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Notice of Appeal.

(Filed June 10, 1931.)

In Chancery of New Jersey

72-132.

Between:

JOHN LARSON,
Complainant,

and

RAYMOND A. KEARNEY,
Defendant.

On Bill &c.

10

The complainant, John Larson, hereby appeals to the Court of Errors and Appeals in the Last Resort in all Causes from so much of the final decree made by the Chancellor, on the advice of Vice Chancellor John O. Bigelow, in the above entitled cause, on the 30th day of April, 1931, as orders and decrees that the bill of complaint filed by complainant herein be dismissed.

Dated, June 9, 1931.

20

PLATOFF, SAPERSTEIN & PLATOFF,
Solicitors of Complainant.

FRED SAPERSTEIN,
Of Counsel.

30

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

FRED SAPERSTEIN,
of Counsel with Complainant. 40

Petition of Appeal.

(Filed June 30, 1931.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

10

Between:

JOHN LARSON,
Complainant-Appellant,

and

RAYMOND A. KEARNEY,
Defendant-Appellee.

On Appeal from
the Court of
Chancery.

Petition on
Appeal.

20

TO THE HONORABLE THE COURT OF ERRORS AND
APPEALS IN THE LAST RESORT IN ALL CAUSES:

The petition of John Larson, the appellant in
the above entitled cause respectfully shows that:

30

Petitioner finds himself aggrieved by a final
decree made in the Court of Chancery by his
Honor, Edwin Robert Walker, Chancellor of the
State of New Jersey, on the advice of Vice-
Chancellor John O. Bigelow, bearing date, the
30th day of April, 1931, in a certain cause in
said Court of Chancery wherein the said John
Larson was complainant, and the said Raymond
A. Kearney was defendant in this respect, to wit:

That the said decree orders and decrees that
the bill of complaint of the complainant be dis-
missed.

Your petitioner, therefore, humbly appeals from
40 that portion of the final decree of the Chancellor

Petition of Appeal.

which decrees as aforesaid, upon the ground that same is erroneous in that:

1. The Court of Chancery erred in dismissing the Bill of Complaint for the reason that the evidence disclosed sufficient facts to establish that defendant should be compelled to specifically perform the agreement for the sale of land entered into by the said defendant with complainant. 10

2. The Court of Chancery erred in dismissing the Bill of Complaint for the reason that the evidence disclosed sufficient facts to establish that defendant should be compelled to specifically perform the said agreement with an abatement to complainant by way of compensation from the purchase price, by reason of a defect in the title of the land so contracted to be conveyed by the said defendant. 20

3. The Court of Chancery erred in dismissing the Bill of Complaint for the reason that the evidence adduced at the trial did not support or warrant such adjudication and decree.

4. The Court of Chancery should have found and adjudged the several allegations of complainant's Bill of Complaint to have been proved, and should have ordered, adjudged and decreed that defendant specifically perform the agreement entered into by the said defendant with complainant. 30

5. The Court of Chancery should have found and adjudged the several allegations of complainant's Bill of Complaint to have been proved, and should have ordered, adjudged and decreed that defendant specifically perform the agreement en- 40

Petition of Appeal.

tered into by the said defendant with complainant, with an abatement to complainant by way of compensation from the purchase price, by reason of the defect in the title of the land so contracted to be conveyed by the said defendant.

10

6. The Court of Chancery erred in dismissing the Bill of Complaint for the reason that the evidence disclosed that complainant, at the time of the execution of the agreement for the sale of land entered into between defendant and complainant, had no notice of any defect in the title to said land.

20

7. The Court of Chancery should have found and adjudged that the complainant, at the time of the execution of the agreement for the sale of land entered into between defendant and complainant, had no notice of any defect in the title to said land.

8. The Court of Chancery erred in dismissing the Bill of Complaint for the reason that the evidence disclosed that complainant was not guilty of laches.

30

9. The Court of Chancery should have found and adjudged that complainant was not guilty of laches, and should have ordered, adjudged and decreed that defendant specifically perform the agreement entered into by the said defendant with the complainant.

40

10. The Court of Chancery should have found and adjudged that complainant was not guilty of laches, and should have ordered, adjudged and decreed that defendant specifically perform the

Petition of Appeal.

agreement entered into by the said defendant with the complainant, with an abatement to complainant by way of compensation from the purchase price by reason of the defect in the title of the land so contracted to be conveyed by the said defendant.

10

11. The Court of Chancery disregarded the parole evidence introduced by complainant to explain complainant's delay in closing title.

12. The Court of Chancery disregarded the parole evidence offered by complainant to explain complainant's delay in instituting an action for the specific performance of the agreement for the sale of land, entered into between complainant and defendant.

20

13. The Court of Chancery erroneously found that the parole evidence offered by complainant to explain complainant's delay in instituting suit, and in closing title, was inadmissible because of Section 5, paragraph 5 of the Statute of Frauds (2 C. S. 2612, Section 5, p. 5).

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 appellant may have such other relief in the premises as to this Court shall seem proper.

30

PLATOFF, SAPERSTEIN & PLATOFF,
Solicitors for Appellant,
FRED SAPERSTEIN,
of Counsel.

40

Final Decree.

(Filed April 30, 1931.)

10 This matter coming on to be heard in the presence of Platoff, Saperstein & Platoff, of counsel with complainant, and Harold K. Smith, of counsel with defendant, and the Court having read the pleadings and heard the proofs submitted by the respective parties and having duly considered the argument of counsel

It is on this 30 day of April, 1931, on motion of Harold K. Smith, of counsel with defendant,

ORDERED:

20 That the bill of complaint herein be dismissed:
And the Court having found that the defendant was not entitled to succeed on his counterclaim, it is, on motion of Platoff, Saperstein & Platoff, of counsel with complainant

FURTHER ORDERED that the counterclaim of the defendant be dismissed.

E. R. WALKER,
C.

30 Respectfully advised:

J. O. BIGELOW, V. C.

Approved as to form.

PLATOFF, SAPERSTEIN & PLATOFF,
Solicitors of Complainant.

HAROLD K. SMITH,
Solicitor of Defendant.

Amended Bill of Complaint.

(Filed Nov. 24, 1930.)

IN CHANCERY OF NEW JERSEY.

To the Honorable EDWIN ROBERT WALKER, Chancellor of the State of New Jersey:

10

The complainant, John Larson, of the Borough of Cliffside Park, in the County of Bergen and State of New Jersey, by his amended bill of complaint, respectfully shows that:

1. On October 23, 1926, Raymond A. Kearney of the City, County and State of New York, entered into a certain agreement in writing, a true copy of which is hereto annexed and made a part hereof, whereby he agreed to convey to complainant, for the sum of Sixteen Hundred (\$1,600) Dollars, by deed of full covenant and warranty, on or before the fifteenth day of December, 1926:

20

ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Ridgefield, in the County of Bergen and State of New Jersey, and known and distinguished on a map entitled "Map of property of S. F. B. Morse, deceased, Ridgefield, N. J., 1890, drawn by Willard Cass, C. E." as southerly half of lot No. 4, in Block P, bounded and described as follows, viz.:

30

BEGINNING at a point on the northwesterly line of Dallytown Road, distant two hundred seventy-two (272) feet and five one-hundredths of a foot eastwardly from the north-easterly corner of Dallytown Road and Edge-

40

Amended Bill of Complaint.

10 water Avenue; running thence northerly but along the easterly lines of lots 9, 8 and 7, Block P, on said map, two hundred eighty-eight (288) feet; thence easterly but along the southerly line of lot 3, Block P on said map, fifty (50) feet to the center line of the block; thence southerly but along said center line of the block to a point in the northwesterly line of Dallytown Road, and distant fifty feet and eighty-four one-hundredths of a foot (50.84) distant from the point or place of beginning; thence westerly along said northwesterly line of Dallytown Road, fifty feet and eighty-four one-hundredths of a foot (50.84) to the point or place of beginning.

20 TOGETHER with all the right, title and interest of Raymond A. Kearney, in and to the easterly half and remainder of lot No. 4, in Block P, if any, which taken together with the above described premises are the same premises conveyed to John Kearney, in deed by Henry Day, executor, in the State of New Jersey, of Samuel F. B. Morse, deceased, and the Mercantile Trust Company as Trustee under the will of said deceased, recorded in
30 the Clerk's Office of Bergen County, New Jersey, on the 19th day of April, 1893, in book 357 of deeds, page 330.

The said contract after having been duly acknowledged, was, on March 5, 1927, filed in the Bergen County Clerk's office in book 1475 of Deeds for said County, page 555, &c.

2. Fifty Dollars of the consideration of said
40 lands, as mentioned in paragraph 1 hereof, was

Amended Bill of Complaint.

duly paid by complainant to the said Raymond A. Kearney upon the execution and delivery of said contract.

3. At the said time for the completion of said purchase and delivery of deed for said premises, complainant was and still is in doubt as to the validity and marketability of defendant's title, and for such reason declined on said day to accept said title; but complainant then and there notified said defendant that he did not intend to abandon said purchase, or his contract with defendant therefor. 10

4. Said defect in defendant's title consisted in an outstanding interest in one "John" Kearney, who was one of the heirs of "John" Kearney, a previous owner in fee simple of said premises. "John" Kearney died intestate leaving surviving him among others, said "John" Kearney and the defendant. All the other heirs conveyed their interest in said premises to the defendant, but said "John" Kearney did not do so. 20

5. The said "John" Kearney has not been heard of since May 1, 1922. 30

6. Complainant and defendant mistakenly believing that proceedings could be instituted on May 1, 1927, to declare the said "John" Kearney legally dead, mutually agreed to postpone the date of performance of the above contract until said date, and in the meantime a search would be made for the missing "John" Kearney.

7. On May 1, 1927, complainant and defendant learned that such proceedings as mentioned above 40

Amended Bill of Complaint.

could not be instituted until May 1, 1929. They thereupon agreed that the date for performance of the above contract would be extended until the last mentioned date, and that in the meantime the search for said "John" Kearney would be continued.

10

8. On January 16, 1929, complainant assigned all his rights in and to the contract described in paragraph 1 to one Nick Acciardi. Prior to the commencement of the within action, said Nick Acciardi duly re-assigned his rights in the said contract to complainant and did surrender any and all rights in and to said contract to complainant.

20

9. Complainant has been ready, willing and able to perform all the terms and conditions of said contract on his part to be performed and is now ready, willing and able, and offers to pay the residue of the purchase money to defendant with an abatement by way of compensation by reason of the failure of title of the premises described in said agreement as is hereinbefore set forth, upon the delivery by said defendant of the deed conveying such title as defendant can convey to said premises, but the said Raymond A. Kearney has wholly failed, refused and neglected to perform the terms and conditions of said contract on his part to be performed and has given complainant notice that said contract is at an end and that he considers the same no longer in force.

30

Complainant is without adequate remedy in the Courts of Law, and therefore prays:

1. That Raymond A. Kearney, who is the defendant to this suit, may answer this bill of complaint and each statement herein made.

40

Amended Bill of Complaint.

2. That said Raymond A. Kearney may be compelled by a decree of this Court to specifically perform the said agreement entered into by the said Raymond A. Kearney with complainant, the said Raymond A. Kearney to convey such title as he can, the complainant tendering himself ready and willing, and hereby offering specifically to perform said agreement on his part with an abatement by way of compensation from the purchase price by reason of the aforesaid defect in the title of the land so contracted to be conveyed by the said Raymond A. Kearney. 10

3. That a writ of subpoena may issue commanding said defendant to answer this amended bill of complaint and abide by such decree as this court may make in the premises. 20

PLATOFF, SAPERSTEIN & PLATOFF,
Solicitors of Complainant.

JOHN N. PLATOFF,
of Counsel.

Schedule "A".

CONTRACT ANNEXED TO BILL OF COMPLAINT 30

(Identical with Exhibit C-1.)

ARTICLES OF AGREEMENT, made the Twenty-third day of October, in the year of Our Lord One Thousand Nine Hundred and Twenty-six.

BETWEEN, RAYMOND A. KEARNEY, of the City of New York, in the County of New York, and state of New York, party of the first part; 40

Amended Bill of Complaint.

AND, JOHN LARSON, of the Borough of Ridgefield, in the County of Bergen, and state of New Jersey, party of the second part;

10 WITNESSETH, That the said party of the first part, for and in consideration of the sum of Sixteen Hundred (\$1,600) Dollars, to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that he the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of Full
20 Covenant and Warranty free from all encumbrance, on or before the Fifteenth day of December, next ensuing the date hereof, all that lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Borough of Ridgefield, in the County of Bergen and State of New Jersey, and known and distinguished on a map entiled "Map of property of S. F. B. Morse, deceased, Ridgefield, N. J. 1890, drawn by Willard Cass, C. E." as Southerly half of lot #4 in Block P, bounded and described
30 as follows: viz:

BEGINNING at a point in the northwesterly line of Dallytown Road, distant two hundred seventy-two (272) feet and five one-hundredths of a foot eastwardly from the north-easterly corner of Dallytown Road and Edgewater Avenue; running thence northerly but along the easterly lines of lots 9, 8 and 7 Block P, on said map, two hundred eighty-eight (288) feet; thence easterly but along
40

Amended Bill of Complaint.

the southerly line of lot 3 Block P on said map, fifty (50) feet to the center line of the block; thence southerly but along said center line of the block to a point in the north-westerly line of Dallytown Road, and distant fifty (50) feet and eighty-four one hundredths of a foot distant from the point or place of beginning; thence westerly along said north-westerly line of Dallytown Road, fifty (50) feet and eighty-four one hundredths of a foot to the point or place of beginning. 10

TOGETHER with all the right, title and interest of the party of the first part, in and to the easterly half of remainder of lot #4 in Block P, if any, which taken together with the above described premises are the same premises conveyed to John Kearney, in deed by Henry Day, executor in the State of New Jersey, of Samuel F. B. Morse deceased, and the Mercantile Trust Company as Trustee under the will of said deceased, recorded in the Clerk's office of Bergen County, New Jersey, on the 19th day of April, 1893, in book 357 of deeds page 330. 20

AND the said JOHN LARSON, for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, his heirs, executors, administrators and assigns, that he, the said party of the second part, will pay and satisfy, or cause to be paid and satisfy, unto the said party of the first part, the sum of Sixteen Hundred (\$1,600) Dollars, as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say: 30 40

Amended Bill of Complaint.

On Execution of this agreement for which this is also a receipt	\$50.00
On Delivery of deed, cash	1,550.00
Total	\$1,600.00

10 This contract is entered into upon the knowledge to the parties as to the value of the land and whatever buildings are upon the same, and not on any representations made as to character or quality;

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

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

30 . AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed of Full Covenant and Warranty, shall be delivered and received at the office of Nick Acciardi, 746 Bergenline Avenue, Union City, N. J., between the hours of nine in the forenoon and four o'clock in the afternoon on the said Fifteenth day of December, next ensuing the date hereof.

The rents of said premises, insurance premiums, water rents, taxes, and interest on Mortgage, if any, shall be adjusted apportioned and
40 allowed as of the day of delivery of said deed.

Amended Bill of Complaint.

Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any, and all other personal property appurtenant to or used in the operation of said premises is represented to be owned by seller and is included in this case. 10

The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part.

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part, shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated.

It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments thereon and that the buildings comply with the municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Supervision, to be shown by the report of the department or board enforcing the same where such ordinances, regulations and said act apply. 20 30

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

The premises above described are sold subject to restrictions appearing of record, if any,

If at the time for the delivery of the deeds, the premises or any part thereof shall be or shall have been affected by an assessment or assess- 40

10

20

RAYMOND A. KEARNEY,
JOHN LARSON.

30

RICHARD MOYLAN.

40

WITNESS our hands and seal this day
of A. D. 1929.

Answer to Amended Bill of Complaint and Counterclaim.

(Filed December 2, 1930.)

This defendant answering the amended bill of complaint herein, says:

1. He admits that he executed a contract with complainant and believes that the copy of the contract annexed to the bill of complaint is a true copy thereof, but for greater certainty reserves the right to refer to said contract when produced.

10

He avers that while said contract recites the payment of Fifty (\$50.00) Dollars on the execution and delivery thereof, such recital is untrue inasmuch as the said sum of Fifty Dollars was paid by complainant to this defendant some two weeks before the contract referred to in paragraph 1 of the amended bill of complaint was executed and delivered.

20

2. He denies the statements contained in paragraph 2 of the amended bill of complaint.

3. He denies the statements contained in paragraph 3 of the amended bill of complaint except that he admits that on December 15th, 1926, complainant was and still is in doubt as to validity and marketability of defendant's title.

30

He avers that complainant had this same doubt about defendant's title long prior to October 23rd, 1926, and that long prior to October 23rd, 1926, defendant told complainant that the validity of such title was doubtful.

4. He is informed that if his brother, John Kearney, is now living, this defendant's title is

40

*Answer to Amended Bill of Complaint and
Counterclaim.*

defective, and avers that he so told complainant long prior to October 23, 1926.

10 5. He denies the statements contained in paragraph 5 of the amended bill of complaint.

6. He denies the statements contained in paragraph 6 of the amended bill of complaint.

7. He denies the statements contained in paragraph 7 of the amended bill of complaint.

20 8. He has no knowledge or information sufficient to form a belief as to the statements contained in paragraph 8 of the amended bill of complaint, as amended, and is not informed except by said bill of complaint.

9. He denies that the complainant has been ready, willing and able to perform all of the terms and conditions on his part to be performed.

30 He avers that even if the complainant is now ready, willing and able and offers to pay the residue of the purchase money to this defendant with an abatement by way of compensation by reason of the failure of title to the premises described in said agreement as is suggested in said bill, upon the delivery by this defendant of a deed conveying such title as this defendant can convey to said premises, he the said complainant is not entitled to such performance on the part of this defendant and abatement by way of compensation as is suggested.

40 He admits that he refuses to carry out said contract at this time and that he has given the complainant notice that said contract is at an end

*Answer to Amended Bill of Complaint and
Counterclaim.*

and no longer in force, and he avers that such notice was given by defendant to complainant.

FIRST SEPARATE DEFENSE.

1. Defendant avers that in the month of August, 1926, he informed complainant that all of the heirs of John Kearney, defendant's father, with the exception of defendant's brother, John Kearney, had conveyed their interest in the lands in question to defendant's mother, Charlotte Kearney, who had conveyed such title to defendant; that defendant would be willing to convey such title as he had to said premises for the sum of Sixteen hundred (\$1,600.00) Dollars, the complainant himself assuming the burden of perfecting title to said premises in whatever manner he might be able so to do. 10 20

2. That when complainant paid this defendant the sum of Fifty Dollars on October 9th, 1926, on account of the purchase price of said property, complainant agreed to take the title that complainant could give to said premises and pay the sum of Sixteen hundred (\$1,600.00) Dollars therefor and to assume the burden of perfecting title in himself. 30

3. That on October 23rd, 1926, when complainant asked defendant to sign a formal contract for the sale of said premises, which complainant had already prepared and produced to defendant, this defendant, who is unfamiliar with such contracts and who has no knowledge of the legal import of the language used therein, believed it was a contract to convey his interest in said lands for the 40

*Answer to Amended Bill of Complaint and
Counterclaim.*

10 sum of Sixteen hundred Dollars; he did not understand or have any knowledge that he was contracting to convey any title to such lands excepting that of which he had theretofore informed complainant; he relied upon complainant's statement that a contract had been prepared by complainant in accordance with the facts, which were known to complainant, and executed and delivered the contract of October 23rd, 1926, under a mistake on the part of the parties thereto as to the effect thereof, and without the advice of counsel.

20 4. Defendant therefore avers that complainant is not entitled to specific performance of the contract of October 23, 1926, with an abatement by way of compensation by reason of failure of title in defendant.

SECOND SEPARATE DEFENSE.

30 1. During the months of August, September, October, November and December, 1926, and during the month of January, 1927, complainant knew of the defect in defendant's title and for more than two years thereafter took no steps or other proceedings to enforce what ever rights he had under said contract of October 23, 1926, that during the interim the value of defendant's lands had increased more than one hundred per cent over the purchase price named in said contract, of which complainant, who resides near and is familiar with the value of land in the vicinity of defendant's land, had full knowledge in January, 40 1929.

*Answer to Amended Bill of Complaint and
Counterclaim.*

By way of counterclaim against complainant, defendant avers:

1. He executed and delivered to complainant a certain contract dated October 23, 1926, a copy of which he believes is annexed to the bill of complaint herein. 10

2. Said contract was executed and delivered by defendant under a representation by complainant that it required defendant to convey only the title that defendant had to the lands described herein.

3. Said representation was false and untrue and known by the complainant so to be at the time of the making thereof. 20

4. Defendant acted upon said representation at the time of the execution and delivery by him of said contract.

5. Defendant had no legal advice at the time he executed and delivered said contract, and said contract was executed and delivered under a mutual mistaken belief on the part of both defendant and complainant that it required defendant to convey only the title which he had to the lands therein described. 30

6. Complainant was unwilling in January, 1927, or at any time prior thereto, to accept such title to the lands described in said contract as defendant was able to convey and pay the sum of Sixteen hundred Dollars therefor.

7. During the interim from January, 1927 to January 1929, the value of defendant's land has 40

*Answer to Amended Bill of Complaint and
Counterclaim.*

increased in value over one hundred per cent, said lands having a value of \$3,500 in January, 1929.

- 10 8. Defendant has paid various municipal liens assessed against said lands subsequent to January 1, 1927, and complainant has paid no part of any or either of the same.

Defendant therefore prays:

1. That complainant may answer this counterclaim and each statement therein made;
- 20 2. That said contract so executed and delivered by defendant on October 23, 1926, as aforesaid, may be declared to be invalid, ineffectual and void;
3. That complainant may be ordered and decreed to surrender said contract;
- 30 4. That complainant may be ordered and decreed to execute whatever instruments may be necessary to release defendant's land and discharge the same from any lien upon or interest in the same by reason of the recording of said contract, if said contract shall have been recorded in the manner provided by law.

HAROLD K. SMITH,
Solicitor for Defendant.

Replication and Answer to Counterclaim.

(Filed December 2, 1930.)

Complainant replying to the Answer to Amended Bill of Complaint and Counterclaim, says:

1. Complainant joins issue on the Answer of the defendant. 10

2. The allegations of the defendant in the First Separate Defense are denied.

3. The allegations of the defendant in the Second Separate Defense are denied.

As to the counterclaim in said Answer, complainant says: 20

1. He admits the allegations of Paragraphs 1 and 6.

2. He denies the allegations of Paragraphs 2, 3, 4, 5 and 7.

3. Complainant has no knowledge or information sufficient to form a belief as to the statements contained in Paragraph 8. 30

PLATOFF, SAPERSTEIN & PLATOFF,
Solicitors of Complainant.

Testimony.

JOHN LARSON, sworn in his own behalf.

Direct Examination by Mr. David Saperstein:

10 Mr. Morten: I have no objection to the contract, except the acknowledgment. The defense is that there was no acknowledgment. We will admit the making of the contract but not the acknowledgment.

 The Court: Don't you want to prove your acknowledgment?

 Mr. Saperstein: I don't think it is material. I offer the contract in evidence.

 The Court: It will be received.

20 (Contract admitted in evidence and marked C-1.)

 Q. You are complainant in this matter? A. Yes, sir.

 Q. What was the first thing you did, Mr. Larson, after October 23, 1926, the date of this contract? A. I went to Mr. Joseph Marini and had it searched.

30 Q. What was the first you heard from Mr. Marini? A. In about three weeks he called me down to his office and he told me that the property was not clear.

 Q. Did he tell you what the trouble would be? A. He said there was some heir missing.

 Q. After that, what did you do, Mr. Larson? A. I talked to Mr. Kearney and I told Mr. Kearney about it.

 Q. Where did you see Mr. Kearney? A. I seen him five weeks,—four weeks, after we settled the contract.

40 Q. Where did you see him? A. See?

John Larson—Direct Examination.

Q. Where did you see him? A. In his office on Ninth Avenue between Forty-first and Forty-second Streets, New York City.

Q. Who was present at the time, do you recall? A. Mr. Kearney was there alone two or three times I came.

Q. Could you fix the time after Mr. Marini spoke to you?

10

The Court: Are you a bit deaf?

A. Say?

The Court: Are you a bit deaf?

A. Yes.

Q. Mr. Larson, who was present the first time you saw Mr. Kearney in New York, after you spoke to Mr. Marini? A. There is a gentleman sitting alongside of Mr. Kearney there, he was standing in the back.

20

Q. Who? A. Moylan. He was in the office at that time at Ninth Avenue.

Q. Anybody else there? A. No.

Q. Tell the Court what took place at that time. A. When Mr. Kearney told me, I said I had been looking the thing over and I couldn't get any satisfaction over there and he said they are only fakers over there and I said will you make an appointment to go over, and he said he would, and he made an appointment to come over to Jersey to meet.

30

Q. Who did he meet? A. Me and Mr. Leuey.

The Court: Who is he?

A. A real estate broker on Anderson Avenue, Cliffside. Mr. Kearney and Mr. Leuey had a con-

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John Larson—Direct Examination.

versation and Mr. Kearney said don't worry, you will get clear property, my brother will be away five years in May and it will be clear. I had it searched and found the same thing.

10 Q. What was that? A. Some heirs missing, some of the brothers were missing.

Q. When did that take place, approximately? A. It took place early in the next year, May, that took place, I couldn't tell you which month.

Q. When did you see Mr. Kearney again? A. I saw him in May.

Q. May of what year? A. 1927, after his brother was five years dead and asked him if his lawyer did anything and he said he found out it took seven years.

20 Q. When did Mr. Kearney come over to Mr. Leuey's office and say that in May he would be ready to give a clear title?

Mr. Morten: The witness did not say that it was in Leuey's office.

A. In 1926, in the fall but in August, in September—something like that, in August, in the fall.

30 Q. Sure of that? A. Possibly June. I didn't have the time down, it was the same day Mr. Kearney came over and he was in the office with Leuey and me in 1926.

Q. Was it after the contract was signed? A. Right after the contract was signed.

Q. You knew the contract was signed in October, 1926, didn't you? A. It was right after the contract, six or seven months and I had advised Mr. Kearney and he said that they would fix it and I told him to come over with me and
40 he did make an appointment with me. It was

John Larson—Direct Examination.

five or six months after I bought the property when I had it searched.

Q. During that period—

The Court: What period?

Q. During the period when you had the conversation which you first testified to with Mr. Kearney, were you ready and willing and able to take this property? A. Yes, sir. 10

Q. Listen to me, what was the next time you saw Mr. Kearney? A. That was in 1927. I was waiting and waiting all the time.

Q. When did you see him again, if at all? A. Saw him, the last time was on Ninth Avenue and I was there three or four times and couldn't find him and then I found one of the clerks that were working in the store and he gave me an address uptown and I found him uptown New York. I went up and saw him and then he made an appointment there. 20

The Court: Has this anything to do with it, running around town?

Q. The delay. Mr. Larson, listen to the question. After this conversation with Mr. Kearney and Mr. Leuey, when was the next time you saw Mr. Kearney in New York? A. That was—I had a fellow with me, he might know. 30

Q. Do you remember? A. I couldn't hardly remember.

Mr. Morten: This bill says 1929, Mr. Saperstein, we will admit it.

Q. That is not what I meant. What was the last time you saw Mr. Kearney, Mr. Larson? A. In 1927. 40

John Larson—Direct Examination.

Q. The last time? A. The last time, 1928. Was in the store up on Amsterdam Avenue.

The Court: Where else did you see him, when was the last time you saw him?

10

A. Amsterdam Avenue.

Q. When? A. 1928.

Q. What month in 1928, do you recall? A. In the fall.

Q. Tell us about that meeting. A. October or November, in the fall, it was very cold.

20

Q. Tell us about that meeting. A. He had two gentlemen in the store and after we waited a while and he questioned me and one of the gentlemen said don't you think it is worth a thousand dollars more now, the property over there? And I said no, I couldn't see it, and he said try to get it, and I said I will have to try to get it.

Q. Who was with you? A. Jim Larmaker.

Q. Was Mr. Larmaker with you at any other time when you saw Mr. Kearney? A. Yes, on Ninth Avenue.

Q. When? A. In May.

Q. What year? A. 1927.

30

Q. Do you recall what took place in May, 1927, when Larmaker was present?

Mr. Morten: I object. It is not permissible under the statute of frauds.

The Court: Have you pleaded the statute?

Mr. Morten: No.

The Court: Overrule the objection.

Q. What took place in May, 1927, at the time
40 Mr. Larmaker was with you? A. He was told

John Larson—Cross Examination.

that it would take five years and then he said he found out it took seven years. And I was waiting and I saw him different times.

Q. Did you tell Mr. Kearney at any time prior to 1928 that you didn't want the property? A. No, never did. I wanted the property to build on. 10

Q. Were you ready and willing at all times to take the property if he gave you what the contract called for? A. Yes, sir.

Q. Did Mr. Kearney ever give you any notation in writing or otherwise that he considered the contract at an end? A. No. Mr. Kearney—

The Court: Don't talk, except answer questions. 20

Cross Examination by Mr. Morten:

Q. Do you remember when you first went to see Mr. Kearney about this property, what year it was? A. 1926.

Q. Didn't you go there in 1925? A. No, to see about the property—

Q. Didn't you go to see Mr. Kearney about 1925, about this property, and didn't you see his mother in 1925? A. No, that was in 1926. That was in his home early in the spring, uptown. That was in 1926— 30

The Court: You have answered it.

Q. Who did you first see in regard to this property? A. With regard to the property, I saw the tax collector in Ridgefield.

Q. Did he say the property was in the name of Charlotte Kearney? A. He told me the property was in Raymond Kearney, stood on the tax bill. 40

John Larson—Cross Examination.

Q. Didn't you go to see Charlotte Kearney first? A. No.

Q. And when you first went to see Mr. Raymond Kearney, didn't he tell you then his brother was missing? A. No, he never did.

10 Q. You paid Fifty Dollars on account of the expenses of this property before you got the contract, didn't you? A. Yes, sir.

Q. And you paid that on October the 9th? A. Before the contract.

Q. And you got from Mr. Kearney his receipt, didn't you (handing same)? A. It looks like the receipt.

20 Q. Your lawyer just gave this to me, you gave it to him. I ask that it be marked for identification.

(Receipt marked D-1 for identification.)

Q. Will you write your name on there (handing witness a piece of paper)? A. Yes, sir (witness writes name).

Mr. Saperstein: I object to this. I can't see the materiality of it.

30 The Court: It has already happened.

Q. Who prepared this contract, Exhibit C-1?
A. Who made it up, you mean?

Q. Who made it? A. Nick Acciardi.

Q. And who is Mr. Acciardi? A. He keeps his office in Bergen.

Q. How did he come to prepare this contract?
A. He had property up around that section and I asked him to make up the contract like he held and he said alright come to the office and he
40 made it up.

John Larson—Cross Examination.

Q. You had two copies of it made? A. Yes, sir.

Q. And then you went over to Mr. Kearney and asked him to have the contract signed? A. Yes, sir.

Q. You signed it and Mr. Kearney signed it? 10
A. Yes, sir.

Q. Did Mr. Moylan sign it as a witness? A. Yes, sir, and another fellow signed it.

Q. Who was the other fellow? A. He is in court.

Q. Mr. Wernert?

The Court: That gentleman (indicating)?

A. Yes. 20

Q. After you got the contract signed, then you went to have the property searched? A. Yes, sir.

Q. And you came back February 14th and asked for an extension of time? A. No.

Q. When you asked for the extension of time. A. Never asked for an extension of time.

Q. Did you close title on the 15th of December? A. I couldn't close it.

Q. You didn't close it. Did you go to New York to see Mr. Kearney? A. Afterwards. 30

Q. How long afterwards? A. I was there time after time to see Mr. Kearney.

Q. How long after December 15th did you go there? A. In January, in February.

Q. Did you go there on December 15th? A. He was supposed to come to New Jersey.

Q. Did you go to Mr. Kearney's office? A. No.

Q. When did you go there after December 15th? A. First. 40

John Larson—Cross Examination.

Q. When, after December 15th, when you were going to close the title and Mr. Kearney didn't come to Jersey, when did you go to Mr. Kearney's. A. A couple of weeks after, I went.

10 Q. Did you talk to Mr. Kearney between that time on the telephone or any way? A. No, I didn't telephone.

Q. Were you there when Mr. Acciardi drew this paper? A. Yes, sir.

Q. Where did Mr. Acciardi get the details which he put in this contract? A. Where did he get the description?

20 Q. Did you— A. Mr. Kearney gave him the description and he sold it to me. I had a contract written and I went down and got the number of lot from the tax collector.

Q. Merely drew it up from what you got from the tax collector? A. Yes, sir. He gave me the record.

Q. The Larson block number? A. Yes, sir. The same deed as the next house.

Q. The tax collector gave you all this description? A. Yes, sir. It is the same as the piece of property next door.

30 Q. Where did Mr. Acciardi get these instructions, do you know? A. He drew up the contract.

Q. Did you give him the paper? A. He furnished the paper.

The Court: Did Mr. Acciardi typewrite the contract out while you waited?

A. The stenographer was there and he told her to put it down.

40 Q. This property described in C-1 faces on the roadway that has been taken for the state high-

John Larson—Cross Examination.

way for bridge across the Hudson River, hasn't it? A. Yes.

Q. Didn't you own property across the street from it? A. From this way, yes.

Q. Didn't you own it? A. No.

Q. When did you sell it? 10

Mr. Saperstein: I object. What is the object?

Mr. Morten: To show value.

The Court: How is that material?

Mr. Morten: To show the new real estate values when he sold it.

The Court: I will let you go ahead. Make it brief.

Q. When did you sell this property? A. I still 20 have title.

Q. You still have title? A. I own it but it is in the hands of somebody else.

Q. I show you a blueprint. Do you see that lot J. Larson, with a stucco house on it? A. Yes, sir.

Q. That is right across from R. A. Kearney, is that right? A. That is right.

Q. And between the two properties pass the Bergen Boulevard? A. Dallytown Road. 30

Q. And that is the road that has been taken for the state highway? A. I don't know.

Q. You don't know? A. The state highway comes from the bridge and right out.

Q. And doesn't it pass between your property and the property owned by Kearney? A. No, that is wrong.

Q. Haven't you received a blueprint like this from the State Highway Department? A. No.

Q. Who has this property in their name now, 40

John Larson—Cross Examination.

your property? A. It is in the receiver's hands at the present time. I don't know who has it. There is nothing on that property.

10 Q. Mr. Larson, do you mean to say that this property that you are buying from Kearney is not on the state highway or do you mean you know that it is? A. The Bergen Boulevard, that is what you call Dallytown Road, was laid out for a state highway ten years ago.

Q. Haven't they given notice that they are laying out the Boulevard? A. I have had no notice.

Q. Isn't this property near the bridge? A. No.

Q. Isn't that this property near the bridge going across the Hudson? A. About two miles away from the bridge, two miles and a half.

20 The Court: What is this, north or south?

A. South of the bridge.

Q. Let me see if I understand you right, Mr. Larson, after you signed the contract, this contract, Exhibit C-1, you did not see Mr. Kearney again until two weeks after December 15th, is that right? A. December 15th, I saw Mr. Kearney in New York, after I had it searched by Mr. Marini, I saw Mr. Kearney.

30 Q. When was that? A. Three weeks after I had the contract made up.

Q. That was in November, that is right? A. It was in November.

Q. November, 1926? A. Yes, sir, 1926.

Q. Then what did you tell Mr. Kearney? A. I would like to have the property.

Q. Is that all you told him? A. Yes, sir.

40 Q. Didn't you tell him that the title wasn't good? A. I told him what the lawyer told me that I couldn't get the mortgage for the loan to build a house on until I got a clear title.

James La Morea—Direct Examination.

Q. When did you see Mr. Kearney after that?

A. I went often to see Mr. Kearney.

The Court: When did you see him?

A. In May.

Q. When was the next time, you say May; was 10
the next time after November, 1926, May, 1927?

A. I have seen him different times in between.

Q. When was the next time after November, 1927, when you had the property searched? A. I had it searched, three weeks or a month after.

Q. Three weeks after November? A. Yes, sir.

Q. That would be December 15th, did you go there then? A. No, I didn't go there December 15th.

Q. You didn't see him until January, did you? 20

A. I seen him before that. Ask Mr. Kearney.

Q. I am asking you when it was.

The Court: You have asked him about five times.

A. I saw Mr. Kearney in May.

30

JAMES LA MOREA, sworn in behalf of the complainant:

Direct Examination by Mr. Saperstein:

Q. What is your business? A. Real estate.

Q. Are you related to Mr. Larson? A. Yes, sir, my father-in-law.

Q. Father-in-law? A. Yes, sir.

Q. Were you present with Mr. Larson at any time when he had a conversation with Mr. Kear- 40

James La Morea—Direct Examination.

ney with regard to this property? A. Yes, sir.

Q. Tell the Court when it was and what took place. A. Yes, sir. Mr. Larson told me to go to New York with him one time.

10 Q. Give us the time. A. The exact time I don't know; in May, 1927, he couldn't find Mr. Kearney's store and I went with him in my automobile and hunted the place.

The Court: You saw Kearney?

A. Yes, sir.

20 Q. What was said? A. We asked Mr. Kearney about this missing heir and Kearney said that we shouldn't worry about it. It would be taken care of and he would clear it and furthermore he would pay the taxes and we thought that would be alright. He said it would take five years to clear it and at that time four years were up. I am not exact to the date.

30 Q. Was there any other occasion you saw Mr. Kearney with Larson? A. Yes, sir. I went back with him before the holidays in 1928. I should judge December or early part of January, I am not certain on that, then he said that Mr. Kearney to bring someone along and I went along and Mr. Kearney said to wait awhile, there was someone to see you.

The Court: When was that?

A. Early part of January, 1928, or the latter part of December.

The Court: This is, I understand it, December, 1927, or January, 1928?

40 A. Right.

James La Morea—Cross Examination.

The Court: The first time you went over was May, 1927?

A. Yes, sir. Mr. Kearney told us to wait and two gentlemen came in. I think they are sitting there now (indicating). They started a conversation about the property and we asked Mr. Kearney what he was going to do and he said to speak to these two gentlemen, he would do what they said. They said if you want the property, you would have to pay more money for it. 10

Q. Did they say how much? A. One thousand dollars. We said why should we and we wanted to know if he was going to be through with the contract or else we'd sue and we left that way.

Q. Did you see Mr. Kearney again after that? A. No. 20

Cross Examination by Mr. Morten:

Q. You want us to understand that this conversation took place in January, 1928? A. In January, 1928, or December, 1927.

Q. That was only six or eight months after you made your first visit in May, 1927? A. Yes, sir.

Q. Don't think you can be in error about that? A. Well. 30

Q. Let me suggest that it was January, 1929. A. January, 1929?

Q. Yes. A. Yes, it could be; excuse me, it is my error.

Q. It was in January, 1929?

Q. At Amsterdam Avenue, wasn't it? A. Yes, sir.

The Court: If it is agreeable to all then I will change my notes. 40

James La Morea—Cross Examination.

Q. Yes: The first visit, you are sure you were there in May, 1927? A. Yes. I was there because we couldn't find the place that he asked me to go with him.

Q. Where did you find him? A. The first time?

10 Q. Yes. A. All I know he said he moved and he would take me to the new store.

Q. Who? A. Mr. Larson: It was an up-town street.

Q. Wasn't that on your January, 1929, visit that that occurred? A. Yes, sir.

Q. I am referring to May, 1927, you said you took Mr. Larson because he couldn't find the place. A. 1929.

20 Q. Then you didn't take Mr. Larson over in 1927 because he couldn't find the place? A. No.

Q. You don't know where you met Mr. Kearney, what street? A. No, I don't remember, it was at night.

Q. When you were there, what time of day was it? A. Night.

Q. What time? A. 7:30 or 8 o'clock.

Q. What kind of a store were you in? A. Delicatessen or grocery.

30 Q. You don't know the name of the street it was on? A. No.

Q. Trolley cars on the street? A. Not that I know of.

Q. Do you know what kind of a building? A. Brick Building, two stories, I am not sure.

Q. Did you notice any name on the building? A. No, I didn't.

Q. You say on that occasion you went with Mr. Larson up there, Anderson Avenue? A. Bergen Boulevard.

40 Q. Opposite this property in question? A. Yes, sir.

Henry J. Wermert—Direct Examination.

Q. You went from there over to New York to see Mr. Kearney and when you got there you saw Mr. Kearney? A. Yes, sir.

Q. You didn't see anyone else there? A. No.

New witness.

10

HENRY J. WERMERT, sworn in behalf of the complainant.

Direct Examination by Mr. Saperstein:

Q. What is your business? A. Real estate.

Q. How long have you been in that business?
A. Five and a half years.

20

Q. Where? A. 654 Anderson Avenue, Cliffside Park.

Q. On October 23rd, 1926, did you accompany Mr. Larson for the purpose of having a contract executed? A. I did.

Q. Is this the contract that was executed at that time? A. Yes, sir. That is correct (indicating C-1).

Q. Tell the Court the circumstances of the contract that was executed. A. I was asked to go with Mr. Larson to see the contract signed.

30

Q. Where was that? A. 42nd or 43rd Street on Ninth Avenue.

Q. Who was present? A. Mr. Moylan and Mr. Kearney.

Q. Did you inform Mr. Kearney of the contents? A. I believe Mr. Moylan knew as much as I did.

Q. Did Mr. Moylan read the contract in your presence? A. Yes, sir.

40

Henry J. Wermert—Direct Examination.

Q. Was there any talk that time about any defect in title? A. Not to me, no.

Q. Did you hear any talk about it? A. No.

Q. Were you present during the time when it was executed? A. Yes, sir.

10 Q. Then you left? A. Yes. We were there only twenty minutes or a half hour.

Q. Were you familiar with real estate values, are you familiar with the property in question? A. The Kearney tract?

Q. Familiar with the lot in question. A. I am.

Q. Were you familiar with the value of those lots in October, 1926, when those lots were sold? A. Yes, sir.

Q. Did you buy and sell lots in that vicinity?

20 A. I did not buy for myself but sold for others.

Q. In that vicinity? A. Yes, sir.

Q. How near? A. Within a hundred or two hundred feet north.

Q. What, in your opinion, was the value of those lots at the time the contract was executed?

A. About twenty-five hundred dollars.

Q. How do you base that? A. On a piece it was fifty feet front on the Boulevard, the only thing I am not familiar is the depth, think it is

30 two hundred and eighty feet, it has to be an opening,—it could be valued at \$2,500.

The Court: A lot 50 foot wide?

A. Yes, sir.

Q. This side of the street, is it as desirable as the other side? A. It is not.

Q. Why? A. It is off the centre and has a sharp decline about 25 or 30 feet. The other side comes to a better level.

Henry J. Wermert—Direct Examination.

Q. What is the condition of the rear portion of the lot in question?

The Court: Is it lower or higher than the street?

A. Lower. 10

Q. What would you say the value of those lots are? A. It isn't worth any better; the only thing that holds up the price, the state highway is coming through there.

Q. That is the direct route that comes from the bridge to the Hudson County Boulevard?

The Court: Has it got anything to do with the bridge? 20

A. It will.

The Court: Will it be a road coming into Hudson County?

A. It will feed into Hudson County Boulevard west.

Q. How long has the laying out of that road been pending? A. My understanding is that the County took it over some three years ago and the State took it over about a year and a half ago. 30

Raymond A. Kearney—Direct Examination.

Defendant's case.

RAYMOND A. KEARNEY, sworn in his own behalf, testified as follows:

10 Direct Examination by Mr. Morten:

Q. You are the defendant in this cause and the property in dispute was originally owned by your father, John Kearney? A. Yes, sir.

Q. And when he died, he died intestate and the property went to you and your brothers and sisters? A. He left no will.

Q. There were 9 children? A. Yes, sir.

20 Q. Do you remember when Mr. Larson first came to see you about this property? A. Previous to November, 1925.

Q. How do you know it was previous to November, 1925? A. Because the first deed was drawn up in November, 1925.

Q. When you say the first deed, the deed was signed by who? A. The deed in favor of mother.

Q. I show you a deed dated November 16th, 1925—is that the deed you referred to? A. Yes, sir.

30 Mr. Morten: I offer this deed dated November 16th, 1925, and recorded in the Bergen County Clerk's Office in Book 1398 of Deeds, page 388—

The Court: Mr. Morten, how many of the nine heirs signed that?

Mr. Morten: All except John. I will take them in order.

40 Q. When Mr. Larson first came to see you about this property, did you know how he came to see you about it? A. I was down at 591 Ninth Av-

Raymond A. Kearney—Direct Examination.

enue, New York City, talking to Mr. Moylan and the man from the front part of the store said that there was a man in front to see me, and I said, "Show him in."

Q. Who was he? A. I didn't know at that time. He said, "Mr. Kearney", and he said, "My name is Mr. Larson" and I said "What can I do for you" and he said, "I want to buy the property in Jersey." I said, "I am glad you came in; it will give me an opportunity to straighten it out." And I went home that night and asked my mother where the deed was, and all I could see in the deed was John Kearney and I went to Mr. O'Shea who was connected with the Supreme Court and he was familiar with the court and he said he would go to see Mr. Murray who was the official reporter in Brooklyn and he said we will make the deed in favor of your mother, and I said, "Don't leave out anything" and he said, "Put your brother's name in."

Q. Who signed that deed? A. All the heirs and wives with the exception of one brother missing.

Q. What is his name? A. John.

Q. Who is Ida? A. She is the wife of John who is missing.

Mr. Morten: I offer it in evidence.

(Deed admitted in evidence and marked D-2.)

Q. After you got this Exhibit D-2 signed and recorded over in the County Clerk's Office, what was the next thing that you did? A. There was another deed made out.

Q. By whom? A. By mother in favor of me.

Q. I show you a deed dated June 11, 1926, recorded in the Brooklyn County Clerk's Office in

Raymond A. Kearney—Direct Examination.

Book 1423, page 20, made by Charlotte Kearney—is that the deed? A. Yes.

Mr. Morten: I offer that deed in evidence.

10

(Deed admitted in evidence and marked D-3.)

Q. After you first saw Mr. Larson, which was some time previous to the date of November, 1925, did you ever see Mr. Larson again? A. On and off—in a week or ten days, and each time I told him, "You will have to wait until the deed comes through, the deed from Charlotte to Raymond."

20

Q. After the deed from Charlotte to Raymond, Exhibit D-3, was recorded, did you have a conversation with Mr. Larson on or about October 9th?

Mr. Saperstein: I object to counsel leading the witness.

Mr. Morton: I am referring to a specific—

The Court: I don't think it does any harm. Did you see Mr. Larson on or about October 9, 1926?

30

A. I can't tell you dates; Mr. Larson had been running in and out every ten days.

Q. Where did you see him? A. 591 Ninth Avenue.

Q. That was the office of the Sheffield Company? A. That was my office, I was superintendent.

Q. At any of these conversations, did you have any conversation with Mr. Larson about the title?

40

A. The talk didn't actually begin until the deed

Raymond A. Kearney—Direct Examination.

from Charlotte to Raymond was recorded and I had that in my possession, and I said to Mr. Larson—

Q. How long after you got the deed in your possession did you see Mr. Larson? A. Maybe a week or ten days.

Q. What did you say? A. "Mr. Larson, I said, here is the deed from mother to me and I understand the deed is alright except my brother who is missing. You take this deed, you have it searched and you find out what is the matter with it. You go and see an attorney and if you can have this matter straightened out to the satisfaction of everybody, you can have the property."

Q. Did you give him the deed? A. Yes, sir.

Q. How long did he have the deed? A. For a month.

Q. I notice at the top of this deed "John Larson"; was that on the deed when you gave it to Mr. Larson? A. Yes, sir.

Q. And it was returned to you by Mr. Larson? A. Yes, sir.

Q. I show you an envelope and ask if you ever saw that before? A. Yes, sir. The deed was in that envelope when I received it from Mr. Larson.

Q. You mean this Exhibit D-3? A. From Charlotte to Raymond.

Q. When was the next time you saw Mr. Larson after you told him to have the title examined? A. I don't know whether it was a week or ten days. Mr. Larson was coming in and telling me that his attorney in Jersey City was searching and that they made the search as far as Canada without success. I gave him a tele-

Raymond A. Kearney—Direct Examination.

phone number. The exchange was Montgomery and they will give him information concerning my brother. I told him where he was in May, 1922, and that his wife had brought an action, and that the case was handled by Perkins and I thought he could get information from him.

10 Q. You told him this? A. To go to the attorney in Jersey.

Q. When did you first talk to Mr. Larson about price? A. Sometime, probably maybe a month or two weeks.

Q. What was that conversation? A. He came down to me and he asked me what the property was worth and I said \$2,000 and he said he could buy all Bergen County for that, and I asked him what the property was worth and he said \$800 and he kept complaining about his family and he was alone and he wanted this party aside of him, they wanted to live together. And I said I didn't want to stand between him and their home, and I set a price of \$1,600 and said I would not be put to any inconvenience or expenses in this matter and he said alright.

20 Q. Expenses about what? A. About locating heirs, about hiring attorneys and about real estate fees and I told him I wouldn't do it.

30 Q. Did he accept that proposition, did you accept the figure of sixteen hundred? A. Yes, sir.

Q. Was any money paid on account? A. I don't know whether it was that day or the following day.

Q. Did you receive anything? A. Yes, sir. \$50.

Q. I show you a paper marked Exhibit D-1 for identification and ask you if you recognize that paper? A. That is my writing.

40

Raymond A. Kearney—Direct Examination.

Q. The date is October 9, 1926. Is that your writing? A. Yes, sir.

Q. Is that the date this paper was signed? A. That is the date it was signed.

Mr. Morten: I offer that in evidence.
(Admitted in evidence and marked D-1.) 10

Q. Your conversation you said you had with Mr. Larson, you said you wouldn't be bothered with any inconvenience, that was on or before the signing of this receipt for \$50? A. Yes, sir.

Q. After the receipt for \$50 was signed, when did you next hear from Mr. Larson? By the way, when this receipt was signed, who was present? A. Mr. Moylan.

Q. Where? A. 591 Ninth Avenue. 20

Q. After October 9th, when was the next time you saw Mr. Larson? A. I don't know exactly. The next time I saw him was when he brought over this contract and asked me to sign it.

Q. By this contract, do you mean this paper marked C-1 bearing your signature? A. Yes, sir.

Q. At the time, if I understand you clearly, the time this contract was signed, Exhibit C-1, Mr. Larson had already had this deed, Exhibit D-3, in his possession for some months? A. Yes, sir. 30

Q. What took place when this contract, Exhibit C-1, was signed? A. He came over to me with the two contracts.

Q. Who was present? A. Mr. Moylan.

Q. Who else? A. A gentleman I afterwards found out was Mr. Wermert.

Q. What then? A. Mr. Larson asked me to sign the contract and Mr. Wermert was against the wall and my desk was over here (indicating) 40

Raymond A. Kearney—Direct Examination.

and Mr. Larson came over and asked me to sign the contract and I said I wanted to be sure it was alright and I thinking that this contract was nothing else but the conversation that we had carried on concerning the bargain and I signed it.

10 Q. Did you read it? A. No, I didn't.

Q. Who did read it? A. Nobody then. The only thing I read was the closing.

Q. Do you remember whether or not you handed it to Mr. Moylan? A. I handed the contract to Mr. Moylan for signature.

Q. You don't know whether he read it or not? A. He didn't read it.

20 Q. At that time did this other gentleman who was there, Mr. Wermert, did he take part in the conversation at all? A. No.

Q. Did he say anything to you? A. He told us what he knew about property up there. The only thing we talked about was property in Jersey.

Q. You didn't have any conversation with Mr. Wermert about the contract or its contents? A. No, sir.

30 Q. Have you had any experience in buying or selling real estate? A. No, sir.

Q. When was the next you saw Mr. Larson after this contract of October, 1926? A. The day previous to the closing.

Q. December 15, 1926 is the closing of the title? A. The day before.

Q. Where was that? A. 591 Ninth Avenue.

40 Q. Had there been any conversation either direct or over telephone between Mr. Larson and you, between the date the contract was signed and December 14, 1926? A. No, sir.

Raymond A. Kearney—Direct Examination.

Q. What took place on December 14 in New York City? A. In the morning of December 14th I went out to the stores and the afternoon I stayed in and cleaned out my desk so that I could be off the next day, and I turned over the job to Mr. Moylan and I stayed in and cleaned up my correspondence so I could go to Jersey the next day to get the money. Around half past five Mr. Moylan came in from his stores and we were in there talking and Mr. Larson came in and I said "what is on your mind" and he said "Mr. Kearney, I came over to ask for a 30-day extension on that contract," and I said "What is the matter" and he said "I can't borrow any money on the title. They would not lend any money on the title, it isn't perfect." And I said "You knew that all along" and he said nothing. 10 20

Q. What about the extension? A. I said, yes.

Q. That would carry the contract until about the middle of January, 1927? A. That is right.

Q. When did you next hear from Mr. Larson after December 14, 1926? A. During the week of January 15, I was forced to resign my position on account of a change in management and doing nothing and I happened to meet Mr. Moylan and Mr. Moylan gave me a slip of paper and on it was a note to call Mr. Larson, which I did, and I got Mr. Larson on the wire and I said "What is it"— 30

Mr. Saperstein: I object. He doesn't know whether he spoke to Mr. Larson or not. Telephone conversation he had with some person.

The Court: Could you recognize Mr. Larson's voice? 40

Raymond A. Kearney—Direct Examination.

The Witness: Yes, sir.

The Court: I will allow it.

10 A. Mr. Larson said "Mr. Kearney, I have a man over here in Jersey that is going to give me the money but first he must talk to you about it. Will you come over to Jersey?" And I said "Yes" and I said "I am doing nothing, I will come over, how will I get there?"

Q. He told you how to get there? A. He told me he would give me his home address.

20 Q. Where did you go? A. He said that he had a real estate broker who was going to give him the money and he said that I must talk to him and we went up on Anderson Avenue to a real estate office and I went outside and I told Mr. Larson I was at 491 W. 178th Street and if he had any occasion to get me or talk to me and I waited 24 hours so as to have my sister-in-law sign it and I didn't get any word and I waited another 24 hours and got no word. I said this is not a very nice way for a man to do.

Q. This was in January, 1927? A. Yes, sir.

Q. When was the next time you saw or heard from Mr. Larson? A. January, 1929.

30 Q. Did you see Mr. Larson or anyone on his behalf respecting this property between January, 1927 and January, 1929? A. No.

Q. Mr. La Marta, the son-in-law, said he came to see you with Mr. Larson in May, 1927? A. No, sir.

Q. Mr. La Marta said that he saw you in May, 1927, a store in a building two or three stories high. A. No.

40 Q. Where were you working in May, 1927? A. Assistant superintendent at Sheffield's with an office at 81st Street and Madison Avenue.

Raymond A. Kearney—Direct Examination.

The Court: You left, what was the cause?

The Witness: I was forced out.

Q. You were forced out in January, 1927? A. Yes, sir.

10

The Court: When did you go back?

The Witness: In May, 1927.

The Court: What part of May?

The Witness: I should say the early part of the month.

Q. Did you have any delicatessen stores in May, 1927? A. No.

Q. When did you open up the delicatessen store? A. I went up there in 1927.

20

Q. Was that when you opened it? A. It was open.

Q. When did you operate it? A. Christmas week, 1927.

Q. And the delicatessen store that you operated in January, 1929, is that located in a two-story building? A. Five-story tenement house.

Q. You said the next time you saw Mr. Larson after January 1927, was January, 1929. Where were you in business in 1929? A. 2081 Amsterdam Avenue.

30

Q. What kind of business? A. A grocery business with a small line of delicatessen.

Q. How do you know you saw Mr. Larson there? A. I came down to work about 11 o'clock in the morning which is my time and as I came in Mr. Larson was sitting on a box and I was surprised to see him and I said "Good morning" and he said "Good morning" and I put on a white coat and I said "Mr. Larson, what is on your

40

Raymond A. Kearney—Direct Examination.

mind." He said "Mr. Kearney, I came over here to sign the paper and I said "Mr. Larson, that contract is no longer any good and I think the property is worth more money" and he thought the contract was good and that it was not worth
10 any more. I asked him where he was living and he said he was working in South Jersey and I said I have refused several offers for it. I said as far as he wanting a home, I was not going to go between him and it and that there was no reason for arguing to bring over somebody and I will have someone and on the following Wednesday Mr. Larson called up asking if the following Saturday was satisfactory and I, in the meantime, got in touch with my man and said yes,
20 that the following Saturday was alright. And he came over with Mr. La Marta, came in like he was on fire and said "What are you going to do."

Q. What took place after the four got there?
A. Just as soon as the four got together, Mr. O'Shea said to Mr. Larson that they had abandoned the contract; that the contract was no longer good. They argued and as time went on, I got in the conversation and said that at
30 the time the contract was drawn the proposition was imaginary and it was now a reality and this man La Marta he got hold of the contract and said I had agreed to something that I couldn't ever do, that I made a free and clear deed, and he said that he was to get a free and clear deed. And I said Mr. Larson knew I couldn't do that and I said what is in it was in it the day of the closing, and he said the day of closing meant nothing. They had the contract fixed so that it
40 ran on forever.

Raymond A. Kearney—Cross Examination.

Q. Wha else? A. Mr. La Marta asked me what the property was worth then and I said \$3,000 and they couldn't see it at that and I came down to \$2,500 and he said he would have to take it up with his wife. The following Wednesday I called up and all I could get was he wanted the deed. 10

Q. In your conversation in January, 1929, when you told him the contract was abandoned, was anything said about the payment of the share of the missing heir? A. The discussion as to the missing heir did come up, who would the heir sue, Mr. Larson or me, and I said he knew all along there was an heir missing and he got the property and would have to take those chances.

Q. Did he make any denial at all? A. No. 20

Q. Who was present in January, 1929? A. Mr. O'Shea and Mr. Moylan.

Q. Mr. La Marta and Mr. Larson? A. Yes, sir.

Cross Examination by Mr. Saperstein:

Q. What is Mr. Moylan? A. At that time he was Superintendent of Sheffield Farms.

Q. Friends of yours? A. Yes, sir.

Q. What is Mr. O'Shea's business? A. Mr. O'Shea is connected with the Supreme Court in Brooklyn. 30

Q. An attorney? A. No. At the present time he is secretary to Judge Dodd.

Q. Mr. Kearney, do you know the difference between a bargain and sale deed, and a warranty deed? A. No, I do not.

Q. Where does Charlotte Kearney live? A. 709 W. 108th Street, New York City.

Q. You say that the first time Mr. Larson came 40

Raymond A. Kearney—Cross Examination.

to see you was in November? A. Previous to November.

Q. 1925? A. Yes.

Q. Around the time the first deed was executed? A. Yes, sir.

10 Q. Came to see you very often after that? A. Yes, sir.

Q. And then you told him that he would have to wait until the deed from Charlotte Kearney to you was executed? A. Yes, sir.

Q. And the deed was dated June 11, 1926? A. I don't know that.

20 Q. How is it it took you from June 11, 1926, until October, 1926, to enter into this contract or this transaction as evidenced by this paper? A. This was the first time Mr. Larson came around there—just as soon as I got the deed from Charlotte Kearney to Raymond I turned the deed over to Mr. Larson.

Q. You turned them over to Mr. Larson prior to the date of this report? A. As soon as I got it from the County Clerk in Brooklyn.

Q. Where did you turn it over to Mr. Larson? A. 591 Ninth Avenue.

30 Q. And he didn't come back until October, 1926? A. I didn't say that; he has been going in and out and all the people he had to search the title they all gave him the same story.

Q. Did he tell you that he was going to have it searched before the deal was made? A. Yes, sir.

Q. Was any talk made about it? A. No, it was agreed verbally that I was to be put to no expense.

40 Q. When did you agree on the purchase price? A. Around October when this receipt was made out.

Raymond A. Kearney—Cross Examination.

The Court: Before you agreed to sell him the property, several months before you agreed to sell him the property, he went to the expense of engaging several lawyers to have the property searched?

The Witness: I didn't have the property searched. 10

The Court: Before you agreed to sell the property, he went to the expense of engaging several lawyers to have the title searched?

The Witness: Yes, sir.

Q. Did you know what Mr. Larson wanted it for? A. Yes, sir; he wanted to build a home for his wife and two children.

Q. The reason he wanted it was that he had a friend next door? A. Yes, sir. 20

Q. Is that friend still there? A. The house is still there. I don't know whether the friend is still there.

Q. Mr. Kearney, you say that you didn't see Mr. Larson after that, from December 14 until January, 1928? A. No, 1927.

Q. Until January, 1927, at the time you saw him in Leulli's office? A. No, Mr. Larson brought me to Mr. Leulli. 30

Q. That was the time you were at Leulli's office? A. Yes, sir.

Q. January 15th you heard from Mr. Larson again? A. No, Mr. Moylan gave me the message from Mr. Larson.

Q. Mr. Moylan? A. Yes, sir.

Q. What was the message? A. It was to call up Mr. Larson.

Q. Pursuant to that conversation, you went to Jersey City? A. Yes, sir. 40

Raymond A. Kearney—Cross Examination.

Q. And you met Mr. Larson and Mr. Leulli?

A. I met Mr. Larson.

Q. And finally met Mr. Leulli? A. Yes, sir.

Q. And again told about the missing heir? A. Yes, sir.

10 Q. After that you didn't see Mr. Larson again until January, 1929? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. When did you find out that this contract was at an end? A. I understood that when he didn't perform his part.

Q. When did you understand that? A. When he didn't take the title that I could give him on December 15th, and then from what I could pick up and ask people they told me the verbal extension was no good.

20 Q. Did you hear from Mr. Larson December 15th? A. No, sir.

Q. By telephone? A. No, sir.

Q. When did you first go to see a lawyer? A. When I was served with paper in 1929 by the gentleman alongside of you.

Q. In January, 1929, the last occasion upon which you were all together that you told Mr. Larson then that the contract was abandoned?

30 A. Yes, sir.

Q. When did you find that? A. What?

Q. When did you determine it was abandoned?

A. I determined the contract was abandoned on and after December 15th when he failed to put in an appearance.

Q. Hadn't you given him an extension? A. Verbally but I understand—

Q. And you gave him 30 days? A. And if he made good on January 15th, I would have gone through with it.

40

Raymond A. Kearney—Cross Examination.

Q. After January, 1927, did you ever notify Mr. Larson or any one for him, in any manner or form, that you considered this matter at an end? A. No, sir.

Q. Didn't Mr. Larson come in to you as frequently in 1927 as he had in 1926? A. No, sir. 10

Q. Sure of that? A. Positive.

Q. When you signed this contract, Mr. Kearney, you say you didn't read it? A. No, sir.

Q. Do you usually sign instruments without reading them? A. It is all according with whom I am dealing.

Q. What is your business? A. At the present time I am in the grocery business.

Q. What was your business at that time? A. Superintendent of stores. 20

Q. What company? A. Sheffield Farms.

Q. Did you ask Mr. Moylan if it was alright to sign it? A. No, sir.

Q. Why was he there? A. That was the local office.

Q. He was there several times. A. He was there all the time I left.

Q. He was present at the conversations with Mr. Larson? A. Yes, sir.

Q. Did you ask his advice? A. No, sir. 30

The Court: Mr. Moylan was your assistant?

The Witness: Yes.

Q. Did Mr. Moylan read this contract? A. No, sir.

Q. You are sure that Mr. Wermert didn't tell you what the contents were? A. Positively.

Q. What makes you so positive? A. Because Mr. Wermert was standing against the wall and 40

Raymond A. Kearney—Re-direct Examination.

facing them,—Mr. Wermert remarked and asked if we knew the public prosecutor.

Q. That is the only conversation? A. Yes, sir.

Q. Why is it that you are not willing to convey this property to Mr. Larson today? A. I want to be a free agent, I don't want to be compelled to do something with a whip held over me.

Q. In January, 1929, you would have conveyed the property to Mr. Larson if he gave you the \$1,000? A. Not on that contract, on a new contract, yes, sir.

Q. You would have sold it to Mr. Larson at that time? A. Yes, sir, that was before there was any talk of any suit.

Q. You are still willing to sell the property? A. On a new contract.

Q. Did you make any search of the property?

A. The only search I got was from my brother who was a resident of Morsemere, N. J.

Re-direct Examination by Mr. Morten:

Q. What advice did he give you? A. At that time he believed that the property was worth \$3,000 a lot and that this rapid transit was coming up on Anderson Avenue.

Q. Passing your property? A. Yes, sir.

Re-cross Examination by Mr. Saperstein:

Q. What is his business? A. He is in the alcohol business—he supervises government permits in selling alcohol.

Richard Moylan—Direct Examination.

RICHARD MOYLAN, sworn in behalf of the defendant, testified as follows:

Direct Examination by Mr. Morten:

Q. In 1925 you were employed by the Sheffield Farms as assistant superintendent under Mr. Kearney? A. Yes, sir. 10

Q. You were both in the same office at 591 Ninth Avenue? A. Yes, sir.

Q. Do you remember Mr. Larson coming in that office in 1925? A. Yes, sir.

Q. What was the conversation that you heard between Mr. Larson and Mr. Kearney at that time? A. He came in and he said—

Mr. Saperstein: Fix the time. 20

Q. Do you remember what time that was in 1925? A. I think it was in the month of August.

Q. In the summer time? A. Yes, sir.

Q. Can you tell what happened? A. He said, "I was up to see Mr. Kearney's mother and to see the property and she sent me to him. Mr. Kearney said the property belonged to his father and it was still in his father's name and he couldn't do anything until the property was straightened out. And he told Mr. Larson that he would try and see what he could do to get the property straightened out as there was a brother missing. 30

Q. Were you present when this deed was given, Exhibit D-3, given by Mr. Kearney to Mr. Larson,—were you there at that time? A. Yes.

Q. Do you remember what conversation, if any, took place at that time? A. I think Mr. Larson said he would want title to the property searched, 40

Richard Moylan—Direct Examination.

so Mr. Kearney gave him the deed and he took it along with him.

Q. Do you know when that was? A. I couldn't just place the date.

10 Q. With reference to it—were you present when the \$50 was paid? A. Yes, sir.

Q. With reference to that time when the \$50 was paid, can you tell when this occasion was, when the deed was given to Mr. Larson, before or after that? A. Two or three months before that.

Q. Were you present when the \$50 was paid? A. Yes, sir.

20 Q. Do you know what conversation took place between Mr. Larson and Mr. Kearney as to price? A. Mr. Larson asked him what he wanted and he said he didn't know and he said you live there and you know what it is worth and Mr. Larson told him \$1,600 and Mr. Kearney told him he thought it was worth \$2,000, and they talked about the title of the property, the missing heir, and all that. And Mr. Kearney told Mr. Larson that he would have to search the record for the missing heir and Mr. Larson agreed to do that.

30 Q. Anything said about the price of the property? A. They finally agreed on \$1,600.

Q. Were you present on October 23 when this contract, Exhibit C-1, was signed? A. Yes, I signed that.

Q. Tell us what took place on that occasion, who brought that Exhibit C-1 to the office? A. Yes, I couldn't remember the morning. Mr. Larson and some other man came in with it.

Q. They had that contract? A. Yes, sir.

40 Q. What took place after they got in? A.

Richard Moylan—Direct Examination.

They were talking with Mr. Kearney and I was at another desk alongside of Mr. Kearney and Mr. Kearney asked him what was the idea of the contract and he said he wanted to make sure that everything was in order and he could get the property. Mr. Kearney signed and asked me to sign and I signed it. 10

Q. Did he read it before signing it? A. I don't know.

Q. Did you read it? A. No.

Q. Is the other man here who came in with him? A. I can't place him.

Q. Was anything said by anybody to Mr. Kearney that it was not satisfactory to Mr. Larson? No.

Q. Did this other man say anything to Mr. Kearney about the contents? A. No, sir. 20

Q. Before it was signed or after it was signed? A. No, sir.

The Court: May I interrupt? Did I understand you to say that when they came in, you were busy at your desk and Mr. Larson talked at Mr. Kearney's desk.

The Witness: Yes, they were close together. 30

Q. How close were you, as close as here (indicating)? A. Yes.

Q. As you are to the Court? A. Yes, sir.

Q. Could you hear what was said? A. I wasn't interested.

Q. There was no conversation except between Mr. Larson and Mr. Kearney? A. No, sir.

The Court: Where was the other man?

The Witness: About ten feet away. 40

Richard Moylan—Direct Examination.

Q. After they went out on October 23, 1926, did you see Mr. Larson again? A. I knew Larson was in there once or twice a week.

10 Q. Were you present on the evening of December 14, 1926, when Mr. Larson came in and asked for an extension of time? A. Yes, sir, I was present.

Q. What took place? A. He said the people he was going to get the money to loan to build, couldn't give him the money and he would like 30 days until he could get someone else.

Q. What did Kearney say? A. He said "Alright, go ahead".

20 Q. Did you see Mr. Larson after that in December, 1926, did you see him again? A. Yes, he came in.

The Court: How many times did he come in?

The Witness: Four or five times.

Q. After January, 1927, did you see Mr. Larson again after that? A. January, 1927?

30 Q. Yes. A. He came in; Mr. Kearney had to resign on January 15th and I think it was two or three days after Mr. Larson came in and I told him Mr. Kearney was no longer here and gave him an address where I thought he could locate him. Mr. Larson gave me a telephone and address.

Q. You took them down on a piece of paper and sent it to Mr. Kearney? A. Yes, sir.

Q. When after that did you see Mr. Kearney? A. Two years after that, in 1929.

40 Q. Where was that you saw him after that in January, 1929? A. In Amsterdam Avenue in a grocery store.

Richard Moylan—Direct Examination.

Q. Grocery store? A. Mr. Kearney's store.

Q. How did you come to be there at that time?

A. Mr. Kearney asked me to come up.

Q. Who was present on that occasion? A. There was Mr. Larson and Mr. La Marca.

Q. Who else was there? A. Myself and Mr. O'Shea and Mr. Kearney? 10

Q. Did you ever see Mr. La Marca before that? A. No, sir.

Q. What took place on that occasion in January, 1929, when you five people were present?

A. I didn't take much part in that conversation.

Q. You heard what was said? A. Mr. O'Shea and I think Mr. La Marca were talking.

Q. What was said? A. They wanted to know why they didn't go through with the contract and Mr. O'Shea said he had abandoned the contract and it was no longer in force. 20

The Court: Just a moment, Mr. O'Shea said he had abandoned it?

The Witness: Mr. Larson, and that he thought the property should be worth more money after two years and the bridge coming there and they argued back and forth on that. They came to no agreement and they walked out. 30

Q. During that conversation was prices mentioned? A. I wasn't interested in the conversation. I let the two talk.

Q. Was there any conversation about the missing heir? A. That was understood.

Q. Was there anything said on that occasion? A. I didn't hear anything.

Q. Anything said about a new contract? A. No, sir. 40

Richard Moylan—Cross Examination.

Cross Examination by Mr. Saperstein:

Q. You say Mr. Kearney gave Mr. Larson a deed to have it searched about three months before this receipt was signed? Yes, sir.

10 Q. Do you know why he gave him that deed?
A. Why sure.

Q. Why did he give it? A. Mr. Larson wanted to take it over and see if he could raise some money on it.

Q. On what? According to this deed. I understand he couldn't get a free and clear title on account of the missing heir but he thought he could raise money.

20 Q. Took Mr. Kearney's deed for the purpose of getting money on it? A. Yes, sir.

Q. When that contract was signed, Mr. Moylan, you witnessed Mr. Kearney's signature, did you not? A. Yes, sir.

Q. When that contract was signed? A. Yes, sir.

Q. And you are sure you didn't read the contract? A. Positively not.

Q. You knew about this whole transaction, didn't you? A. Sure.

30 Q. And you were friendly with Mr. Kearney, talked over his business dealings with you? A. Yes, sir.

Q. As a matter of fact, you were close friends, were you not? A. Yes, sir.

Q. Mr. Larson did not come over with any lawyer? A. No, sir.

Q. You, as Mr. Kearney's close friend, wasn't interested enough to read the contract for him?

40 A. Mr. Larson came over as a poor man, pleading as a poor man, just wanted to build a house and

Daniel O'Shea—Direct Examination.

Mr. Kearney said, "I am a poor man and I won't stand in your way"—he mentioned about his friend next door who owned the lot next door and wanted to be close to one another, that Mr. Larson's family was all being married off.

10

Mr. Saperstein: That is all.

Mr. Morten: That is all.

DANIEL O'SHEA, sworn in behalf of the defendant:

Direct Examination by Mr. Morten:

Q. Do you recall being present at the conversation of Mr. Larson, Mr. Moylan, Mr. Kearney, Mr. La Marca in January, 1929, at 281 Madison Avenue, New York? A. I do. 20

Q. What took place at that time? A. Kearney called me up and said that he expected Larson to be there and he wanted to have me there and I got up at the store and Larson and his son all were there. They came in and they started hollering and the young fellow he did all the talking. They said they wanted the deed and I said, "You people have abandoned the contract" and this young fellow said, "This contract is good for everything and it is in force", and said "It is good for twenty years." I said the property was worth more now and I thought Kearney would sell it if he got a suitable price. Larson thought \$3,000 was too much and they finally compromised and he said he would have to persuade his wife that it was satisfactory. 30

Q. Who said that? A. Larson. He would get 40

Daniel O'Shea—Cross Examination.

in touch with his wife, I believe he said he would let Kearney know.

Q. Was there any conversation at that time relative to the missing heir? A. Yes, sir. Kearney told him that he knew what he was getting, he
10 knew what the contract was.

Cross Examination by Mr. Saperstein:

Q. At that conversation you told Mr. Larson that he abandoned his contract? A. Yes, sir.

Q. Did you say anything about Mr. Kearney abandoning his contract? A. No, sir.

Q. Had Mr. Kearney consulted you prior to this time? A. No, but I knew what this thing was, that they had some property.

20 Q. Did they talk to you in 1925? A. I knew he was trying to sell the property. He was anxious to sell it because he came to Brooklyn to me. He stated the condition of the deed and I turned him over to the interpreter who was a lawyer and he told him the deed wasn't good until the heir was located.

Q. After January, 1927, did Mr. Kearney talk to you about it? A. No, not until he called.

30 Q. The first time was in January, 1929, from January, 1927? A. The first time he called me up.

Q. How long have you known Kearney? A. Since he was a little boy.

Q. Know the other members of the family? A. Know the brother.

Q. Ever talk to the brother? A. No, sir.

Marcus O. Sarokin—Direct Examination.

Rebuttal.

MARCUS O. SAROKIN, sworn in behalf of the complainant.

Direct Examination by Mr. Saperstein:

10

Q. What is your business? A. Real estate and insurance.

Q. Where is your business located? A. Dispatch Building, Union City.

Q. How long have you been in the real estate business? A. Since July, 1919.

Q. Are you familiar with the property in question? A. I am familiar with property in and about that district.

Q. In October, 1926, did you buy and sell property in that vicinity for yourself and in behalf of others? A. I did. 20

Q. How close to this property did you buy and sell property? A. A tract across a—

The Court: Is this witness merely to corroborate the value?

Mr. Saperstein: Yes.

The Court: That is not in dispute. 30

JOHN LARSON, recalled in his own behalf:

Direct Examination by Mr. Saperstein:

Q. Did you, prior to this receipt signed by Mr. Kearney, ever have a search made on the property? A. Mr. Kearney gave me that receipt.

Q. Before this receipt, did you have a search made on this property by anyone? A. No, sir. 40

John Larson—Recalled, direct.

Q. Did Mr. O'Shea; did you ever see this man before? A. I seen this man up in the upper store.

Q. That was the last time you saw Mr. Kearney too? A. Yes, sir.

10 Q. Did you ever see Mr. O'Shea or Mr. Kearney in January, 1925, with respect to this property? A. No.

Q. Did you know about this defect on the title before the search by Mr. Marini? A. No, I didn't, nobody ever told me.

Q. At the time this contract was signed, did you see Mr. Moylan read the contract? A. Mr. Moylan?

20 Q. Mr. Moylan. A. That gentleman (indicating Mr. Moylan), yes. Mr. Moylan read the contract and after he read it, he read it back to us and said, "That is alright, Mr. Kearney" and they all didn't read it and I heard Mr. Moylan say it was alright.

The Court: Just a moment, who else if anybody, did you get to look up the title except Mr. Marini?

30 The Witness: I had a Mr. Dillingham of Jersey City.

Q. Did you see him before you saw Mr. Marini? A. After I saw Mr. Marini.

Mr. Morton: There is an assignment on the back of the contract and I understand there is no objection to this reassignment.

Exhibit C1.

CONTRACT dated October 23, 1926, made between
Raymond A. Kearney and John Larson.

This exhibit is identical with Schedule A annexed to the Amended Bill of Complaint and printed infra, and the printing of the exhibit is 10
omitted by consent.

Exhibit D1.**MEMORANDUM**

192

MR..

20

SUBJECT:

Received from J. Larson fifty dollar 50.00
deposit on property as recorded on the 2nd day
of July 1926 8.37 A. M. Book 1423 page 20.
County Clerk Bergen Co.

RAYMOND A. KEARNEY.
Oct. 9, 1926.

30

Exhibit D2.

DEED dated November 16th, 1925, made by
Charles A. Kearney and wife, Ida Kearney, wife
of John Kearney, Leo A. Kearney and wife, Wil-
liam J. Kearney and wife, Mary E. Kearney,
Raymond A. Kearney, Stephen B. Kearney and
wife, Margaret B. Kearney, Joseph L. Kearney
heirs at law of John Kearney, deceased, to Char- 40

Exhibit D3.

lotte Kearney, widow of John Kearney, deceased; conveying premises as described in Paragraph 1 of the Amended Bill of Complaint herein filed November 24, 1930.

- 10 This deed was acknowledged on November 16th, 1925, and recorded in the Bergen County Clerk's Office on April 9th, 1926, in Book 1398 of Deeds for Bergen County, pages 388 &c.

It is stipulated between counsel that the above abstract be printed in lieu of the entire Deed and that the same contains all the matter material on this appeal.

20

Exhibit D3.

DEED dated June 11th, 1926, made by Charlotte Kearney, widow of John Kearney, deceased, to Raymond A. Kearney; conveying same premises as described in Exhibit D2.

- 30 This deed was acknowledged on June 11th, 1926 and duly recorded in the Bergen County Clerk's Office on July 2nd, 1926, in book 1423 of Deeds for Bergen County, on pages 20 &c.

It is stipulated between counsel that the above abstract be printed in lieu of the entire Deed and that the same contains all the matter material on this appeal.

Memorandum of Vice-Chancellor Bigelow.

(Filed January 2, 1931.)

BIGELOW, V. C.:

This is a suit for the specific performance of a contract dated October 3, 1926, whereby defendant agreed to convey certain land to complainant by deed of warranty free from all encumbrances in consideration of \$1,600. When this contract was made defendant was, as he still is, the owner of only an undivided eight-ninths of the premises. By the amended bill of complaint, complainant tenders to pay the purchase price less an abatement by way of compensation for the outstanding one-ninth interest. 10

The first defense is this: That when the contract was made, complainant knew that defendant was only a tenant in common. I find that this is the fact although the testimony is conflicting. The outstanding interest belonged to John Kearney, a brother of defendant, who disappeared in 1922 and has not since been heard from. It is suggested by counsel for complainant that since John has been absent over seven years, defendant could institute a proceeding to have him declared to be dead and thus perfect his title. But defendant is only one of eight heirs of John and could add to his title in this manner only a one-seventy-second part. I think that *Peeler v. Levy*, 26 N. J. Eq. 330, controls and that complainant is not entitled to the relief asked, namely, a conveyance of the defendant's interest upon payment of the purchase price, less an abatement. 20 30

The defendant also pleads laches. The contract called for delivery of the deed December 15, 1926. 40

Memorandum of Vice-Chancellor Bigelow.

The bill of complaint was filed January 30, 1929. Complainant explains this delay on the ground that the parties in January, 1927, agreed orally to extend the time for passing title until May, 1929, when they anticipated that John would be
10 declared dead and that he brought the suit immediately upon a repudiation of the contract by defendant. In my opinion, an agreement to extend the time for passing title more than one year, is within the operation of the Statute of Frauds and cannot be proved by parol evidence. This leaves the delay in bringing suit unexplained, so this defense should prevail.

Defendant, by way of counterclaim, prays that the contract be canceled on the ground that it
20 was executed under a mutual mistake, in that the parties only intended to contract for the conveyance of an undivided eight-ninths of the land. The evidence is insufficient to establish the counterclaim.

Both the bill of complaint and the counterclaim should be dismissed.

30

40

New Jersey Court of Errors and Appeals

Between :

JOHN LARSON,
Complainant-Appellant,

and

RAYMOND A. KEARNEY,
Defendant-Appellee.

On Appeal
from the
Court of
Chancery.

BRIEF ON BEHALF OF COMPLAINANT- APPELLANT, JOHN LARSON.

Statement of Facts.

This is a suit for specific performance, brought by complainant-appellant, John Larson, against defendant-appellee, Raymond A. Kearney, to compel the defendant-appellee to specifically perform the terms of a certain agreement in writing dated October 23rd, 1926, which agreement involves the sale of real estate. Pursuant to said agreement, the said Raymond A. Kearney agreed to convey to said John Larson by full covenant and warranty deed, certain lands and premises in the Borough of Ridgefield, County of Bergen, on or before the 15th day of December, 1926.

A search of the title to the property made by John Larson revealed that Raymond A. Kearney was the owner of an undivided eight-ninths (8/9)

interest in the said premises, the remaining one-ninth ($1/9$) interest being vested in one, "John" Kearney, a brother of said Raymond A. Kearney, who, it appears, had disappeared and had been missing and unheard from since May, 1922. The said Raymond A. Kearney was therefore unable to deliver a marketable title to the vendee, John Larson, on December 16th, 1926, the date set for closing.

The said Raymond A. Kearney and John Larson, mistakenly believing that proceedings could be instituted on May 1st, 1927, to declare the said "John" Kearney legally dead, thereupon mutually agreed to postpone the date of performance of the said contract until May 1st, 1927, and further agreed that in the meantime, a search would be made for the missing "John" Kearney.

In May, 1927, the said "John" Kearney had not been located although a search had been made. The parties thereupon learned that proceedings to declare him legally dead could not be brought at this time and mutually agreed to postpone the closing of title until such time as legal proceedings could be brought to declare the said "John" Kearney legally dead, that is to say, after seven years had expired from the date of his disappearance. It was further agreed that in the meantime, the search for said "John" Kearney would be continued and if he was located, that the title would be closed at such time. It was represented by Raymond A. Kearney, that if the said "John" Kearney were not located by May, 1929, he would institute the necessary proceedings to declare said "John" Kearney legally dead and would further take the necessary proceedings to enable himself to convey a marketable title to John Larson.

The said John Larson was at all times ready, willing and able to perform the terms and condi-

tions of said agreement on his part to be performed and is now ready, willing and able and offers to pay the balance of the purchase money due pursuant to said agreement with or without an abatement as this Court shall direct.

In the latter part of December, 1928, or the early part of January, 1929, said Raymond A. Kearney informed John Larson that the missing "John" Kearney had not been found. He also informed Larson that if he still wanted the property he would have to pay One Thousand (\$1,000) Dollars over and above the contract price, and further informed Larson that he had no intention of doing anything further in the matter.

After the repudiation by the said Raymond A. Kearney as aforesaid, John Larson filed a bill of complaint in the Court of Chancery on January 30th, 1929, to compel said Raymond A. Kearney to specifically perform his agreement.

Up to December, 1928, the said Raymond A. Kearney had, at no time, given notice to Larson, either written or oral, of his intention to terminate the contract. The said John Larson has, at no time, given notice to Raymond A. Kearney, either written or oral, of his intention to terminate and abandon his contract.

The cause was originally referred to Vice Chancellor Bentley and subsequently re-referred to Vice Chancellor Bigelow. Vice Chancellor Bigelow rendered an opinion on December 31st, 1930, wherein he advised that the bill of complaint should be dismissed and on April 30th, 1931, a Final Decree was entered in this cause dismissing complainant's bill of complaint. Complainant-appellant appeals from so much of said Final Decree as dismisses his bill of complaint as aforesaid.

BRIEF OF THE ARGUMENT.

POINT I.

The Court of Chancery should have found and adjudged that complainant was not guilty of laches.

This Court, in *Massie v. Asbestos Brake Co.*, 95 N. J. Eq. 298, at page 311, gives a clear and concise statement of the attitude of our Court of Equity with respect to the defense of laches.

“Neither do I find laches. True it is that the action which has now been taken by this suit could have been taken equally well at any time during a period of about eight years prior to the filing of the bill. But laches involves something more than mere delay, mere lapse of time. There must be delay for a length of time which, unexplained and unexcused, is unreasonable under the circumstances, and which has been prejudicial to the defendant. Cf. *Johnston v. McKenna*, 76 N. J. Eq. 217 (at p. 229); affirmed, 77 N. J. Eq. 555; where there was delay of some seven or eight years. Cf. also *Soper v. Cisco*, 85 N. J. Eq. 165 (at p. 174).”

Vice Chancellor Green in *Tynan v. Warren*, 53 N. J. Eq. 313 (at p. 321) said:

“I do not understand that mere delay in bringing a suit will deprive a party of his remedy unless such neglect has so prejudiced the other party by loss of testimony or means of proof or changed relations, that it would

be unjust to now permit him to exercise his right."

Vice Chancellor Garrison in *Farr v. Hauenstein*, 69 N. J. Eq. 740 (at p. 742) says:

"The defendants failed to show that they are prejudiced in any way by reason of the delay of the complainant in bringing his suit, and there is no aspect of the case in which the lapse of time has affected or could affect the defendants' opportunity to procure or produce testimony, hence the case is not within the ruling in *Lutjen v. Lutjen*, 64 N. J. Eq. 773."

In *Keim v. Lindley*, 30 A 1063, there was a delay of several years due to the inability of the vendor to make title and the vendee was at all times ready and willing to complete the contract. Evidence here showed that both parties were awaiting the outcome of litigation concerning the title. The Court held that the defendant could not take advantage of a delay for which he himself was wholly or partly responsible, citing Pomeroy "Specific Performance of Contracts", Section 405, in which Professor Pomeroy states that:

"In accordance with the rule that a defendant who desires to rely upon the plaintiff's delay as a ground for defeating the suit, must himself have been ready, willing, and prompt, it follows that a defendant can never take advantage, as a defense, of a delay which he himself has caused" (Note that under this section Pomeroy cites a whole group of cases holding that a reasonable objection to defendant's title excuses vendee's delay).

Keim v. Lindley, *supra*, was reversed by this Court in 54 N. J. Eq. page 418, but the rules pertaining to the defense of laches were not disturbed.

In *Klein v. Cutter*, 34 N. J. Eq. 329, the Court held that the alleged laches in foreclosure of mechanic's lien claim was no bar because the delay had been caused by the endeavors of both parties to straighten the matter out without resort to litigation.

In *Vliet v. Cowenhoven*, 83 N. J. Eq. 234, the laches of the plaintiff suing to foreclose a mortgage was held to be no bar because the defendant had consented to numerous extensions of time and therefore could not be heard to say that the plaintiff had not been diligent enough in prosecuting his claims.

It is to be noted in the instant case that the defendant does not disclose any injury resulting from the delay in the bringing of the bill for specific performance. It is to be further noted at this point, that the testimony clearly shows that the complainant was not speculating upon the rise of the real estate market. Mr. Wermert, a real estate expert testified (S. of C., pp. 40 and 41) that the value of the land at the time the contract was signed was Twenty-five Hundred (\$2,500) Dollars, and in his opinion, the value of the land had remained the same. The testimony of Mr. Wermert is entirely unrefuted.

The defendant himself (S. of C., p. 55) upon cross examination admitted that he knew that the complainant wanted the property to build a home for himself and his two children. The defendant, when asked why he was unwilling to convey the property answered (S. of C., p. 58) that he wanted to be a free agent and did not want to be compelled to do something with a

whip held over him. This is the only reason assigned by the defendant for his refusal to convey, making no claim for any injury whatsoever resulting from the delay.

POINT II.

The Court of Chancery erred in its refusal to admit parol evidence offered by complainant to explain the delay in instituting suit because of Section 5, Subdivision 5 of the Statute of Frauds.

In *Smith v. Balch*, 89 N. J. Eq. 566 (at p. 568), WHITE, J., speaking for this Court construed Section 5, Sub-division 5 of the Statute of Frauds as follows:

“In order for this provision of the statute to apply it must appear that the parties intended when they made the contract that it should not be performed within the year. If this does not expressly or clearly appear, and the contract is one which, taking in consideration the subject matter, may be performed within the year, the statute does not apply, although, in fact, a longer time was actually taken in performance. *Eiseman v. Schneider*, 60 N. J. L. 291; *Devalinger v. Maxwell*, 54 Atl. Rep. 684; Page Cont. Secs. 668, 674, 675.”

In *Okin v. Selidor*, 78 N. J. L. 54, it was held that although a contract in term covers a period of five years, yet, if under its terms performance may be required of the promisor within one year, an action is not barred by the Statute of Frauds

if within such year the event upon which the duty of performance depended actually happened.

GARRISON, J., speaking for the Supreme Court at pages 55, 56 in *Okin v. Selidor*, *supra*, says:

"The second ground cannot avail the appellant for the reason that although his agreement covers five years, it was not one that was not to be performed within one year and within such period its performance was required. The section of the Statute of Frauds is cast in this negative form, hence it applies wherever by no contingency covered by the contract the promisor can within one year from the making of his agreement be required to perform it."

It has been held in many jurisdictions that this provision of the Statute of Frauds has no application to contracts involving real estate. This question has never been directly passed upon by the Courts of this State insofar as appellant has been able to ascertain.

In 25 Ruling Case Law, 473, Section 52, it is stated:

"The broad rule has been laid down that contracts concerning lands or interests in lands are not within the purview of the provision of the statute relating to contracts not to be performed within a year, as it was the intention of the legislature to deal with such contracts under the special provision of the statute relating to the subject of realty and the provisions relating to contracts for the sale of land, and therefore the subject matter of such contracts is not within the purview of the one year clause."

In Pomeroy "Specific Performance of Contracts" 3rd Edition, page 242 (Sec. 100 b) :

"It has been held in some jurisdictions that the section of the Statute of Frauds dealing with contracts not to be performed within a year, had no application to contracts relating to real estate" citing :

Worley v. Sibe, 111 Ind. 238;
Baynes v. Chastel, 68 Ind. 376;
Timmonds v. Taylor, 48 Ind. App. 531;
Stern v. Nysonger, 69 Iowa 512.

In *Woodworth v. Franklin*, 85 Okla. 27,²⁷ 1 A. L. R., 590, 604, it was held :

"This Court has held that the first subdivision of 8941 Rev. Laws 1910 providing that 'an agreement that, by its terms, is not to be performed within a year from the making thereof', applies only to agreements other than those relating to land and that subdivision 5 of said section governs with reference to agreements concerning real estate. *Sullivan v. Bryant*, 40 Okla. 80, 49 L. R. A. (N. S.) 819; *Collins Co. v. Elk Co.*, 48 Okla. 485, 150 Pac. 457."

It may be well to note at this point that the Statute of Frauds in Oklahoma pertaining to agreements not to be performed within a year, is identical with the Statute of Frauds in this State involving the same point.

The particular section of the Statute of Frauds in the State of Oklahoma may be found in *Sullivan v. Bryant*, 40 Okla. 80; 49 L. R. A. (N. S.) 819.

The learned Vice Chancellor below did not find it necessary to make any specific finding of fact as to the explanations offered by appellant and respondent, respectively, relating to the delay between the date set for the closing of title and the filing of the bill of complaint. The Vice Chancellor's only comment on this point (S. of C., p. 72) is as follows:

"The bill of complaint was filed January 30, 1929. Complainant explains this delay on the ground that the parties in January, 1927, agreed orally to extend the time for passing title until May, 1929, when they anticipated that John would be declared dead and that he brought the suit immediately upon a repudiation of the contract by defendant. In my opinion, an agreement to extend the time for passing title more than one year, is without the operation of the Statute of Frauds and cannot be proved by parol evidence. This leaves the delay in bringing suit unexplained, so this defense should prevail."

This would seem to imply that the Vice Chancellor found that the parties as a matter of fact had agreed orally to extend the time for passing title in January, 1927, to May, 1929. This delay was necessitated by the disappearance of a brother of defendant possessing an interest in the property to be conveyed. It was intended that proceedings to declare the missing brother dead would be brought by defendant-respondent in May, 1929, which would enable him to take the necessary proceedings to convey a marketable title pursuant to his contract. It is clear from the testimony and it follows logically from the nature

of the ~~causes of the cause~~ ^{transaction} that if the missing brother had appeared before May, 1929, it would be unnecessary to have him declared legally dead and the defendant could have then arranged for the conveyance of the property free of this outstanding interest. It does not appear from the testimony nor does it logically follow that the parties intended to wait until May, 1929 under any and all circumstances. The reappearance of the missing brother would have enabled the defendant to consummate his agreement to convey.

The testimony of the complainant clearly shows that he made many visits to the defendant during this entire period for the purpose of finding out whether anything new had developed with reference to the missing brother. It would seem therefore, that the rule as laid down by WHITE, J., in *Smith v. Balch, supra*, may be applied to the facts and circumstances of the instant case. It may be noted that the contract called for the delivery of a full covenant and warranty deed; that complainant was always and at all times, ready, willing and able to perform providing he received a deed pursuant to the contract. The extensions of time of the performance of the contract were made solely for the purpose of enabling the defendant to comply with the terms of his contract and thus solely for his benefit.

POINT III.

Proofs do not justify a finding that appellant had knowledge of the defect in title when the contract was made.

The learned Vice Chancellor found as a matter of fact, although the testimony was conflicting, that complainant had knowledge of the defect in

title when the contract was made. Appellant emphatically denied (S. of C., p. 30) that respondent told him of his missing brother when the sale of the property was first discussed. Appellant further denies having searched the title to the property at any time prior to the date of the contract (S. of C., p. 31). This testimony of the appellant is corroborated by respondent's witness, Mr. Moylen (S. of C., p. 64) in which he states that the deed from respondent's mother was given to Mr. Larson before the contract was signed so that the latter could take it to New Jersey and find out whether any money could be raised on it. Mr. Moylen does not say that Mr. Larson intended to have a search made of the property. Let us assume for the sake of argument that Mr. Larson had made a search of the property and had been advised that the defect in title existed and he had been so advised before the execution of the contract, it would seem very strange that he should have then, knowing of the defect, entered into a formal contract for the purchase of said premises. If Mr. Larson had ascertained that the defect existed, he certainly must have known that he could raise no money on the property and it would have been foolhardy for him to have entered into the contract.

It is also very extraordinary for a person purchasing real estate to have a search made before a formal contract has been entered into. We submit therefore that the testimony of the appellant should have been believed by the learned Vice Chancellor, not only because of the testimony aforementioned, but because common practice relating to such transactions should lead one to disbelieve the respondent's version of the transaction.

POINT IV.

Knowledge by vendee of existing title defects does not estop him from demanding a conveyance free of such defects.

Assuming for the purpose of the argument that complainant had knowledge of the defect, it is submitted that such knowledge would not stop him from demanding such a conveyance which the defendant has contracted to deliver.

In *Propper v. Colson*, 86 N. J. Eq. 299 (at p. 401), Chief Justice GUMMERE, speaking for the Court of Errors and Appeals says:

“It is further argued on behalf of the respondents that at the time of his purchase Mr. Propper was fully aware of the existence of the building restrictions upon the land which was bid in by him, and that, therefore, he is to be presumed to have waived any objection to the title because of them. But knowledge by a grantee, at the time of the delivery of the deed, that there are outstanding incumbrances upon the property conveyed is no bar to his right of action on the covenant against incumbrances (*Demars v. Koehler*, 62 N. J. Law, 203; 41 Atl. 720; 72 Am. St. Rep. 642; *De Long v. Spring Lake Co.*, 72 N. J. Law 125; 59 Atl. 1034), and therefore cannot estop him from insisting that he shall receive by the conveyance to him what his vendor contracted to give him; that is, a title free and clear of all incumbrance.”

In *Simpson v. Klipstein*, 89 N. J. E. 543, the vendor is suing for specific performance and the

vendee defends on the ground that the complainant is unable to furnish a title free of incumbrances as he was obligated to do under the contract. The evidence showed that the vendee, prior to the signing of the contract, was shown a map of the property about to be sold with a dedication of a public street indicated thereon. Despite this fact, this Court held that the vendee had the right to insist on a title clear of incumbrances and was not estopped from setting up the defect of which he had previously been informed.

Demars v. Kochler, 62 N. J. L. 203 (Ct. of Errors and Appeals) presents the following situation. The vendee is suing for damages resulting from a breach of covenant against incumbrances. The Supreme Court had held that the grantee's knowledge of the incumbrance barred him from bringing the action. The Court of Errors reversed the lower Court in an opinion by MAGIE, C. J., who characterizes the Supreme Court's decision as being opposed to reason and dignity. Decrying the reasoning of the Court below, MAGIE says:

"With great respect, I deem the reasoning specious and the conclusion insupportable, for knowledge of the existence of an encumbrance not only does not destroy its inherent character as encumbrance, but may and often does lead to the purchaser's requiring the grantor to protect him by covenants. *Smith v. Lloyd*, 29 Mich. 382. When a covenant is made against all encumbrances without exception, knowledge of the existence of one encumbrance cannot take that encumbrance out of the general terms of the covenant unless such was the intent of the parties. But

knowledge alone does not prove such intent, for a contrary intent is consistent with it. Proof of knowledge or other proof of the intent of the parties that a particular encumbrance should be excepted from the general terms of the covenant, could only be admitted by a violation of the canon of evidence which forbids parol proof to vary the terms of a written contract.

It results that a grantor who fails to except from his covenant against encumbrances one which is known to the grantee, cannot defeat recovery upon that covenant by proof of such knowledge. The grantee is not compelled to require for his protection a special covenant against the known encumbrance, but may rely on the general and unrestricted covenant against all encumbrances. * * *

The general rule is that the right of action on the covenant against encumbrances arises upon the existence of the encumbrance, irrespective of any knowledge on the part of the grantee or of any eviction of him or of any actual injury it has occasioned him, so that if he has not paid off or bought in the encumbrance he is entitled at least to nominal damages. 2 *Greenl. Evid.* 242; 2 *Washb. Real Prop.* 707; *Carter v. Denman's Executor*, *ubi, supra*; *Townsend v. Weld*, 8 *Mass.* 146; *Hovey v. Newton*, 7 *Pick.* 29; *Harlow v. Thomas*, 15 *Id.* 66; *Batchelder v. Sturgis*, 3 *Cush.* 201; *Spurr v. Andrew*, 6 *Allen* 420; *Flynn v. Bourneuf*, 143 *Mass.* 277; *Rickert v. Snyder*, 9 *Wend.* 416; *Smith v. Lloyd*, *ubi, supra*; *Edwards v. Clark*, 83 *Mich.* 246; *Hubbard v. Norton*, 10 *Conn.* 422; *Prichard v. Atkinson*, 3 *N. H.* 335; *Van Wagner v.*

Van Nostrand, 19 Iowa 422; *Barlow v. McKinley*, 24 Id. 69; *Long v. Moler*, 5 Ohio (N. S.) 271."

The case of *De Long v. Spring Lake Beach Company*, 72 N. J. L. 127, again presents the situation of a vendee suing for a breach of warranty and the vendor claiming immunity because of complainant's knowledge of the defect at the time when the contract was entered into. During the course of his opinion SWAYZE, J., citing *Demars v. Koehler*, *supra*, says that knowledge of the existence of a defect is no defense whatsoever where said defect is one of title and not of the physical condition of the property. The case *sub judice* is obviously one of the former class.

In 57 A. L. R. 1541, the annotator, in an article on marketable title states:

"But the general rule is that knowledge by the vendee of the vendor's lack of title at the time he entered into the contract is immaterial, since he has a right to rely upon the vendor either having a title, or procuring it so as to carry out his agreement. It is no defense for the vendor to show that the vendee knew of the existence of outstanding encumbrances, and that he agreed to take only the title which the vendor then had, where such facts depend upon extrinsic evidence, and are contradictory of the express terms of the contract entered into between the parties."

In *Coombs v. Witte*, 104 N. J. L. 520, the vendee is suing to recover his deposit paid pursuant to a contract for the sale of real property. The plaintiff had entered into the contract knowing

that the vendor had taken title from her father who was in a State Hospital for the insane and who, therefore, lacked the mental capacity necessary to pass a valid title to his daughter. The contract provided for a clear title, free of all incumbrances and the Court of Errors held that the vendee was entitled to such a title despite his aforementioned knowledge. GUMMERE, C. J.:

"The next contention is that the court erred in not charging the following request: 'If the plaintiff knew when he signed the agreement that Witte was in the state hospital, and that he was mentally incapable of executing the deed, he cannot recover.' The court properly refused to charge this request. By the terms of the agreement he was entitled to a warranty deed which would give him the absolute title to the land involved in the transaction, subject only to the restrictions provided in the agreement. This the intending vendor was required to give him, and that could only be done by having a valid and enforceable conveyance made by Mr. Witte at or before the time of the execution of the contract of sale. The fact that the plaintiff knew when the agreement was signed that Witte was in the state hospital and lacked the mental capacity to make a valid deed did not estop him from insisting that the agreement should be carried out in exact accordance with its terms, and that a conveyance, absolute and beyond successful attack, should be given to him. *Simpson v. Klipstein*, 89 N. J. Eq. 543, and cases cited."

The case of *Peeler v. Levy*, 26 N. J. E. 330, is relied on by the learned Vice Chancellor as con-

trolling the instant case, at least insofar as specific performance with an abatement of the purchase price is concerned. It is respectfully submitted that this case does not control. Although in that case Vice Chancellor Van Fleet denied compensation it should be noted that specific performance was entirely disallowed. The vendor had agreed to convey four tracts of land although title to two of said tracts was in his wife and his wife had not signed the agreement. The Vice Chancellor refused specific performance as to the first two tracts because the complainant did not show special grounds entitling him to equitable relief, nor had he changed his position so as to suffer loss if specific performance was denied nor does he present any evidence that a suit of law would not have afforded him complete redress. Specific performance as to the other two contracts was denied because of a long line of cases in this state holding that in actions for specific performance husbands will not be decreed to procure their wives to join in the executions of deeds, if they are unwilling to do so.

In view of these facts, it is respectfully submitted that the remarks of the Vice Chancellor in *Peeler v. Levy, supra*, addressed to the question of abatement for defects in title should not control the instant case.

That this case has not been accepted as authority for the proposition for which the learned Vice Chancellor below accepted, seems apparent from the way it is referred to in *Hall v. Ely*, 91 N. J. Eq. 92, in which this court held that compensation will be denied a vendee who sought merely whatever title the vendor had. PARKER, J.:

“In the first report the master relied mainly on the rule propounded by the late Vice

(Chancellor Van Fleet in *Peeler v. Levy*, 26 N. J. Eq. 330, to the effect that compensation will 'generally be denied where the party asking it had notice at the time the contract was made, that the vendor was agreeing for more than he could give or convey, and it appears that the vendee has not, in consequence of the contract, placed himself in a situation from which he cannot extricate himself without loss'. * * *

We come to the conclusion that the decree below should be affirmed, but prefer to rest our decision upon the second point rather than the first. Beyond noting the later case of *White v. Weaver*, 68 N. J. Eq. 644, where Vice Chancellor Reed refused to follow the rule just quoted from *Peeler v. Levy*, and his opinion was adopted by this Court (at p. 646), we express here no opinion on the correctness of the rule quoted above from *Peeler v. Levy*."

It is submitted therefore that the correctness of the rule as laid down by this Court in *Peeler v. Levy*, *supra*, has been seriously questioned by this Court and has been impliedly overruled by this Court in *White v. Weaver*, *supra*. It is further submitted that even under the rule of *Peeler v. Levy*, the relief sought by complainant should not be denied. The rule as laid down in *Peeler v. Levy*, if applied to the instant case, would prevent the complainant from obtaining compensation for the defect but by no stretch of the imagination could the rule be extended to operate as a complete bar to the relief sought by complainant.

POINT V.

A parol agreement extending time for performance of a contract within the Statute of Frauds is enforceable.

The earliest leading case on this point in the State of New Jersey, is *Stryker v. Vanderbilt*, 25 N. J. L. 482, in which GREEN, C. J. held that a parol agreement extending the time for performance of a contract for the sale of realty was valid and enforceable.

“The weight of authority, however, is that a parol agreement, enlarging the time for performing a contract under seal, may avail as an excuse for non-performance at the day specified in the original agreement. *Flemming v. Gilbert*, 3 Johns. R. 528; *Longworthy v. Smith*, 2 Wend. 587; *Mead v. Degolyer*, 16 Wend. 632; 3 *Cowen’s Ph. on E.* 1479, Note 987.

In *Cox v. Bennet*, 1 Green 165, it was held, that the time fixed for the payment of money due on bond might be extended by an agreement not under seal. And the Chief Justice, in delivering the opinion of the Court, said, ‘the party to whom a condition or covenant is to be performed may, by acts as well as words, enlarge the time of performance.’ There was no pretense that the bonds were avoided by the parol agreement.

It was suggested by counsel, upon the argument, with much apparent force, that this construction will entirely defeat the plaintiff’s right of recovery. For the covenant being altered by subsequent parol agreement,

no action of covenant will lie upon the written contract, but the plaintiff can maintain assumpsit only upon the parol agreement, and the parol agreement, being for the sale of land, will be void under the statute of frauds.

The answer to the objection is, that a subsequent parol agreement, not contradicting the terms of the original contract, but merely enlarging the time of execution, is good, even in the case of a contract required by the statute of frauds to be in writing. *Cuff v. Penn*, 1 Maule & Sel. 21; *Chit. on Con.* (1st Am. ed.) 27 (9th Am. ed.), 125, Note; *Cummings v. Arnold*, 3 Metc. 486. A different doctrine is held in *Blood v. Goodrich*, 9 Wend. 68.

But, however this may be, it must be regarded as settled, that the time for the performance of a contract either by deed or by parol, may be enlarged by parol."

In *Van Syckel v. O'Hearn*, 50 N. J. Eq. 173, Vice-Chancellor Bird unequivocally states that an obligation in writing and under seal may be extended by a parol agreement.

"The complainants say that the obligation being in writing and under seal the time for the performance thereof cannot be enlarged by a parol agreement. I think all of the authorities, in this state at least, hold the time for performance of every such contract may be extended by parol. *Bigelow v. Rommelt*, 9 C. E. Gr. 115; *Tompkins v. Tompkins*, 6 C. E. Gr. 338; *Maryott v. Renton*, 6 C. E. Gr. 381; *Cox v. Bennet*, 1 Gr. 165; *Van Houten v. McCarty*, 3 Gr. Ch. 148; *Stryker v. Vanderbilt*, 1 Dutch. 482; *Bell v. Romaine*, 3

Stew. Eq. 28; *Sharp v. Wyckoff*, 12 Stew. Eq. 376; *Measurall v. Pearce*, 4 Atl. Rep. 678; *King v. Morford*, Sax. 274; *Stoutenburgh v. Tompkins*, 1 Stock. 332; *Baldwin v. Salter*, 8 Paige 463; *Lattimore v. Harsen*, 14 Johns. 329."

Nissel v. Swinley, 76 N. J. L. 288, presents the following situation—the vendee is suing for damage suffered as a result of a breach of contract to convey land. At the closing date, there was a verbal agreement of extension between the parties. The Court says that it is ^{governed} concluded by the *Stryker v. Vanderbilt* case, *supra*, and continues as follows:

"The plaintiff cannot recover unless he has shown a breach of the contract by the defendant. That question is narrower than whether a contract for sale of lands under seal can be altered as to the time of performance by parol. The opinion of Chief Justice GREEN in *Stryker v. Vanderbilt*, 1 Dutcher 482, is conclusive upon this Court. He there expressly approved of Lord Ellenborough's decision in *Cuff v. Penn*, 1 Mau. & Sel. 21, 26. The reasons for holding that there is no actionable breach under such circumstances are well stated in *Thomson v. Poor*, 147 N. Y. 402. The court said: 'The rule is well understood that if there is forbearance at the request of a party, the latter is precluded from insisting upon non-performance at the time originally fixed by the contract as a ground of action. The case is not as manifest where the party who solicited the forbearance alleges the consent of the other party as an excuse for non-performance. But in such a case,

where one party to a contract, before the time for performance by the other party has arrived, consents, upon his request, to extend the time of performance, he must be presumed to know that the other party relies upon the consent; and until he gives notice of withdrawal he has no just right to consider the latter in default, although meanwhile the contract time has elapsed. We think the principle of equitable estoppel applied in such case. * * *

In Massachusetts it is held that although a verbal agreement to extend the time for performance of a contract required by the statute of frauds to be in writing, cannot be made the basis of an action, it is nevertheless a binding agreement, and excuses failure to perform at the time fixed. *Stearns v. Hall*, 9 Cush. 31. This view finds support in what was said by this court in *Stryker v. Vanderbilt*, and in *Long v. Hartwell*, 5 Vroom 116, 125. If it is correct the plaintiff may still rely upon the original contract but cannot put the defendant in default until the new date fixed for performance has arrived.

In the English courts it is held that the assent to a postponement of the performance of the contract is not a new contract but is merely a voluntary and revocable forbearance by one party at the request of the other. *Benj. Sales* (5th Eng. ed.) 690; *Ogle v. Vane*, L. R., 3 Q. B. 272; 36 L. J., Q. B. 175; on appeal 37 L. J., Q. B. 77; *Hickman v. Haynes*, L. R., 10 C. P. 598; 44 L. J., C. P. 358. If this view is correct the plaintiff, in order to put the defendant in default, must either wait until the new date fixed for performance ar-

rives and tender himself ready and willing to perform, or he must give notice revoking his consent to the extension of time and allow a reasonable time for performance."

In *Kerney v. Johnson*, 104 N. J. Eq. 244, the vendor was suing for specific performance of a contract to convey real estate. The contract had contained a clause expressly making time of the essence but the Court found that the parties by their actions, had waived the provision and, in fact, extended the time for performance. MINTURN, J., writing for the Court of Errors and Appeals says:

"In such an eventuality, where the parties themselves have practically construed their own contract, such a clause does not control the situation, but the circumstances and the equities of the case as defined by the conduct of the parties present the best interpretation as to the meaning of such a clause; for concededly, under the settled construction of the law upon this subject, the acts of the parties in dealing with the subject-matter of their contract afford the best indication of their intention either to execute it or to annul it. *Acta exteriora indicant interiora secreta*. 8 Coke Rep. 291." (Note that in this case an extension was worked out from the acts of the parties without the aid of even an oral agreement extending the time.)

POINT VI.

Where time is not of the essence, notice must be given after closing day to make it of the essence.

In *Roberts v. C. R. Realty Co.*, 7 Misc. 599—The situation in this case is quite similar to ours, namely; an agreement for the purchase of real property in which there was a postponement of the closing day in order to permit the vendor to perfect his title.

“A date for settlement having been fixed in the agreement without making such date of the essence of the contract, and such date being permitted to pass by the agreement of the parties, neither could put the other in default without notice and the affording of a reasonable time to the owner within which to perfect the title. The cases to this effect are many and clear; a late case on the subject is that of the *Orange Society v. Konski*, 94 N. J. Eq. 632, 121 A. 448, affirmed 95 N. J. Eq. 254, 122 A. 753. Still a later authority to the same effect is *Nass v. Munzing*, 100 N. J. Eq. 421, 136 A. 344. Time not having been made of the essence of the contract, either in the written agreement or by any specification of time by the plaintiffs giving reasonable opportunity to the defendant to clear up its title, the plaintiffs were not entitled to recover the deposit of \$500.”

The language of GUMMERE, C. J., in the case of *Gerba v. Metruske*, 84 N. J. Eq. 141 (Ct. of E. & A., at p. 143) (a case similar to the one next above) is very instructive.

"The prevailing rule, with relation to cases of this kind, is that where the time of performance is not of the essence of the contract the complainant is entitled to a decree, if a clear title can be given by him at the time of the making thereof. *Oakey v. Cook*, 41 N. J. Eq. 350, 364; *Moore v. Galupo*, 65 N. J. Eq. 194; *Agens v. Kock*, 74 N. J. Eq. 528. The rights of the parties in the present case must therefore depend upon whether time was of the essence of this particular contract. We think it was not. As a general rule, in equity, time is not deemed to be of the essence of the contract unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract; and, so, equity will enforce the specific performance of agreements after the time fixed for their performance has been suffered to pass by the party asking for the intervention of the Court, unless the facts submitted show that the parties to the contract intended that time so fixed should be of its essence. *Huffman v. Hummer*, 17 N. J. Eq. 263; *King v. Ruckman*, 21 N. J. Eq. 599."

There can be no doubt but that time was not of the essence of the contract in the instant case. Defendant-respondent (S. of C., p. 57) frequently says that after January 19th, 1927, he did not notify Mr. Larson or anyone for him, in any manner or form, that he considered the matter at an end. Nowhere in the testimony does it appear that any notice whatsoever was given the complainant-appellant making time of the essence or terminating the contract in any manner.

POINT VII.

Specific performance with compensation for defects in title will be decreed by the Court of Equity in favor of a vendee.

The case of *Ferrell v. Bork*, 76 N. J. Eq. 615 (Ct. of E. & A.) follows the one at bar very closely. The vendor had contracted to sell a piece of property although he had only a three-fourths ($\frac{3}{4}$) interest therein in the hope of finding a next heir who is entitled to the other one-fourth ($\frac{1}{4}$) interest. He was unsuccessful in so doing and the vendee sues for specific performance and abatement of the purchase price. The Court of Errors grants the relief prayed for with an abatement of a proportionate amount of the purchase price. V. C. LEAMING at page 899, says:

"So on this branch of the case, so far as I have gathered it, it seems to me entirely clear that the complainant is entitled to a decree for specific performance requiring the defendant to convey to him his undivided three-fourths interest in the land, with an abatement of a proportionate amount of the purchase money; that is to say, the purchase money mortgage will be one-fourth less than the amount agreed upon, \$2,700 and the total amount of \$1,000 cash to be paid will be abated one-fourth, so that there will be a proportionate abatement of the purchase-money mortgage and cash."

Triplett v. Ivins, 93 N. J. E. 202 (Ct. of E. & A.)

The vendor contracted to sell a plot of ground but was unable to convey more than a life estate.

therein. In an action for specific performance by the vendee the court said:

"Should complainant elect to take a conveyance of the life estate as of the date of the contract with an equitable abatement from the purchase price there appears to be no doubt of his right to do so. Professor Pomeroy states this right to be 'too strongly fortified, as well as founded on reason, to be successfully denied.' *Pom. Con. (Spec. Per.)* 438, 439, and notes. This right has been enforced, even though the interest which can be conveyed is but a small part of that contracted for, such as an undivided fractional share; and in *Barnes v. Wood*, L. R., 8 Eq. Cas. 424, a life estate of defendant was decreed to be conveyed under a contract in which defendant engaged to convey the property in fee.

'A decree will be advised securing to complainant a life estate as of the date named. A reference may be had to a master to determine its value on the basis of the contract price as the value of an absolute estate in fee.'"

Conclusion.

It is submitted that the defense of laches in this case should certainly not prevail. Mere lapse of time in itself, does not constitute laches. It is shown beyond any question of doubt that no harm has been suffered by the defendant-respondent by reason of the delay. It is further submitted that the Statute of Frauds, Section 5, sub-division 5 has no applicability in the instant case. Firstly, because the parties never intended to wait more

than one year under any and all circumstances and secondly because this section of the Statute does not apply to contracts for the sale of real estate. Further, that it is firmly established that parol extensions of time for performance of contracts within the Statute of Frauds are enforceable. It is further submitted that the testimony and the nature of the transaction between the parties clearly show that the complainant-appellant did not have knowledge of the defect at the time the contract was executed, and further that the rule in *Peeler v. Levey, supra*, is not applicable, and if applicable, is not sufficient to constitute a bar to the relief sought by complainant-appellant, but at best would operate as a bar to compensation. It is further submitted that the rule in *Peeler v. Levey, supra*, has been impliedly overruled by this Court. It is further submitted that time was never made of the essence of the contract and that defendant-respondent had, at no time, given notice either oral or written, to complainant-appellant, making time of the essence or terminating the contract. It is lastly submitted that the testimony stands undisputed that the complainant-appellant desires this property only for the purpose of building a home for himself and his family and no other purpose, eliminating any suspicion that he was speculating upon an increase in value of the property in question. It is respectfully urged that so much of the decree as dismisses complainant-appellant's bill of complaint be reversed.

Respectfully submitted,

PLATOFF, SAPERSTEIN & PLATOFF,
Solicitors of Complainant-Appellant.

FRED SAPERSTEIN,
of Counsel.

New Jersey Court of Errors and Appeals

Between:

JOHN LARSON,

Complainant-Appellant,

and

RAYMOND A. KEARNEY,

Defendant-Respondent.

On Appeal
from the Court
of Chancery.

BRIEF ON BEHALF OF DEFENDANT-RESPONDENT.

STATEMENT OF FACTS.

On October 23, 1926, respondent entered into a contract with appellant to convey certain lands to appellant upon the terms and conditions therein stated (11).

The contract provides for a conveyance by a deed of full covenant and warranty, free from all encumbrances, and for a delivery of the deed on December 15th, 1926. The bill of complaint was not filed until January 30th, 1929, over two years thereafter.

In his bill, appellant asks for relief by way of specific performance with abatement by way of compensation because of defect in title.

The first defense interposed by the respondent as a reason for denying the appellant relief by way of specific performance, is that the appellant knew at the time he entered into the contract that

the respondent was seized of only an eight-ninths interest in the premises in question and that there was an outstanding interest in John Kearney, a brother of the respondent, who had disappeared in 1922, and that therefore the appellant knew when he entered into the contract that the respondent could not perform the same (19).

The second defense interposed is that the appellant waited for a period of over two years during which the premises had greatly increased in value and then brought his suit for specific performance, and that the appellants should be denied relief because he was guilty of laches (20).

POINT I.

THE APPELLANT WAS GUILTY OF LACHES.

The testimony of the real estate expert produced by the appellant discloses that the land in question is on the direct route from the Hudson River Bridge by way of State Highway to the Hudson County Boulevard and that when this route is completed, it will affect the price of the lands in question (58).

The respondent urges that the appellants can not speculate as to the value of his contract. He can not wait for a period of two years and then when he finds that the value of these lands has materially increased, due to the construction of contemplated highways, come into a court of equity and ask that a court of equity compel the owner of the property to specifically perform the contract.

Delay in seeking performance of this contract under these circumstances is fatal to his relief in equity.

Heller v. Sweeney, 100 N. J. Eq. 150,
at p. 155.

Cohen v. Miller, 97 N. J. Eq. p. 440.

The appellants attempted to excuse his delay by offering evidence that verbal extensions had been agreed to between the parties for a period of some two years or more. This evidence was denied by the respondent.

The Court of Chancery did not find it necessary to determine this question because of other grounds on which it based its decision.

POINT II.

THE PAROL EVIDENCE OFFERED BY APPELLANT TO EXPLAIN DELAY IN INSTITUTING SUIT WAS NOT ADMISSIBLE UNDER SECTION 5 OF THE STATUTE OF FRAUDS. (Compiled Statutes, page 2612.)

Under Subdivision 4 of this statute, no action shall be brought upon any contract of sale of lands, tenements or hereditaments or any interest in or concerning them, unless the agreement upon which such action be brought or some memorandum or note thereof, shall be in writing, and signed by the parties charged therewith or some other person thereunto by him or her lawfully authorized.

If the appellant intends to rely upon a verbal contract to explain his delay in bringing this action under which the respondent was to have from

May, 1927, until May, 1929, or thereafter, within which to perform his contract, as alleged in paragraph 7 of the amended bill of complaint (9), he is then bringing an action not on the original contract alone but based on a subsequent contract concerning an interest in lands, which contract is not in writing, as required by the Statute of Frauds and therefore parol evidence of such contract is inadmissible.

Again, under Subdivision 5 of the Statute of Frauds, the agreement that he alleges was made in May, 1927, was not to be performed until May, 1929, or thereafter, and inasmuch as the evidence offered by the appellant to prove that the agreement was extended, was parol evidence only, it was likewise inadmissible, as was found by the Court below.

This case is not similar to the authorities cited by the appellant under his second point. There is no allegation and no proof, assuming the allegations of the bill of complaint to be true, that the contract in question could be performed short of the time agreed upon, as was the situation in the case of

Smith v. Balsch, 89 N. J. Eq. 566, and
Okin v. Selidor, 78 N. J. Law 54.

The allegation in the amended bill of complaint and the proofs offered by the appellant, as well as the statement on page 10 of appellant's brief, all disclose the fact that the claim of the appellant is that the parties had agreed orally in January, 1927, to extend the time for passing title to May, 1929. Therefore, assuming appellant's contention to be correct, it is apparent at once that there was no agreement that the passing of title

was to be performed at any time prior to May, 1929, and this was more than one year from the making of the agreement.

We therefore submit that the finding of the Court of Chancery was correct that the parol evidence offered by the appellant to substantiate this contention, was inadmissible under the provisions of the Statute of Frauds.

POINT III.

THE COURT OF CHANCERY FOUND THAT THE APPELLANT HAD KNOWLEDGE OF THE DEFECT IN TITLE WHEN THE CONTRACT IN QUESTION WAS ENTERED INTO.

The only evidence upon this question on behalf of the appellant is his own testimony. As against this, however, we have the testimony of the respondent (45), corroborated by the witness Richard Moylan (59-60) and by Daniel O'Shea (66).

We therefore submit that the Appellate Court will not disturb the finding of the Court of Chancery where there is ample evidence to support such finding, as there is in this case, especially in view of the fact that the evidence of two corroborating witnesses has been in no way denied.

POINT IV.

WHERE A VENDEE HAS KNOWLEDGE OF DEFECTS IN TITLE BEFORE ENTERING THE CONTRACT TO PURCHASE, EQUITY WILL NOT COMPEL SPECIFIC PERFORMANCE WITH AN ABATEMENT IN PURCHASE PRICE.

The appellant suggests that this principle, as laid down by V. C. Van Fleet, in the case of *Peeler v. Levy*, 26 N. J. Equity 330, has been questioned.

In *Peeler v. Levy*, the rule laid down was that compensation will generally be denied where the party seeking it had notice *at the time the contract was made* that the vendor was agreeing for more than he could give or convey and it appears that the vendee has not, in consequence of the contract, placed himself in a situation from which he can not extricate himself without loss.

In *White v. Weaver*, 68 N. J. Equity p. 644, V. C. Reed refers to this case but does not in any way question the correctness of the rule laid down by V. C. Van Fleet. On the contrary, he finds that the complainant White did not know that Weaver could not make good title at the time the contract was entered into.

So, therefore, the cases are not analogous.

V. C. Reed did say that he would not follow the rule laid down in *Ludlum v. Buckingham*, 35 N. J. Equity p. 71, to the effect that where the complainant knew at the time the bill of complaint was filed that there was a defective title, compensation would be denied.

It is true that in *Hall v. Ely*, 91 N. J. Equity at page 94, the opinion of this Court states that V. C. Reed refused to follow the rule quoted from *Peeler v. Levy*, but we respectfully submit that this statement will not be borne out by an examination of the two cases in question.

In *Peeler v. Levy*, it appeared that the vendee knew at the time of the making of the contract that vendor's title was defective.

In *White v. Weaver*, the Court found that the vendee did not know of the defect in vendor's title at the time of the making of the contract, although he did have knowledge thereof at the time of the filing of the bill of complaint.

The appellant cites the case of *Propper v. Colson*, 86 N. J. Equity p. 399, to sustain his contention that there can be an abatement in purchase price even though the vendee knew of the defect in title at the time of the making of the contract.

No such rule is laid down in this case. There is no intimation that the complainant had any knowledge of any defect in title when he purchased the property at the auction sale. The question involved in that case was whether the restrictions appearing in the title were encumbrances and of such a character as to entitle the vendee to rescind his contract to purchase. This was not an action where a vendee was seeking specific performance with abatement in purchase price. Neither specific performance nor abatement in purchase price was argued or considered in that case.

In the case of *Simpson v. Klipstein*, 89 N. J. Equity p. 543, a vendor sought to obtain specific

performance on a contract by a vendee. The vendee resisted on the ground that the title was not marketable and upon that issue, this Court found in favor of the vendee. The question of specific performance with an abatement in purchase price was neither raised nor considered in this case.

The appellant further argues that the rule laid down in *Peeler v. Levy* can not be extended to operate as a complete bar to the relief sought by the appellant.

The only relief sought by the appellant in his amended bill of complaint is a decree for specific performance with an abatement by way of compensation for defect in title (11).

The appellant neither prayed for in his bill of complaint, nor sought any relief, other than that and inasmuch as he was not entitled to that relief, the Court of Chancery could not do otherwise than deny it.

POINT V.

THE APPELLANT CONTENDS THAT A PAROL AGREEMENT EXTENDING THE TIME FOR THE PERFORMANCE OF CONTRACT WITHIN THE STATUTE OF FRAUDS IS ENFORCIBLE.

In this case the bill of complaint alleges that complainant and defendant agreed in May, 1927, that the time for the performance of the contract should be extended until May, 1929, or thereafter. We have failed to find any proof presented by the complainant to establish this allegation, while on the contrary, we find the defendant testifying un-

der cross-examination that he did not see the complainant from January, 1927, until January, 1929 (55-56). So that the only evidence that we have upon the subject is evidence which tends to show that there was no such extension as alleged.

However, even if the Court could find that such an extension had been agreed upon, the defendant contends that it is unenforceable because the Statute of Frauds, Section 5, provides:

“That no action shall be brought * * *
(5) upon any agreement that is not to be performed within one year from the making thereof unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing,” etc.

It is not alleged nor contended that this extension of this agreement enlarging the time for performance for a period of over two years was in writing and there is no case cited by the appellant holding that this section of the Statute of Frauds does not apply to cases such as are now under consideration.

The appellant cites the following cases to sustain his contention:

Striker v. Vanderbilt, 25 N. J. Law p. 482.

Cox v. Bennett, 1 Green p. 165.

Van Sickle v. O'Hearn, 50 N. J. Eq. p. 173.

None of these cases are in point, however. They all relate to the extension of time for the payment of moneys due on bonds.

The requirement of the Statute of Frauds was neither raised, considered nor decided.

POINT VI.**THERE WAS NO CONSIDERATION FOR ANY
EXTENSION OF TIME FOR THE PERFORMANCE
OF THE CONTRACT.**

The appellant alleged that there was an extension enlarging the time for performance of this contract. The respondent denied that there was such an extension.

Under these circumstances, it is not necessary that the defendant should plead lack of consideration in order to set up that defense, because the respondent could not raise the defense of lack of consideration when he, himself, denied the existence of the alleged contract.

However, if the appellant could possibly succeed in establishing the contention that there was an oral agreement extending the time, consideration must be shown therefor. As there is no consideration shown or alleged in this case, such an agreement is not enforceable.

Van Sickel v. O'Hearn, 50 N. J. Eq.
pp. 173, 175.

POINT VII.

The respondent does not contend that time was of the essence of the contract under consideration but the respondent does contend that he was under no obligation to carry out a contract with the appellant where the appellant had allowed more than two years to go by after the time fixed for the consummation of the contract without making any effort to secure its performance.

POINT VIII.

That specific performance with compensation for defects in title may be decreed by a court of equity in favor of a vendee, provided the circumstances warrant it, may be conceded in this case.

The cases cited by the appellant to sustain this contention bear it out, but they do not apply to the case in hand.

In *Ferrell v. Bork*, reported in 79 Atlantic, page 897, the opinion discloses that the vendee did not know that there was any defect in the title at the time of the making of the contract. It was not until after the contract had been executed and examination of title had been made by a title company that it was ascertained that the vendor owned only three-fourths of the property. Therefore, the rule applicable in that case does not apply to the case under consideration.

The same thing is true in the case of *Triplett v. Evans*, 93 N. J. Equity 202. In this case, also, both parties believed that the vendor was the sole owner of the land and it was not until after some time thereafter that it was discovered that the defendant had only a life estate.

The appellant has not cited, nor do we believe that there is any reported case holding that a vendee who has knowledge of a defective title at the time he enters into the contract for purchase, is entitled to specific performance.

POINT IX.

**SPECIFIC PERFORMANCE OF A CONTRACT IS
ALWAYS DISCRETIONARY WITH THE COURT.
IT IS NOT A MATTER OF RIGHT.**

In this case, the Court of Chancery has declined to exercise its discretionary right to compel the respondent to specifically perform the contract which he entered into with the appellant and we do not believe that under all the circumstances, the Appellate Court will be justified in reversing the decree of the Court below.

We respectfully submit that the decree should be affirmed.

MELOSH, MORTON & MELOSH,
Solrs. for Respondent.

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POINT IX

SPECIFIC PERFORMANCE OF A CONTRACT IS
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In this case, the Court of Chancery has declined to exercise its discretionary right to compel the respondent to specifically perform the contract which he entered into with the appellant and we do not believe that under all the circumstances the Appellate Court will be justified in reversing the decree of the Court below.

We respectfully submit that the decree should be affirmed.

WILLIAM MORTON & BELOW,

Solicitors for Respondent.