see anybody or did you see anybody two or three days before the settlement?

A. Within a week before the settlement, yes.

Q. Who did you see?

A. Mr. Bouvinger.

Q. Where did you see him?

A. In his office, Ocean City.

Q. Did you talk about the settlement?

A. Yes.

Q. At that time, had the day of settlement been fixed?

A. Yes, verbally.

Q. Verbally fixed?

A. Yes.

Q. What was the conversation about the settlement?

A. Met him by accident that morning in the Ocean City Title, and Mr. Price came out where he was sitting outside of Mr. Price's office, and he said, "I am going to write to you of the settlement," naming the date, and that is all that was said and I didn't wait.

Q. At that time Mr. Bouvinger say anything about not settling?

A. No.

Q. Have you since demanded of the company that they convey this property to you?

A. No.

Q. Except such demand as was made by the suit and the demand here last week?

A. Yes.

Cross-examination.

By Mr. Rauffenbart:

Q. You say that you know that the title company gave some notice to McLaughlan-Conover Company. Do you know how much notice they gave?

A. Three days verbal notice, two days written.

Q. Were you present when the verbal notice was given?

A. I was.

Q. Where was that given?

A. In the Ocean City Title Company's office, outside of Mr. Price's private office.

Q. To whom was it given?

A. Mr. Bouvinger and myself.

Q. Was that the conversation that you mentioned here on direct examination of Senator Richards?

A. Yes.

Q. In which Mr. Price said, "I am going to write you about the date of settlement?" Is that what was said, "You are going to get a letter from me about the date of settlement?"

A. He said the settlement was, gave the date, which was later in the letter gave that date, and I think it was a Monday.

Q. How long before the Monday was that?

A. That was, assuming it was Monday, it was Friday; it was three days before.

Q. You told Senator Richards it was about one week before, didn't you?

A. No.

Q. Well, if your testimony was it was a week before you were mistaken, were you?

A. I wasn't mistaken.

Q. If your testimony on direct examination was that it was one week before Monday, you were mistaken, were you?

A. No.

Q. Then it was one week before, was it?

A. It was not. It was this day, on that particular day, the date prior to ——

Q. If you said ——

A. If you will show me the notice, I will give you the actual dates.

Q. If you said in your direct examination here this morning, in answer to a question by Senator Richards, that you met Mr. Bouvinger in the title company one week prior to the date fixed for settlement when Mr. Price told him he was going to write him a letter, you were mistaken, were you?

A. Read my answer. I believe it was about, I said about.

Q. What do you say now?

A. I say that the day prior to the written or three days.

Q. On Friday, was it?

A. Prior to the—I am not sure the date, but three days prior to the date of settlement is the time the verbal notice was given.

Q. What did Mr. Price say to Mr. Bouvinger?

A. That the settlement would be on a given number date which is indicated by the notice itself, the letter, of which I have a copy.

Q. What conversation was it, can you recall what Mr. Price said to Mr. Bouvinger?

A. That the settlement would be on, say the twenty-fifth, I think was the date, on the twenty-fifth of November, or whatever date it was.

Q. Do you know what date Mr. Price set if he set any date?

A. Not from memory, no.

Q. Do you say now that you were at the title company at 1.30 on the twenty-fifth?

A. Between 1.30 and two o'clock.

Q. You saw Mr. Price, did you?

A. I did.

Q. Mr. Price made a notation of the fact that you were there, didn't he?

A. I don't know.

Q. You were here and heard his testimony, did you not?

A. I did.

Q. Well, don't you recall that he said he made a notation of it?

A. Yes, I heard him state it.

Q. Didn't he say you were there at three o'clock, you were not there at 1.30?

A. He did.

Q. You were not there at two, but you were there at three?

A. Well, I wasn't.

Q. He is mistaken, is he?

A. He is.

Q. Notwithstanding the fact he made a note of it?

A. I didn't say he made a note.

Q. I understood you to say so?

A. You are trying to make me say so.

Q. You say that you saw Mr. Bouvinger in his office at one o'clock that day?

A. I didn't say so, not the day of the settlement, if that is what you are speaking of now. I didn't see him at one, I saw him in his office, in Bouvinger's office, not Price's office.

Q. That is exactly what I said, you saw Mr. Bouvinger at his office at one o'clock?

A. Yes, by appointment with Mr. Bouvinger.

Q. At that time he told you he wasn't going to go through with the transaction?

A. Yes, in a few moments after, maybe ten or fifteen.

Q. Didn't you ask him why?

A. No.

Q. Weren't you concerned as to the reason for his not going through with the transaction?

A. Naturally.

Q. Then why didn't you ask him why he wasn't going through?

A. Well, I didn't do it.

Q. Just state, for the benefit of the Court, what you said to Mr. Bouvinger at that meeting concerning the transaction and what Mr. Bouvinger said to you?

A. I have no recollection that, I won't take on my oath I will take affidavit to of what was said on either side except he wouldn't settle, and I invited him to go around, wouldn't go, and, as promptly as I could, one block it was to the office, I went around there.

Q. How long were you with Mr. Bouvinger?

A. Not over twenty to thirty minutes.

Q. Well, then it was only one block to the title company?

A. One block to the title company.

Q. So you went immediately around to the title company?

A. I did.

Q. So you were there before 1.15, weren't you?

A. No, I wasn't.

Q. You met Mr. Bouvinger at one o'clock, you said about twenty or thirty minutes?

A. I said I was there one-thirty to two.

Q. You were there 1.30?

A. I said to two.

Q. From 1.30 to two?

A. No, I said between the time 1.30 to two. I didn't look at the watch.

Q. Did you go immediately to Mr. Price?

A. Immediately.

Q. In the twenty minutes or thirty minutes you spent with Mr. Bouvinger you can't remember one thing he said except he said he wasn't going through with the deal?

A. No.

Q. Weren't you surprised?

A. I was.

Q. Notwithstanding the fact you were surprised you didn't ask him why?

A. No.

Q. Do you recall the day that you—that this contract that you offered in evidence, you recall the day that that was signed?

A. Very well, indeed.

Q. You were present with Mr. Bouvinger and Mr. McLaughlin in the office?

A. I was.

Q. And Mr. Nell?

A. Not Mr. Nell.

Q. Mr. Nell witnessed the agreement you offered in evidence, didn't he?

A. Well ——

Q. You know Mr. Nell, do you not, Mr. Young?

A. No, I don't.

Mr. Rauffenbart: Mr. Nell, will you stand up?

(Gentleman stands up in court room.)

A. I know it must be Mr. Nell.

Q. He wasn't present, was he not?

A. He was present when this was signed.

Q. Was he present during the negotiations leading up to the signing of it?

A. He was not.

Q. Was he present while the agreement was being written?

A. No.

Q. What time did he come in, at what stage?

A. I don't recall.

Q. Now prior to the signing of this statement did Mr. McLaughlan or Mr. Bouvinger ask you what you paid for the stock that you were offering for the property?

Mr. Richards: That is objected to, if your Honor please.

The Court: I will permit the question, if they asked him.

Mr. Richards: If your Honor please, what would be the probative value of it? We are not interested in what he paid for it or even what its value was, it seems to me. The agreement is that he should transfer this stock.

The Court: Is the question predicated prior to the signing of the agreement?

Mr. Rauffenbart: Prior to the signing of the agreement.

The Court: I will sustain the objection.

Q. Did you tell Mr. McLaughlin and Mr. Bouvinger that you gave eighty thousand dollars in real value for this stock?

Mr. Richards: That is objected to, if your Honor please.

The Court: I will hear you on that.

Mr. Richards: If your Honor please, the contract itself says, in about the middle of it, that "No representation has been made as to the value of the said stock by Mr. Young." Now that being in the contract itself, it seems to me that any testimony concerning the value is irrelevant and immaterial.

The Court: I will hear you on that, Mr. Rauffenbart.

Mr. Rauffenbart: If the Court pleases, our contention is that this man came to the office of Mr. McLaughlan and Mr. Bouvinger, and there presented himself and said, during the negotiations here in response to a question of Mr. McLaughlan like this. Mr. McLaughlan said to Mr. Young, "What we are concerned in, Mr. Young, more than anything else, is whether or not this was treasury stock of the company and whether or not you gave full value for it?" Then Mr. Young said, in response to that question, said, "Yes. This is real treasury stock, and I took it at eight dollars a share, and I give full value by conveying real estate for it." Relying on that statement these men entered into this agreement. They were induced, by the statement made by Mr. Young that this was treasury stock, and that he had paid the company full value for it, that they entered into this agreement.

The Court: I will sustain the objection. It is anticipating the defense.

Q. Mr. Young, at the time that you entered into this agreement was this statement there?

Mr. Richards: I object to that, if your Honor please.

Mr. Rauffenbart: Just preliminary, if the Court please.

Mr. Richards: I don't mind you identifying the statement.

Q. Was this statement of the National Land Value Refunding Company there before you gentlemen?

A. No, I had never seen it at that time.

Q. Had you never seen this statement prior to that time?

A. No.

Q. Well, you did see it at that time, did you?

A. I just answered that I did not.

Q. Well, you did see it at the time that you were preparing this agreement?

A. No.

Q. Did you see it afterwards?

A. Yes.

Q. Had you seen it prior?

A. No.

Q. After you did see it, did you see this item of real estate and first mortgages, $214,000, on the statement?

A. I did.

Mr. Richards: I object. That should be stricken.

The Court: Sustain the objection.

Q. Did you, at the time you were negotiating or just before the signing of this agreement say to Mr. McLaughlan that you had access to Morgan and Company, that you dealt with Morgan and Company?

Mr. Richards: I object to that.

The Court: Sustain the objection.

Q. Did you at that same time tell them that you and Senator Richards owned a million dollars' worth of real estate here in Atlantic City?

Mr. Richards: That is objected to.

The Court: Sustain the objection.

By Mr. Richards:

Q. Mr. Young, I want to ask you one thing about this agreement, where was this agreement drawn, C1?

A. In the McLaughlan-Conover office.

Q. When was it drawn, on the date that it bears date?

A. On the date that it bears date.

Q. That is the seventh of November?

A. Yes.

Q. 1929?

A. Yes.

Q. Who actually drew it?

A. Mr. Bouvinger typed it at the dictation of Mr. McLaughlan.

Q. You mean by that that Mr. Bouvinger sat down at the typewriter and wrote this out on the typewriter as Mr. McLaughlan dictated it to him?

A. He did.

Q. Or did he dictate it in shorthand and then transcribe it?

A. Oh, no, dictated directly to the machine or to Mr. Bouvinger at the machine.

Q. And all of this paper was dictated by Mr. McLaughlan to Mr. Bouvinger, is that correct?

A. It was.

Q. After it was typed, was it immediately signed?

A. Yes.

Q. By Mr. McLaughlan and by yourself and attested by Mr. Bouvinger and witnessed by Mr. Nell?

A. Yes.

By Mr. Rauffenbart:

Q. Mr. Young, do you know Mr. Pardon Adams?

A. I do.

Q. Prior to the date of the signing of this agreement you say you hadn't seen this statement?

A. I did.

Q. Did you have a talk with Mr. Pardon Adams prior to that time?

A. I had a number of talks with Mr. Pardon Adams. He had a mortgage on the property.

Q. He had a mortgage on the property?

A. Yes.

Q. Did you go to see him concerning it?

A. Concerning what?

Q. The mortgage?

A. I did.

Q. Did you tell him that you were vice-president or an officer of this company?

Mr. Richards: I object to that, if the Court please.

The Court: Sustain the objection.

Q. Were you an officer of the company?

Mr. Richards: I object.

A. I was not.

The Court: Sustain—it has been answered.

Q. Mr. Young, at the time that you made this transaction, did you know the value of the stock of the National Land Value Refunding Company?

Mr. Richards: That is objected to.

The Court: Sustained.

COMPLAINANT RESTS.

DEFENDANT'S TESTIMONY.

WILLIAM MCLAUGHLAN, sworn.

Direct examination.

By Mr. Rauffenbart:

Q. Mr. McLaughlan, you are president of the defendant company, McLaughlan-Conover Company, are you?

A. I am.

Q. Were you such on the seventh day of November, 1929, when the contract in evidence in this case was executed?

A. I was.

Q. Mr. Bouvinger was the secretary, was he?

A. He was.

Q. Your company owned the real estate mentioned in the contract?

A. It did.

Q. Are you familiar with and were you at that time familiar with the value of that real estate?

A. I was.

Q. What was its value?

A. About fifty thousand dollars.

Q. You know Mr. Young, of course?

A. I do.

Q. You recall Mr. Young coming to your office?

A. I do.

Q. You recall conversations had with him concerning the transaction?

A. Yes.

Q. Who drew this agreement?

A. I dictated all but one paragraph.

Q. Who wrote it?

A. Mr. Bouvinger.

Q. What paragraph was that that you did not dictate?

A. Referring to the value of the stock.

Q. "No representation has been made as to the value of the said stock by Mr. Young?"

A. That is it.

Q. How did—who suggested that?

A. Mr. Young had written out on a piece of paper and handed it over to Mr. Bouvinger.

Q. Had some conversation been had up to that time about the stock?

A. Before inserting that in the contract I said, "Well"——

Mr. Richards: The answer is yes or no, Mr. McLaughlan.

Q. Had some conversation been had about it?

A. Yes.

Q. Do you recognize this statement of the National Land Value Refunding Company?

A. I do.

Q. Was that there in front of you gentlemen at the time?

Mr. Richards: That is objected to, if your Honor please, as being immaterial.

The Court: I will permit it.

Q. Was it there, Mr. McLaughlan?
A. It was.
Q. Was this produced in his presence?
A. It was.
Q. As a matter of fact, he brought it there, didn't he?

Mr. Richards: I object, if your Honor please.

The Court: Sustain the objection.

Q. Now what conversation did you have with Mr. Young concerning this stock, if any, before drawing the agreement?

Mr. Richards: That is objected to, if your Honor please.

The Court: That seems to be the crux of the case. I will hear you gentlemen on that.

Mr. Richards: Your Honor please, it seems to me certainly this is the law that where the parties agree that the value of the consideration shall not be thereafter questions, as in this agreement, this agreement saying, "No representation has been made as to the value of the said stock by Mr. Young," and that being the sole consideration for this contract, it doesn't now lie in the mouths of these people to come here and say that representations were made and that those representations

were false. Now this wasn't like sometimes happens in some cases where the agreement is in fine print, and is not brought to the attention of the parties, but in this case it is admitted that this clause was deliberately inserted in this contract at the time it was written with the full knowledge of all the parties. The present witness testifies that Mr. Young handed this memoranda to Mr. Bouvinger, another officer of the company, and that he inserted. Mr. Young says that all the contract was written or dictated by the president of the defendant company. Now in either case and under either circumstance this was in there with full knowledge of everybody and was immediately executed. Now after this agreement solemnly sets forth that there is no representation concerning the value of the stock, to permit the parties at this time to give evidence concerning its value or lack of value or representations concerning its value by the complainant would be, of course, to absolutely set aside the rule concerning the varying of a written contract by parole, and in its most essential characteristic, that is the consideration. Now, unless counsel on the other side can find some authority for that—which I assume does not exist in any Anglo-Saxon jurisprudence anywhere—certainly your Honor would not hear the evidence that is now proposed to be produced. That, of course, is what the answer sets up, and it is the vital point in this case. I don't think it is necessary to cite any cases to your Honor, the rule is so familiar and so well-known that it seems futile to bother you with citations on the subject.

The Court: The only question is, is this statement within the rule? It is a mere statement of some extrinsic fact altogether, which may or may not be true. There is no connection with it in any way that it is a part of the moving of the contract at all. It is just an insertion that something did not happen. Couldn't it be just exactly the same as a statement in it that it was signed in Ocean City when the fact was it was signed in Atlantic City, if such had been the fact, or if there was a statement in there it was signed in Atlantic City when, as a matter of fact, it was in Ocean City, as it was done? Is it a part of the contract as a contract? Does it have any connection with the contract at all?

Mr. Richards: If your Honor please, certainly is. The consideration was the transfer of this stock, wasn't it?

The Court: Yes.

Mr. Richards: That being the fact, it was very likely that some discussion concerning the value of the stock was had. Now stock has a variable value, any stock has, and this stock, incidentally, had no par value, so that there was no indication upon the face of it what its value might be. Now the parties to that situation might very well have wished, and particularly Mr. Young might have wished to anticipate the possibility of this very thing happening and the consideration, that is the moving consideration here outside of the deed was the stock, so as to put that beyond the pale of controversy was the

very reason for that statement. It was just as much a part of the contract as the part that immediately preceded it, "Title to the Ocean City Gardens Lots shall be free and clear excepting mortgage in the sum of $4750, covering said lots, accrued interest, 1929 taxes on said mortgage, and lots to be represented in a note executed by the party of the second part in favor of the party of the first part for four months." Every statement is put in the form of a statement, if your Honor please, if you notice, "All of the foregoing property for and in consideration of ten thousand shares of common stock of the National Land Value Refunding Company of New York, incorporated, said stock now being in the name of Charles W. Young, stamped not to be transferred prior to December 1st, 1929." All of these are in the form of statements. Then comes the serious statement: "No representation has been made as to the value of said stock by Mr. Young. Title to the above shall be such as shall be insured by the Ocean City Title and Trust Company at their regular rates. Settlement to be made on forty-eight hours' notice," &c.

Again, if your Honor please, let me call your attention to this, which seems to me to settle the thing so far as this is concerned, reading above—your Honor have the copy of the agreement before you?

The Court: No.

Mr. Richards: Suppose you take mine and I will take Mr. Rauffenbart's copy. Beginning above, after stating generally whom the parties are to the

contract, says, "for and in consideration of the sum of one dollar, each to the other in hand paid, receipt of which is hereby acknowledged, party of the first part agrees to sell and party of the second part agrees to buy all of said tracts of land situate in the city of Ocean City, county of Cape May, described as follows:" then comes the description, then "subject to the following terms and conditions"—then each one of them is limited. Now how is it possible to say that this is a mere statement? It is one of the terms and conditions, to wit, that "no representations were made as to the value of the stock by Mr. Young."

Everything that follows of the terms and conditions is that the title to be free and clear of encumbrance, that the lots known as the Ocean City Gardens shall be free except of a mortgage of $4750. The interest and taxes shall be represented by a note; that the consideration shall be ten thousand shares of common stock now in the name of Young, not transferable until December first. No representation has been made as to the value. The title shall be such as shall be insured by the Ocean City Title Company. Settlement shall be on forty-eight hours' notice. That agreement shall extend to and be binding on the heirs, executors, &c. Now, how is it possible to pick out any one of the elements in this thing and say that is a statement, and not a part of the contract? Because the words certainly "subject to the following terms and conditions" governs everything that follows it and everything is in the same form. Doesn't state "it is agreed, specially agreed or understood," as everything is a

statement that follows that statement, but, it seems to me that there can be no question then but what it was agreed as a part of this contract that no statement had been made by Young as to its value, therefore that the value of the stock was not in the contemplation of the parties.

Mr. Rauffenbart: If the Court pleases, the rule is that specific performance will only be decreed where complete justice can be done.

The Court: Suppose that is all true, Mr. Rauffenbart, let me ask you this question: Suppose Mr. McLaughlan goes upon the witness stand, as he has, and says representation was made; suppose Mr. Bouvinger goes on the stand and says representation was made, could I consider their testimony as binding over the seal of the company? They have said it wasn't so. Would I be justified in saying that they made an agreement with Mr. Young which contained a false statement, and that they came into equity now and say that they are entitled to relief because what they signed before was false, and the proof of the falsity is their own statement?

Mr. Rauffenbart: Now, if the Court pleases, he who comes into equity must do so with clean hands, and this Court is not going to sit and enforce an agreement even though a man was slick enough to have his vendors include in that agreement a statement such as this man got these people to put in there. Now I want to call the Court's attention to this in Pomeroy: "It is sufficient to defeat specific

performance that a statement is actually untrue so as to mislead the party to whom it is addressed."

Notwithstanding this statement being in this agreement, if we can show that this man came in there and made certain statements, which we believed and which we acted on, and which we afterwards found to be untrue, and which we propose to prove were untrue, by following up this testimony, will this Court decree specific performance? It would only to my mind, this clause being in there and having been suggested by this man, raise a suspicion in the mind of the Court that all was not well about this stock and he knew it. Now here Pomeroy says—and it is the law—that if they make a statement, which is untrue, and which leaves these men to make this deal, then they won't enforce it.

Now that is what we propose to prove, that he came in and made certain statements, that is, he said, "it is treasury stock; I gave eighty thousand in value for it." He told them that he was a man of means and got into their confidence, they relied on him, considered him a man of good judgment, from what he had told them, believed him and acted on it, and we find it is a lie. Now is this Court, in the face of that statement, in the face of the proof we propose to produce here, going to say that this man is entitled to specific performance of this agreement?

The Court: You, however, do not answer the question that I asked of you, how can this Court, if these two witnesses, who were present, swear that representations were made by this man, how can I

accept that as being the fact in the face of their signed statement that it was not so.?

Mr. Rauffenbart: We are simply offering these as statements made by this man which induced them to act, and we are offering to prove that these statements which he made were untrue.

The Court: That is not the point I have asked you. I have asked you what probative force can it be in this Court's mind if Mr. McLaughlan swears that they were made when here, over his signature and the seal of the company, he says they were not made? What probative force? I am now talking about the machinery of it. Can I say that I believe him?

Mr. Rauffenbart: With the broad powers of this Court, if the Court pleases, there is no question in my mind, where the rules says "specific performance will only be decreed where complete justice can be done."

The Court: It is useless for me to argue the question. You decline to answer the question.

Mr. Rauffenbart: I don't decline. May I ask the question be repeated?

The Court: The question is this: suppose both Mr. McLaughlan and Mr. Bouvinger go on the witness stand and swear that such representations were made, how can the Court find that to be fact if each

of the witnesses have signed a statement in which another fact is stated?

Mr. Rauffenbart: If the Court please, the contract reads this way: "No representation has been made as to the value of said stock by Mr. Young." Now that means just this, that Mr. Young didn't say to them, "This stock is worth eighty thousand dollars." That is what it means, if the Court please. We are not attempting by this testimony to show that. I think the Court can fairly interpret that as meaning just that, that they didn' say so. He didn't in dollars and cents say what this stock was worth, if the Court pleases. I am not attempting to prove that. I am not attempting to show that he said this stock is worth eight dollars a share. I am not attempting to show he said it was worth five dollars a share, if the Court pleases. I am not attempting to do that at all. Now this question would arise, here is the question they put to him, "Now, Mr. Young, is this treasury stock? Did you pay full value for it?" And he told them he did. Now, suppose that that stock had been issued by this company without any consideration, and it was called in by the company? There is another question to be considered. This contract, we submit, covers that phase of it, that he didn't. We don't say that he did say to us that this stock was worth eight dollars a share, if the Court please, or five dollars a share. That is the interpretation this Court can put on it and the interpretation should be put on it, but we come in here and say this man as to other things told us falsehoods which were

material and which we relied on and induced us to sign this contract.

Mr. Richards: If your Honor please, as to whether or not it was treasury stock or paid full value wouldn't make any difference. That would be entirely immaterial, if your Honor would receive that, but that is not the issue. The issue is here, as made by the answer, "That further answering the whole bill and the equity thereof defendant avers that it is informed and believes and states the truth to be that said ten thousand shares of common stock of National Land Value Refunding Company was not of any value whatsoever, that its sole asset consists of a tract of meadow land near Pleasantville, Atlantic County, New Jersey, carried on its books for so much," &c., and it was sold at a fictitious price and complainant given credit for the value of this land—the consideration of said conveyance and purchase price of said land was the sum of $20,000 to be satisfied as follows—instead of two hundred thousand, as alleged, and defendant therefore charges the said stock is valueless, that it was issued and held by complainant fraudulently, without consideration by the National Land—or said complainant, directors and officers of said corporation, and is void in his hands, even though said stock has been issued and that the same has no value. Now I would concede that an inquiry as to whether or not the complainant holds this stock legally might be made by this Court, but I do not concede that the defense, that it has no value whatever, can be considered by this Court, and, of course, as your Honor

says, this statement is like a confession, if Mr. McLaughlan swears now to a whole series of facts relating to representations concerning the value of this stock you are met both, it seems to me, by the contractual obligation as well as the probative statement, that he has already said that no such representation was made, so that in neither case, I think, both from the legal side and from the factual side, your Honor cannot go into that question, and therefore that this question is immaterial.

(Question repeated.)

The Court: If that is limited concerning the ownership of the stock, I will permit it. I will exclude any conversation concerning the value of the stock, if any.

(Question withdrawn.)

Q. Did you ask Mr. Young what he paid for this stock?

Mr. Richards: That is objected to.

The Court: I will permit that as some element whether he held title to the stock, not as to its value at all.

Mr. Richards: If your Honor please, it seems to me the way to prove his title to the stock is by the proper official of the National Land Value Refunding Company.

The Court: Yes, probably true.

Mr. Richards: Not by what he paid for it, long as he paid value for it and it was in his possession.

The Court: That can be answered yes or no.

A. Yes.
Q. What did he say?

Mr. Richards: That is objected to.

The Court: I will sustain the objection.

Q. Did you ask Mr. Young whether or not this was treasury stock?

Mr. Richards: That is objected to.

The Court: I will permit that.

A. Yes.
Q. What did he say?

Mr. Richards: That is objected to.

The Court: I will permit that, the question that it was treasury stock you may answer.

A. He said it was treasury stock.
Q. Did you ask Mr. Young what he took the stock in at?

Mr. Richards: That is objected to.

The Court: Sustain the objection.

Q. Did you ask Mr. Young whether or not he gave full value for the stock?

Mr. Richards: That is objected to.

The Court: Sustain the objection.

Q. Did Mr. Young tell you that he took the stock in at eight dollars per share and gave full value for it in conveyance of real estate?

Mr. Richards: That is objected to.

The Court: Sustain the objection.

Q. I show you a letter marked Exhibit C2, Ocean City Title and Trust Company, directed to the McLaughlan-Conover Company, dated November 23, 1929; did you receive that letter, Mr. McLaughlan?

A. I saw it in the office.

Q. Do you know what day of the month November 23, 1929, was on, what day of the week?

A. Saturday.

Q. You received this through the mail on the following Monday, did you?

A. We did.

Q. Now did Mr. Young see this statement when you were there?

Mr. Richards: That is objected to.

Q. Of the National Land Value Refunding Company?

(Statement marked D1 for identification.)

The Court: I will permit the question.

A. He did.

Q. Did he tell you what this item of real estate and mortgages represented, $214,000?

Mr. Richards: I object.

The Court: Sustain the objection.

Cross-examination.

By Mr. Richards:

Q. Did you have this statement that has been marked D1 for identification prior to the time that Mr. Young was there?

A. We did.

Q. You had it in your possession, did you?

A. We did.

Q. What is your business, Mr. McLaughlan?

A. Real estate development.

Q. You draw many contracts for the sale of real estate, don't you?

A. I have.

Q. You drew this particular contract?

A. I dictated all but that one paragraph.

Q. Well, you knew that the paragraph was in there?

A. There was some discussion about putting it in before we put it in there.

Q. You talked about putting it in?

A. When he handed that over to Mr. Bouvinger we objected to putting it in there.

Q. Then after you objected you put it in?

A. After he explained what he meant.

Q. After that you put it in?

A. Yes.

Q. And signed the agreement with the statement concerning the fact that he had made no representation about the value of the stock?

A. After he explained that.

Q. Wait a minute; you signed it after that was put in there?

A. After we got the explanation.

Q. Now prior to the date of the signing of this contract you not only seen this statement marked D1 for identification, but you had seen other statements of this company, hadn't you?

A. I don't recall seeing any other statement.

Q. Did you or your company sell or offer for sale any of the stock of this company?

A. Never considered selling any of the stock, had no interest in selling any of the stock.

Q. Did anybody in the company sell any of it or offer it for sale?

Mr. Rauffenbart: That is objected to, if the Court please.

The Court: If he knows, I will permit it.

Q. If you know?

A. I don't know of any stock being offered by any member of the company for the company.

Q. Was there any bonds of the National Land Company offered for sale by your company?

A. No, sir.

Q. Did you ever cause any advertisement to be inserted in the Ocean City papers offering such bonds for sale or stock for sale of this company?

A. Did I?

Q. Yes.

A. No.

Q. Did anybody in your firm do that?

Mr. Rauffenbart: That is objected to, if the Court please.

The Court: If he knows I will permit it to be answered.

Mr. Rauffenbart: How could that affect the company anyhow, anyone interested in the company, in an outside transaction, as an individual? I don't see how it could be done unless was by the company.

The Court: No, couldn't except it is connected so far as the company is concerned. It is a preliminary question.

(Question repeated.)

A. We was selling bonds.

Q. Or stock of this company?

A. I can't answer that question without explaining.

Mr. Rauffenbart: If the Court please, Mr. McLaughlan has said his company never had anything to do, never offered any stock or any bonds.

(Question repeated.)

Mr. Rauffenbart: I think that question should be reframed and ask him whether or not anybody did that for his company.

The Court: He can answer the question, if he can; if not, he can say so.

A. Nobody representing the company has sold no bonds or getting any business for the company; I don't know anything about selling bonds.

Q. You mean no one acting for the company did that, is that what you mean?

A. Yes, selling any bonds.

Q. Did any officer of the company, to your knowledge, independently of the company, offer for sale any stock or bonds of this company, and, in that connection, use either this statement D1 for identification or any similar statement to your knowledge?

Mr. Rauffenbart: Now, if the Court please, independently of this company, and I don't suppose any knowledge obtained independently of this company, but not acting for the company would bind the company.

The Court: It might not bind the company, but

might show knowledge on the part of this witness. I will admit the question.

Mr. Rauffenbart: But the action here is against the company.

The Court: I will admit the question.

A. When you ask about selling bonds I don't know anything about selling bonds.

Q. About stock?

A. No, there was nothing ever talked about selling any stock.

Q. What, Mr. McLaughlan, is the office address of your company?

A. 520 Ninth Street, Ocean City.

Q. Ralph R. Bouvinger is the treasurer of the McLaughlan-Conover Company, is he not?

A. He is.

Q. I want to ask you again whether or not you are sure that Mr. Young saw this statement marked D1 for identification?

A. We discussed it prior to signing the agreement.

Q. Now what I want to get at is this, are you sure it was this statement, or whether it was another statement, preceding statement of this company that you saw or that he saw at that time?

A. Do you mean by that whether that is printed on a different piece of paper or not?

Q. Yes.

A. If that is not the same statement, the statement is similar whether printed on that piece of paper or not.

Q. That is what I am getting at, you are not undertaking to say that the statement in the identical form and on the same paper as this was the paper that was present on the day that you signed the contract, are you?

A. Looks to me like the same one.

Q. Are you prepared to say that it is.

A. I am prepared to say it is.

Q. You are prepared to say it is.

A. Yes.

Q. There is no doubt in your mind about that?

A. I can't see how there could have been any other; it is the only one I remember of seeing.

Q. There is on one side of this paper a lot of funny looking things that look something like a test tube to me or elongated question mark, or something of that kind; you ever see that in that form on any other piece of literature of this company?

A. I can't recall that.

Q. Did you ever see it anywhere else?

A. I may have seen it in some advertisement in some newspaper or something; I don't recall. I am not sure about that.

Q. Are you quite sure that it was this particular statement, printed on this particular paper, that you had on the twenty-ninth of November in the office and which you discussed with Mr. Young, or that it was some other similar statement?

A. That appears to me, as far as I can remember, as being the statement.

Q. The trouble with this ——

A. I know about the figures there.

Q. That is the point you are referring to?

A. We discussed the figures.

Q. Mr. McLaughlan, you are referring to the figures on this paper, aren't you?

A. Yes.

Q. Those are the things that you are interested in?

A. Those are the figures we discussed.

Q. You see the trouble is that Mr. Young was asked by Mr. Rauffenbart whether or not this paper was present, and he has answered no. Now what you are trying to tell the Court is that it isn't so much this paper as it is the figures that was there, isn't that right?

A. Well, my recollection is the figures. I believe it is the same statement.

Q. But your recollection is concerning the figures and not the statement, isn't it?

A. I had in mind the figures on that statement.

By Mr. Rauffenbart:

Q. In answer to a question of Senator Richards you said that at the suggestion of Mr. Young you inserted this clause in the agreement after you got the explanation; now what was that explanation?

Mr. Richards: I object to that, if the Court please.

Mr. Rauffenbart: If the Court please, I think I am entitled to that.

The Court: I think you are entitled to it.

Q. What was that explanation?

A. Mr. Young says, I says, "Well, what is the idea of putting that in?" He said, "Well, you know we discussed this statement," and he says, "I am not going by that statement." I said, "Well, what we are interested in, Mr. Young, is did you give full value for that stock," and he says ——

Mr. Richards: No.

The Court: Yes, I will permit it.

A. He says, "I delivered eighty thousand dollars' worth of land." I says, "Well, we are interested in whether that stock was issued to you in return for full value." He said, "It was absolutely. I gave eighty thousand dollars' worth of land." I said, "That is what we are interested in."

Q. Now did you believe that?

A. We did.

Mr. Richards: If your Honor please, I ask that it be stricken on the ground that it was not responsive; that furthermore it is an attempt now to get in by indirection what he couldn't get in directly, and, thirdly, that it doesn't explain the statement, and, fourth, if it did explain that statement, the statement does not require an explanation.

The Court: It can only be received in so far as the question was asked on cross-examination, and the witness said he couldn't answer it without an explanation. The answer was insisted upon with-

out the explanation, and now he is entitled to make the explanation, only so far as that inquiry is concerned. It has no other probative force at all.

Mr. Rauffenbart: If the Court please, just hear me for a minute. My opinion is that, even though this clause appears in there, if they were induced to put that clause in there by statements made by this man and they believed those statements, and did put it in there and it was afterwards found out that those statements were not true, that this man, by his fraud, procured this contract.

The Court: I am prepared to rule upon that point. Certainly parties can't make a contract in which they specifically say certain things were not done and then come in and say that those things were done. I am prepared to rule upon that point.

Mr. Richards: If your Honor please, there is no issue of that kind here.

The Court: I have ruled upon that point continuously. I don't think there is any question. There is an issue that there was no value, not value, but I mean that he was not the bona fide holder of them. Now to that extent I am permitting you to prove what was said concerning that. I have admitted the question and permit you to make that explanation, and now refuse to strike it out upon the grounds I have just made that he is entitled to make an explanation of an answer which he is compelled to answer yes or no.

Q. Have you completed your explanation of why, the explanation he made to you before you put this clause in the agreement?

A. Mr. Bouvinger also questioned him about the same thing before you put that in; was quite some discussion.

Q. Would you have signed the agreement if he had not made that statement to you?

Mr. Richards: Wait a minute; I object.

The Court: Sustain the objection.

Mr. Rauffenbart: Is that because it is not covered by the pleadings, one of the reasons?

The Court: That is one of the reasons.

Mr. Rauffenbart: May I move at this time to amend my answer to include that?

The Court: It is untimely. This matter has been at issue for some time.

Q. Mr. McLaughlan, did you—you refused to go through with the contract, did you?

A. We did.

Q. And why?

Mr. Richards: That is objected to.

The Court: Sustain the objection.

Mr. Rauffenbart: If the Court please, the purpose now is to show that they ascertained that this stock was of no value.

The Court: How is that admissible? I have already ruled that you can't show that.

Mr. Rauffenbart: We can't show the stock was of no value?

The Court: No, you can show this man had no title to it. Makes no difference whether it has any value or not. You have waived that.

Mr. Rauffenbart: The only way, if the Court please, we can show that he had no title would be to show that he obtained this stock from this company in fraud, and the only way we can show that is to show that this land which we put into the company at eighty thousand dollars was encumbered for the full amount which he was supposed to pay for it; in other words, that there was absolutely no equity over and above the mortgages which were on the property, and the later one he created.

The Court: How does that affect title?

Mr. Rauffenbart: In this way, that was done and followed up later on by a deed which was made to this company by Mr. Young's nominee for a consideration of $214,000. We are prepared to show that through the title company and the title company, I understand, refused to insure because Mr.

Young could not procure from his nominee an affidavit as to that consideration. Those facts, we contend, will show that this transaction from its inception, from the time he took title to this ground until he conveyed it and down to the time that he induced McLaughlan-Conover Company to make this transaction reeked with fraud. He knew it, and that he, in conjunction with Mr. Beach, the president of the company, who has since disappeared and unable to reach him, conceived and made this transaction, and that the stock was then turned over from the company to him through Beach without any consideration. We are prepared to show, with an officer of the company here, that it is the intention of the company to institute suit for the purpose of recalling this stock or cancelling the issuance of this stock on the ground of no consideration and issued in fraud.

The Court: Do you admit that this Court, upon this matter, can say that stock issued by a company and the title thereto in the party to whom the company made it is invalid without the company being a party in any way?

Evidently the company has never objected to this stock being held by Mr. Young. Can you, as a third party, outside, without making the company a party or having any connection in it, claim that this stock, that the title is not in Mr. Young?

Mr. Rauffenbart: Even though suit has not been instituted, if the Court pleases, if we can show these facts through the officer of the company I do

not think there is any question about that, that the stock was procured in fraud. If it was procured by Young in fraud in its inception he never acquired any title to it.

The Court: Do you mean to say that you can prove that there is fraud between Young and the company in an action in which the company is not even represented, not a party to in any way?

Mr. Rauffenbart: I do not think that the company is a necessary party to this action, if the Court pleases. Our defense here is that this stock was obtained in fraud, had no value, and we attempt to show that value by showing, if the Court pleases ——

The Court: You are getting right back to the value which you have barred yourself from showing.

Mr. Rauffenbart: Under our answer we have said this stock is worthless. We are going to attempt to prove that by the officers of the company, and was worthless at that time.

The Court: Suppose I find that it is worthless, you are still bound by your contract, if you are not bound some other way, having accepted this stock regardless of its value, have to take upon yourselves the onus on that point.

Mr. Rauffenbart: But they say that they were in-

duced to sign this contract not by representations by this man of value in dollars and cents, but by what he paid for it, relying on his judgment and his representation to them that he was a man of means, a man of property, and they relied, to some extent and had a right to, on what he said to them and the truth of what he said.

The Court: I will sustain the objection.

Mr. Rauffenbart: We propose to offer proof here, if the Court please, to save time, that this piece of real estate which Mr. Young conveyed to the National Land Value Refunding Company of New York was conveyed to them by a deed through his nominee setting forth the consideration of $214,000; that the statement of the company, which was before these gentlemen at the time the agreement was signed, showed real estate and first mortgage, $214,525. I propose to show that the only piece of real estate that they had was this piece of real estate which was conveyed by this deed for that consideration, that they had no other tangible assets. I propose to show that this real estate which Mr. Young conveyed had a value at that time of somewhere between two thousand and five thousand dollars; in other words, that he conveyed no equity to this company, that at the time that he made this transaction with these people this statement was before him, and he knew that this stock was worthless, that this $214,000 of real estate was the only tangible asset, and that was a fictitious value, and that he had knowledge of this transac-

tion from its beginning. He represented himself to one of the mortgagees there as an officer of the company and representing the company in their transactions, Mr. Pardon Adams, and changed a contract which had been drawn by the company respecting the payment of that mortgage. That he represented to Mr. Fell, of the Schwehm building, that he was an officer of this company just prior to the making of this transaction, and procured from him a key to the company's office in the Schwehm building. That he, in other words, had knowledge of all these things, and, having such knowledge, did not disclose this fact to the McLaughlan-Conover Company.

Mr. Richards: My answer to that is that ——

The Court: You object?

Mr. Richards: Yes.

The Court: Sustain the objection. I will refuse to hear testimony to prove facts as suggested by Mr. Rauffenbart.

RALPH R. BOUVINGER, sworn.

Direct examination.

By Mr. Rauffenbart:

Q. Mr. Bouvinger, I show you Exhibit C2 of the Ocean City Title and Trust Company, letter to McLaughlan-Conover Company; you saw that letter?

A. Yes.

Q. That is dated November twenty-third?

A. Yes.

Q. According to the calendar that was a Saturday, and I understand you received this on the following Monday?

A. Yes.

Q. The previous Friday did you meet Mr. Young with Mr. Price in the Ocean City Title and Trust Company?

A. I met them inadvertently in the lobby.

Q. Were you notified at that time that settlement would be made on the following Monday at one-thirty?

A. No.

Cross-examination.

By Mr. Richards:

Q. What day was it you met Mr. Young?

A. Where?

Q. In the lobby.
A. Friday.
Q. That was the day before?
A. Yes.
Q. That settlement was to be the following day, is that what you mean?
A. No.
Q. When was the settlement to be?
A. I didn't know at that time.
Q. Didn't you talk about the settlement?
A. No.
Q. On Saturday did you see Mr. Young in your office?
A. Yes.
Q. Did you object to the date of the settlement?
A. Sir?
Q. Did you object to the date of the settlement?
A. You asked me did I see Mr. Young on Saturday in my office?
Q. Yes.
A. I didn't see Mr. Young on Saturday in my office.
Q. Was that the day of the settlement?
A. No.
Q. Monday was the day of the settlement?
A. Yes.
Q. On Monday you saw him?
A. Yes.

Mr. Rauffenbart: If the Court please, I object because it is not cross-examination.

The Court: You have asked him about one day

and two days prior to the settlement, and I think that is so closely connected that on cross-examination ——

Mr. Richards: Trouble was Mr. Rauffenbart did, and the testimony, Mr. Young's testimony is ——

The Court: I have admitted the question.

Mr. Rauffenbart: I was rebutting up to that one question whether or not he had met Mr. Young in the title company on that Friday.

The Court: He said he had.

Q. You met him on Friday, the settlement was on Monday?

A. I didn't know it then.

Q. When did you know it?

A. Monday.

Q. You didn't know it until Monday?

A. No.

Q. You saw Mr. Young on Monday, did you?

A. Yes.

Q. At that time did you tell him you were not prepared to settle then?

A. Yes.

Q. You did?

A. Yes.

Q. Why?

A. Because of questions that had come up and which had awakened our suspicions and our doubts as to whether it would be wise to go ahead with it.

Q. Hadn't anything to do with the fact that you were all ready with the deed, you were all ready with the deeds, weren't you?

A. We hadn't prepared any deeds.

Q. You hadn't prepared any deeds?

A. No.

Q. Your refusal to settle on Monday ——

Mr. Rauffenbart: That is objected to, if the Court please. I can't see it is cross-examination.

The Court: Don't answer and I will hear it.

Q. —— related to something connected with the consideration of the transaction, did it not?

Mr. Rauffenbart: That is objected to, if the Court please.

The Court. I will sustain the objection. Not cross-examination at all.

Q. What conversation did you have on Friday with Mr. Young, Mr. Bouvinger?

A. Nothing in particular. My recollection of the meeting was simply "How do you do?" We were simply in the lobby, I came into the lobby there inadvertently on other business, and I assume Mr. Young was there on other business just the same as we met downstairs in this building, we didn't meet by appointment. I didn't know he was there. Didn't know he was to be there.

Q. On any day prior to that day had you dis-

cussed with Mr. Young the time of settlement on Monday?

A. We didn't know of any settlement on Monday.

Q. You didn't know anything about that?

A. No.

Q. You had never discussed at any time prior to Monday, the twenty-seventh, was that of November, 1929, a day of settlement; is that what you want to say?

A. We didn't know of any date.

Q. It isn't whether you knew about it; what I want to find out is whether you want to say now that neither on the twenty-third nor at any other day prior to the twenty-ninth, did you discuss the day of settlement with Mr. Young?

A. No.

Q. So it isn't a question of date? What I am getting at is this that there was no time prior to the twenty-ninth?

A. You are running from twenty-third, to twenty-fifth, to twenty-seventh, to twenty-ninth.

Q. No time prior to the twenty-fifth, that is Monday, the day of the proposed settlement, had you any discussion with Mr. Young concerning that date of settlement?

A. No.

Mr. Richards: Now have you got, Mr. Rauffenbart, a letter from Mr. Young dated November 23, 1929?

(Letter produced.)

Q. I show you a letter dated Philadelphia, Pa., November 23, 1929, signed Charles W. Young, envelope addressed McLaughlan-Conover Company, 520 Ninth Street, Ocean City, postmarked November 23, 12.30 P. M., 1929, Philadelphia, with the return card in the corner, C. W. Young, 1632 Latimer Street, Philadelphia, and ask you whether you received this letter in this envelope?

A. Well, I didn't receive this letter until Monday.

Q. I am not asking you that. I am asking you whether or not, first of all, this letter came in this envelope, it was so produced by your counsel just now?

A. Yes. It evidently did.

Q. Now you say you saw this letter on Monday?

A. Yes, it didn't arrive on Sunday. We have no delivery on Sunday.

Q. Reading the letter, it says, "After leaving your office I took the four o'clock bus to Atlantic City and have just arrived in Philadelphia. The original contract in the South Jersey Title Company settlement sheets are at my home, and, as I will not get there until late, I will bring them down Monday for the settlement, which, as you know, has been arranged by the Ocean City Title and Trust Company at their office Monday, November 25, 1929, at 1.30 o'clock. Trusting everything will be ready at that time, with kindest regards, I am, cordially yours, Charles W. Young. Attention, Mr. William H. McLaughlan, President." Does that now refresh your memory that you did have a conversa-

tion in the Ocean City Title and Trust Company on Friday with Mr. Young?

A. We had no conversation in reference to any settlement date. Mr. Young is assuming that I knew about it, but I had no knowledge of it. He is putting an assumption in my mouth. I didn't put it there.

Q. What I am getting at, Mr. Bouvinger, is this, does this now refresh your memory that on this Friday when you met Mr. Young you did discuss the settlement?

A. No.

Q. It does not?

A. No.

Q. Does it refresh your memory that you had such a discussion in your office on that Friday or any day prior to the twenty-fifth?

A. No.

Q. Did you tell Mr. ——

(Letter and envelope marked C7 and 8 for identification.)

Q. When you saw Mr. Young on Monday, did you say anything to him about not having had any conversation with him prior to the twenty-fifth relative to the settlement?

A. I don't remember any such conversation.

Q. You mean you don't remember having any conversation with Mr. Young on the twenty-fifth, or you don't remember any conversation like that?

A. Like that.

Q. You had seen this letter prior to the time Mr. Young came in on the twenty-fifth?

A. Sure, Monday morning mail.

Q. How do you get the mail, the McLaughlan-Conover mail?

A. By delivery.

Q. At the office?

A. Yes.

Q. You also have a postoffice box?

A. No.

Q. While you are on the stand, I don't know whether this is going to become important, but you are here and I want to get you to identify for me certain advertisements.

Mr. Rauffenbart: I am going to object.

The Court: The witness is now Senator Richards' witness.

Mr. Richards: Yes, for this purpose.

Q. I show you a full-page advertisement in the Ocean City Sentinel Ledger and News of Ocean City, Friday, September 20, 1929, entitled, "Sound Land values can be guaranteed against loss." Then comes quite a lot of reading matter. At the bottom is, "National Land Value Refunding Company of New York, Inc., Charmen Towers Building," and above it, on the right-hand side of the page is, "Bond applications may be had of Ralph R. Bouvinger, 520 Ninth Street, Ocean City, General Agent for Cape May County. Bonds may be delivered

through the First National Bank, Ocean City, Depository for premium payments." I want to ask you whether or not you are the Ralph R. Bouvinger mentioned in this advertisement?

Mr. Rauffenbart: That is objected to, if the Court please. I don't know what their purpose is, what they intend to rebut. The Court has already denied us and refused to receive any evidence concerning the value of this stock. We were confined to facts only which would, as the Court put it, as to the ownership, whether or not this man owned this stock, and this has no relevancy, rebuts nothing that is in the case, and, for that reason, is not admissible.

The Court: I will sustain the objection at this time.

Mr. Richards: I think at this time it probably is. I simply said while he was on the stand I wanted to ask him that.

Mr. Rauffenbart: We rest on the statement we made, if the Court please.

The Court: Now, gentlemen, is this case properly in court? According to the contract this sale could not and the delivery of the stock could not be made until after the first day of December, 1929. There has been at no time any tender or suggestion of an

offer to complete this contract until in the court room, and I take it that there must at least be some offer before the issue can be raised. It is in the contract, and, I assume, in the stock that the stock cannot be delivered by Mr. Young to the company until after the first day of December, 1929.

Mr. Richards: It doesn't say that, if your Honor please. The notice on the back of the stock is "Notice to register and transferee."

The Court: Your contract, however, is that it is stamped not to be transferred prior to December first, 1929. Now it can't, if stock cannot be transferred, it cannot be delivered in its totality.

Mr. Richards: If your Honor please, I think so. The transfer on the books of the company—this is what the certificate has stamped on the back, "This certificate is not transferrable upon the books of the company until December 1st, 1929."

The Court: And it is, therefore, subject to any attack which may be made against it up to that date.

Mr. Richards: That is right. Now, if your Honor please, this contract was dated November 7, 1929, less than a month before, and the contract, recognizing that fact, provides that said stock, now being in the name of Charles W. Young, stamped not to be transferred prior to December 1st, 1929, and again it says, the agreement says, that this is one of the

things this was subject to, one of the terms and conditions was that stock may be transferred between the parties by the physical transfer of the stock. Its transfer upon the books of the company is a different proposition. Now they took that subject to this so that they not only had the notice in their contract, but they took it subject to the knowledge that it wasn't transferable on the books of the company until that date. Now I am very glad to give your Honor citations on that, if I thought that would be important.

The Court: Yes, I think that is, as I see it, at the present time, the important point before the Court.

Mr. Richards: And, of course, as Mr. Kreps suggests, the tender in court was a proper tender because time was not made of the essence of this contract.

The Court: Yes, but I don't conceive that specific performance can be based upon an effort to settle, and then come into court and say, "Yes, but we have never done it yet, but we will do it now."

Mr. Richards: Of course, it isn't raised as an issue in the case. The issue raised in the case is one we have endeavored to discuss here today, so that the point involved is not ——

The Court: The point involved is simply whether this man has a full title to this stock which he can transfer, whether they are compelled to accept

stock which has stamped upon its back, and which the contract mentions in evidence, subject to whatever may be against it on the books.

Mr. Richards: If your Honor please, the situation would be analogous to accepting even a postdated check for the value of this land.

The Court: It may be so.

Mr. Richards: And yet it would be good. It would be like taking a promissory note, like taking anything, title might pass, and where they agreed that the title, as far as the title as being a holder was concerned, could not pass until the first of December.

The Court: I will give you ten days to file a memorandum upon that point, and Mr. Rauffenbart may have five days to answer, and if you have any further argument that Mr. Rauffenbart desires to make, he may make it.

Mr. Rauffenbart: May I call the Court's attention and suggest a moment, we find on the other page there that the defense set forth the writing was procured and obtained by means of fraudulent statements. My contention would be that was fraud enough to receive that testimony.

COMPLAINANT'S EXHIBITS.

EXHIBIT C1.

This agreement made this 7th day of November 1929, between McLaughlan-Conover Company, a corporation of the State of New Jersey, party of the first part and Charles W. Young, of city and county of Philadelphia, state of Penna. party of second part.

Witnesseth, that in consideration of the sum of one dollar each to the other, paid in hand, the receipt of which is hereby acknowledged, that the party of the first part agrees to sell and the party of the second part agrees to buy all those lots or tracts of land and premises, situate in the City of Ocean City, County of Cape May, State of New Jersey, described as follows:

Being lots #1-5-6-7-8-11-12-13-15-16-17-18 section #712

" " #1-2-3-4-5-6-7-10-11-12-13-14-15-16-17-18-19-20 section #713

" " #1-2-3-11-12-13-14-15 — section #714 all of Bayside Tract, McLaughlan-Conover Company.

Also

" " #2128-2129-2130 Plan #3 McLaughlan-Conover Company, Ocean City Gardens, Ocean City, N. J.

Subject to the following terms and conditions.

Title to the Bayside Tract lots shall be free and clear excepting a mortgage in the sum of $4750.

now covering said lots. Accrued interest and 1929 taxes on said mortgage and lots to be represented in a note executed by the party of the first part, in favor of the party of the second part, for four months.

All of the foregoing property for and in consideration of ten thousand shares of the common stock of the National Land Value Refunding Co. of New York, Inc. Said stock now being in the name of Charles W. Young and stamped not to be transferred prior to December 1, 1929. No representation has been made as to the value of the said stock by Mr. Young.

Title to the above land shall be such as will be insured by the Ocean City Title and Trust Co. at their regular rates.

Settlement to be made on 48 hours notice by the Ocean City Title & Trust Company.

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

In Witness whereof, the parties hereto have set their hands and seals, the day and year first above written.

McLaughlan-Conover Company
William McLaughlan
President.
Chas. W. Young SEAL

Attest:
Ralph R. Burringer
Secretary

Witness:
Harry A. Gull

EXHIBIT C2.
6/5/30 L

William E. Massey, President
Henry D. Moore, Vice President
Clayton Haines Brick, Vice President
James F. Koch, Secy. & Treasurer
Clinton B. Price, Title Officer
Edwin R. Stiles, Asst. Title Officer
Stirling W. Cole, Trust Officer
Clarence L. Cole, Solicitor

OCEAN CITY TITLE AND TRUST COMPANY
Ocean City, N. J.

November 23rd, 1929.

A-8710.

McLaughlan-Conover Co.,
520 Ninth Street,
Ocean City, N. J.

Gentlemen:—

We have, at the request of Mr. Charles W. Young, reserved 1.30 P. M., Monday, November 25th, for your settlement with him under our A-8710. This letter is sent you at the request of Mr. Young.

Very truly,

C B Price
Title Officer.

CBP:EEL.

EXHIBIT C3-4-5-6.

(COPY)

INCORPORATED UNDER THE LAWS OF THE STATE OF FLORIDA NATIONAL LAND VALUE REFUNDING CO. OF NEW YORK INC.
Number 236 Shares 2500.
Preferred Stock 20,000 Shares
Par Value $100 Each
Common stock 400,00 Shares
Without Nominal or Par Value

This certifies that CHARLES WOOD YOUNG is the owner of TWENTY FIVE HUNDRED* fully paid and non-assessable Shares of the COMMON Capital Stock of NATIONAL LAND VALUE REFUNDING CO. OF NEW YORK, INC., transferable on the books of the Corporation by the holder hereof in person or by duly authorized Attorney, upon surrender of this certificate properly endorsed.

All of said stock, with nominal or par value shall be 8% cumulative, non-voting preferred stock and when sold shall be issued as fully paid and non-assessable. It shall have preference over common stock both in the payment of dividends and distribution of assets, as herein provided. The holders of said preferred stock shall be entitled to receive and the Corporation shall be bound to pay thereon cumulative annual dividends at the rate of 8% per annum, payable quarterly out of the earnings of the Corporation for the preceding year or years before any dividends shall be set apart or paid on

the common stock. The holders of said preferred stock shall not be entitled to participate in any other or additional earnings of this Corporation, but on the distribution of the assets of this corporation, in the event of insolvency or dissolution, shall be entitled to be repaid in full together with dividends then accrued or due thereon before any liquidating dividends shall be paid to the holders of the common stock. The Corporation shall have the option of redeeming and retiring or reissuing said preferred stock either in whole or in part at the option of its board of directors at any dividend paying date after January 1, 1930, at $110 per share with all dividends then accrued and due thereon. The holders of said preferred stock shall not be entitled to vote at any of the meetings of the stockholders of said corporation nor shall they be entitled in any event to participate in the control or management of the corporation. The said shares of stock without nominal or par value shall be common stock, and subject to the restrictions contained in the by-laws as to registration and transfer on the books of the corporation, shall possess the usual characteristics of common stock. It shall be the exclusive voting stock. Owners of common stock, when registered on the books of the Corporation, as required by the by-laws, shall when present in person or by proxy, at any and all stockholders' meetings, be entitled to one vote for each share of common stock so owned and registered on any and all questions to be voted on by the stockholders. Each share of common stock shall participate equally with each other share of common stock in the earnings of the Corporation,

(Corporate Seal of

National Land Value Refunding Co. of New York, Inc.)

but shall be deferred as to dividends and as to distribution of assets in event of insolvency or dissolution in favor of preferred stock, as hereinbefore provided

IN WITNESS WHEREOF, said Corporation has caused this Certificate to be signed by its duly authorized officers, and its corporate seal to be hereunto affixed this First day of July A. D. 1929

(signed) H. Gordon Weight Treasurer

H. Lincoln Beach President.

(On Reverse Side)

Notice to Registrar and Transfer Agent—This certificate is not transferrable upon the books of the company until December 1st, 1929.

For value Received ..... hereby sell transfer and assign unto .....

Street and Number City State

.....

the Shares of the Capital Stock represented by the within Certificate, and do hereby irrevocably constitute and appoint .....

Attorney to transfer the said stock on the Books of the within named Corporation, with full power of substitution in the premises.

Dated ..... 19 ....

CHARLES WOOD YOUNG

In Presence of

.....

CONCLUSIONS.

(Filed Nov. 3, 1930.)

IN CHANCERY OF NEW JERSEY.

Between
CHARLES W. YOUNG,
Complainant,
and
McLAUGHLAN-CONOVER COMPANY,
Defendant.

On Bill, &c.
Conclusions.
(Not for Print.)

MR. F. STANLEY KREPS for complainant.
MR. JOHN RAUFFENBART for defendant.

INGERSOLL, V. C.:

At the time of the hearing, permission was given to file briefs upon the following:

"The point involved is simply whether this man (complainant) has a valid title to the stock which he can transfer, whether they (defendants) are compelled to accept stock which has stamped upon its back, and which the contract mentioned in evidence, the words, 'Notice to

Registrar and Transfer Agent. This certificate is not transferrable upon the books of the company until December 1st, 1929.' Was such a condition sufficient to affect the consideration for the sale of the land mentioned in the contract and, therefore, justify the Court in refusing to grant a decree for specific performance?''

Briefs have been received and I am convinced that such endorsement upon the stock in question did not invalidate the consideration of the contract.

A decree will be advised in favor of the complainant. Should an appeal be taken, I reserve the right to amplify upon both the oral memorandum and these comments.

FINAL DECREE.

75/667

(Filed Dec. 19, 1930.)

IN CHANCERY OF NEW JERSEY.

Between
CHARLES W. YOUNG,
Complainant,
and
McLAUGHLAN-CONOVER
COMPANY,
Defendant.

On Bill, Etc.
Final Decree.

This cause coming on to be heard in the presence of Emerson L. Richards, Esquire, of counsel, and F. Stanley Kreps, Esquire, solicitors of the complainant, and John Rauffenbart, Esquire, solicitor of the defendant, and the Court having examined the pleadings and having taken proof orally and in open court, and heard and considered the arguments of counsel thereon;

And it appearing to the satisfaction of the Court that on November 7th, 1929, McLaughlan-Conover Company, the defendant, entered into a contract in writing whereby it agreed to convey to Charles W.

Young, the complainant, in consideration of ten thousand (10,000) shares of the common stock of the National Land Value Refunding Company of New York, Inc., by warranty deed all those certain lots, tracts or parcels of land situate in the City of Ocean City, County of Cape May and State of New Jersey, and more particularly described as follows:

Being lots #1-5-6-7-8-11-12-13-15-16-17-18 Section Number 712.

Being lots #1-2-3-4-5-6-7-10-11-12-13-14-15-16-17-18-19-20 Section #713.

Being lots #1-2-3-11-12-13-14-15 Section #714 all of Bayside Tract, McLaughlan-Conover Company, Also being lots #2128-2129-2130 Plan #3 McLaughlan-Conover Company, Ocean City Gardens, Ocean City, New Jersey.

And it appearing that the complainant tendered Title to said property to be free and clear of all encumbrances excepting a mortgage in the sum of forty-seven hundred fifty ($4,750) dollars and accrued interest and 1929 taxes to be represented in a note given by the complainant to the defendant payable within four (4) months from the date thereof; ten thousand (10,000) shares of the common stock of the National Land Value Refunding Company of New York, Inc., at the time and place fixed for settlement by the Ocean City Title and Trust Company and that said defendant refused and still refuses to deliver to the complainant a deed for said lands and premises in accordance with the terms of the agreement mentioned aforesaid;

And the Court being of the opinion that said

complainant is entitled to the specific performance of said contract as prayed;

It is on this 19th day of December, 1930, ordered, adjudged and decreed that the defendant, McLaughlan-Conover Company, a corporation of the State of New Jersey, within twenty days after the service upon the registered agent or an officer of said company of a certified copy of this decree, execute and acknowledge in due form of law and deliver to said complainant, Charles W. Young, a good and sufficient deed of conveyance for all those certain lands and premises situate in the City of Ocean City, County of Cape May and State of New Jersey, more particularly described as follows:

Being lots "1-5-6-7-8-11-12-13-15-16-17-18 Section Number 712.

Being lots "1-2-3-4-5-6-7-10-11-12-13-14-15-16-17-18-19-20 Section Number #713

Being lots "1-2-3-11-12-13-14-15 Section #714, all of Bayside Tract, McLaughlan-Conover Company, Also being lots #2128-2129-2130 Plan #3 McLaughlan-Conover Company, Ocean City Gardens, Ocean City, New Jersey.

Title to lots 2128, 2129 and 2130, Plan #3, McLaughlan-Conover Tract shall be conveyed free and clear of all encumbrances excepting a first mortgage in the sum of forty-seven hundred fifty ($4,750) dollars now existing as a lien against said lots and also the 1929 and 1930 municipal taxes which have been assessed against the same; that if said 1929 taxes have been paid by the defendant, it shall accept the promissory note of the complainant payable four (4)

months from the date of settlement as the adjustment of said taxes.

That the title to all of the remaining lots or parcels of land which are hereby decreed to be conveyed shall be conveyed free and clear of all encumbrances excepting municipal taxes for the years 1929 and 1930, which shall be assumed by the complainant.

And that upon delivery of the title to the complainant by the defendant for the lands described aforesaid that the said complainant shall deliver to the defendant ten thousand (10,000) shares of the common stock of the National Land Value Refunding Company of New York, Inc., properly endorsed so that it may be transferred on the books of the company to the defendant.

And it is further ordered that the said defendant, McLaughlan-Conover Company, pay to the complainant or his solicitor, F. Stanley Kreps, the costs of this suit to be taxed, including a counsel fee of two hundred fifty dollars, which is hereby allowed to said complainant, and that in default of the payment of said tax costs within days after the service upon said defendant of a true but uncertified copy of this decree and of said tax costs, execution issue against the goods and chattels, lands, tenements, hereditaments and real estate of the said defendant, McLaughlan-Conover Company, to make said costs according to the practice of this Court.

E. R. WALKER,
C.

Respectfully advised,
R. H. INGERSOLL,
V. C.

A true copy.
FERD GARRETSON,
Clerk.

NOTICE OF APPEAL.

(Filed Jan. 9, 1931.)

IN CHANCERY OF NEW JERSEY.

Between
CHARLES W. YOUNG,
Complainant,
and
McLAUGHLAN-CONOVER COMPANY,
Defendant.

On Bill, Etc.
Notice of Appeal.

The defendant, McLaughlan-Conover Company, hereby appeals from the final decree of the Chancellor made on December 19th, 1930, on the advice of Robert H. Ingersoll, Vice-Chancellor, in the above-entitled cause and from the whole and any part thereof to the Court of Errors and Appeals, in the last resort in all causes.

Dated: Jan. 6th, 1931.

JOHN RAUFFENBART,
Solicitor for Defendant.

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

SAMUEL MORRIS,
Of Counsel with Defendant.

Service acknowledged Jan. 7, ~~1930~~ 1931.

F. STANLEY KREPS,
Solicitor of Complainant.

PETITION OF APPEAL.

(Filed January 27, 1931.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
CHARLES W. YOUNG,
Complainant-Respondent,
and
McLAUGHLAN-CONOVER COMPANY,
Defendant-Appellant.

On Bill, Etc.
Petition of Appeal.

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

The petition of McLaughlan-Conover Company, the appellant in the above-entitled cause, respectfully shows that:

Petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date December 19, 1930, in a certain cause wherein the said Charles W. Young was complainant and the said McLaughlan-Conover Company was the defendant, in this respect, to wit: that

the said decree adjudges that the defendant, McLaughlan-Conover Company, a corporation of the State of New Jersey, within twenty days after the service upon the registered agent or an officer of said company of a certified copy of said decree, execute and acknowledge in due form of law and deliver to said complainant, Charles W. Young, a good and sufficient deed of conveyance for all those certain lands and premises situate in the City of Ocean City, County of Cape May and State of New Jersey, more particularly described as follows:

Being lots "1-5-6-7-8-11-12-13-15-16-17-18 Section Number 712.

Being lots "1-2-3-4-5-6-7-10-11-12-13-14-15-16-17 18-19-20 Section Number 713.

Being lost "1-2-3-11-12-13-14-15 Section #714, all of Bayside Tract, McLaughlan-Conover Company, Also being lots #2128-2129-2130 Plan #3 McLaughlan-Conover Company, Ocean City Gardens, Ocean City, New Jersey.

Title to lots 2128, 2129 and 2130, Plan #3, McLaughlan-Conover Tract, shall be conveyed free and clear of all encumbrances excepting a first mortgage in the sum of forty-seven hundred fifty ($4,750) dollars now existing as a lien against said lots and also the 1929 and 1930 municipal taxes which have been assessed against the same; that if said 1929 taxes have been paid by the defendant, it shall accept the promissory note of the complainant payable four (4) months from the date of settlement as the adjustment of said taxes. That the title to all of the remaining lots or parcels of land which are hereby decreed to be conveyed shall be conveyed free and

clear of all encumbrances excepting municipal taxes for the years 1929 and 1930, which shall be assumed by the complainant. And that upon delivery of the title to the complainant by the defendant for the lands described aforesaid that the said complainant shall deliver to the defendant ten thousand (10,000) shares of the common stock of the National Land Value Refunding Company of New York, Inc., properly endorsed so that it may be transferred on the books of the company to the defendant. And it was further ordered in said decree that the said defendant, McLaughlan-Conover Company, pay to the complainant, or his solicitor, F. Stanley Kreps, the costs of said suit to be taxed, including a counsel fee of two hundred fifty dollars, which was thereby allowed to said complainant, and that in default of the payment of said tax costs within days after the service upon said defendant of a true but uncertified copy of said decree and of said tax costs, execution issue against the goods and chattels, lands, tenements, hereditaments and real estate of the said defendant, McLaughlan-Conover Company, to make said costs according to the practice of said Court.

And petitioner appeals from the whole and every part of the said decree of the Chancellor as aforesaid, upon the ground that the same is erroneous for that by the evidence and according to the law of the land, the complainant was not entitled to the relief prayed for nor any other relief, and the said decree is contrary to equity.

Petitioner therefore prays that the said decree of the Chancellor may be reversed, set aside and for nothing holden. And that petitioner may have such

relief in the premises as to this Honorable Court may seem meet.

JOHN RAUFFENBART,
Solicitor for
SAMUEL MORRIS,
Of Counsel with Appellant.

AFFIDAVIT OF SERVICE.

(Filed February 2, 1931.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between CHARLES W. YOUNG, *Complainant-Respondent,* and MCLAUGHLAN-CONOVER COMPANY, *Defendant-Appellant.*	On Bill, Etc. Affidavit of Service.

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

JOHN RAUFFENBART, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I personally served a copy of the petition of appeal in the above matter, duly certified to be a true copy by the Secretary of State, on F. Stanley Kreps, solicitor for complainant-respondent, on the 28th day of January, 1931.

JOHN RAUFFENBART.

Sworn and subscribed to before me this 31st day of January, A. D. 1931.

DOROTHY APFELBAUM,
Notary Public of N. J.

ANSWER TO PETITION OF APPEAL.

(Filed Feb. 25, 1931.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between CHARLES W. YOUNG, *Complainant-Respondent,* and MCLAUGHLAN-CONOVER COMPANY, *Defendant-Appellant.*	On Appeal from the Court of Chancery. Answer to Petition of Appeal.

The answer of Charles W. Young, the above-named respondent, to the petition of appeal of Mc-

Laughlan-Conover Company, the above-named appellant;

Your respondent, not admitting the truth of all or any of the matters in said petition of appeal contained, for answer thereto nevertheless admits that a final decree was made and entered in the Court of Chancery of New Jersey in the above-entitled cause on December 19th, 1930, for the purposes in said petition mentioned as therein set forth, but as to the substance and form of said decree this respondent begs leave to refer thereto when the same shall be produced.

Your respondent is advised and believes that the said final decree is agreeable to equity; and he therefore prays that the same may be affirmed with costs to be taxed in his favor.

F. Stanley Kreps,
Solicitor for and of Counsel with Respondent.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

CHARLES W. YOUNG,
Complainant-Respondent,

and

MCLAUGHLAN-CONOVER COMPANY,
Defendant-Appellant.

ON BILL, &C.

ON APPEAL FROM CHANCERY.

BRIEF OF DEFENDANT-APPELLANT.

This was a bill for specific performance by Charles W. Young against McLaughlan-Conover Company. Complainant and defendant entered into an agreement in writing bearing date November 7, 1929. The writing provides among other things,

New Jersey State Library

that the defendant, McLaughlan-Conover Company, shall convey to the complainant, Charles W. Young, certain lots of land in Ocean City, specifically designated and numbered, in payment for which the complainant agreed to give defendant 10,000 shares of the common stock of the National Land Value Refunding Co. of New York, Inc., standing in the name of Charles W. Young. The agreement provided for "Settlement to be made on 48 hours' notice by the Ocean City Title & Trust Co." Defendant contends that it was induced to enter into the contract by means of fraudulent statements and concealments touching facts so material to the subject-matter thereof as to induce a court of equity to refuse its aid to the complainant and deny the remedy of specific performance. No place is designated in the writing at which settlement shall be made. The title company, by letter dated November 23, 1929, at the request of complainant, fixed the date for settlement as Monday, November 25, 1929, and the place, inferable from its letter, at the office of the title company in Ocean City, at the hour of 1.30 P. M. Neither party to the contract attended for settlement at the time and place so designated, although Mr. Young seems to have called at the office of the Title Company about 10.30 in the morning (Young, direct, State of Case, page 33, line 28) and again about 3 o'clock in the afternoon (Price, direct, State of Case, page 24, lines 32-33). On the second occasion (Mr. Price testified), that Mr. Young handed to me or tendered to me, representing the title company, "4 certificates of stock dated July 1, 1929, issued in the name of Charles Wood Young, which I thereupon returned to him" (State of Case,

New Jersey State Library

page 24, line 35, and page 25, lines 1 to 12, inclusive). Mr. Price made a pencilled memorandum of what occurred on this occasion and relied in his testimony on his memorandum.

Following the morning visit of Mr. Young to the title company office, he interviewed Mr. McLaughlan and Mr. Buvinger. What occurred at that interview is not disclosed with certainty. Mr. Young gathered, however, that the McLaughlan-Conover Co. did not intend to proceed further in the contract. Mr. Young thereupon filed the present bill.

The defendant offered to prove at the time of the trial that the complainant had represented that the stock in question was treasury stock and that he had paid full value therefor, which statements were in fact false, the offer of which proof the Court refused to accept, on the ground that embodied in the contract was the statement, "No representations have been made as to the value of the said stock by Mr. Young."

The defendant further offered to prove that the real estate which the complainant conveyed to the National Land Value Refunding Co. of New York, Inc., as a consideration for the issuance of the stock was conveyed to it through the deed of the complainant's nominee, which deed set forth a consideration of $214,000; that the financial statement of the National Land Value Refunding Co. of New York, Inc., given to the defendant company by the complainant, set forth as an asset, real estate of the value of $214,525; that the only real estate owned by said National Land Value Refunding Co. of New York, Inc., was the land so conveyed by the complainant at a value of not over $5,000.00;

that no consideration was given by the complainant to the National Land Value Refunding Co. of New York, Inc.; that is to say, there was no equity in the real estate conveyed; that at the time of the execution of the agreement of sale, specific performance of which is sought, complainant knew that the piece of real estate mentioned was the only real estate owned by the company and that that piece of real estate was set forth in the statement of the company at a value of $214,525 and that the stock of the said National Land Value Refunding Co. of New York, Inc., was worthless; that all of the facts which the defendant offered to prove were known to the complainant and that he failed to disclose them to the defendants, but the learned Vice-Chancellor refused to hear testimony to prove the facts set forth in the offer (see State of Case, page 79, lines 24, 25, 26, incl.), having previously held that proof should be limited to the ownership of the stock (see State of Case, page 62, lines 17, 18, 19, 20, incl.).

A decree was advised by the Vice-Chancellor in favor of the complainant for specific performance of the contract, from which the defendant now appeals.

ARGUMENT.

The questions raised on the record and which, as we view it, press for solution, are these:

FIRST. Is the contract such as a court of equity will specifically enforce? And

SECOND. Assuming that the Court will lend its aid to the specific enforcement of the contract, has the complainant put himself in a situation that entitled him to invoke equitable intervention; in other words, was not the filing of the bill premature?

I.

Touching the specific performance of contracts, Prof. Pomeroy says (*Pom. Eq. Jur.,* Sec. 1405):

> "Assuming that a contract has been completely concluded, and that it belongs to a class capable of being enforced, it must still possess certain essential elements and incidents, in order that a court of equity may exercise the jurisdiction to compel its performance. Some of these elements affect its validity; others its *equitable character,* * * * The contract must be free from any fraud, *misrepresentation* or, even though not fraudulent, mistake or illegality. The elements which peculiarly affect the *equitable* character of the agreement and of the remedy are the following: The contract must be perfectly fair, equal and just in its terms and in its circumstances."

And in a note to Section 1405 the learned author quotes from the judgment of Lord Cottenham, *Vigers v. Pike,* 8 Clark & F. 562, 645, as follows:

> "If, then, the contract itself is unfair, one-sided, unjust, unconscionable, or affected by any other inequitable feature; or if its enforcement would be oppressive or hard on the defendant, * * * or would work any injustice; or if the plaintiff has obtained it by sharp and unscrupulous practices, by overreaching, by trickery, by taking undue advantage of his position, by non-disclosure of material facts, or by any other unconscientious means—then specific performance will be refused. It necessarily follows that a *less strong case* is required to *defeat* a suit for a specific performance than is requisite to obtain the remedy."

It was this principle that Vice-Chancellor Leaming had in mind when he declared in *Bowker v. Cunningham,* 78 N. J. Eq. 458, 79 Atl. 608, that:

> "The rule of this class of cases enters the domain of ethics, and, when so considered, must necessarily be applied alike to all material representations of a complainant which have been operative to deceive a defendant and which have in that manner induced such defendant to enter into the contract."

The main defense to the relief sought by the complainant was that the contract was induced and obtained by representations made by the complainant which were material and false, in reliance upon which the contract was entered into on the part of the defendant. It was sought to prove these matters by parol evidence that during the prepara-

tion of the contract the complainant desired to have inserted therein these words: "No representation has been made as to the value of the said stock by Mr. Young" (State of Case, page 51, lines 4 to 18, incl.).

The stock comprised the whole consideration for the proposed conveyance by defendant to complainant of land of the value by defendant at $50,000 and the stock had stamped upon it the words, "Not to be transferred prior to December 1, 1929," while the agreement was to provide for a settlement under it at any time on 48 hours' notice after November 7, 1929, the date of the contract.

In this situation the complainant was asked why he wished that provision to be embodied in the agreement, the parties having before then and having previously discussed a statement purporting to have been issued by the company whose stock the complainant proposed to give in exchange for defendant's land, which statement exhibited among the assets of the company an item listed as "Real Estate and First Mortgages, $214,525.00," less mortgages, showing a net asset in real estate of $195,525.00.

The complainant having said in response to Mr. McLaughlan's inquiry as to why he wanted the exculpatory statement in the contract, said: "Well, you know we discussed this statement and I am not going by that statement" (State of Case, page 72, lines 2 to 5). He was then asked by Mr. McLaughlan whether the stock he, Young, held was treasury stock and what he, McLaughlan, was interested in was whether he had given full value for that stock, and his answer was, "I gave $80,000

worth of land'' (see State of Case, page 72, lines 18 and 19).

The defendant offered testimony to prove the falsity of this statement and representation that the company had no equity in the land, that the land had been conveyed to the company by the complainant, subject to mortgages in excess of its value; that complainant actually paid nothing for the land, nor received anything from the company, that the stock issued to and held by complainant was issued without consideration or value; that he had not given $80,000.00 worth of land therefor or any other consideration; that the company owned no land other than the land conveyed to it by complainant, nor possessed any other valuable assets and that said stock was worthless and subject to attack by the company or its officers and stockholders.

The testimony so offered was excluded on the ground that by reason of the presence in the contract of the stipulation, ''No representation has been made as to the value of the said stock by Mr. Young.'' That by reason of Mr. McLaughlan and Mr. Buvinger having executed the contract as officers of the company, they were precluded from testifying as to any misrepresentations by Mr. Young by which they were induced as officers of the company to enter into the contract in the name and on behalf of the company. In other words, the complainant having succeeded in procuring by fraudulent means the insertion in a written contract of false representations, parol evidence could not be received to show the falsity thereof. The learned Vice-Chancellor seems to hold (State of Case, p. 57) that in the face of the presence in the contract

of the provision referred to any evidence accounting for its presence upon any theory depending upon a misrepresentation is wholly without probative force and that the only purpose for which such evidence could be received and considered is in determining the question of the complainant's title to the stock.

It is respectfully urged that the view of the Court of the application and effect of such evidence, as indicated by this ruling, seems too narrow and limited.

Fraud vitiates all that it touches and may always be shown by parol evidence. Prof. Pomeroy says (2 Pom. Eq. Jur. Sec. 858):

> "It is an elementary doctrine that parol evidence is not, in general, admissible between the parties to vary a written instrument. * * * It is equally well settled that mistake, fraud, surprise, and accident furnish exceptions to this otherwise universal doctrine * * *. This exception rests upon the highest motives of policy and expediency; for otherwise an injured party would generally be without remedy. Even the statute of frauds cannot, by shutting out parol evidence, be converted into an instrument of fraud or wrong."

In *Hall v. Ely* (Err. & App. 91 N. J. Eq. 92, 108 Atl. 370), (a specific performance case), one of the points argued for reversal was that it was error to admit testimony touching transactions which occurred prior to the execution of the contract because obnoxious to the rule excluding parol evidence tend-

ing to vary or contradict the terms of the contract, but the Court said the evidence objected to was clearly competent, not as varying or contradicting the contract, but to show the defendants' knowledge of the facts at the time he entered into it,

> "just as he himself would have been entitled to put in similar antecedent transactions to show, let us say, *fraud of complainant.*"

The contract must be free from any fraud, misrepresentation even though not fraudulent, mistake or illegality. The relief granted by a Court of Equity in the specific performance of contracts is said to be discretionary. The essential elements and conditions upon which the Court acts are nothing more than expressions and applications of the fundamental principles, "he who seeks equity must do equity" and "he who comes into equity must come with clean hands." Therefore, the question in each case is not what the Court must do but what in view of all the circumstances it should do to further justice and it follows that if in the case fraud or other inequitable incidents be discovered although not appearing upon the face of the pleadings, the Court will refuse to decree enforcement.

From the earliest times, parol evidence of fraud has been received in this court for the purpose of defeating specific performance of written contracts and the power of the Court to uncover and deal with fraud however contrived or concealed is unlimited and unquestioned.

In *Kilpatrick v. Corning,* 40 Eq. 241 (Ct. of Appeals), at page 258, Mr. Justice Scudder says (quoting Kerr on Fraud and Mistake):

"The strong language applied to cases of fraud is that deeds, obligations, contracts, awards, judgment, or decrees may be instruments to which parties may resort to cover fraud, and through which they may obtain the most unrighteous advantages, but none of such devices or instruments will be permitted, by a court of equity to obstruct the requisitions of justice. If a case of fraud be established, a court of equity will set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivance by which it may have been attempted to protect them."

In the early case of *Miller v. Chetwood,* 2 N. J. Eq. 199 (specific performance), it was held competent for the defendant to prove parol declarations made at the time of the contract, although not incorporated in the agreement, in order to rebut the complainant's equity. Such evidence was held admissible for the purpose of defeating performance.

The 3rd, 4th and 5th head notes read:

"This Court, in a bill for specific performance, not being bound to aid the complainant unless his claim is founded in justice, will look at all the circumstances, and see whether any fraud was practiced at the time of the sale.

If misrepresentations were made at the time, though not in writing, calculated to mislead in any essential particular, the party will be left to his remedy at law.

On a bill for specific performance, the Court

> will grant its aid or not according to the justice of the case; and it will never interfere where the party has practiced any fraud, or been guilty of misrepresentation in any material particulars."

The particular fraud in that case was a misrepresentation as to the quantity of land, and the Court said that the land was before the purchaser's eyes and subject to his every day observation can furnish no excuse to the vendor for his misrepresentation. *He is bound to declare the truth at any rate.*

Relief was denied.

In *Stoutenburgh v. Tomkins,* 9 N. J. Eq. 322, it was said:

> "An agreement may be fully proved; it may be clear in every particular, and upon its face equal and just in all its parts; the defendant may be unable to prove any mistake, fraud or accident in reference to its execution, and yet the conduct of the complainant may have induced a state of things in relation to the subject-matter of the agreement as would make it not only proper, but the plain duty of the Court to refuse its aid in enforcing its specific performance.
>
> Courts of equity have manifested much more liberality in admitting parol evidence in cases of specific performance to resist than to enforce it."

In *Plummer v. Keppler,* 26 N. J. Eq. 481; affirmed 27 N. J. Eq. 550, the defense set up was that the

complainant procured the contract by fraudulent representations as to the cost of the house and the value of the lot. These representations were proved by parol to have been made at and immediately before the contract was signed. Specific performance was refused, the Court saying:

> "The Court will grant or refuse its aid according to the justice of the case; it will never extend its aid to a suitor who has practiced a fraud, or procured the contract by a misrepresentation of a material fact, and that an intentional misrepresentation of a fact materially affecting the value or use of the property, will deprive the party making it of all right to a remedy in equity."

Carskaddon v. Kennedy (Err. & App.), 40 N. J. Eq. 259:

> "It is permissible for the defendant to prove by parol evidence that the representations influenced him in the negotiation, and that they were made *mala fide,* even if it appear that they did not intend to make the representations a part of the contract."

In *Hallinger v. Zimmerman,* 58 N. J. Eq. 217; 42 Atl. 726, Vice-Chancellor Grey received testimony for the purpose of showing that the complainant as an inducement to the contract falsely represented pending the negotiations that the property was rented at eight dollars per month. In this case the parol evidence did not sustain the defendant's contention and specific performance was decreed, but

the rule touching the admissibility of parol evidence in this class of cases was recognized and acted upon.

In *Worth v. Watts,* 74 N. J. Eq. 609; 70 Atl. 357, Vice-Chancellor Leaming held that the value of the land agreed to be conveyed may be inquired into in determining the question of fraud. After saying that a court of equity will not ordinarily refuse to decree specific performance of a private contract for the sale of land because the price is less than the market value of the land, he proceeds to state the following well settled and frequently declared equitable principle:

> "Inadequacy of price, however, is a feature which may be considered in determining the existence of fraud. It may, in connection with other evidence, establish the existence of fraud, or the inadequacy of price may be so gross as to shock the conscience of the Court, and thus furnish satisfactory and decisive evidence of fraud. In either case it may be said to be the fraud so ascertained, and not the inadequacy of price, which operates to bar relief" (citing authorities).

On the hearing, however, this Court limited the ~~effort~~ effect of the testimony offered except so far as it concerned "the *ownership* of the stock, and excluded all conversation concerning the value of the stock" (State of Case, pages 62 and 64).

In *Bowker v. Cunningham,* 78 N. J. Eq. 458; 79 Atl. 609, Vice-Chancellor Leaming, after declaring that:

> "I incline to the view that complainant probably did not intend to deceive or mislead defendant, and that he probably did not realize that his statements were such as to lead the defendant to believe that the building which he promised to erect was not to be a building for use as a store; but the fact remains that his statements did create that belief."

and advised a decree dismissing the bill, states the rules upon which a court of equity acts pursuing this branch of its jurisdiction as follows:

> "It is one of the necessary inherent qualities of a decree for specific performance that it does complete justice.
>
> In suits of this nature this Court will grant its aid or not, according to the justice of the case.
>
> Specific performance will be decreed only when complete justice is done.
>
> Misrepresentation of a material matter, though unintentional, precludes specific performance in favor of the person making it."

The learned Vice-Chancellor then quotes with approval Prof. Pomeroy (*Pom. on Contracts, Specific Performance, Sec.* 217), as saying:

> "In maintaining the defense to a suit for specific performance, the knowledge, belief, or intent of the party making the representations is wholly immaterial, and the question is not raised. The point upon which the defense turns is the fact of the other party having been mis-

> led by a representation calculated to mislead him, and not the existence of a design to mislead."

See to the same effect, *Williams v. M. E. Blatt Co.*, in the Court of Appeals, 95 N. J. Eq. 326; 23 Atl. 362. Affirmed on the opinion of Leaming, V. C., below.

In *Miller v. Weiss* (Lewis, V. C.), 91 N. J. Eq. 29; affd. 109 Atl. 359, parol evidence was received of misleading representations touching matters existing at the time of signing the contract. The Vice-Chancellor said:

> "In suits for specific performance anything said or done to mislead the purchaser compels the Court to deny relief to the complainant."

In each of the cases above noticed, parol evidence of statements made by the parties to the contract preceding the signing and during the negotiations was admitted and necessarily so since without such testimony the Court could not have been informed of such representations nor determined their effect as inducing the making of the contract.

An authority precisely in point is *Neptune Fisheries Co. v. Cape May Real Estate Co.*, 89 N. J. Eq. 552; 105 Atl. 212, in the Court of Appeals reversing the decree below.

In the opinion of the Appellate Court, Mr. Justice Bergen said:

> "There is another objection to the decree, which is founded alone upon the pleadings; no proofs having been introduced. The contract

declares the consideration to be 1,000 shares of the complainant company at the par value of $10 each, and the answer of the defendant charges that it was induced to enter into the contract by the statement of the complainant, or someone in its behalf, that 60% of its capital stock had been subscribed for, or more than sufficient to put up buildings and machinery on the land, to cost $60,000 which was false and untrue. * * * There can be no doubt that such representation, if untrue, would injuriously affect the value of the consideration to be paid, for it would leave the stock with little, if any, value; the only asset of the company being what defendant contributed, and it amounted to a failure, at least in part, of the consideration. If it (the contract) had been procured by any sort of fraud or falsehood, or its enforcement will be attended with great hardship or manifest injustice, the Court will refuse its aid."

In the very recent case of *Essex Airport, Inc., v. Nestico, et al.,* 106 N. J. Equity 479 (151 Atlantic Reporter 277), in the opinion, Vice-Chancellor Backes cites with approval the law set out by Prof. Pomeroy in his work on Equity Jurisprudence, Par. 270, as follows:

"If to the suppression of material facts within his knowledge, there is added any affirmative misrepresentation, even the slightest positive deviation from the truth tending to blind the eyes of the vendor, to draw away his attention from the actual condition of affairs, and thus

> to mislead him into making a sale at all to his disadvantage—even though there might be but a misguiding word—the contract procured in this artful manner could not pass the scrutiny of a court of equity; but would be avoided at the suit of the vendor."

And in the case of *Lloyd v. Hulick,* 69 N. J. Equity 784, a Court of Errors and Appeals case, it was stated by Chief Justice Gummere:

> "In the transaction of business men ordinarily deal with one another in the belief that each is honest. If the opposite belief prevailed in such dealings attempted frauds would rarely be successfully carried into execution and Courts would seldom be called upon to grant relief against them. Failure to discover an intended fraud before it has been actually perpetrated must necessarily exist in every case where the Courts are appealed to relieve the wronged party from its effects, and the fact that the exercise of a greater degree of prudence on the part of him who has been defrauded would have prevented the fraud from being successfully carried through affords no ground for refusing relief."

The stock which the complainant proposed to give in exchange for defendant's land was plainly marked with the restrictive phrase "not to be transferred prior to December 1, 1929." The defendant on No-

vember 7, 1929, was about to formally execute a contract obliging it to convey its land and accept that stock without any title to it on 48 hours notice from the 7th of November, 1929, or, in other words, before title to the consideration for the conveyance could be acquired by it. That restrictive endorsement of the stock was notice to the defendant or to those acting in its behalf of some lien upon or equity in the stock in the hands of complainant yet remaining in the company by which it had been issued. Perhaps the stock had not been paid for and the complainant had until December 1, 1929, by arrangement with the company to make payment or perhaps some other reason existed known to the complainant and not known to the defendant, why title could not be immediately transferred.

Section 48 of the General Corporation Act provides that nothing but money shall be considered as payment of any part of capital stock and Section 49 permits its issuance for property necessary for the business of the company upon the judgment of the directors as to the value of the property purchased. Mr. McLauchlan and Mr. Buvinger were, therefore, concerned in ascertaining before parting with their land and for that purpose inquired of Mr. Young who held and offered stock he was unable to transfer whether that stock had been paid for in money or property. If it (the stock) had not been so paid for in money or property, it had been issued in violation of the letter and policy of the Corporation Act and was without value in the hands of the complainant. They asked the complainant and he told them he had given $80,000 worth of land for the stock and that statement induced the making of the

contract and was false, and it was to show not the value of the stock which they could have determined for themselves upon the basis of $80,000 worth of land owned by the company, but the falsity of the representation made and its effect upon their minds in inducing the contract upon the truth of which they relied that the excluded evidence was offered. Had the representation been true the value of the stock was, of course, immaterial.

In the very recent Court of Errors and Appeals case of *Graham v. Fleissner's Executors,* 107 N. J. Equity 52; (153 Atlantic Reporter 526), in an opinion by Mr. Justice Parker, it was held:

> "A party acquiring stock in the first instance with knowledge, or charged with knowledge, of its issue for less than par in cash, or at an obvious overvaluation for property purchased, and any transferee from him, mediate or immediate, similarly situated, unless an innocent purchaser has intervened, is chargeable with liability to assessment up to the par value of the stock on the bankruptcy or insolvency of the corporation."

II.

The filing of the present bill was premature. The complainant could not be in a situation to tender performance on his part or insist on performance by defendant prior to December 1, 1929, for he could not give consideration for the conveyance. He was wholly unable to transfer the stock.

The only rational construction to be given the agreement under the 48 hours settlement clause of the agreement in view of the restrictive transfer clause on the stock was 48 hours after December 1, 1929.

What transpired between the complainant and Mr. Price at the office of the Title Company had no semblance of a tender of performance under the agreement and notice, Mr. Price neither having nor pretending any authority to act for the defendant.

It seems to us that overwhelming judicial precedent and authority without exception points to the admissibility of the testimony offered and rejected.

It is respectfully submitted that the decree advised by the learned Vice-Chancellor should be reversed.

JOHN RAUFFENBART,
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SAMUEL MORRIS,
Of Counsel.

NEW JERSEY COURT OF ERRORS AND APPEALS.

CHARLES W. YOUNG,
Complainant-Respondent,

against

McLAUGHLAN-CONOVER COMPANY,
Defendant-Appellant.

ON BILL, &c.

COMPLAINANT'S SUPPLEMENTAL BRIEF.

The learned Vice-Chancellor was correct in his rulings upon the evidence and is amply sustained by authority. The attempt of the respondent-appellant to prove that the stock in question was improvidently issued because of the fact that the consideration for it was the conveyance of incumbered real estate, was not evidence of a kind which was admissible, as the corporation which issued the stock was not shown to have made any such contention, and it was the only party by whom such a contention could be raised. No witness connected with the

corporation which issued the stock was called to testify.

The title of the plaintiff to the shares of stock was not impeached, and no proof was submitted which could justify an inference that he was in any manner disqualified in transferring it. The legal inference is that the registered owner of shares of stock has the unlimited right to dispose of it, and in any such controversy the corporation is an indispensable party to such contention.

The respondent-appellant entered into an exchange of kind for kind, under an agreement under seal, and repented of its bargain on the day of settlement. The motives of the respondent-appellant for desiring the shares of stock were not disclosed, but it is apparent that the question of value was not the motive. And this is apparent by the agreement of exchange.

The mere question of representations concerning the shares of stock is nowhere shown to have been material; no loss is shown; no failure of the purpose for which it was intended to be used, is alleged, either in the pleadings or proofs.

In every case of alleged false representations inducing a purchase, the representations made constitute only one element of several, which are indispensable to sustain a complaint, and one of these must be affirmative proof of injury; and in the absence of such proof, the representations made are immaterial. And the learned Vice-Chancellor was correct in excluding the testimony offered as to representations made, as there was no proof of failure of title, or injury.

The question as to the sufficiency of the notice of

settlement is not involved; the respondent-appellant has not rested its case upon such ground because at the time set for settlement, it announced that no settlement would be made, and no reasons were stated, nor any further time suggested. The respondent-appellant has therefore not shown any grounds for either legal or equitable relief.

There is no rule of law which requires either party entering into a contract to disclose his purpose or his intentions or information. There was no fiduciary relations between the parties. There was no obligation for any disclosure. The purchaser, the respondent-appellant, did not disclose its purpose for entering into the contract. There was no warranty that the transfer of the stock would suit the purpose desired. There was no obligation on the part of the seller of the shares of stock to disclose any knowledge or information he possessed. He did not suppress anything which he was obligated to disclose because he was not obligated to disclose anything. It was no concern of the purchaser what consideration was given for the stock by the seller, and therefore any evidence to that point was not relevant. The respondent-appellant was not defrauded in any manner, either by any failure to make disclosures or by any representation of any fact.

The endorsement on the certificate as to the day after it would be transferrable is not evidence of any fact except that the books were not available for such purpose prior to that date, and this was a condition provided for by the contract of exchange, and subject to which the purchase was made. Such endorsement did not impeach the title to the stock

or raise any implication of liability on the part of the holder or transferee.

There was no evidence of any inquiry being made by respondent-appellant of the officers of the corporation issuing the stock as to the purpose of such endorsement, and no evidence that such endorsement affected the stock in any manner whatever. And it is not alleged in the pleadings or proofs that such endorsement caused any detriment to the purchaser. It is also provided in the contract of exchange that the purchase was made subject to such endorsement. No necessity for immediate transfer is anywhere alleged or shown.

The respondent-appellant in the purchase of this stock was in a position of an innocent purchaser for value without notice of any defect in title, and therefore the shares of stock were non-assessable in its hands, and the question of consideration given for it by the seller was immaterial, and was properly so held by the learned Vice-Chancellor.

Respectfully submitted,

EMERSON L. RICHARDS, ESQ.,
Solicitor and Counsel for Complainant.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

Between

CHARLES W. YOUNG,
Complainant-Respondent,

and

MCLAUGHLAN-CONOVER COMPANY,
Defendant-Appellant.

ON BILL, &C.

BRIEF OF COMPLAINANT-RESPONDENT.

There are only two points at issue in this case; viz: First, should the defendant, McLaughlan-Conover Company, through its officers, be permitted to testify that the complainant, Charles W. Young, made false and untrue representations as to the value of the ten thousand shares of the common stock of National Land Value Refunding Company of New York, Inc.; and secondly, whether the complainant had such title to the stock as he could trans-

fer or whether the defendant was compelled to accept the stock which had stamped on the back of it, "Not to be transferred prior to December 1st, 1929."

The agreement of sale contains this clause, "No representation has been made as to the value of the said stock by Mr. Young" (State of Case, page 5, lines 18-20).

The testimony discloses the fact that Mr. McLaughlan, the president of McLaughlan-Conover Company, dictated the agreement himself and that Mr. Bovinger, the treasurer of the company, wrote the same on a typewriter in the office of the defendant company (State of Case, page 47, lines 20-35; page 48, lines 1-15).

It is submitted that the defendant company, having admitted over the signature of its president and the seal of the company that no representations were made by Mr. Young as to the value of the stock, that the Court was justified in refusing any testimony which was offered by the defendant to the effect that Mr. Young did make representations concerning the value of the stock which were fraudulent, false or untrue. As the Honorable Vice-Chancellor so aptly stated, any testimony of that nature, in view of the written contract, would have no probative force.

Having inserted such a statement into the agreement, the assumption is that McLaughlan-Conover Company had made its own investigation as to the status of the National Land Value Refunding Company of New York, Inc., and was satisfied that the consideration for the sale of the land, viz.; ten thousand shares of the common stock of said company,

was adequate consideration and they are certainly now estopped from coming into a court of equity and stating that Mr. Young made false and fraudulent representations concerning the value of said stock and that they should therefore be relieved from their contract.

It is a well-settled rule of this Court that parol evidence in absence of fraud or mistake is not admissible to vary, add to, modify or contradict the terms or provisions of a written instrument by showing the intentions of the parties or the real agreement with reference to the subject-matter to have been different from what is expressed in the writing; for where parties have deliberately put their engagements into writing in such terms as import a legal obligation without any uncertainty as to the object and extent of their engagements, all previous negotiations and agreements with reference to the subject-matter are presumed to have been merged in the written contract and the whole engagement of the parties and the extent of their undertaking is presumed to have been reduced to writing. The rule, however, goes even further than this and it has been established that if the instrument is free from ambiguity and is in itself susceptible of a clear and sensible construction, parol or extrinsic evidence is not admissible even to explain its meaning or determine the construction of the writing. *Castlebaum v. Wolfson,* 104 Atlantic 84; *Ferber v. Cona;* 91 N. J. L. 688; *Bockian v. United Candy Co.,* 91 N. J. L. 314; *Decker v. Smith,* 88 N. J. L. 630.

There is nothing in the answer, nor in the attempted proof which either cites or infers that any fraud was practiced by Mr. Young, which induced the

officers of the McLaughlan-Conover Company to insert in the contract the clause that "No representations had been made as to the value of the stock by Mr. Young." Further than that, it is admitted by Mr. McLaughlan that the clause was inserted at his direction as he dictated the contract himself personally. It is therefore submitted that there was the absence of both fraud or mistake and that therefore the Court rightfully refused to admit testimony concerning representations alleged to have been made by Mr. Young as to the value of the stock in view of the fact of the written agreement, over the seal of the company, that no such representations had been made.

Attention is called to the fact that this clause was not a part of a printed form of agreement but that it was inserted in the agreement at the suggestion of Mr. Young after it had been discussed and that it was then made one of the terms and conditions of the contract as it will be noticed that it follows the clause in the agreement which says that the property is sold "under and subject to the following terms and conditions" (State of Case, page 4, line 35).

But where a written contract, which a party seeks to rescind on the ground of oral fraudulent representations of the other party, contains provisions negativing the claim that the representations were relied on, or contains other representations on the same subject inconsistent with the alleged oral representations, the oral representations are inadmissible as varying the contract. With the limitation that while a party may, in an action at law avoid the contract by proof of fraud, he cannot in such an action establish by parol evi-

dence or recover upon an agreement different from that expressed in the writing. 22 *Corpus Juris,* page 1217.

Parol evidence is not admissible to vary or contradict the terms of a written instrument and evidence of fraudulent misrepresentations as to its effect to induce its execution must be clear and convincing to warrant a disregard of its terms. *Barr v. Chandler,* 47 N. J. Equity 532.

There was an attempt on the part of the defense to offer testimony to the effect that the stock was not treasury stock and that Mr. Young had not paid a legal consideration for the same. It is submitted that the Court rightfully refused such testimony and attention is especially called to the fact that no such defense was set up in the answer which was filed.

THE COMPLAINANT HAD SUCH TITLE TO THE STOCK AS HE COULD TRANSFER.

The second question in the case is whether or not the following condition endorsed on the certificates of stock, viz: "*Notice to Registrar and Transfer Agent.* This certificate is not transferable upon the books of the company until December 1st, 1929;" was such a condition as to affect the consideration for the sale of the land in question and therefore justify the Court in refusing to grant a decree for specific performance.

The condition mentioned aforesaid was known to both parties to the original agreement of sale, for they specifically mentioned in the agreement that

the stock was stamped not to be transferred prior to December 1st, 1929.

> "Title to a certificate and to the shares represented thereby, can be transferred only, (a) By delivery of the certificate endorsed either in blank or to a specified person by the person appearing by the certificate to be the owner of the shares represented thereby, or (b) By delivery of the certificate and a separate document containing a written assignment of the certificate or a power of attorney to sell, assign or transfer the same, or the shares represented thereby signed by the person appearing by the certificate to be the owner of the shares represented thereby. Such assignment or power of attorney may be either in blank or to a specified person.
>
> The provisions of this section shall be applicable although the charters or articles of incorporation or code of regulations or by-laws of the corporation issuing the certificate, and the certificate itself, provided that the shares represented thereby shall be transferable only on the books of the corporation or shall be registered by a registrar or transferred by a transfer agent." *Section 1—Uniform Stock Transfer Act.*

The provisions of the above section are in accordance with the existing law, except that the transfer of this certificate is made to operate as a transfer of the shares, whereas at common law it is the registry on the books of the company which makes the complete transfer. The reason for the

change is in order that the certificate may, to the fullest possible extent, be the representative of the shares. This is the fundamental purpose of the whole act and is in accordance with mercantile usage. The transfer on the books of the corporation becomes thus like the record of a deed of real estate under a registry system. *Uniform Laws Annotated,* Vol. 6—page 2.

The right of unrestricted transfer of shares inheres in the very nature of a corporation and courts will carefully scrutinize any attempt to impose restrictions or limitations upon the right of stockholders to sell and assign their stock. The right to impose any restraint in this respect must be conferred upon the corporation either by the governing statute or by the articles of the corporation. It cannot be done by a by-law without statutory or chartered authority. *Thompson on Corporations*—Third Edition, Vol. 6, paragraph 4341, page 201. *Morgan v. Struthers,* 131 U. S. 246, held:

> "One essential feature of an incorporated joint stock company is the right of each stockholder without restraint to sell or transfer his shares at pleasure. Thompson Liability of Stockholders, Sec. 210 and cases cited. So well established is this right that a by-law of a bank putting restrictions upon the transferability of stock in the hands of its members has been held void as being in restraint of trade. Moore v. Bank, 52 No. 377. Even where the charter gives the corporation the power to regulate transfer of stocks it has been held this power does not include the authority to restrain transfers.

Choteau v. Harris, 20 Mo. 382, citing 10 Mass. 476, and numerous authorities."

Bank v. U. S. Steel Corp., 267 U. S. 22.

Shares of stock in N. J. Corporation endorsed in blank can be seized as German property by England.

See Justice Holmes' opinion affirming same case, 300 Fed. 741.

The latest text-book on the subject of transferred stock by Francis T. Christie of the New York Bar, 1929, page 7476 states:

> "If the law provides that no shareholder shall sell his stock except to the corporation or if the prohibition of the transfer is unlimited in point of time it may be held invalid. 107 N. Y. Misc. 646; 177 N. Y. Supp. 873; 262 Pac., or restraining sale to competitor invalid, 193 Mo. Ap. 99; 181 S. W. 1066; 7 S. W. (2) 671."

See article in Harvard Law Review, Vol. XLII, No. 4, page 555, Feb., 1929.

The purpose of making a transfer of stock on the books is to give notice of the transfer as between the transferror and the transferee, title passes without transfer on the books. *Equitable Tr. Co. v. Bank,* 142 S. E. 811.

Thompson on Corporations, Sec. 4370, holds:

> "The transferee cannot question the validity or legality of the transfer. The transferee in such case cannot even avoid the transfer on the ground that there is no consideration for the sale of the stock (76 N. Y. 365, 32 Am. Rep. 315). Likewise the transferee is estopped from impeaching the transfer on the ground of in-

formalities. 72 Mo. 461; 19 Colo. Ap. 483; 76 Pac. 546; 9 Cush. (Mass.) 576."

And he has an equitable title which will be protected as against all parties not showing a superior right although his transfer was not registered. 38 Miss. 85; 35 N. W. 577; 8 Am. St. 643; 44 Minn. 183; 46 N. W. 331; 68 Miss. 121; 70 N. W. 1079.

The failure of the buyer of stock to have it transferred does not invalidate the sale. 181 S. W. 1089.

In determining the rights of the transferee his stock will be considered as transferred as of the date of the demand.

A stockholder who pooled his certificates has the right to make a valid sale and transfer of his stock and could compel the poolholder to issue a certificate, when the statute provided that no transfer was valid until entered upon the books. *Brassell v. Knapp,* 155 Fed. 809.

A stockholder is not bound to resort to an action at law to recover damages on refusal of the corporation to transfer stock on its books and issue new stock to him, the corporation will be bound to recognize such transfer the same as if it had been regularly made. 54 N. Y. S. 116.

A by-law cannot take away or abridge the substantial rights of a stockholder. The holder has the right to transfer. 9 *Ry. & Corp. Law Journal,* 469; 33 *Am. & Eng. Corp. Cases,* 271; *Bloede Co. v. Bloede,* 33 L. R. A. 107; 29 L. R. A. 844; 43 Am. St. 147; *Fitzsimmons v. Lindsey,* 205 Pa. page ; *Garrett v. Phila. Lawn Mower Co.,* 39 S. C. 78.

In view of the foregoing facts, law and citations

it is respectfully submitted that the decree for specific performance should be affirmed.

Respectfully submitted,

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