

NEW JERSEY

COURT OF ERRORS AND APPEALS

Between

ALEXANDER MILMOE,

Complainant, and

WILLIAM MURPHY *and*

OTHERS,

Defendants.

On Bill &c.

BRIEF FOR COMPLAINANT.

This is a suit for specific performance of a written contract to convey land.

The bill alleges that the complainant and defendant entered into an agreement under seal, duly acknowledged, at Newark, New Jersey, on the twelfth day of October, nineteen hundred, whereby the defendant, Murphy, agreed on or before the first day of November next ensuing to sell and convey by deed of warranty, free from all encumbrances, unto the complainant a certain lot of land in Newark, for Four Hundred and fifty Dollars.

The agreement was only signed by the defendant, but at the signing of the agreement the complainant

paid Twenty Five Dollars as part of the consideration money of the sale.

The agreement was acknowledged, and was recorded on the tenth day of November, nineteen hundred.

That after the making of the agreement the complainant employed an attorney to make a search, who discovered a defect in the title and so notified the defendant; that the defendant promised that he would take the necessary steps to extinguish the outstanding interest and perfect the title; but that he never did so.

That the defendant refused to carry out the contract; that the complainant was always ready to perform his part of it; that on the thirtieth day of May, nineteen hundred and one, the defendant, Murphy, conveyed the premises to the defendant, Thomas J. O'Leary; that O'Leary had both constructive and actual notice of complainant's agreement. It prays that the defendant may be decreed to specifically perform the agreement, and for such further and other relief as may be proper under the circumstances.

The answer admits the making of the agreement, the payment of Twenty Five Dollars on account; and says that the complainant did not discover the defect in the title, but that such fact was communicated by the defendant to the complainant's attorney. That such fact was contained in an affidavit belonging to the defendant, which he delivered to complainant's attorney two days after the signing of the agreement; denies that he declined to deliver a deed for the premises, but said he was always willing to perform his contract, until the complainant refused to take any deed except a warranty deed free from encumbrances; that thereupon the agreement was abandoned and the matter ended. Admits the subsequent sale to Thomas J. O'Leary and denies notice.

The following facts are undisputed:

- I. The making of the agreement; the payment of Twenty Five Dollars on account.

II. That the defendant Murphy had, at the time of the making of the agreement, in his possession an affidavit made by his father showing the outstanding interest in the property in question (see page 8, printed case). So that at the time of the making of the agreement to convey by warranty deed, the defendant Murphy knew that there was a defect in the title.

III. The defect, as set out in the answer, page 8, was as follows: That Owen Murphy, the father of the defendant Murphy, purchased the property in question more than forty years ago; that said Owen Murphy and wife, conveyed the premises in the year eighteen hundred and fifty nine, to one Bernard Ward; that thereafter the said Bernard Ward died intestate, seized with the property in question, leaving several children as his heirs at law; that of these children, all died when young but two; that one of the two remaining children, Robert J. Ward, on the thirteenth day of January, in the year nineteen hundred, conveyed to the said Owen Murphy, the father of the defendant Murphy, the premises in question; and that Owen Murphy on the ninth of May, nineteen hundred, conveyed the property to the defendant Murphy; that the affidavit in the possession of the defendant Murphy which was sworn to by the said Robert J. Ward, alleged that his brother who was, with himself, the only surviving member of the family, had not been seen or heard from in thirteen years and that he was believed to be dead.

The defendant, Murphy, therefore, at the time he made this agreement to convey by warranty deed could, by proper proceedings, taken under the act declaring when the death of persons absenting themselves shall be presumed (General Statutes, p. 1185), have obtained such decree as would have enabled him to carry out his contract exactly as he made it. It is to be presumed that the defendant Murphy, knowing of the defect at the time he made his agreement to sell and convey by warranty deed, contemplated taking

these steps. As a matter of fact the evidence shows that after the making of the agreement he went to Mr. Butler, attorney-at-law of the city of Newark, and who represented Mr. Milmoe, the purchaser and the complainant in this suit, and requested him to take such proper proceedings as would result in a decree enabling him to carry out his contract. (Printed case p. 33.) (Cross examination p. 38.)

It appears however that Mr. Murphy declined to pay any fee for the services, and suggested that Mr. Butler deduct Fifty Dollars of the purchase price to be paid to him, Murphy, by Milmoe, at the time the conveyance should be perfected, but that Butler declined to accept such contingent fee.

It appears further that Mr. Milmoe agreed with the defendant Murphy to waive the time of the performance of the contract and extend it until such time as proper proceedings could have been taken and a decree had. (See case p. 16, line 10 from top and line 26 from top.)

The complainant testifies (p. 16) "Mr. Murphy told me if he could save that Fifty Dollars that he was going to do it. You know, he said, these lawyers only want to get as much money out of you as they can, and then he said, if he could advertise for this man in different papers probably he could find him. He said, if I don't find him in a month, I may find him in two. I said I was in no hurry to build on the property *until the Fall; if you can find him in a few months, I am satisfied, and we left each other with that understanding.*" That conversation took place (p. 15) four or five days after the making of the agreement. It is not specifically contradicted by the defendant, Murphy. The general question was put to Mr. Murphy (p. 34) "Was anything said about perfecting the title" and he answered "*Not a word.*" This answer was palpable untrue; as Murphy testifies on the same page and immediately preceding it, that considerable was said about perfecting the title. (Lines 10, to 30, p. 24.) Murphy's

testimony is discredited. His attention was not specifically called to the conversation narrated by Mr. Milmo, nor does he anywhere deny that it took place.

Some correspondence then took place. It appears that on the ninth day of November, the attorney of the complainant wrote to the defendant, Murphy, as follows: "November 9, 1900. Mr. William Murphy: Dear Sir:—I just saw Mr. Milmo and he says that he will not take the title until it is perfected. He says you will have to refund all his forfeit money and his search and survey expenses, making a total of \$58. Yours truly, Thomas J. Butler."

This letter however so far as rescinding or abandoning the contract could have had no such effect upon the mind of the defendant, because he says (p. 32) "I got a letter from Mr. Butler, the letter of November 9th" (above quoted) "then I came to Newark and got Mr. Smith, the real estate agent; we went to Mr. Butler's office and I said, what is the matter that I have to refund this money, and why does Milmo refuse the title; he said, I will tell you, Milmo is not satisfied with that title; I said, didn't I give you the property at your own figure; I gave you the price you asked for perfecting the title. I have seen lawyer Kenny and he tells me I do not need to pay for the search which was not legal. Well, he said, we will attend to the matter, I said, well I suppose it is all off. Well yes, he said. You will give me back my papers then. He said yes, and takes the papers out of his desk and hands them to me." Now, immediately after the receipt of this letter of November 9th, and the above conversation with the writer of it, the defendant, Murphy, went to the complainant, Milmo, and Milmo repudiates Butler's letter and statement (case p. 33.) Defendant, Murphy, fully understood that Milmo disapproved his attorney's act because (case p. 34) he testifies that after this conversation with Milmo he went back to the attorney (Butler's) office and demanded to know what he (Butler) meant by telling Mr. Milmo what he had; and he (Murphy) says at line 12 of the printed case

that Butler admitted "Well, I misunderstood you," and had some further conversation (same page) with both Butler and Milmoë which precludes any idea of Milmoë's abandonment of the contract.

It will be seen that the letter of November ninth and the conversation with lawyer Butler, and the delivery of the papers could have had no effect upon the mind of the defendant, Murphy, leading him to suppose that the contract was rescinded or abandoned, because upon continuing a reading of the testimony just quoted, it will be seen that the defendant, Murphy, said (case p. 32) "I asked him where I could find Mr. Milmoë, and he said, he couldn't tell." (Case p. 33.) "*After that* we went to Mr. Milmoë's house and inquired where we could find him, and his wife directed us to a place in Bloomfield avenue. I walked up to Mr. Milmoë and said, what is the reason you refused to take the title. I will tell you, he said, Mr. Butler says you refuse to perfect the title. Why, I said, Mr. Butler set his own price. I asked Mr. Butler what his price would be for perfecting the title, and he said it will only be a matter of going to the Chancellor and have him declare the man dead; it would cost \$35, or \$36, or \$50, and I told him I would pay it and for him to go ahead and perfect the title. Well, he said, Mr. Butler told me that you would not pay anything for perfecting the title. Then I said that I agreed to pay \$50, and Mr. Milmoë said it looked as if he wasn't acting square, and I kind of suspect him. Then me and him and Mr. Smith went to a saloon on the corner there and he calls up Mr. Butler, and said to him over the wire, Mr. Murphy informs me that he offered to pay you for perfecting the title. Then Mr. Murphy went to the 'phone and told us—(evidently this should be Mr. Milmoë, because Mr. Murphy is the person testifying, and the testimony should read as follows:) Then Mr. Milmoë went to the 'phone and told us Mr. Butler said, there is some mistake, and Milmoë went to the 'phone and asked him what he meant by telling Murphy that it was Milmoë who refused to take the title.

So that it quite clearly appears that after the delivery back of the papers by Butler to Murphy and after the writing of the letter of November 9th, Murphy and Milmoë had a full explanation and understanding, whereby it appeared that the writing of the letter and the delivery of the papers was a mistake, and the letter of Mr. Butler was repudiated and its statement disaffirmed, and Mr. Murphy knew at that time that the matter was not changed in any particular, and that Mr. Milmoë still expected and was willing to take and pay for the title, agreed to be conveyed. Furthermore on that identical day on which this conversation between Murphy and Milmoë occurred—November 10, 1902—Milmoë recorded the agreement. Certainly this act of his taken in connection with his repudiation of Butler's letter, and the subsequent explanation and understanding with Murphy, was not an abandonment of the contract, but quite the contrary.

The other letters referred to in the learned Vice Chancellor's opinion (p. 59) are first an unsigned letter, on the writing paper of Edward Kenny, Counsellor at Law, 800 Broad street, Newark, New Jersey, and is dated November, twenty eighth, nineteen hundred, addressed to Thomas J. Butler, Esq., (the attorney of the complainant) and reads as follows: "Mr. Murphy informs me that although your client Mr. Milmoë has refused to complete the purchase of the lot on South Sixth street, he has taken possession of it and occupies it. Why is this thus. Yours truly."

In reply to that letter, and on December first, nineteen hundred, Mr. Thomas J. Butler, the attorney of Mr. Milmoë, wrote as follows: "Edward Kenny Esq., Dear Sir:— Yours of November 28th, with reference to Mr. Milmoë's occupation of Mr. Murphy's lot, just received. I do not understand such a state of circumstances to exist, however I have send your letter to Mr. Milmoë and advised him to desist, if such is the case I am contemplating the bringing of an action against Mr. Murphy for damages sustained by Mr. Milmoë, owing to his (Murphy's) failure to give Milmoë title. I would

suggest that you advise him to send me \$100 and I will procure a proper release for him. Yours truly, Thomas J. Butler."

It will be seen that this letter was more than twenty days after the conversation over the 'phone between Milmoë and Butler, at which conversation Mr. Murphy was present and at which time Mr. Milmoë repudiated the action of his attorney, and said that there was some mistake, and asked his attorney what he meant by telling Murphy that it was Milmoë who refused to take the title. So that no matter what Mr. Butler may have said after that time Murphy had *no right* after this repudiation, *to rely* upon letters or statements in regard to this transaction from Mr. Butler, but was bound to have gone to Milmoë himself for any information, in regard to that matter, which he desired to procure. However, it expressly appears that at that time, some twenty days after the aforesaid conversation, the defendant Murphy *knew that Mr. Milmoë had taken possession of the lot in question and was occupying it* (see Exhibit D for defendant p. 65). So that whether Mr. Butler understood such a state of circumstances to exist or not could make no difference whatever. The fact was that Mr. Milmoë had repudiated any attempt on the part of his attorney to define his (Milmoës) position or to rescind or abandon the agreement, and Mr. Murphy was well aware of such condition of affairs, and also knew that Milmoë had entered into possession of the lot and was using and occupying it, thereby plainly evincing a determination to have the contract carried out and completed; and precluding any idea of abandonment.

It further appears that no return or tender of the Twenty Five Dollars paid on account of the contract was ever made, and that the defendant still has it in his possession.

It seems quite fair to say that the facts in the case therefore show conclusively that the agreement had never been rescinded or abandoned, but that Milmoë from the beginning has been ready to carry it out, and

notwithstanding any action on the part of his attorney to the contrary, such act was at once repudiated, and Mr. Murphy fully informed of the real condition of affairs; and that Murphy knew that after such disaffirmance of his attorney's letter Milmoë was in possession of the lot, occupied and still does occupy it. His occupancy of the lot is shown further by the testimony of the defendant, O'Leary, p. 50-51. Mr. O'Leary says that before Mr. Milmoë took possession of the lot it had a sign upon it "Lots for Sale;" that after Mr. Milmoë made his agreement to purchase the lot, the sign for sale was taken down and that Mr. Milmoë placed bricks and other building material upon the lot, and occupied it openly and notoriously by storing thereon building and other materials, such as was used by Mr. Milmoë in his business. It might be stated at this point that Mr. Thomas O'Leary is the defendant and claims to be a bona-fide purchaser; but the evidence conclusively shows he not only had constructive notice from the record of the agreement to convey to Milmoë, but actual notice of the fact that Mr. Milmoë was in possession and occupancy of the lot at the time he, O'Leary, took his deed, and that O'Leary never made any inquiry of Mr. Milmoë with regard to his occupancy of said lot. (Case p. 50-51.) He lived next door to the lot in question, and saw Milmoë occupying and using it.

All the delay in carrying out this contract has been caused by the defendant, Murphy. The evidence shows quite conclusively that Milmoë offered to give him all the time necessary to complete the title, — months if necessary—in the manner pointed out by the Statute; and it is to be presumed that the defendant contemplated so doing at the time of the making of the agreement, Milmoë under this extension of time had a right to wait till Murphy completed his proceedings to perfection. The complainant Milmoë cannot be charged with laches.

The learned Vice Chancellor, in his opinion (page 59) says, there is another reason why the complainant

must fail. He has by his conduct stopped himself from claiming a specific performance, and cites the case of *Meidling vs. Trefz*, 3 Dick. 639, saying, "There, as here, the contract was unilateral and Mr. Justice Magie said, when contracts are optional in respect to one party, delay on his part is viewed with special strictness. Here there was not only delay but, as the above quoted correspondence shows, little short of actual abandonment."

In the present case, although the contract was unilateral, a portion of the purchase money had been paid; and the reason for the delay is amply explained; and was caused entirely by Murphy's conduct.

It is respectfully contended the acts of the complainant conclusively disprove any intention on his part to abandon the contract. The fact of his repudiation of his attorney's letter on November 9th, the recording of the agreement of November 10th, and the fact he entered into possession of the property and occupied it, show to the contrary. There is no dispute but what the defendant, Murphy, agreed to make the title good and took the initiatory steps and then abandoned his efforts in that direction, and it was his abandonment and delay of his efforts in that direction which caused the delay.

This was not a contract impossible of performance.

If there is any doubt concerning the title, and the vendor can remove that doubt at trifling expense, he must do so.

The rule is, that equity will not decree a specific performance of a contract and convey land where there is a *substantial defect* in the title *which cannot be remedied* before the decree. (*Waits Actions and Defences at Law and Equity*, vol. 3, page 188, and cases cited.)

The defect in the present case was not a *substantial defect* and could easily have been cured. The defendant had all the evidence in his possession that a Court of Equity would require in order to make a decree

that the land might be sold free and clear and by warranty deed as the defendant had agreed to do. (Meyer vs. Madrepela, 53 Atl. Rep. 477.)

The rule that Courts of Equity will not enforce the specific performance of a contract at the instance of a vendor where his title is involved in difficulties, does not apply to a vendee. If the covenant be within the range of possibility it must be performed. To bring the case within the rule of dispensation, it must appear that the thing to be done cannot by *any means* be accomplished.

(3. *Comyns Dig.* 93.)

(*School Trustees of Trenton vs Bennett.* 3 *Dutch.* 513.)

Where a party, by his own contract, creates an absolute duty or charge upon himself, he is bound to make it good, because he might have provided against it by contract.

(*Seventh Am. & Eng. Ency. of Law*, 2nd Edition, p. 148.)

(*In 22nd American and English Ency. of Law*, 1st Edition.)

Under the head of specific performance, it is said, under the heading "Enforcement must be possible". The situation of the parties, and the nature of the contract must be such that the agreement may be executed at least substantially according to the original design. A substantial compliance must be practicable as well as possible. A large number of cases are cited.

As when under a contract to convey land the vendor has since parted with his title or encumbered it or a flaw in it is developed.

The Court under the prayer of general relief could have decreed a conveyance of such title as the defendant had, with compensation, (see Daniels Chancery Practice, 4th Ed. vol. 3, p. 2259 foot note 1, and citing Davis vs. Parker 14 Allen 92.)

Cases where time is held not to be of the essence of the contract are some times treated as coming under the head of specific performance with compensation, on the ground that the interest on the unpaid purchase money is sufficient compensation to the vendee but the term is more usually applied to cases where either the vendor has not the very thing he contracted to sell, or where there is some deficiency either in the quantity or quality of the property ; the Court will generally enforce specific performance with compensation.

In like manner, if there should be some slight deficiency in the quantity of the property, or if there be some inconsiderable portion thereof (not essential to the enjoyment of the rest) to which the vendor cannot show a good title, then in the absence of some reason to the contrary, specific performance and compensation will be decreed. (Thompson's Compendium of Modern Equity (London, '99) p. 465-467. Leake, on the Law of Contracts, 3rd Edition, page 721.)

Where a vendor has only substantially the whole interest he has contracted to sell he cannot enforce the contract against the purchaser, and yet the purchaser can insist on having all that the vendor can convey with a reduction of prices.

(Fry on Specific performance Sec. 229, page 203.)

Generally if the vendor can make good title at any time before the day fixed for the completion of the contract it will be enforced. (In re. Bryant etc. 1899, 44 Chancery Division at pages 233, 234.)

(Rawlins on specific performance (1899) p. 124.)

In Smith's Manual of Equity, at page 229, it is said : "where the vendor is incapable of making a complete title to all the property sold—Courts of Equity will generally allow the purchaser to proceed with the purchase *pro-tanto*, that is, to have the contract specifically performed as far as the vendor can perform it, and to have an abatement made out of the purchase money or a compensation."

The defence relied upon this case as that of abandonment; and the evidence offered in proof of such abandonment is the letter of November 9th, which was expressly repudiated the day afterwards; delivery up of the papers, which was also repudiated the day afterwards, as has already been shown and the subsequent letter of Mr. Butler to Mr. Kenny after the action of Mr. Butler had been discredited so far as this transaction is concerned.

In *Hoffman v. Hummer*, in 3rd C. E. Green, p. 83.

At page 90 the Chancellor (Zabriskie) in a very able opinion in defining what a waiver or abandonment of a contract such as this is says: "But such parole waiver or discharge must be clear and explicit and proved beyond doubt. In this case (*Hoffman vs. Hummer*) the conversation of March 15th, relied upon as a waiver of the contract was not intended as such and cannot be so construed. The complainant insisted on his construction, felt certain and positive that he was right, and avowed his intention to adhere to it and not to perform the contract otherwise. Taken by itself it was no discharge or waiver, but when accompanied by the words which the defendant himself testified were used by the complainant at parting: "We will settle this some other time." It is very clear that it was not intended as a discharge of the contract was not received as such."

Few contracts would stand in this Court if such statements and negotiations about their execution should be held to discharge them. Fry on Spec. Per. sec. 698.

The learned Vice Chancellor's opinion cites *Meidling vs. Trefz* as a case in point.

It is respectfully insisted that the cases are not alike, for the following reasons.

In the *Meidling* case there was a clause in the agreement stating that the money would be returned if any legal defect in the title was discovered; and the plead-

ings alleged that the vendee objected to the title and refused to complete the contract, and that the money paid on account at the time of the making of the agreement had been returned.

In that case the contract was in the alternative.

If there was a defect in the title Mrs. Meidling was bound to return the deposit money ; if there was no defect she could be required to convey.

As the learned Judge who wrote the opinion in that case says : This cast on Mrs. Trefz's a duty to ascertain the state of the title and to give notice of satisfaction or dissatisfaction therewith within a reasonable time. Citing *Reynolds vs. O'Neil* 11 C. E. Green 225.

In the case in hand the contract was not in the alternative, nor has the money paid on account thereon ever been returned.

No rule respecting the length of delay which will be fatal to relief, can be laid down ; for each case must depend upon this peculiar circumstance. *Meidling vs. Trefz*, *Supra*, and cases therein cited at page 644.

The peculiar circumstances in this case were that Milmoë upon being informed by Murphy of the difficulties in the way of perfecting the title, agreed to give him all the time necessary,—months if required, and he had a right to wait,—in fact, was bound to wait—knowing that proceedings in chancery are some times drawn out to great length ; but immediately upon his discovering that Murphy had attempted to alienate the title to O'Leary he commenced suit. He appears to have been ready, desirous, prompt and eager to perform the contract on his part.

It is respectfully contended that after due consideration of all the facts in this case, and under the general prayer for relief the doctrine as stated by Mr. Justice Depue in *Loundsberry vs. Locumder* 10 C. E. Green 554, should be followed, and that the decree of the Court of Chancery should be so modified as to compel

the vendor to perform the contract so far as he is able, and that the vendee should be allowed compensation or a reduction on the purchase price for such part of the title as the vendor is not able to make.

This is the rule laid down in *Young vs. Paul*, 2nd Stockton, 401.

There is no difficulty in the way of fixing the amount of compensation, or reduction on the purchase price of the land. In a letter Mr. Butler offered to conduct the proceedings necessary under the "Death Act" to procure a decree for the conveyance of the land free from the outstanding interest for \$50. This, then, could be fixed as the amount together with the taxed costs of the proceedings. If a decree be made of specific performance the amount of the purchase money remaining unpaid could be ordered to be paid into the Court of Chancery, and upon the making of a decree that the conveyance be made free from the cloud the amount of \$50 to the Solicitor and the taxed costs could be deducted and the balance paid over to the defendant.

This is a case where relief ought to be granted if possible, because of the—to say the least—unbusinesslike and lack conduct of the defendant, Murphy, in covenanting, under seal by an instrument solemnly acknowledged, to convey by warranty deed free from all encumbrances, when he, the defendant, Murphy, knew of the outstanding interest. He ought in all fairness and equity be compelled to convey which he has and bear the expense of the proceedings to cure the defect. It is a curable defect. His contract is possible of performance—at small expense; and having placed himself, with his eyes wide open, in the position he did, he ought to be willing to make the conveyance, and if not willing—he ought to be made to.

To recapitulate, it is quite clear that the defendant knew of the defect when he made his agreement to convey by warranty deed free from encumbrances. That after the execution of the contract he took initia-

tory steps to perfect the title. That it was possible to perfect the title; that it was not only *possible* but *easy*. That the letter of the attorney of November 9th and his delivery up of the papers was repudiated by the complainant to the defendant the following day and the agreement of sale was recorded so that the defendant knew that the agreement was in full force and effect after that time. That the defendant knew that the complainant had entered into possession and was and still is occupying the land. That the defendant never offered to return the part of the purchase money paid. That the complainant extended the time for months if necessary in order that the defendant might take proper steps enabling him to comply with his contract. That as soon as complainant heard of the attempted conveyance to O'Leary, he filed his bill, therefore there can be no laches charged against him. That O'Leary, who took title subsequent to the agreement, had full knowledge not only by the record but by seeing the complainant in possession of the land at the time he took title, and was therefore chargeable with notice. That the decree of the Court of Chancery should be modified and the defendant decreed to convey such title as he has and make compensation for such title as he has not.

WALTER J. KNIGHT,

Counsel with Complainant.

New Jersey Court of Errors and Appeals.

ALEXANDER MILMOE,

Appellant,

AND

WILLIAM MURPHY AND

THOMAS J. O'LEARY,

Appellees,

On Appeal.

BRIEF FOR APPELLEES.

This is a bill for specific performance. The facts of the case are simple. William Murphy had title to a tract of land in the City of Newark. He entered into a written agreement (Printed Case p. 66) with Alexander Milmoe, the appellant, to convey said tract of land to him by deed of warranty, for the sum of four hundred and fifty dollars. The agreement bears date October 20, 1900. The contemplated deed was to be executed before the first day of November, at the office of Thomas J. Butler, solicitor for the appellant, in the City of Newark, between the hours of ten in the forenoon and two o'clock in the afternoon, on said first day of November (p. c. 67).

According to the contention of the appellant this agreement was rescinded, and a deed was subsequently executed in the month of May, 1901, to Thomas

J. O'Leary. The bill of complaint was filed to obtain a decree for specific performance, adjudging that the deed from Murphy to O'Leary was void, that it might be set aside, and that Murphy might be decreed to perform specifically the said agreement.

The answer to this charge is in substance, that Murphy was willing at all times to convey such interest as he had in the premises to the appellant; that this was declined by him and that the conduct of the appellant, and his solicitor, was such as to make it clear that the agreement aforesaid, so far as accepting a deed was concerned, was entirely at an end.

STATEMENT OF EVIDENCE.

The witnesses for the appellant were Alexander Milmoe, the complainant, and Thomas J. Butler, his solicitor. The witnesses for the defendant were William Murphy, Martin A. Smith, a real estate agent, and Thomas J. O'Leary. The testimony, therefore, is brief, and it will be found upon examination to be substantially as follows:

Milmoe testified that after the agreement was made, he instructed his counsel, Mr. Butler, to make a search; that Mr. Butler reported to Milmoë that he could not find the title clear, and that then they sent for Mr. Murphy. It appears, however, by the testimony of Mr. Murphy, in which Mr. Butler himself concurs, (p. c. 21 & 36) that a few days after the agreement was signed, Mr. Murphy handed to Mr. Butler, in order to help him make the search, certain papers, among which was an affidavit. It may be said here, in order to make the matter plainer at this stage, that the title in question of Mr. Murphy shows that the land was

purchased by his father about forty years ago, and that his father and his mother conveyed the same in 1859 to one Bernard Ward, who was his father's brother-in-law; that said Ward died intestate seized of the property leaving two children Robert J. Ward, and a brother; that in the year 1900 Ward conveyed to the father of the defendant Murphy, the said tract, and that he conveyed it to the defendant. William Murphy. The brother of Robert J. Ward, however, had not been seen or heard from in thirteen years, and was believed to be dead, and had been absent for more than that time from this State. The affidavit aforesaid, which I see has not been printed in the state of the case, but which was offered in evidence, was made by the said Robert J. Ward, concerning his brother's absence, as aforesaid. It will be seen, therefore, that when Mr. Murphy gave to the solicitor of the complainant, the affidavit setting forth the facts aforesaid, it apprised him of everything within his knowledge. It was thus open and fair, I may say here, that no one who heard him give the testimony before the Vice-Chancellor could help being convinced of his sincerity and good faith. It was from Mr. Ten Eyck, a lawyer, after the execution of the agreement in question, that the first intimation came to him about a probable defect in the title (p. c. 38). He then went to see Mr. Butler. This was some time after he had left the affidavit and papers with him. He told Mr. Butler what Mr. Ten Eyck had told him. "Then," to use his own words, "Mr. Butler took down a leather covered book and he read to me a phrase out of the law of New Jersey, which says that if a man does not turn up in seven years he's dead. What I will have to do is to go down to the Chancellor and have him

declared dead." (p. c. 38) Mr. Murphy asked him, "How can it be perfected," Mr. Butler said, "The law reads here that if a man is not seen for seven years he is dead; but you never know what these Chancellors are going to do, and to make it stone-wall and Gibraltar, we will go to the Chancellor and have him declared dead." He asked what it would cost. The answer was that it was a matter of \$35 or \$36 or \$50 at the outside. Mr. Murphy told him to go on. He said that he was sure of his fee, because as he was acting as counsel for Mr. Milmoe and that he could deduct the fee from the contract price. He said that it was all right (p. c. 39).

It will be found upon the examination of Mr. Butler's testimony that he substantially agrees with this account except in the particular that Mr. Murphy would have another perfect the title. This Murphy denies, and the testimony of Martin A. Smith (p. c. 43), who is a disinterested witness, supports in this regard, the testimony of Mr. Murphy. On October 29th (p. c. 65) Mr. Butler wrote to Mr. Murphy, stating that he would close the title on Thursday, November 1st, at 10 A. M., and that it would be necessary for him to bring his wife and his father at the time. Mr. Butler says this letter was written five days after he had the affidavit (p. c. 25). Mr. Butler stated that he concluded to reject the title until there was some disposition made of the outstanding half interest (p. c. 29). The following questions were asked:

Q. Did you ask for the deposit money and search fees?

A. I did not.

Q. I show you this letter of November 9th (showing letter to witness).

A. Yes; I recollect writing that.

Q. Then you did ask back this money before this conversation seven or eight weeks after the first of November?

A. It appears from that letter that I did.

That letter is as follows:

NOVEMBER 9, 1900.

MR. WILLIAM MURPHY,

DEAR SIR:

I just saw Mr. Milmoë, and he says that he will not take title until it is perfected. He says you will have to refund him his forfeit money and his search and survey expenses, making a total of \$58.

YOURS TRULY,

THOMAS J. BUTLER.

This seems to be as clear as it can be made that the title was rejected, and the relationship between the parties ended, so far as taking title to the land was concerned.

When the Court comes to read the testimony of Mr. Murphy and that of Mr. Butler, I think it will be very evident that the testimony of Mr. Murphy is clear and reliable, while that of Mr. Butler is in conflict with his own letters, before such letters were produced, and that his attempt to qualify their force makes his testimony weaker and less reliable.

But if further evidence is required, it is to be found in a letter of Mr. Butler, solicitor of the appellant, and marked "Exhibit E for defendant" (p. c. 66). I do not find in the printed book the fact that this letter was offered, but this book is now found to be inaccur-

ate. The affidavit of Ward, though offered in evidence, is not published, nor does it appear at what point of the case Exhibits D and E were offered. The appellant has had them printed in the case, however, and the Vice Chancellor, in his opinion (p. c. 56) refers to them. This letter is dated December 1st, 1900, just one month after the time provided in the agreement for passing title. It was an answer to a letter from Mr. Edward Kenny, the lawyer, of Newark, and the solicitor of Mr. Murphy. Mr. Kenny's letter is dated November 28th, and is as follows:

THOMAS J. BUTLER, ESQ.,

DEAR SIR:

Mr. Murphy informs me that although your client, Mr. Milmoë, has refused to complete the purchase of the lot on South Sixth street, he has taken possession of it, and occupied it. Why is this thus?

YOURS TRULY,

The answer to this letter is important as showing the understanding of both parties at the time. Mr. Butler writes in answer as follows:

DEAR SIR:

Yours of November 28th with reference to Mr. Milmoë's occupation of Mr. Murphy's lot just received. I don't understand such a state of circumstances to exist. However, I have sent your letter to Mr. Milmoë and advised him to desist, if such is the case. I am contemplating the bringing of an action against Mr. Murphy for damages sustained by Mr. Milmoë, owing

to his (Murphy's) failure to give Milmoë title. I would suggest that you advise him to send me \$100.00 and I will procure a proper release for him.

YOURS TRULY,

THOMAS J. BUTLER.

Surely, if there is a finality in any action everybody concerned must have believed at that time in this case, that the agreement was at an end Murphy certainly did. The appellant declined to accept the title which Murphy was willing to convey, on the ground that the half interest outstanding could not be conveyed by him. The money on deposit was to be returned and the expenses for search and survey were asked to be paid. This was on November 9th. Mr. Murphy's papers were returned to him by Mr. Butler (p. c. 39). Then on December 1st, it is stated that he was to bring an action against Mr. Murphy for damages. This statement of the case seems to me to carry conviction with it. No step was taken, however, in the case of any kind by the complainant. In the month of May, five months after this last letter, Murphy conveyed part of the tract to O'Leary, who is proven to be a bona fide holder for value, without personal notice. The agreement had been recorded on November 10th in the Register's office, the day following the writing of the letter of November 9th (p. c. 65).

Upon the foregoing facts, it is contended that the complainant below can not have a decree for specific performance. Of course, the deed to O'Leary could not be decreed to be void, as he asks, nor could Murphy be decreed to perform specifically the agreement aforesaid, because the complainant himself, has declared he would not accept it. Murphy could not be decreed

to give a warranty deed, because it may be that there is a half interest outstanding still. He has, in good faith, apprised the complainant of every fact within his knowledge. He has been willing to convey what he had, or to hold his title, if not acceptable, to the complainant. The conduct of the complainant and his solicitor, and the letters in the case, show that the agreement was at an end; it was rescinded by the express statement of complainant's solicitor, as well as by their conduct. No step was taken towards specific performance until after a deed of part of the property was executed to the defendant O'Leary. This is laches on the part of the complainant. He cannot stand idly by and indicate his rescission of an agreement, and when the parties place themselves in a position by a sale from which they cannot recede direct the court to make a decree in his favor.

The exercise of specific performance is not a matter of right in either party, but is a matter of discretion in the court; that is to say, of a sound and reasonable discretion that withholds or grants relief according to the circumstances of each particular case.

Stoutenburgh vs. Tompkins, 1 Stock, 332-335.

The court will not decree specific performances where the obligation to perform rests upon one of the parties only. In such case equity will enforce the contract with great caution.

The general principle is that where the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other.

Van Doren vs. Robinson, 1 C. E. Gr. 256.

In the case in hand the agreement was signed only

by Murphy. The complainant Milmoe did not sign it. He, therefore, while not obligated himself to take the land is endeavoring to enforce the only person who did sign it to execute it. Such unilateral or optional contracts are not favored in equity and want of mutuality of obligation and remedy is a bar to specific performance.

Hawralty vs. Warren, 3 C. E. Gr. 124-126.

Pinner vs. Sharpe, 8 C. E. Gr. 274-281.

Gilbert vs. The Trustees of the East Newark Co., 1 Beas. 180.

The fact that the complainant when called on to perform the contract on his part has refused or omitted to do it, will bar his claims to specific performance.

Merritt vs. Brown, 4 C. E. Gr. 286.

Earl vs. Halsey, 1 McCart. 332.

When contracts are optional in respect to one party delay on his part is viewed with especial strictness.

Fry, Spec. Perf. Sec. 773.

In the case in hand the complainant not only refused to take the deed, but made no step for four months, and then not until the defendant had conveyed to another, a part of the premises in question.

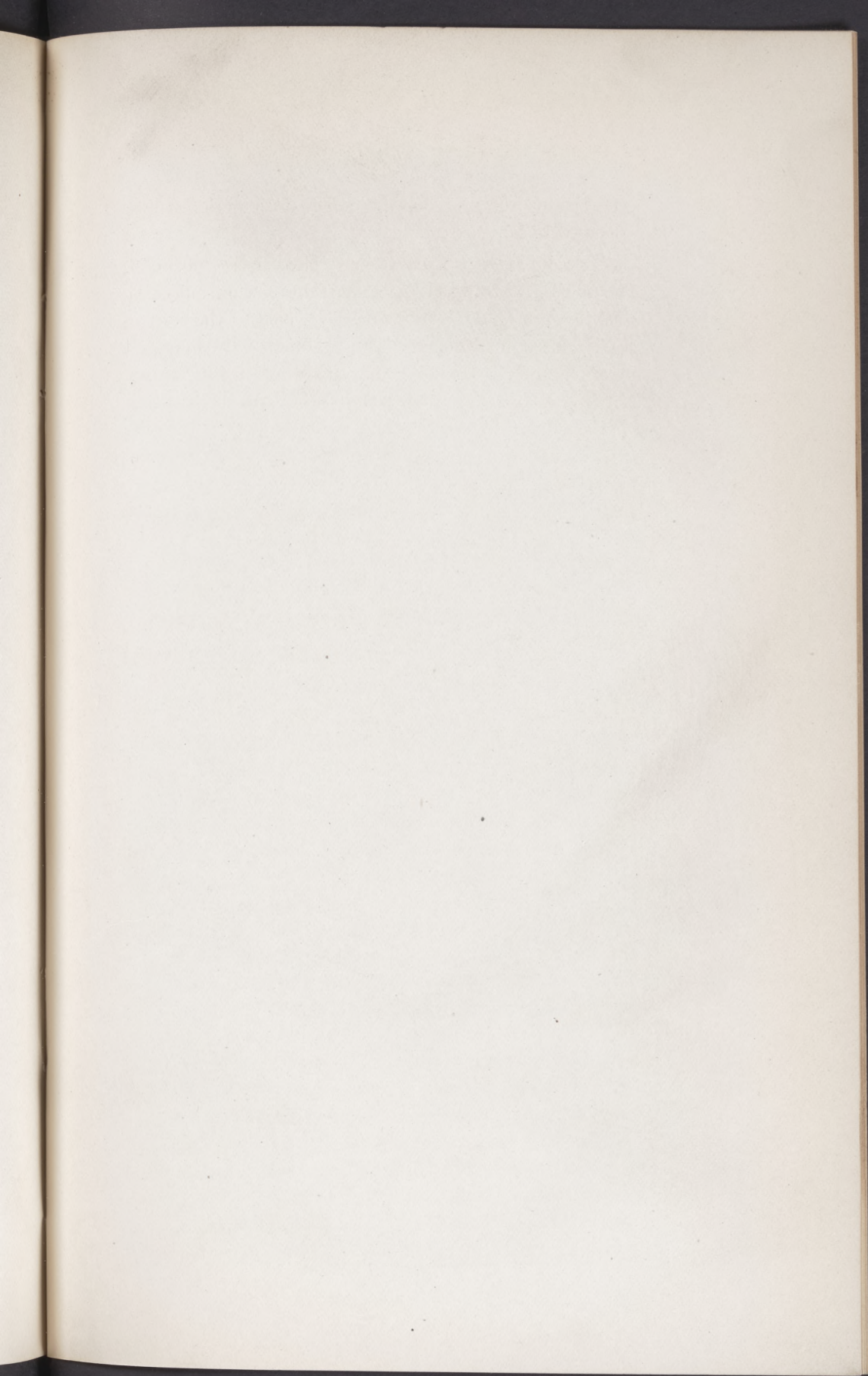
It was held in Meidling, vs. Trefz, 3 Dick. 638, in the Court of Errors, that specific performance of a contract for the conveyance of land (which the buyer is not bound to buy) will not be decreed when the conduct of the buyer has been adapted to induce, and has induced, the seller to infer an abandonment of the option to buy, and by acting upon such inference the seller

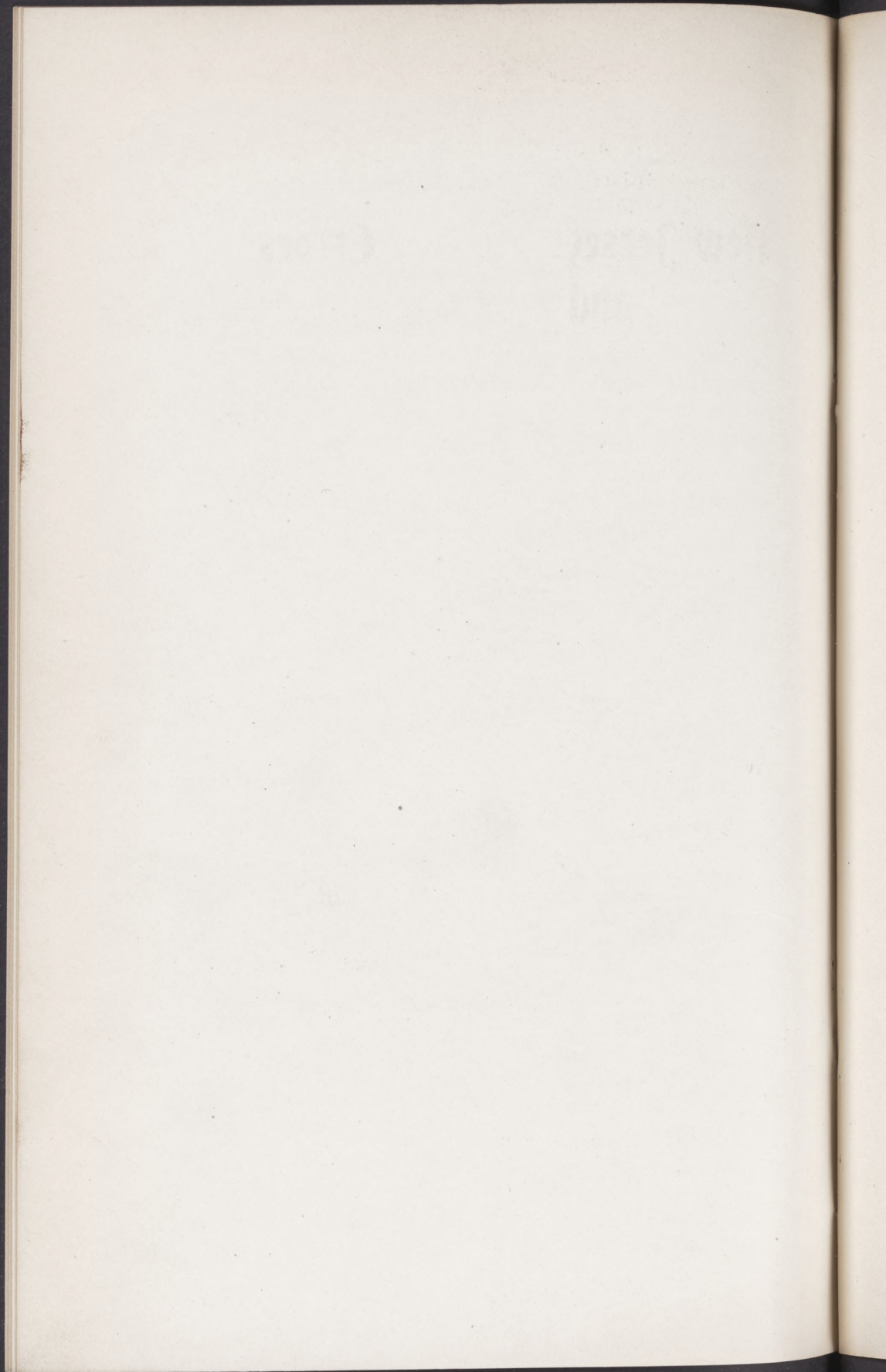
has been injured; an abandonment of the option will be deemed to be thus established.

The defendant, Murphy, has relied on the abandonment of the contract, as under the circumstances he had a right to do. He conveyed a part of the tract to the defendant O'Leary. The conduct of the appellant has, therefore, changed the situation of the parties. Murphy is not now the owner of the land. O'Leary is a bona fide holder for value without personal notice. It is impossible to restore the parties to the original position in which they stood.

It is, therefore, respectfully urged that the decree of the Court of Chancery should be affirmed.

WILLIAM B. GOURLEY,
Of Counsel with Appellees.





In Chancery of New Jersey.

Between

ALEXANDER MILMOE,

Complainant,

and

WILLIAM MURPHY,

and

THOMAS J. O'LEARY,

Defendants.

On Bill, &c.

10

TO HIS HONOR, WILLIAM J. MAGIE,

Chancellor of the State of New Jersey.

20

Humbly complaining, sheweth to your Honor, your orator, Alexander Milmoe, of the city of Newark, county of Essex, State of New Jersey, on the 12th day of October, 1900, entered into a written agreement under seal with one William Murphy, of the city of Paterson, county of Passaic, State of New Jersey, wherein and whereby said William Murphy, for and in consideration of the payment to be made to him of the sum of \$450,00, on or before the first day of November next ensuing, agreed to sell and convey unto your ora- 30
tor a certain lot, tract or parcel of land in the city of Newark, aforesaid, and described as follows: Beginning in the easterly line of south Sixth street at a point distant 100 feet southerly from the southeasterly corner of the same and Cabinet street, being 25 feet front and rear, by 120 feet deep, being a part of the same premises conveyed to Owen Murphy by deed recorded in Book F. 8 of Deeds for Essex County, Pages 513, etc., together with a strip of land 20 feet in width, lying between the line of old Nicholay street and the 40

easterly line of south Sixth street, and that said conveyance should be made by said William Murphy to your orator *by deed of warranty* free of all encumbrances.

And your orator further shows that said agreement was duly executed and acknowledged on the said 20th day of October, 1900, before Thomas J. Butler, one of the Masters of this Honorable Court, and was thereafter, and on the 10th day of November, 1900, recorded
 10 in the Register's office of the County of Essex aforesaid, as by reference to said original agreement, now in the possession of your orator, and ready to be produced, will more fully and at large appear.

And your orator further shows that upon the execution and delivery of said agreement, he paid the said William Murphy the sum of \$25.00 as part of the consideration money of the said conveyance, and agreed on his part in the said agreement to pay the balance,
 20 to wit, the sum of \$425.00 on delivery of the aforesaid deed, which delivery was to be made at the office of the said Thomas J. Butler, Room 1016 Prudential Building, 763 Broad street, Newark, between the hours of 10 o'clock in the forenoon and 2 o'clock in the afternoon on the 1st day of November next ensuing the date of said agreement, as by reference to said agreement as aforesaid, will more fully and at large appear.

And your orator further shows that after the execution and delivery of said agreement as aforesaid, your
 30 orator caused a search to be made in regard to the title to the said land and premises by said Thomas J. Butler, a lawyer of this city, and was informed by the said attorney that a search of the title disclosed an outstanding undivided one half interest in said premises, in one Ward, and thereupon your orator informed the said William Murphy of said fact, and requested him to take such steps as were necessary to extinguish said one half outstanding interest and perfect the title to said lands and premises which the said William Murphy
 40 promised he would do.

Your orator further shows that the said William Murphy did not make, deliver or tender any deed for the land and premises described in said agreement, to your orator at the time and place agreed upon for the purposes in said agreement, and has never, from the time of the making and delivery of such agreement until this time offered to make the said conveyance as aforesaid by warranty deed or any other deed, either at the time and place agreed on or at any other time and place, but so to do has refused, although your orator has demanded on many occasions that he should, and that a deed should be made by said William Murphy and delivered to your orator free from all encumbrances for the said premises as he had agreed to do as aforesaid. 10

And your orator further shows that he has always been ready and is still ready and willing to perform the said agreement on his part, and has so informed the said William Murphy on many occasions.

And your orator further shows that on the 13th day of May, 1901, the said William Murphy made a conveyance of the said lands and premises described in said agreement to one Thomas J. O'Leary of the city of Newark, county of Essex, State of New Jersey, and that the deed of said conveyance was recorded in the Register's office of said county on the 14th day of May, 1901, as by reference to said deed or a duly certified copy thereof, to which your orator begs leave to refer, will more fully and at large appear. 20

And your orator shows that said conveyance by said William Murphy to the said Thomas J. O'Leary was made without the knowledge or consent of your orator, and in direct violation and disregard of said agreement, and your orator's rights in the premises. 30

And your orator further shows that the said Thomas J. O'Leary had notice of the agreement between the said William Murphy and your orator hereinbefore set forth, and took the said deed of conveyance for the said land and premises before referred to, with full knowledge and notice that the said William Murphy was 40

under agreement to convey the same to your orator, and had received a portion of the consideration therefor.

10 All which actings and doings are contrary to equity and good conscience, and tend to the manifest wrong and oppression to your orator. In tender consideration whereof and foreasmuch as your orator is without adequate remedy in the premises at and by the strict
20 rules of the common law, and can only obtain relief in this honorable court, where matters of this nature are properly cognizable and relievable.

To the end therefore that the said William Murphy and Thomas J. O'Leary may without oath (answer under oath being waived) to the best and utmost of their respective knowledge, remembrance, information and belief, full, true and perfect answer make to all and singular the matters aforesaid, as fully and particularly as if the same were here repeated, and they and each
20 of them distinctly interrogated thereto, and that the said conveyance of said lands and premises made by the said William Murphy and the said Thomas J. O'Leary may be decreed to be void, and that the deed of conveyance may be set aside; and that the said William Murphy may be decreed to specifically perform the agreement herein set forth with your orator, and that your orator may have such further or other relief in the premises as the nature of the case may require, and as shall be agreeable to equity and good con-
30 science.

May it please your Honor, the premises considered, to grant unto your orator the State's writ of subpoena, issuing out of and under the seal of this honorable Court, to be directed to the said William Murphy and Thomas J. O'Leary commanding them and each of them, by a certain day and a certain penalty, therein to be expressed, to be and appear before your Honor in this Honorable Court, then and there to answer all and singular the said premises, and to stand to, abide by,
40 and perform such order and decree therein as to your

Honor shall seem meet, and as shall be agreeable to equity and good conscience, and your orator as in duty bound, will ever pray &c.

THOMAS J. BUTLER,
Solicitor of Complainant.

WALTER J. KNIGHT,
of Counsel with Complainant. 10

In Chancery of New Jersey.

Between

ALEXANDER MILMOE,
Complainant, and

WILLIAM MURPHY and
THOMAS J. O'LEARY,

Defendants.

On Bill &c.

—Answer—

*The answer of William Murphy, defendant, to the bill of
complaint of Alexander Milmoe, complainant.*

This defendant answering says that he admits that
on the twelfth day of October, in the year nineteen
hundred he agreed in writing in consideration of the
sum of four hundred and fifty dollars to be paid to him
20 on or before the first day of November then next
ensuing to convey to the said complainant the lands
and premises set forth and described in the bill of com-
plaint in this cause, and that said deed should be a
warranty deed and free from encumbrances.

This defendant further answering says that he has
no copy of said paper writing in his possession or un-
der his control but he believes the fact to be that the
said Alexander Milmoe did not execute said paper
writing binding himself to make said payment but that
30 the said paper writing was signed only by this defend-
ant and was placed in the register's office of the
County of Essex as hereinafter set forth for record
without the signature of the said complainant being
subscribed thereto; and this defendant charges the fact
to be that said complainant in not signing said agree-
ment endeavored to bind this defendant for the de-
livery of said deed but did not desire to bind himself
at that time of the signing of said agreement until he
would discover at a later period whether it was at such
40 time to his interest or not to execute the same.

This defendant further answering admits that the said paper writing purporting to be an agreement was duly executed and acknowledged on the twentieth day of October, in the year nineteen hundred, before Thomas J. Butler, one of the masters of the court of Chancery but this defendant denies that it was executed and acknowledged by said Alexander Milmoë ; that it was left for record on the tenth day of November then following in the register's office in the County of Essex but this defendant charges the fact to be that this was ten days after the time named therein for the delivery of the deed aforesaid. 10

This defendant further answering admits that the sum of twenty-five dollars was paid upon the execution of said paper writing which said sum of twenty-five dollars was to be part of the consideration of the said conveyance ; but this defendant denies that said money was paid to him by the said complainant as in said bill set forth, but this defendant is informed and believes it to be true that said money was delivered to one Milton A. Smith a real estate agent of the city of Newark, who was the agent through whom the said complainant had been informed that the said premises was for sale and in whose hands this defendant had placed the same for sale. 20

This defendant further answering admits it to be true that the deed for said premises was to be delivered at the office of the said Thomas J. Butler, in the Prudential Building on Broad street in the City of Newark between the hours of ten o'clock in the forenoon and two o'clock in the afternoon on the first day of November, nineteen hundred. 30

And this defendant further answering denies that the said Thomas J. Butler informed this defendant of the fact that there was an undivided one-half interest in said premises not owned by said defendant but this defendant states the fact to be that the facts from which said Butler made this statement were given to him by this defendant. 40

This defendant further answering says that about two days after he had signed the paper writing aforesaid described as an agreement in the bill of complaint he handed to the said Thomas J. Butler several papers relating to the title of the premises in question including an affidavit and several deeds from which it appeared that the father of this defendant purchased the property in question more than forty years' ago, and that thereafter the said father of this defendant whose
 10 name was Owen Murphy and his wife Ann Murphy conveyed said premises in the year eighteen hundred and fifty-nine to Bernard Ward, who was the brother-in-law of the said Owen Murphy; that thereafter the said Bernard Ward died intestate seized of the property in question and leaving several children as his heirs-at-law; that of these children all died when young but two; that one of the two remaining children, that is to say, Robert J. Ward by deed bearing date the thirteenth day of January in the year nineteen hundred, did
 20 convey to the said Owen Murphy the father of this defendant the premises in question by proper conveyance and that said Owen Murphy did by proper conveyance bearing date the ninth day of May, nineteen hundred, convey to this defendant the said premises in question; that in said conveyances as aforesaid were included not only the premises in question but also the lot adjoining thereto and said conveyances were such to vest in the said defendant an estate in fee simple therein as hereinbefore and hereinafter set forth; that
 30 in the said affidavit left with the said Thomas J. Butler as aforesaid it was sworn to and deposed by said Robert J. Ward that his brother who was with himself the only surviving members of the said family had not been seen or heard from in thirteen years and that he was believed to be dead; that said Ward and brother had been absent from New Jersey for more than that length of time and that the said brother was presumed to be dead.

And this defendant further says that having apprised
 40 the said Thomas J. Butler of the foregoing facts the

said Butler being the Solicitor for the complainant in his attempted purchase of the said premises, and left with him the affidavit and deeds aforesaid and that said Butler informed this deponent that he was satisfied with the title in question and that thereupon he notified Edward Kenny a practicing lawyer of the City of Newark who represented this defendant in the transaction that is to say the said Butler notified the said Kenny to have said deed prepared as he was satisfied with the title. 10

This defendant further answering denies that he has refused to deliver a deed for said premises but had always been willing until the refusal of the said complainant to accept a deed for the same to execute a proper deed to said complainant in consideration of the money aforesaid, that is to say, a warranty deed free from encumbrances; that while the matter was undetermined this defendant was informed by the said Butler that the said complainant would not accept said title and that there was no use in presenting a deed 20 for the same.

This defendant further answering says that the said complainant has not at any time made an offer of the consideration money or made any demand upon him for a deed except as above set forth; that this defendant was also notified by the said complainant that he would not accept said deed; that thereupon the said paper writing purporting to be an agreement if it ever had any binding force on this defendant in view of the fact that it had not been signed by the complainant 30 was rescinded and it was verbally agreed between the said parties to treat the matter as ended; that the said complainant requested the return of the twenty-five dollars on deposit which was subsequently offered to him by the said Milton A. Smith in whose hands it had remained; that subsequently the complainant refused to accept said sum of money but demanded from him the sum of fifty-eight dollars which this defendant declined to pay.

This defendant further answering says that after the 40

facts aforesaid this defendant was informed by said complainant, that he did not want the lot in question because it would be of no use to him without the other contiguous lot, as he wished to use both lots for a dumping ground.

10 This defendant further answering says that in view of the foregoing facts this defendant states it to be true that said obligation to convey the premises in question if such it be was rescinded by consent of the parties
 10 as well as by the refusal of said complainant to accept a deed from this defendant and that he was at full liberty unrestricted by any alleged agreement with the complainant to sell his property to such purchaser as he might obtain ; that thereafter he did for valuable consideration convey by deed of warranty to one Thomas J. O'Leary the premises as described in the bill of complaint in this cause ; that said deed was recorded as in said bill of complaint set forth but this
 20 defendant denies that said deed was made in direct violation of said alleged agreement.

And this defendant further answering says that the said plaintiff is in laches in waiting for a period of seven months before instituting suit for the specific performance of said alleged agreement and permitting this defendant to addition to the foregoing facts which constituted a rescission of said alleged agreement if it was binding upon him at any time to assume from this lapse of time that the matter was at an end and to change his position in conveying said premises to a
 30 bona fide purchaser.

And this defendant humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf must wrongfully sustained.

WILLIAM B. GOURLEY,
Solicitor and of counsel with the
defendant William Murphy.

In Chancery of New Jersey.

Between

ALEXANDER MILMOE,
Complainant, and
WILLIAM MURPHY *and*
THOMAS J. O'LEARY,
Defendants.

On Bill

Replication 10

The Complainant joins issue on the answer of the defendants.

THOMAS J. BUTLER,
Solicitor of Complainant.

WALTER J. KNIGHT,
of Counsel. 20

In Chancery of New Jersey.

Between

ALEXANDER MILMOE,
Complainant, and

WILLIAM MURPHY, *and*
THOMAS J. O'LEARY,

Defendants.

On Bill &c.
Order of Reference

10

¶ It is on this twenty-seventh day of August, A. D. Nineteen Hundred and One, on motion of Thomas J. Butler Solicitor of Complainant, Ordered that the above stated cause be referred to Frederic W. Stevens Esq., one of the Vice Chancellors to hear the same for the Chancellor, and to report thereon to him, and advise what order or decree should be made therein.

By the Statute,

20

JOHN R. EMERY,
Master.

I hereby consent to the making of the within order.

W. B. GOURLEY,
Solicitor of Defendants.

30 Filed August 27, 1901.

Hearing Thursday, December 12, 1901, at 10 a. m. at
Chancery Chambers, Newark, N. J.

FREDERIC W. STEVENS Esq.
V.-C.

A true copy.

40

E. C. STOKES,
Clerk.

In Chancery of New Jersey,

December 12, 1901.

In the matter of

ALEXANDER MILMOE,

*Plaintiff,**and*

WILLIAM MURPHY,

Defendant.

On Contract.

10

Transcript of shorthand notes taken in the above mentioned case in Chancery Chambers, Newark, N. J., on Thursday, Dec. 12, 1901, before Vice Chancellor Fred. W. Stevens.

Appearances :

Thomas J. Butler and Walter J. Knight for the 20
plaintiff.

William B. Gourley for defendant.

By Mr. Knight. I offer in evidence an agreement for the sale of property made between William Murphy and Alexander Milmoe, dated the 20th of October, 1900, acknowledged on the same day, and recorded in the Register's office 30
of Essex County on the 10th of November. This is an agreement for the sale of the property in question.

By the Court. I think you had better state when the agreement was to be performed.

By Mr. Knight. Between 10 in the morning and 2 in the afternoon of the 1st November, the date of the agreement being Oct. 20, 1900.

(Agreement in question admitted in evidence, and marked No. 1 for Plaintiff.)

40

Alexander Milmoë, on being duly sworn according to law, on his oath deposes and says:

Direct-Examination by Mr. Knight.

Q You are the plaintiff in this case?

A Yes.

Q And do you know William Murphy, the defendant?

10 A Yes.

Q Are you the Alexander Milmoë mentioned in the agreement?

A Yes.

Q And is the defendant the William Murphy mentioned in this agreement?

A Yes.

Q After this agreement was executed and made, did you instruct your counsel to make a search?

A Yes.

20 Q Who was your counsel?

A Mr. Butler.

Q And did he report to you as to the result of that search?

A Yes.

Q In consequence of the report which he made to you, did you have any communication with the defendant afterwards?

A Yes.

Q When about?

30 A When Mr. Butler reported to me that he couldn't find the title clear, we sent for Mr. Murphy.

Q And did Mr. Murphy come?

A Yes.

Q Whereabouts did the meeting take place?

A In Mr. Butler's office.

Q When?

A I couldn't exactly tell the date, sir.

40 The Court. Can you tell with reference to the 1st of November?

By Mr. Knight.

Q How long before the 1st of November?

A It was something about four or five days after we had this agreement—after the 20th.

Q Four or five days after the agreement was dated?

A Yes.

Q And who was present at that interview?

A Mr. Butler, Mr. Murphy and myself.

Q Did you acquaint Mr. Murphy with what you had found out in regard to the title?

A I did.

Q Just tell us what you told him.

A Mr. Butler told him that he found in the title there was some member of the family that was missing, as well as I could get at it, he couldn't be found to sign the deed, or whatever it should be.

Q Was any suggestion made as to any proceedings to be taken to make the title perfect?

A Mr. Murphy said he would like to perfect the title if it would not cost too much, and he asked Mr. Butler what it would cost. Mr. Butler said it would cost \$50 or thereabouts; and Mr. Murphy said he thought that was a little too much. Mr. Butler told him he could go to some other counsel, and see if he could get it done cheaper.

Q What did Mr. Murphy say after that in regard to the title?

A Mr. Murphy asked me if I would be willing and satisfied to give Mr. Butler \$50 of the \$425 that I was going to pay him for the property.

Q You mean the \$425 which was to be paid for the property; he asked if you would be satisfied to give Mr. Butler \$50 out of that?

A Yes.

Q What did Mr. Butler say to that?

A Mr. Butler told me that I should not do it—that Mr. Murphy ought to perfect the title at his own expense.

Q Then what was done?

A Mr. Murphy asked, when he saw I would not pay the \$50 to Mr. Butler in that way, he asked me if I would give him some time, so that he could advertise for the missing man, and see if he couldn't be found.

Q What did you say to that?

A I told him it was all right; that he could have a few weeks if he thought he could find him.

10 Q You told him he could have two weeks?

A A few weeks. We told him he could have a few weeks, and he left the office with that understanding. I also left shortly afterwards, and I met Mr. Murphy on Broad street, at the corner of Clinton, the same afternoon.

Q Did you have any further conversation about this matter?

A Yes.

Q What was it?

20 A Mr. Murphy told me if he could save that \$50 that he was going to do it; "You know," he said, "these lawyers only want to get as much money out of you as they can," and then he said that if he could advertise for this man in different papers, probably he could find him. He said "If I don't find him in a month, I may find him in two." I said I was in no hurry to build on the property until the Fall; if you can find him in a few months I am satisfied," and we left each other with that understanding.

30 Q Have you ever been tendered the deed for that property?

A No, sir.

Q Have you always been ready to pay the money agreed upon?

A Yes, sir.

Q And are you to-day?

A Yes.

Q Upon the tender of the deed as called for by the agreement?

A Yes.

Q At a moment's notice.

A Yes, at a moment's notice.

Cross-examined by Mr. Gourley.

Q How did you become aware of the fact that these lots were for sale?

A I live right across the street from them, and I saw the sign on the lots that they were for sale.

Q Who did the sign say you should go to to arrange the matter? 10

A A man of the name of Smith.

Q Real estate agent?

A Yes.

Q Did you go to him?

A Yes.

Q Was it at Smith's office this agreement to sell was drawn by your lawyer?

A The agreement to sell?

Q Yes. 20

A I believe it was; I think it was; I am not positive.

Q Are you sure exactly when the meeting was at Butler's office, that you have spoken about—what time that was; how near to the 1st of November?

A Am I sure what time it was?

Q The exact time?

A I said it was about four or five days from the time we were up at Smith's office.

Q Do you not know that it was Mr. Murphy who told Mr. Butler about the flaw in the title? 30

A Did I know it was Murphy told Mr. Butler that?

Q Yes.

A No, sir, I do not.

Q This agreement (Ex. 1 for plaintiff) is not signed by you? Although it cites that it is between you and Mr. Murphy. You did not sign this paper?

A No, sir; I was not asked to sign it.

Q Well, who drew the paper; do you remember?

A I suppose Mr. Butler did. 40

Q You are not sure about that?

A No.

Q Do you remember of an affidavit being presented by Mr. Murphy to Mr. Butler about this missing heir?

A No, sir; I do not.

Q Did you ever see that paper, so far as you know (handing witness paper).

A No, sir.

10 Q Now, the \$25 which you paid Mr. Smith as a deposit, that remained in his hands; is that true?

A Yes, I suppose so; I gave it to Smith, but I don't know who has it now.

Q Did you make a demand on Mr. Murphy for the expenses of searching and the survey?

A I never did; no, sir.

Q Did you know of a demand being made upon him for the expenses of the search and survey?

A No, sir.

20 Q Did you never hear of any such demand being made on him?

A No, sir?

Q This conversation that you say took place between you and Mr. Butler, where was that.

A Part of it in Mr. Butler's office, and partly on Broad street, corner of Clinton street.

Q This title was to be approved by Mr. Butler, was it not?

A Which title?

Q The title to this lot?

30 A Mr. Butler didn't want to have it approved by him; he said if Mr. Murphy could get another lawyer to do it cheaper, he was willing.

Q Did you know why Mr. Murphy suggested advertising to correct this flaw in the title?

A Do I know?

Q Yes?

A In order to save the expense; that's the understanding I had with Mr. Murphy.

Q That was in order to save the \$50?

40 A Yes.

Q When did you first learn that Mr. Murphy offered \$50 to Butler to correct this flaw in the title?

A In his office.

Q Did Mr. Butler say anything about \$35 or \$36?

A He said somewhere about \$50.

Q That is your recollection?

A Yes.

Q Do you remember a conversation had between Mr. Murphy and Mr. Butler over the wire one day?

A No, sir.

10

Q Were you present one time, when Mr. Butler was called up on the telephone at his office, in reference to why he had not corrected the title for Murphy?

A I don't remember of that; no, sir; I do not.

Q Do you remember that on that occasion Mr. Smith was present and Mr. Murphy was present, and talked over the wire with Mr. Butler?

A I don't remember the day; no sir.

Q Do you not remember the fact that Murphy called him up on the 'phone after you had, and talked with him?

A No, sir; I do not; I don't remember of that.

Q And then did you drive Murphy down to Mr. Butler's office to have an explanation about it?

A No, sir; never; never drove Mr. Murphy in my carriage.

Q Did you go to Mr. Butler's office with Mr. Murphy after talking with him over the 'phone?

A Never took Mr. Murphy in my carriage.

Q Did you not go to Mr. Butler's office after this talk over the wire to talk about the subject?

30

A No, sir.

Q Quite sure about that?

A Yes, sir.

Q Do you remember Mr. Murphy saying to Mr. Butler over the wire "Do you deny that I offered you \$50 to perfect this title?"

A No, sir; never heard such a conversation; no, sir.

Q Did you ever tell Mr. Murphy that you wanted your \$50 back?

40

A No, sir; I did not.

Thomas J. Butler, being duly sworn according to law, on his oath deposes and says :

Direct Examination by Mr. Knight.

10 Q You are an attorney at law of this city?

A Yes.

Q You know Mr. Milmoë, the plaintiff in this case?

A I do.

Q Are you his attorney.

A I am in some matters.

Q And have been for some time past?

A For the last four or five years.

Q Do you know the defendant?

A I have met him through this controversy.

20 Q I show you this paper (*Exhibit No. 1* for the plaintiff). Did you draw that?

A Yes.

Q How did you come to draw it?

A I went to the office of Mr. M. Smith, Bloomfield avenue.

Q What's his business?

A Real estate dealer. I went there at the request of and with Mr. Milmoë; when I got there I met Mr. Murphy, the defendant, and as a consequence of their conversation I drew this agreement.

30 Q Did you hear the conversation between them?

A I did.

Q Repeat it as near as you can?

A They talked about purchasing a lot of land on the east side of South 6th street.

Q And then you drew the agreement?

A Yes.

Q And you took the acknowledgment?

A I did.

Q Did you make a search after that?

40 A Yes.

Q What did you discover as to the condition of the title?

A I made the search, and the first search made by me disclosed the title as being good; acting on that first search I notified Mr. Kenny, who was Mr. Murphy's attorney and who was going to fix up the Murphy end of the matter, to prepare his deed; I also told him there had to be a release from Mr. Murphy's father; and I also told him I notified him so early that there would be nothing to stop this matter being closed on the 1st of November. A couple of days after that Mr. Murphy handed me three or four papers, saying "These papers may shed some light on the title." I read the papers over, and found one of them was an affidavit that set forth that some person of the name of Ward had not been heard of in a number of years, and they presumed he was dead. I was not sure then that I had made a full search and proceeded to the Register's office, and I thought at first I had not made an error, but on a closer examination I found that the name Murphy in the index had been altered and consequently that was the reason I did not turn up this deed to Bernard Ward. I proceeded further, and found a deed to Bernard Ward. This affidavit which Mr. Murphy handed me stated that Bernard Ward had died in Chicago or New York, or somewhere; I have forgotten which, and that all of his heirs were dead except two sons, and one of the sons had not been heard of in so many years; and there was a deed to Mr. Owen Murphy, the father of the defendant, and this made the title perfect so far as the half interest was concerned. I then immediately advised Mr. Murphy of the fact that there was an outstanding half interest.

Q By letter or how?

A That I can't say; my impression is, however, that I wrote him. I am not certain as to how he got notice of the fact that I had discovered this defect in the title, but at all events he came to my office, and I told him that I couldn't advise Mr. Milmoie to take the title, and would not advise him to do so until the title

was perfected. He than asked me in what way the title could be perfected; and I told him there was a proceeding by which this missing man or heir could be declared dead. He said "How much will that cost?" I said "I don't know," as I never had a case like that, but I presumed about \$50. He then demurred for some little time, and finally he said "You get \$50 from Mr. Milmoë, and proceed and have the title perfected, and then when Mr. Milmoë is paying me, you
 10 can deduct that \$50." I said "I don't think I can safely advise Mr. Milmoë to do that; the proceedings might unearth the missing heir, and I don't know what the final termination of the proceedings might be, and I also said I did not see why Mr. Milmoë should do what somebody else should do. Then he said "Well, let the matter rest for a little while, and perhaps I can get trace of him, or get some knowledge of his whereabouts." I said that was all right; I was perfectly willing; that Mr. Milmoë was not in a great hurry; we
 20 could wait a short time. He then went away, and came in again probably ten days afterwards, and I asked him if he had done anything further; he said "No," he had not; so he went away and said "I'll do the best I can."

Q Were you present at the conversation which Mr. Milmoë had with Mr. Murphy and which took place about five days afterwards?

A I was.

Q In your office?

A I was.

30 Q Have you repeated that conversation?

A I have.

Q Was anything said as to any length of time Mr. Murphy desired to perfect his title?

A Mr. Murphy, as I recollect it, said, that he would like to have some time wherein to perfect it; whether he said two weeks or three I can't say.

Q Did he say either one or the other?

A He said either one or the other.

Q What did Mr. Milmoë reply to that?

A He said "I am in no hurry ; I don't care to build on it until the Fall."

Q Did you see Mr. Murphy after that ?

A I can't recall seeing him after he went away with the understanding that he was to perfect his title.

Q Did you afterwards learn anything in regard to this property ?

A Mr. Milmo informed me that he had seen in the paper a conveyance of this property to a man of the name of O'Leary. 10

Q Did you procure a certified copy of that deed ?

A I did.

Q And this is the certified copy that you procured (handing witness a paper) ?

A It looks like it ; yes, that's it.

Q And does that show the property described in the agreement made between the plaintiff and defendant ?

A Yes.

20

Mr. Knight. I offer in evidence deed dated the 13th day of May, 1901, and acknowledged on the same day and recorded in the Register's office of the County of Essex on the 14th day of May, for the premises in question.

(Paper in question marked No. 2 for the plaintiff.)

30

Q Was any deed for this property ever tendered you ?

A No, sir.

Q Never has been to this day ?

A No, sir.

Cross-Examined by Mr. Gourley.

Q The deed must have been prepared at your office ?

A No, sir ; at Mr. Kenny's office.

Q On the 1st of November ?

40

A It was to be delivered on November 1st, and prepared at Mr. Kenny's office; at least that was the understanding, I believe.

Q And delivered at your office on the day of the agreement?

A Yes.

Q What papers did Mr. Murphy give you in reference to the title at the first interview?

10 A Why he gave me the deed to his father.

Q When did you next see Mr. Murphy after that?

A Well, I next saw him about probably five days after, when he came into the office.

Q Then you thought his manner was perfectly open and above board about the matter of the title?

A Yes.

Q There was no attempt on his part to conceal anything?

A No.

20 Q You regarded it as perfectly fair, his conduct I mean?

A Well I regarded it as an attempt on his part to bring to me whatever he had which would shed any light on his title.

Q Is that the affidavit he showed you at the time? (handing witness a paper).

A That looks like it; of course I can't remember it.

Q So far as you know that's it, isn't it?

A Yes, so far as I know that's the affidavit.

Q It had been sworn to?

30 A Yes.

Q And was made by Mr. Ward?

A Yes.

Q Look over it and see what it sets forth, or is there any doubt in your mind as to whether it is the same affidavit or not?

A (Looking at paper) Yes, that's it.

(Offered in evidence, and marked Exhibit "A" for the defendant.)

Q How long after that first interview at your office was it, when he brought the affidavit to you?

A Why, I would fix it about 3 or 4 days after that.

Q How close would that bring it to November?

A It would bring it up into the neighborhood of the 29th of October.

Q That last interview?

A Yes.

Q When he came with the affidavit?

A Yes.

10

Q Then you saw him next when?

A Well, I saw him a short time subsequent to November 1st.

Q Do you remember writing that letter to Mr. Murphy on October 29th (handing witness letter)?

A Yes; that's my signature.

(Letter in question offered in evidence and marked *Ex. "B"* for the defendant.)

Q When was it after that interview in relation to the affidavit that you next saw Mr. Murphy.

20

A After the delivery of the affidavit? I think about October 29th.

By the Court.

Q Was this letter "Exhibit B for the defendant" written before or after you had received the affidavit?

A That was written after I had received the affidavit?

Q How long after?

30

A Probably five days, because as I recall it, he came in within three or four days after the signing of the agreement, which would bring it to October 24th.

By Mr. Gourley.

Q Where did you next see Mr. Murphy?

A At my office.

Q With whom?

A He came in there himself, alone, and then Mr. Milmo came in a few minutes afterwards,

40

Q Was that the first conversation in relation to correcting the title?

A Yes: I think it was.

Q Do you remember the facts of that conversation about the cost of correcting the title?

A I told him I thought it would cost in the neighborhood of \$50.

Q Did you not say to him it would cost in the neighborhood of \$35?

10 A I may have said that it would not be less than \$35.

Q It was a comparatively easy matter, you said to him?

A Well, no I didn't, because I knew it was not.

Q I am not asking you what you knew; what did you say to Mr. Murphy about it?

A Well I described the proceedings.

Q Didn't you say all you would have to do would be to go before the Chancellor and get an order declaring the missing man dead?

20 A No.

Q Did you try to impress him with the idea that it was a very simple matter?

A No; I told him it cost not over \$50.

Q Did he ask you to do it for him?

A He did.

Q When did you tell him that you would not do it.

A I told him I would do it if I got a retainer.

Q Didn't he say "Go on, and I'll be responsible for it?"

30 A No, he didn't say that.

Q My point is this—do I understand that you then and there declared to Mr. Murphy that you would not do it?

A That I would not do it unless I got a retainer for doing it; I preferred to have somebody else do it.

Q Did you declare that you would not?

A I told him I would not do it unless I got a retainer.

Q Did you mention the size of your retainer?

40 A Well, I told him it would cost in the neighbor-

hood of \$50, and I ought to have at least half of that before doing anything.

Q Are you sure of that?

A I am telling you what I said to the best of my recollection.

Q Are you clear on that point?

A I am.

Q Sure you are?

A I feel sure I am.

Q Do you remember Mr. Milmoë and Mr. Murphy 10
coming to see you one day after that?

A I can't say I do.

Q Do you remember having a conversation with Murphy over the wire one day?

A No, sir.

Q Try and remember that if you can? That is if you remember talking from your office over the telephone with Mr. Murphy?

A I cannot.

Q You are familiar enough with Murphy's voice to 20
recognize it over the telephone?

A I can't say that I am; I don't know that I ever met the man until the 20th October; and then have only met him for the short times I have spoken about.

Q Didn't you talk over the wire with anybody, to the best of your recollection about having taken proceedings to correct the defect in the title?

A No, sir.

Q Do you remember Mr. Smith and Mr. Murphy being present, and Mr. Murphy charging you with 30
having done nothing towards clearing the defect in the title; that you had agreed to do it for \$50 and wanted to know what reason you had for not going on with the proceedings?

A I do recollect Mr. Smith, and Mr. Murphy did come into my office one day, and said something about the matter, but I can't recall just the exact conversation.

Q Did you say the Chancellor might order to go out to Chicago or somewhere else?

A I said I might have to take depositions in Chicago.

Q You do remember that?

A Yes, sir.

Q Mr. Smith and Murphy were there at the time?

A Yes.

Q How long was that after the first conversation?

A That was some little time after.

Q When was it?

10 A Well, it might be 6 or 7 or eight weeks subsequent to October 1st.

Q Are you sure?

A No, I am not sure.

Q I only want your recollection of the facts. You knew, of course, as a lawyer, that simple advertising for an heir would have been no good?

A Well I knew that, but I inferred Mr. Murphy was trying to locate him in a general way.

Q But you say that this missing man's whereabouts
20 had not been known for 11 years?

A Yes.

Q Did you leave Mr. Murphy with the impression that he could go and advertise for the missing man, and the title would then be all right?

A I did not.

Q How did you think the advertising for the missing heir would help the matter?

A I considered in the event of the advertising having the result of locating him then it would make
30 matters easier.

Q Rather problematical, wasn't it?

A Strange things have happened, and I thought it was possible he might be found.

Q Did you say to Mr. Murphy that there wouldn't be much use in advertising?

A I think I told him that I didn't think he would have much result from that: I think I told him that.

Q Then you concluded, nevertheless, to reject the title?

A I concluded to reject the title until there was some disposition made of that outstanding half interest.

Q Did you ask for the deposit money and search and survey fees?

A I did not.

Q I show you this letter of November 9th (handing letter to witness)?

A Yes, I recollect writing that.

Q Then you did ask back this money before this conversation seven or eight weeks after the 1st of November?

A It appears from that letter that I did.

(Letter offered in evidence, and marked "C" for the defendant.)

Q I just wanted to refresh your memory. Then the point was simply at that time that you didn't get a retainer?

A That was the point, that I didn't get my retainer to perfect the title.

Q Did you get this money back?

A What money?

Q This money for the search that you demanded?

A I did not.

Q You demanded the money for the search?

A Now, I will tell you how that came about—

Q Did you demand the money back for the search?

A If that letter— — —

Q Can't you remember; give us your best recollection?

A Mr. Murphy at one time, or during one of the conversations, I told him he would be answerable to Mr. Milmo for damages, and he kind of laughed, and said "In the first place there is \$25 for the search, and there is \$25 deposit money paid, and I understand there is something more for a survey; there's \$58 already of actual damages. In writing that letter I may have worded it that way, as I understood Mr. Milmo was pushed for money, and wanted to hurry him up.

Q But Mr. Smith told you, didn't he, that the money was ready to be paid over any time?

A He said he had the money.

Q Why didn't you go down and get it?

A I don't know that he said I was to come down after it.

Q You know that you could have done that?

A I suppose so.

Q Did you advise O'Leary about the title?

10

A I never saw Mr. O. Leary.

Q Didn't O'Leary ask you if the title was all right and you said that it was?

A I had something to do with that transaction; I think I drew the deed for Mr. Murphy to O'Leary, but I never made any search for Mr. O'Leary, as I recall.

Q Where was that lot?

A It was one of the adjoining lots.

Q And the deed was made after you had this affidavit?

20

A No, I don't think it was.

Q But you had passed on the title?

A No, I did not.

Q You drew the deed?

A Yes; I did.

Q Didn't you tell O'Leary that his title was all right?

A No, I did not.

Q Are you sure of that?

A I don't recall of Mr. O'Leary ever asking me
30 whether it was good or bad.

Q So you don't recollect anything on that subject?

A No.

By Mr. Knight.

Q In regard to this letter, in which you say that you had seen Mr. Milmoë, and that he says he would not take the title until it was perfected; and that Murphy would have to refund him the search and
40 survey and deposit money, amounting to \$58, if he

would not perfect it. What is your explanation of that letter?

A Well, I was informed that Mr. Murphy was rather close as to money matters, and I thought that letter would cause him to go to work and perfect the title.

Q Have you had the \$25 deposit paid by Mr. Milmoë to Mr. Smith tendered to you?

A No, sir.

Q Offered to you?

A No, sir.

10

Q Have you ever demanded that it should be?

A No, sir; never was authorized to demand it.

By the Court.

Q I do not clearly understand why you wrote that letter of October 29, saying that you would close the title on Thursday, November 1st, at 10 A. M. I understand you to say that this letter was written after the affidavit had disclosed to you that there was a possible half interest outstanding?

20

A Well, I am not sure about that—with reference to the time of the delivery of the affidavit to me. If I can just look at that letter it might possibly help me. I may have had some conversation with Mr. Kenny who was representing Mr. Murphy. In fact, I did have some conversation with him, and it may have been that relying on statements he made to me that he would have the title perfected, or give some information with reference to this heir—that I wrote that letter.

30

By Mr. Gourley.

Q Didn't Mr. Kenny tell you there was a missing heir?

A No, Mr. Kenny knew nothing of it when I spoke to him.

By Mr. Knight.

Q As I understood your testimony, if this conversation took place as you think it did, 3 or 4 days after

40

the signing of the agreement, at that time the defendant said he would perfect the title?

A Yes.

Q And that was prior to your writing this letter?

A Oh, yes.

Plaintiff rests.

William Murphy, being duly sworn according to law on his oath deposes and says:

10

Direct examination by Mr. Gourley.

Q You are the defendant in this case, are you not, sir?

A Yes.

Q You know Mr. Milmoë and Mr. Butler?

A I do, sir.

Q You may state if you will when and where you first met Mr. Milmoë with reference to this sale. When did you have any conversation with Mr. Milmoë and
20 Mr. Butler with reference to having this contract agreement declared off?

A I got a letter from Mr. Butler—the letter of November 9th—this letter (picking up letter from the desk). I got this letter stating that I would have to refund Mr. Milmoë his forfeit; also for the search and the survey; then I came to Newark and got Mr. Smith, the real estate agent; we went to Mr. Butler's office, and I said "What's the matter that I have to refund this money, and why Milmoë refuses the title." He
30 said "I'll tell you; Milmoë is not satisfied with the title." I said "Didn't I give you the property at your own figure; I gave you the price you asked for perfecting the title. I have seen Lawyer Kenny, and he tells me I do not need to pay for the search, which was not legal." "Well", he said; "we'll attend to the matter." I said "Well, I suppose it's all off?" "Well, yes," he said. „You'll give me back my papers, then." He says "Yes," and takes the papers out of his desk and hands them to me. I asked him where I could
40 find Mr. Milmoë and he said he couldn't tell.

Q Who was with you at this time?

A Mr. Smith, the real estate man.

Q How did you come to go there to Butler's office.

A Well, we went to see what the matter was with the title. After that we went to Mr. Milmoë's house and enquired where we could find him, and his wife directed us to a place in Bloomfield avenue; any way Mr. Milmoë was digging the foundation for a Hebrew institution; I walked up to Mr. Milmoë, and said "What is the reason you refused to take the title?" "I'll tell you," he said; "Mr. Butler says you refuse to perfect the title." "Why," I said, "Mr. Butler set his own price. I asked Mr. Butler what his price would be for perfecting the title, and he said it will only be a matter of going to the Chancellor and have him declare the man dead; it will cost \$35 or \$36, or \$50, and I told him I would pay it, and for him to go ahead and perfect the title." "Well," he said "Mr. Butler told me that you would not pay anything for perfecting the title." Then I said that I agreed to pay \$50, and Mr. Milmoë says it looks as if he wasn't acting square, and I kind of suspected him. Then me and him and Mr. Smith went to a saloon on the corner there, and he calls up Mr. Butler and said to him over the wire: "Mr. Murphy informs me that he offered to pay you for perfecting the title." Then Mr. Murphy went to the phone and told us Mr. Butler said there is some mistake, and Milmoë went to the phone and asked him what he meant by telling Murphy that it was Milmoë who refused to take the title.

Objected to.

Q Do you know Mr. Butler's voice over the telephone?

A Yes.

By the Court.

Q You recognized his voice?

A Yes.

By Mr. Gourley.

Q Did you subsequently see Mr. Butler after that?

A Yes, sir.

Q When?

A That same day; Mr. Milmoë took me in his carriage down to Butler's office.

Q What did you say to Mr. Butler when you saw him?

10 *A* I said "What do you mean by telling Mr. Milmoë that I misrepresented things." "Well", he said, "I misunderstood you." "What do you mean", I said, "by telling such things about me, when I said I would give you \$50 to perfect the title." "Well, never mind that," he said. I said "I don't like it; I have been advised by legal authorities that it was not just for me to pay for the search." Then I left the office and went out on the street, and right there by the bank, Milmoë came up to me and said "Look here, Murphy, I have got
20 money enough in the bank to buy half of South 6th street, and it wouldn't cost me anything, because I have to pay Butler any way, and if you get in Court with us, you won't accomplish anything." "Mr. Milmoë," I said; "I don't just know how much money you have got, but I think justice can be obtained in court; if I thought I was in the wrong, I would pay it immediately."

Q Was anything said about perfecting the title?

A Not a word.

30 *Q* Did you and Mr. Smith meet at Mr. Butler's office on any other occasion?

A I don't remember that I did.

Q Did you say in the office of Mr. Butler at any time that you were going to have the title perfected?

A I never did, sir.

Q Did you take any step indicating that you were going to do it?

A I never did.

Q Did you and Mr. Smith see Mr. Butler?

40 *A* Yes.

Q When was that?

A That was the day I went to take the papers to Mr. Butler.

Q At this previous conversation was Mr. Smith present?

A Yes, he was present.

Q Who drew the deed to O'Leary for the adjoining lot?

A Mr. Butler.

Q Of this adjoining lot Mr. Butler prepared the deed?

A Yes.

Cross-Examination by Mr. Knight.

Q I show you an affidavit, Mr. Murphy, made by Robert J. Ward on the 7th of February; where did you get that from?

A From my father.

Q When?

20

Objected to.

Q Where did you first meet Mr. Milmo?

A At Mr. Smith's office.

Q Do you recollect the date?

A I think it was the 20th of October, the day the agreement was made and drawn.

Q And you received \$25 as a deposit?

A I did not; my agent received it.

Q You knew he received it?

30

A Mr. Smith told me it was paid to him.

Q When after that was the first conversation you had with Mr. Butler or Mr. Milmo?

A When I left the agency that day Mr. Butler said to me "Murphy all papers that you have concerning this property, if you will bring them to me, it will help to make the search." I said "All right." At this time all the papers were with Lawyer Ten Eyck.

Q Was it Mr. Butler who suggested that you bring all those papers?

40

A Yes, to help him make out the papers. I said "I'll let you have them."

Q As a result of that conversation you took those papers to Mr. Butler's office?

A I did.

Q When was that?

A That was in November; I can't just remember the date.

Q It was in November?

10 A Yes; I mean October.

Q When in October was it?

A The matter of a week after the agreement was drawn.

Q Have you any memorandum of it?

A No, sir.

Q Has Mr. Smith?

A Mr. Smith couldn't tell me the date when I asked him.

Q You say it was about a week after the signing of
20 the agreement?

A A week or so; yes.

Q And then you say you gave Mr. Butler those papers?

A Yes.

Q How long after that did you have the second conversation with him?

A The second conversation I think was—I got a letter from Mr. Kenny, stating to me—

Q Have you got the letter?

30 A I got a letter stating to me there would have to be a release given to me by my father, and he would draw up the release and go with me to Brooklyn to have it signed.

Q What was the next step— —that was when, about?

A I think it was the 27th of October.

Q That was the 27th of October?

A Yes.

Q How long after that did you next see Mr. Butler
40 or Mr. Milmo?

A The next time?

Q How long after the 27th October; how many days or weeks?

A I saw Mr. Milmoë, I think on the 28th, the next day after I got that letter.

Q One moment, please; you came down in pursuance of this letter you got?

A I came down in answer to a letter from Mr. Kenny.

Q You mean on the 29th?

10

A Yes.

Q Came down on the 29th October?

A The day after I got the letter.

Q Where did you receive this letter?

A In Paterson.

Q And the day after you received it, you came down to Newark?

A Yes.

Q Who did you see?

A Mr. Butler and Mr. Kenny.

Q What was your conversation with Mr. Butler that time?

20

A The conversation with Mr. Butler that day? I can't remember the conversation that day.

Q Don't you recollect that Mr. Butler told you that day that he had made a second search?

A Never, sir.

Q Didn't he tell you that your affidavit was correct?

A No, sir.

Q Didn't he tell you that there was an outstanding interest against the property?

30

A Never, sir.

Q Never told you that?

A No, sir.

Q Then you never learned it, did you?

A Yes.

Q Who told you of it?

A Lawyer Ten Eyck.

Q When?

A When I handed the papers to Lawyer Ten Eyck.

Q When?

40

A In October.

Q What time in October ?

A I can't remember just the date.

Q After or before this agreement with Mr. Milmoë?

A It was after the agreement.

Q After the agreement, then you had a conversation with Lawyer Ten Eyck ?

A Yes.

Q And what did Mr. Ten Eyck tell you ?

10 A He said to me, "You are about to sell a lot of land to a man of the name of O'Leary," and then he says "there is a heir to the property that is supposed to be dead, why supposing he isn't, then you'll be in the wrong." "Why," said I to him, "I have a sworn affidavit here, and I ask you now right here if you don't think the title is fair," and he said it was. When I went to see Mr. Butler after that I said to him what Mr. Ten Eyck had told me. Then Mr. Butler took down a leather covered book, and he read to me a
20 phrase out of the law of New Jersey, which says that if a man does not turn up in seven years, he's dead; what I'll have to do is to go down to the Chancellor and have him declared dead.

Q Did Mr. Butler suggest to you that this defect in the title should be cured ?

A Yes.

Q And right there and then ; tell us what the conversation was ?

A In that conversation I said to him : "How can it
30 be perfected?" He says : "The law reads here that if a man is not seen for 7 years he's dead ; but you never know what these chancellors are going to do, and to make it stone wall and Gibraltar we'll go to the Chancellors, and have him declared dead." "How much will it cost me," I said. "Matter of \$35 or \$36, or \$50 at the outside." "Would you do it for \$50," I asked him, and he said he would. Then I said "Go on, Mr. Butler, I'll give you the \$50." He never said anything about a retainer. I said to him "You are sure of your
40 fee, Butler ; you are acting as counsel for Milmoë, and

you can deduct your fee from the \$425 which is due me from Mr. Milmoë." "All right, Murphy," he said; "I'll attend to that."

Q This was on the 28th or 29th of October, 1900, the day you came down to see Mr. Kenny?

A No, I don't say that was the day.

Q When was it; was it the week of the 27th of October?

A Something like that time.

Q You had some conversation about curing this defect in the title, and you authorized Butler to go on with the work, and promised to pay him? 10

A Yes.

Q Didn't you have a subsequent conversation about that—some later conversation in regard to the matter. Didn't he tell you that he would not allow Mr. Milmoë to pay that fee for perfecting the title?

A He did not. The only other conversation was about the forfeit money.

Q When was this? 20

A This was the morning I took the papers away from Butler's office; I was in the office twice the day I took the papers away.

Q When did you take the papers away from him?

A I can't just remember what date it was.

Q How long after the time the deed was to be delivered?

A It was in November; I can't remember the date. 30

Q The latter part of November, or when?

A It was going towards the middle of November.

The Court. When does Mr. Butler fix the time when these papers were fetched away; when do you fix the date of handing them back to Mr. Murphy?

Mr. Butler. Well, my impression is that it was some six or seven weeks after the date fixed for closing the agreement—after November 1st. 40

The Court. Then you think it was early in December?

Mr. Butler. Yes, about the middle of December.

By the Court.

Q (To the witness): Mr. Murphy, how does your
10 recollection agree with Mr. Butler?

A (Witness continuing): It strikes me it was in November.

Q What time in November?

A Between the 10th and the 15th—about the time when I refused to pay the search.

By Mr. Knight.

Q You ascertained, didn't you that Mr. Butler
would not take these proceedings in the Court of
20 Chancery?

A Yes.

Q And you never offered him the \$50 or paid him?

A He never asked me for it.

Q He told you what his charge was?

A Yes; and I told him to go ahead, and that I would pay the \$50.

Q You promised to pay him?

A Yes.

Q After you discovered that he would not?

30 A He told me he would not.

Q How long afterwards was that?

A I can't just remember the date; it was just a few days before he wrote me a letter demanding the forfeit money back.

Q Which letter do you mean?

A This letter of November 9th.

Q How long before that was it that you learned that he would not take the proceedings; as near as you can tell?

40 A I think it was after the 5th.

Q Now, if you learned it from him, you must have had some conversation with him on the subject?

A Yes.

Q Where was that conversation?

A At his office.

Q What did he tell you?

A This is what he said: "Murphy, now this matter that I was to do for you for \$50 with the Chancellor, I don't see how I can do it; when you go up before these chancellor fellows you don't know where they'll 10 send you; he might order you to Chicago, or some other place, you can't tell." Well, I said, "Mr. Butler can't you give me some idea of what it will cost me?" and he said: "No, I couldn't give you any idea." I said, "Mr. Butler, you promised to perfect the title for \$50, and now you want me to launch into something I may not have the means to pay."

Q But you found that he would not take the proceedings for you?

A Yes. 20

Q Was there any conversation as to any other lawyer being engaged by you?

A No, sir.

Q Didn't he suggest that you should get some other lawyer?

A He did not.

Q That was not suggested?

A No, sir.

Q Did you speak about other lawyers?

A I did not. 30

Q Nothing was said at that time, or any other time, about another lawyer?

A No, sir; not to do that work.

Q Where did you leave the papers after that?

A I didn't take the papers off of him, because I was not up in real estate; he had me just then so that he had me that I really didn't know what kind of a man I had to deal with.

Q You don't recall what the exact conversation was about the matter? 40

A Well, he kept changing things so ; he had a different tale to tell me every time I went to see him ; one time he would say that Milmoë was not satisfied, and then the next time, he would say he wasn't, or something like that.

Q You were always willing to close the agreement?

A Yes.

Q Did you take these papers afterwards to another lawyer?

10 A I did not.

Q What did you do with them?

A I took them home.

Q And kept them there?

A I keep my papers home.

Q Have you ever returned the \$25 deposit to Mr. Milmoë?

A I never had the \$25.

Q But your agent has never returned it?

A No, sir ; he has never returned it.

20 Q And you have never tendered the deed for this property?

A I don't understand that.

Martin A. Smith, being duly sworn according to law, on his oath deposes and says.

Direct Examination by Mr. Gourley.

Q Mr. Smith, are you a real estate agent?

30 A Yes.

Q And do you have a lot of properties for sale?

A I do.

Q You may state if you remember going to Mr. Butler's office to have certain papers taken away from there, and any conversation between Murphy and Mr. Butler in your presence in reference to ending the matter?

A Mr. Murphy came to my office and asked me if I would go to Mr. Butler's office with him ; and we
40 went there, and at that time Mr. Butler surrendered

the papers he had of Mr. Murphy's, but I can't recall all of the conversation. I recollect Mr. Murphy—

By the Court.

Q Can you tell us when that conversation occurred?

A No, I have not the remotest idea.

Q Was it in November?

A I can't remember.

Q Can you tell with reference to the time when the agreement was to be consummated? 10

A On November 1st; it was subsequent to that.

By Mr. Gourley.

Q Was that your first visit to Mr. Butler's office?

A I believe it was, sir.

Q You may state what occurred on that occasion?

A Of course I remember the conversation in a general way; the only thing I distinctly remember was Mr. Murphy mentioning the cost, as he said, of declaring this missing man dead, and referred to Mr. Butler again about the price being \$50. While I don't remember Mr. Butler's saying that he had not agreed to do the work for \$50, yet I am positive he did not deny it. 20

Q Was it at this meeting the papers were taken back by Mr. Murphy?

A Yes.

Q Do you remember another meeting with Mr. Butler? 30

A I don't remember being at his office, but I remember well going with Mr. Murphy to a place on 16th Avenue in the neighborhood of Broome St., where Mr. Milmo was at work on an excavation for a Hebrew institute there; I don't know what it is; and from there we went across to a saloon on the north-east corner.

Q What for?

A For the purpose of calling up Mr. Butler on the telephone. 40

Q Well, what conversation was had between Murphy and Milmoë there; did you hear it?

A It was in reference to this title.

Q Can you remember what it was?

A I recollect Mr. Milmoë going to the telephone, and from the conversation—of course telephonic conversation is always one-sided—I gathered—

Q What did Mr. Milmoë say?

10 A Milmoë said, Mr. Murphy was there, and I really can't remember what was said.

Q What was the conversation about?

A In reference to this \$50 for perfecting the title; Mr. Murphy asked Mr. Butler if he was going ahead in reference to some misunderstanding in regard to the title.

Q Did Murphy talk over the wire?

20 A Yes; and he said, "What do you mean, Mr. Butler, by saying that I misrepresented things;" that I distinctly remember. Then Mr. Milmoë suggested taking Mr. Murphy down to Mr. Butler's office in his carriage, and also invited me in to take a ride down. I said, however, that I thought two was enough in the buggy, and that I had other business to attend to, and I got on a car and went home.

Q Did those two go to Mr. Butler's office?

A I believe so.

Q You did not?

A No.

30 Q This conversation between Murphy and Butler at the office, was it before or after?

A After that.

Q Were you there when the papers were surrendered?

A Yes.

Q To Mr. Murphy?

Yes.

Q What about this \$25 you had in your possession. Did you say anything to Milmoë or Butler about it?

40 A Yes; I told Mr. Butler that I had that \$25, and I was ready to refund it to Milmoë.

Q At that time?

A Yes.

Q And you have heard nothing since?

A No.

Q You still have the \$25?

A I have the \$25.

By Mr. Knight.

Q This first conversation you heard Mr. Murphy 10
about the \$50 for perfecting the title, when was that?

A Well, I think that was at the time the papers
were surrendered.

Q And what was the conversation in regard to
the \$50?

A I have told the other lawyer that I can't recol-
lect the conversation.

Q Let me refresh your memory. Was there not
some talk about curing this defect in the title, which
was to cost \$50? 20

A I think there was; naturally that was what
would arise.

Q The conversation was that Mr. Murphy would
employ Mr. Butler to take steps to cure the defect in
the title, and that conversation took place at that
time?

A Yes; that is my remembrance.

Q And at that time, Mr. Butler said he would
do it?

A I didn't say he said he would do it for \$50. I 30
inferred that he had agreed to do it; that he didn't
deny it when Mr. Murphy asked him why he hadn't
done it. Mr. Butler did not say that he would not do
it. He simply dropped his head.

Q Was there any further talk at that time about
legal proceedings?

A Not to my recollection.

Q Did he talk about any suggestion by Mr. Butler
about other lawyers?

A No. 40

Q You didn't hear it if there was anything said on that subject?

A I was in the room, and would have heard it if anything like that had occurred, but I am positive there was no such talk as that.

Q This conversation over the telephone at 16th Avenue with Mr. Milmoë—did you afterwards go down to Mr. Butler's office? weren't you driven down in the carriage?

10 *A* No, I went back to my office. They invited me to get in with them, but I didn't accept the invitation, as I thought a third would make a crowd.

Q All you know of that interview was that Mr. Murphy and Mr. Milmoë spoke to Mr. Butler over the telephone?

A Yes.

Q And that you said you had the \$25?

A Yes.

20 *Q* You did not tender it to him?

A No.

Q And you never have to this day?

A No; I said I had the \$25, and was instructed to do so by Mr. Murphy, and was ready to do so at any time.

Q And if he had demanded it, you would have paid it over?

A He never has demanded it. No.

30 **Thomas J. O'Leary**, being duly sworn according to law, on his oath deposes and says.

Direct Examination by Mr. Gourley.

Q You are one of the defendants in this suit?

A Yes.

Q Had you any knowledge in any way of this property having been agreed to be sold to Mr. Milmoë?

A No, sir; I did not.

Cross-Examined by Mr. Knight.

Q When did you have your first negotiations with Mr. Murphy in regard to this property.

A On the 11th of May.

Q The 11th of May, 1901?

A Yes.

Q You had previously bought some land in that vicinity?

A No, sir. 10

Q Have you not bought some other land there?

A No, sir.

Q Your brother, then?

A Yes, my brother has.

Q Some time prior to that?

A Yes.

Q How did you come to know that this lot was for sale?

A Through Mr. Murphy notifying my brother.

Q And then did you go to see Mr. Murphy? 20

A Yes.

Q Where did you see him and when?

A In Paterson.

Q When?

A On the 11th of May.

Q And did you ask him if he had that lot for sale?

A He told me he had.

Q Did you ask about the condition of the title?

A No, sir; Mr. Murphy agreed that if there was 30
anything wrong he would stand good for it.

Q Then you did ask him about the title?

A No, sir.

Q But you had some conversation about it?

A No, sir.

Q How did he come to say that to you?

A He sold some land to my brother on the same terms.

Q Didn't you ask him if the lot was free and clear?

A He told me that—that if there was anything
wrong he would stand good for it. 40

Q Didn't you enquire if there were any liens or mortgages on this property?

A I didn't understand anything about it; he agreed to stand good for it.

Q He agreed to what?

A To give me a clear warranty deed of this property.

Q Didn't you make any inquiry as to the condition of the title?

10 *A* No, sir; I did not.

Q You knew he had made this same agreement with your brother?

Q Yes.

Q And you expected he would make the same kind of agreement with you?

Objected to.

Q Didn't you make any inquiry as to the condition of the title?

A No, sir; not at all.

Q Have you ever bought any land before?

A No, sir.

Q You know there are sometimes mortgages placed on lands?

A Not on this land.

Q But you know there are such things as mortgages?

A Yes.

30 *Q* And you know that judgments can be recovered against men who own land?

A Did I know?

Q Yes?

A No, I did not.

Q Don't you know that if a man had judgment against him, they can take his land?

A No.

Q Did you have any agreement in writing with Mr. Murphy?

40 *A* When I paid a deposit.

Q Get a receipt ?

A Yes.

Q Have you got it with you ?

A No.

Q Where is it ?

A At home.

Q How much did you pay ?

A Ten dollars.

Q And you were to pay the rest when ?

A On the 13th of May. 10

Q How much were you to pay for it ?

A \$500.

Q Did you have a search made ?

A No, sir.

Q Why ?

A Mr. Murphy agreed to stand good for it.

Q You were willing to take his word for it ?

A Yes.

Q Did you have an attorney ?

A No, sir ; I didn't have an attorney. 20

Q Consult anyone about taking this lot in that way ?

A No.

Q Did Murphy tell you not to have a search made ?

A No.

Q Just told you he would stand against you ?

A Yes.

Q Have you paid Mr. Murphy the balance on the land ?

A Well, no ; Murphy holds a mortgage on it.

Q How much have you paid up to now ? 30

A \$125.

Q And he holds a mortgage for the balance ?

A Yes.

Q How long has that mortgage to run ?

A Five years.

Q Did you never hear Milmoë's name mentioned in connection with these lots, or in regard to this transaction ?

A Not until I gave notice to Mr. Milmoë to clean up the lots. 40

Q How long ago was that?

A The 22nd day of May I notified him.

Q Had you ever seen these lots before you purchased them?

A I live next to them.

Q Didn't you know there was a good deal of property on these lots—stones and bricks?

A Yes.

Q Did you know whose bricks and stones they
10 were?

A I did.

Q Whose?

A Mr. Milmo's.

Q Did you ever go to Mr. Milmo and ask him about them?

A No.

Q Did you ever see Mr. Milmo there?

A Yes.

Q Did you ever go to Mr. Milmo and ask him?

20 A No.

Q You know they belonged to Mr. Milmo?

A Yes.

Q Did you ever make any enquiries of Mr. Milmo as to what rights he had there?

A No, sir.

Q How often did you see Mr. Milmo?

A Every day almost.

Q Live right next to him?

A Yes.

30 Q It would have been very easy for you to make the inquiry?

A Well, I didn't.

Q But after you got your deed then you went to him?

A Yes.

By the Court.

Q These things were on the property at the time
40 you bought it?

A Yes.

Q Did you know at the time you bought the lot that the property was Mr. Milmoes?

A No, sir.

Q I mean the things that were on it?

A Yes.

Q Do you remember when he put them there?

A Before he ever spoke about buying the lots.

Q When did he put it there according to your recollection? 10

A When my brother bought the lot right next to our house a year ago, and there was the lot of Mr. Milmoes next it.

Q Was this put upon the land before the 1st of November, 1900, or was it put on this land after the 1st of November?

A Put on before.

Q How long before?

A I believe two or three weeks. 20

By Mr. Knight.

Q You say that Mr. Milmoes put this property on this lot before he had any agreement to buy it?

A Before he ever owned the lot; the sign was up "For Sale".

A You say that Mr. Milmoes put these bricks on before he agreed to buy it?

A I did not.

Q When was the sign taken off the lots? 30

A The sign was taken off after Mr. Milmoes started to dump there.

Q But prior to that time there had been a sign up there "Lots for Sale?"

A Yes.

Q And after he started putting these bricks and stones on, the sign was taken down?

A Yes.

Q You know that?

A Yes; I saw that it was taken down. 40

William Murphy recalled.

By Mr. Gourley.

Q You have heard what has been testified about these stones and bricks on these lots; you may state what you know about them?

A I can state that Mr. Milmoie has been continuously
10 dumping these things on my property, and I have warned him to desist many times. About the 26th of October—25th or 26th, Mr. Smith came to Paterson, and stated to me that Mr. Murphy— — —

Objected to.

Q What do you know about the 25th or 26th of October?

A I know that Mr. Milmoie was dumping on the lot
20 before he ever had any agreement.

Q Did anyone call your attention to it?

A Yes; this gentleman's mother; the lot was so disfigured.

Q What was her name?

A Mrs. O'Leary.

By Mr. Gourley.

30 *Q* Did Mr. Smith call your attention to it?

A Yes.

Q Was that before this agreement for the sale of the lot was signed?

A Yes.

By Mr. Knight.

Q You sold the lot afterwards to Mr. O'Leary?

A Which lot?

Q You made a sale of this lot in question to Mr.
40 O'Leary?

A I made a sale of it, yes.

Q What did you say to him about the title?

A What did I say? I says to Mr. O'Leary: "Now, Mr. O'Leary, you understand about this missing heir; well that is the only thing there is against the title whatever?"

Q Did you tell him that you had an agreement with Mr. Milmoë about the property?

A I did not.

Q And that that agreement had been abandoned 10
because of a defect in the title?

A I did not.

Q Why?

A I did not think it was necessary; I thought that agreement was all ended; I thought when Mr. Butler handed me my papers that it was all ended.

Q Why didn't you tell Mr. O'Leary about that agreement?

A I didn't think it was necessary.

Q You knew the agreement was on record? 20

A No, I did not; I thought the day they handed me my papers, and then demanded the search and deposit money that that was the end of it all.

Q I ask you why you did not tell him?

A It didn't come to my mind.

Q You knew Mr. Milmoë had these bricks and stones on the lot?

By Mr. Gourley. The chain of title in this 30
case comes from Owen Murphy, the father of
the defendant William Murphy, and is as fol-
lows: A deed from Owen Murphy and wife to
Bernard Ward, dated the 7th of April, 1850, and
recorded in the Registrar's office of this county,
on the 2nd of June, 1859. The next deed is
from Robert J. Ward, the son of the last
grantee, to Owen Murphy, bearing date the
13th of January 1900, and recorded on that day
in the Registrar's office—on the 18th of January,
1900 in Book X 32 of deeds for this county. 40

The next deed is one from Owen Murphy to William Murphy, the defendant, bearing date the —— day of May 1900, and recorded on the 31st day of July in the Registrar's office of this county in Book P 33 of Deeds.

Thomas J. Butler, recalled.

By Mr. Knight.

10 Q State briefly what took place when you delivered back the papers to Mr. Murphy—the conversation. Mr. Murphy says that you said to him in effect that the deal was off. Did you ever so state to him?

A No.

Q Now state with reference to the conversation about his paying you the \$50 to perfect the title.

A I said, it might cost \$50 and we might possibly have to take depositions in Chicago ——

By Mr. Gourley. We have had all that.

20 A (Witness continuing) And then I told him the Court required abundant proof in such cases as to what search had been made, what steps had been had with reference to locating and determining whether this missing man was dead or alive, and that was the reason it might run up to \$50 or a little more.

By Mr. Gourley.

Q Was not all that present in your mind when you said at first that you were willing to take these proceed-
30 ings?

A I don't know that I gave it much thought the first time.

Q Did you do anything at all towards taking these proceedings?

A No, because I was not authorized to.

Hearing in the case, for the presentation of briefs and arguments, adjourned to Tuesday, December 17th,
40 1901, at 2 P. M., in Chancery Chambers, Newark, N. J.

In Chancery of New Jersey.

Between

ALEXANDER MILMOE,
Complainant, and
WILLIAM MURPHY and
THOMAS J. O'LEARY,
Defendants.

On Bill &c.

10

MR. WALTER J. KNIGHT *for Complainant.*

MR. WILLIAM B. GOURLEY *for Defendant.*

Conclusions.

20

F. W. STEVENS, *V. C.*

This is a suit for specific performance of an agreement to convey land. The contract signed only by the vendor, Murphy, is dated on October 20th, 1900. Murphy therein agrees to convey the lot in controversy by deed of warranty, free from all encumbrance, for the consideration of \$450, on or before November 1, 1900. The evidence shows that the title to the lot was prior to the year 1850, in Owen Murphy, the father of the defendant, William Murphy: that Owen conveyed to his brother-in-law Bernard Ward and that Robert Ward, the son of Bernard, reconveyed it to Owen Murphy. The answer and an affidavit put in evidence state that Bernard Ward, while he held title, died seized of the property in question, leaving several children as his heirs at law; that of these children all died when young but two; that Robert, the above

40

grantor, was one of these two and that the other had not been seen or heard from in thirteen years, and was believed to be dead. The defendant gave the complainant's counsel, Mr. Butler, the affidavit and papers disclosing these facts a few days after the agreement was signed and thereupon Mr. Butler advised the complainant that he could not safely take title. He called upon the defendant Murphy to take steps to have it declared that the missing brother's title had, because
 10 of the presumption of death, which under our Statute arises from seven years absence (Gen. St. 1187 Meyer v. Madreperla 53 Atl. 477), vested in his brother Robert, whose deed, if the absence were proved, conveyed the entire fee and not merely an undivided half. There were some negotiations between the parties which failed because, it would seem, of the unwillingness of the defendant, Murphy, to pay in cash to Mr. Butler \$50 as a fee for perfecting the title.

The agreement was to have been performed on November 1, 1900. On November 9th, Mr. Butler wrote defendant Murphy as follows: "Dear Sir:—I just saw Mr. Milmoë and he says he will not take the title until it is perfected. He says you will have to refund him his forfeit money" (referring to \$25 paid on the signing of the agreement) "and his search and survey expenses, making a total of \$58."

On November 28th, Mr. Kenny, Mr. Murphy's solicitor, wrote Mr. Butler as follows: "Mr. Murphy informs me that although your client, Mr. Milmoë, has
 30 refused to complete the purchase of the lot on South Sixth Street, he has taken possession of it and occupies it. Why is this thus?" On December 1, 1900 Mr. Butler responded—"Dear Sir:—Yours of Nov. 28th with reference to Mr. Milmoë's occupation of Mr. Murphy's lot just received. I do not understand such a state of circumstances to exist. However, I have sent your letter to Mr. Milmoë and advised him to desist if such is the case. I am contemplating the bringing of an action against Mr. Murphy for damages sustained
 40 by Mr. Milmoë, owing to his (Murphy's) failure to give

Milmoe title. I would suggest that you advise him to send me \$100.00 and I will procure a proper release for him."

After this nothing was said or done by either party until May 13, 1901, when Murphy sold the property to the defendant O'Leary, whom the evidence shows to have been a bona fide holder for value without personal notice. The agreement had however been recorded on November 10, 1900, the day *after* the first of the above letters was written. 10

On this state of facts, I think it plain that the complainant cannot maintain his bill. In the first place he asks that the deed from Murphy to O'Leary may be decreed to be void. Of course the court could make no such decree. All it could do would be to direct a conveyance from O'Leary to complainant on the theory that O'Leary had constructive notice. In the second place the bill prays, not for specific performance *cy-pres*:—not for a conveyance of such title as defendant is able to give,—but for absolute performance. It prays "that the said William Murphy may be decreed to specifically perform the agreement herein set forth with your orator." On the trial the complainant did not recede from this position. He did not ask for a conveyance of such title as the defendants had, but for a conveyance of a perfect title. As, according to the complainant's insistence, the defendant did not have such title, a decree to convey would not give complainant either what he wants or what he is willing to pay for. He stands in this dilemma. If defendant's title is good, then he is himself in default for not complying with the contract, for the evidence shows that defendant, Murphy, was willing to convey what he had. If the title is bad, then complainant is not willing to pay the agreed price on a decree for a conveyance. He has never tendered the money and he has always taken the position that he is not obliged to pay any part of the consideration until he gets a perfect title. In this aspect of his case, what he is trying to do is not only 40

to secure specific performance but, as an indispensable preliminary, to obtain a decree directing defendant to perfect his title—a thing which he may or may not be able to do. Of course the court can make no such decree.

Complainant prays however for general relief and under this prayer it may be suggested that he is entitled to a decree for performance with compensation or indemnity, on the principle stated by Chief Justice Depue in *Lounsbery v. Locander* 10 C. E. Gr. 559, who there says: "On a bill by the purchaser, a vendor will be required to allow compensation in case he is able to make title for a part, but not for the whole, if the purchaser consents to accept part performance with such compensation." In answer to this suggestion it is enough to say that complainant has never put his demand in that way. So far as appears from the record he did not, even at the trial, offer to accept part performance. The court could not, by its decree, compel him to do so, because he had a right to say, I will have all or nothing. But if he should now consent to take part, aside from the objection that he should have framed his case in that way, he would be obliged to show that it was such as to admit of compensation. It is said in *Fry on Sp. Per. Sec. 302*, "It is obvious that, in this proceeding to give the purchaser an estate different from that which the vendor contracted to sell, the court is executing the contract *cy-pres*, or rather perhaps is carrying into effect a new contract—a course in which difficulties will necessarily sometimes arise and these put restrictions on the jurisdiction under discussion. These seem to be the following: Where the difference in value of the interest contracted for and the interest actually to be conveyed is incapable of computation." &c. That, as the pleadings and evidence now stand, is the situation here. The case is in this respect totally unlike *Keator v. Brown* 12 Dick. 600, where it was easy to make a decree that was just to both parties. It is impossible to say what proportion of the purchase money shall be

deducted. I think however that the conclusive answer to giving this kind of relief is that the complainant has not asked for it or consented to accept it.

There is another reason why the complainant must fail. He has by his conduct stopped himself from claiming specific performance. The case of *Meidling v. Trefz*, 3 Dick. 639 is in point. There as here the contract was unilateral, and Mr. Justice Magie said "When contracts are optional in respect to one party, delay on his part is viewed with especial strictness." 10 Here there was not only delay, but, as the above quoted correspondence shows, little short of actual abandonment. When the papers were delivered up by Milmoë to Murphy and when Mr. Butler wrote as he did to Mr. Kenny, Murphy was, I think, justified in supposing that Milmoë had made up his mind to insist not upon a specific performance, but upon damages. He made no claim to the contrary until after the conveyance to O'Leary and that conveyance was not made until five months and a half after the writing of the 20 last letter.

I think the bill should be dismissed with costs.

FREDERICK W. STEVENS, V. C.

In Chancery of New Jersey.

10 *Between*

ALEXANDER MILMOE,

Complainant, and

WILLIAM MURPHY

et als,

Defendants.

On Bill &c.

Final Decree.

20 This cause coming on to be heard in the presense of
Thomas J. Butler and Walter J. Knight of counsel with
the Complainant and William B. Gourley of counsel
with the Defendants, and the pleadings and proofs
having been read and the arguments of the respective
counsel having been heard and considered and this
Court having duly considered said pleadings, proofs
and arguments and it appearing to the Court that the
complainant is not entitled to the relief sought and
prayed for by him in his bill of complaint.

30 It is on this fifteenth day of March 1902 on motion
of William B. Gourley, Solicitor and of counsel with
the defendants, ordered, adjudged and decreed that this
complainant's bill be and the same is hereby dismissed
with costs. And it is further ordered and decreed that
the complainant pay to the defendants their costs of
this suit to be taxed, and that execution issue therefor
according to the practice of this Court.

Respectfully Advised,

FREDERIC W. STEVENS,

V. C.

W. J. MAGIE,

C.

In Chancery of New Jersey,

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Between

ALEXANDER MILMOE,
Complainant, and

WILLIAM MURPHY and
THOMAS J. O'LEARY,
Defendants.

On Bill &c.

Notice of Appeal.

The Complainant hereby appeals from so much of
the final decree made in this Court, in the above stated
cause as declares that the complainant's bill should be
dismissed.

Dated March 15, 1902.

THOMAS J. BUTLER,

Solicitor of Complainant.

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

WALTER J. KNIGHT,

of Counsel with Complainant.

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NEW JERSEY COURT OF ERRORS AND APPEALS.

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Between

ALEXANDER MILMOE,
Complainant, and
WILLIAM MURPHY *and*
THOMAS J. O'LEARY,
Defendants.

On Bill &c.

Petition of

Appeal.

20 To the Honorable Court of Errors and Appeals, in the
last resort in all causes :

The humble petition of Alexander Milmoe, the ap-
pellant in the above stated cause, respectfully shows
that your petitioner finds himself aggrieved by a final
decree made in the Court of Chancery by his Honor
William J. Magie, Chancellor of the State of New
Jersey, bearing date the fifteenth day of March Nine-
teen Hundred and two, wherein the said Alexander
Milmoe was complainant and William Murphy and
30 Thomas J. O'Leary were defendants in this respect,
that the decree adjudges that the complainants bill
should be and thereby was dismissed. And your
petitioner humbly appeals from that part of the decree
of the Chancellor which decrees that said bill should
be and was thereby dismissed as aforesaid, upon the
ground that the same was erroneous for that, your
petitioner was entitled to have said bill retained in
the Court of Chancery, and the relief therein prayed
for, granted, as fully and completely as the same was
40 prayed for.

Your petitioner therefore prays that the said decree of the said Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

THOMAS J. BUTLER,
Solicitor of Complainant.

WALTER J. KNIGHT,
Counsel with Complainant. 10

Endorsed. "Filed April 27, 1902.
S. D. DICKINSON, Clerk."

Service of a copy of this within notice is hereby acknowledged for the within named defendants this 17th day of March, 1902.

WILLIAM B. GOURLEY,
Solicitor of Defendants. 20

New Jersey Court of Errors and Appeals.

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Between

ALEXANDER MILMOE,

*Appellant**and*

WILLIAM MURPHY,

and

THOMAS J. O'LEARY,

Respondents.

On Appeal.

ANSWER.

20 The answer of the above named respondents to the petition of appeal of the above named appellant.

30 These respondents, not acknowledging all or any of the matters, which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit, that a decree was on the fifteenth day of March, last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, these respondents pray to refer thereto when the same shall be produced. And these respondents are advised and believe that the bill of complaint filed by the said Alexander Milmoe was properly dismissed, and that the said decree is agreeable to equity, and they pray that the same may be affirmed with costs to be adjudged to these respondents.

WILLIAM B. GOURLEY,
*Solicitor for and of counsel with
the respondents.*

Exhibit "B" for Defendant.

October 29, 1900.

WILLIAM MURPHY Esq.

Dear Sir.

Yours of the 27th inst to hand. In reply would state that I will close the title on Thursday, Nov. 1st, at 10 A. M. It will be necessary for you, your wife and father to be on hand.

Yours truly

THOMAS J. BUTLER.

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P. S. I have talked to Mr. Kenney about the matter and I presume he has written you. T. J. B.

Exhibit "C" for Defendant.

November 9th, 1900.

Mr. WILLIAM MURPHY.

Dear Sir.

I just saw Mr. Milmoie and he says that he will not take the title until it is perfected. He says you will have to refund him his forfeit money and his search and survey expenses making a total of \$58.

Yours truly

THOMAS J. BUTLER.

Exhibit "D" for Defendant.

EDWARD KENNY
Counsellor - at - Law
800 Broad Street
NEWARK, N. J.

30

November 28th, 1900.

THOMAS J. BUTLER Esq.

Dear Sir.

Mr. Murphy informs me that although your client Mr. Milmoie has refused to complete the purchase of the lot on South Sixth Street he has taken possession of it and occupies it. Why is this thus?

Yours truly

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Exhibit "E" for Defendant.

December 1st, 1900.

EDWARD KENNY Esq.

Dear Sir.

Yours of Nov. 28th with reference to Mr. Milmoes occupation of Mr. Murphy's lot just received. I do not understand such a state of circumstances to exist. However, I have sent your letter to Mr. Milmoes and advised him to desist if such is the case. I am contemplating the bringing of an action against Mr. Murphy for damages sustained by Mr. Milmoes owing to his (Murphy's) failure to give Milmoes title. I would suggest that you advise him to send me \$100.00 and I will procure a proper release for him.

Yours truly

THOMAS J. BUTLER.

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Exhibit 1 for Complainant.

Articles of agreement, made the Twentieth day of October in the year of our Lord One Thousand Nine Hundred, between William Murphy of the City of Paterson in the County of Passaic and State of New Jersey of the First Part: and Alexander Milmoes of the City of Newark in the County of Essex and State of New Jersey of the Second Part; Witnesseth, That the said party of the first part, for and in consideration of the sum of Four Hundred and fifty Dollars to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that he the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of Warranty free from all encumbrance on or before the First day of November next ensuing the date

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hereof, all that lot, tract, or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Newark in the County of Essex and State of New Jersey. Beginning in the easterly line of South Sixth street at a part distant one hundred feet southerly from the southeasterly corner of the same and Cabinet Street. Being twenty five feet front and rear by one hundred and twenty feet deep. Being a part of the same premises Conveyed to Own Murphy by deed recorded in Book F. 8 of Deeds for Essex County page 513 etc. together with a strip of land 20 feet in width lying between the line of old Nicholay Street and the easterly line of South Sixth Street. And the said Alexander Milmo for himself, his heirs, executors and administators, doth covenant, promise and agree to and with the said party of the first part, his heirs, executors, administrators, and assigns, that he the said party of the second part, will pay and satisfy or cause to be paid and satified, unto the said party of the first part, the said sum of Four Hundred and fifty Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say: twenty five Dollars upon the signing of this agreement, the receipt whereof is hereby acknowledged, and the balance to wit, the sum of four hundred and twenty five Dollars (\$425 00) upon the delivery of the aforesaid deed. And it is further agreed, by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises an the First day of November next ensuing the date hereof and from thence take the rents, issues and profits to his and their use.

And it is further agreed, by the parties hereto, that the said Deed shall be delivered and received at the office of Thomas J. Butler, Room 1016 Prudential Building, No. 763 Broad Street, Newark, N. J., between the hours of ten in the forenoon and two o'clock in the afternoon on the said First day of November next ensuing the date hereof.

In Witness Whereof, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

Signed, Sealed and Delivered in the presence of

WILLIAM MURPHY (L. S.) THOMAS J. BUTLER.

State of New Jersey, County of Essex, ss.

Be it remembered that on this Twentieth day of October, before me Thomas J. Butler, a Master in
 10 Chancery of New Jersey, personally appeared William Murphy who I am satisfied is the person mentioned in and who executed the foregoing agreement, I having first made known to him the contents thereof he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes herein expressed.

THOMAS J. BUTLER,
M. C. of N. J.

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(Endorsement.)

Agreement for the Sale of Property.

WILLIAM MURPHY

to

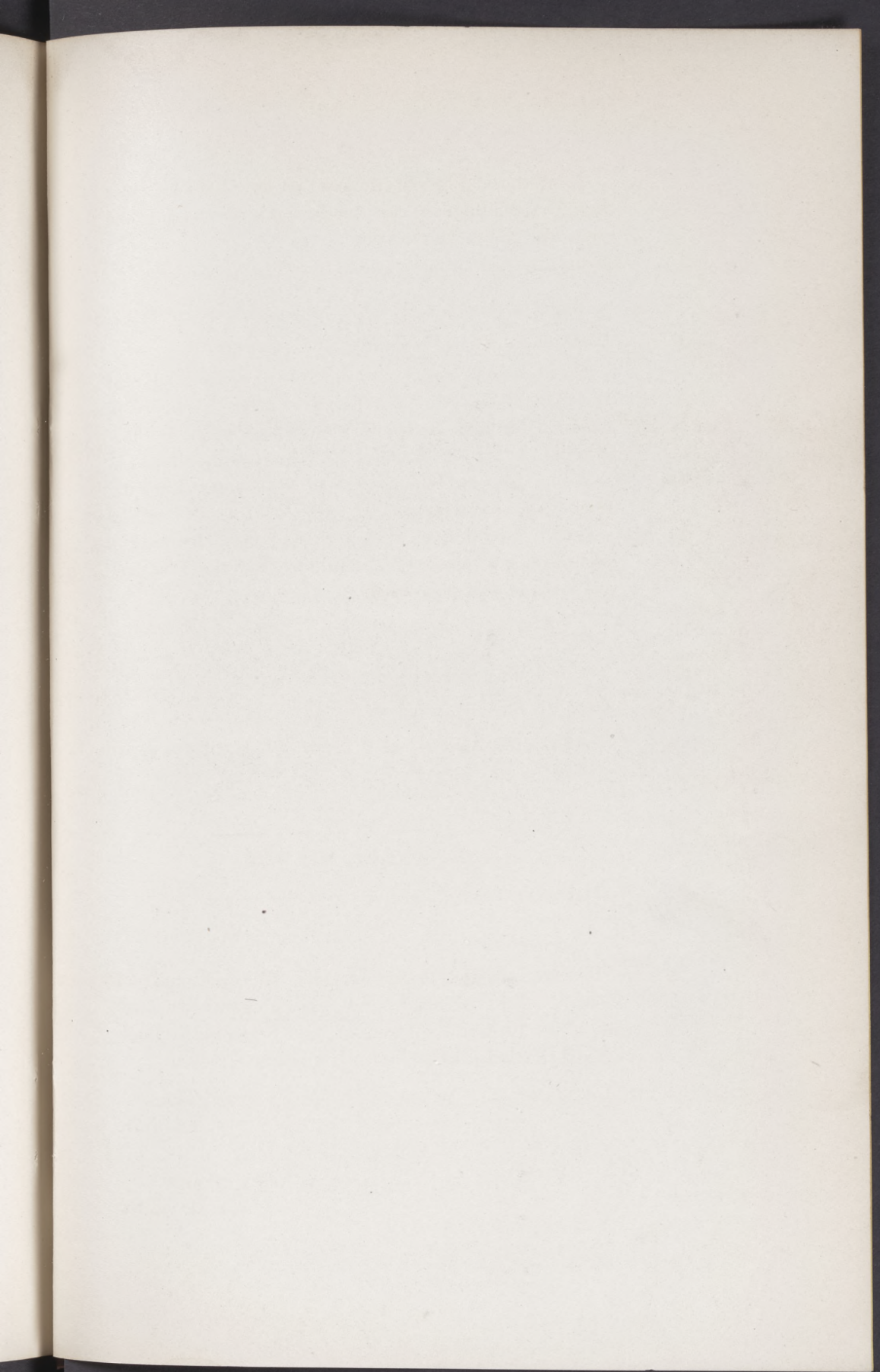
ALEXANDER MILMOE

Dated, October 20, 1900.

30 Received in the Registers Office of the County of Essex, N. J., on the 10th day of November A. D., 1900 at 10.⁴⁵ o'clock in the forenoon, and Recorded in Book 2.33 of Deeds for said County, on pages 472-473.

J. P. DEXHEIMER,
Register.

THOMAS J. BUTLER,
Attorney at Law,
 751 Broad St.



THE UNITED STATES OF AMERICA
DO hereby certify that the following
is a true and correct copy of the

original as the same appears on file in the

Department of the Interior at Washington, D. C.

in accordance with the provisions of the

Act of Congress approved March 3, 1879,

chapter 25, section 1, entitled "An Act

to provide for the preservation of the

public lands of the United States,

and for other purposes."

Witness my hand and the seal of the

Department of the Interior at Washington,

D. C., this 1st day of January, 1901.

AGREEMENT FOR THE SALE OF TRACT

NUMBER 11

ALTA RURA MINERAL

Tract, Containing 20 Acres

Section 10, Township 10 N., Range 10 E.,

County of Adams, State of Colorado

Between the United States of America,

of the one part, and the Colorado Fuel

and Iron Company, of the other part,

do hereby certify that the following

is a true and correct copy of the

original as the same appears on file in the

Department of the Interior at Washington,

D. C., this 1st day of January, 1901.

