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NOTICE OF APPEAL.  
NEW JERSEY SUPREME COURT.

<p>MARY ALLAN ELWOOD,     <i>Plaintiff-Appellant,</i></p> <p style="text-align: center;">v.</p> <p>VIVIAN B. SMITH,     <i>Defendant-Respondent.</i></p>	}	<p>Action at Law. Notice of Appeal. 10</p>
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*To Wm. H. Smathers, Esq., Attorney of Defendant-Respondent:*

Take notice that the plaintiff appeals to the New Jersey Supreme Court from the whole of the judgment entered in this cause on the following grounds, viz: 20

The trial Court refused to find as requested by plaintiff:

1. Plaintiff is entitled to substantial damages for the loss of her bargain although the defendant's title through no fault of his own was defective, where the agreement provides for damages.

2. Where a vendor makes sale of premises to which he knows, or has reason to know, that another has an outstanding interest, his inability to convey a clear title would not excuse him as it might where such a defect is latent and unknown to him, as such a contingency would properly be attributable to the vendor's fault in making a needless contract of sale. 30

3. If the defendant undertook to convey something that he had cause to believe he was unable to give a clear title, his so doing would be an index of bad faith and therefore render him liable to substantial damages.

4. The fact that the defendant's wife has on numerous occasions joined in conveyances with her husband and balked only on this one is a circumstance tending to show a lack of good faith, or that she was prompted thereto by her husband.

5. As defendant had nearly three months from the time of his alleged attempted breach of his contract wherein to procure his wife's signature to the deed of conveyance, his then declaration of inability to procure same should be taken as indicia of bad faith.

6. Not having assigned inability to procure his wife's consent in his original answer, and his amendments made more than a year thereafter making such a defence is a circumstance strongly corroborative of the plaintiff's contention that such a reason for the defendant's breach was not made in the first instance but is rather an after-thought for the purpose of avoiding the consequences of his act.

7. The contract appearing to have been signed by the defendant without reference to his wife, and no space appearing to have been reserved for her signature is likewise a circumstance strongly corroborative of the plaintiff that no mention was made of the contract being contingent upon the defendant's getting his wife's signature.

8. Bad faith is more likely imputable from the defendant's action or attendant circumstances despite

his own and the testimony of others in interest to the contrary.

9. Unless the defendant did actually and in good faith assign at the time of the breach inability to procure his wife's signature to the deed of conveyance, plaintiff is entitled to recover damages for the loss of her bargain.

10. One authorized to contract is the defendant was and did, may make a valid contract even though the possibility of its performance depends upon the will of another.

Yours, &c.,

H. W. LEWIS,

*Attorney of Plaintiff-Appellant.*

Service acknowledged this June 2nd, 1927.

WM. H. SMATHERS,

*Attorney of Defendant-Respondent.*

### SUMMONS.

THE STATE OF NEW JERSEY, TO VIVIAN B. SMITH:

You are summoned to answer the annexed complaint of Mary Allan Elwood (L. S.) in an action at law in the Atlantic County Circuit Court. And take notice that unless you file your answer to the said complaint with the clerk of the Atlantic County Circuit Court, at Mays Landing, New Jersey, within twenty

days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness Honorable  
Judge of the Atlantic County Circuit Court, at Mays Landing, this tenth day of March, nineteen hundred and twenty-four.

WM. A. BLAIR,  
*Clerk.*

10 H. W. LEWIS,  
*Attorney.*

COMPLAINT.

ATLANTIC COUNTY CIRCUIT COURT.

20 MARY ALLAN ELWOOD,  
*Plaintiff,* }  
v. }  
VIVIAN B. SMITH,  
*Defendant.* }

Action at Law.  
Complaint.

30 The plaintiff, Mary Allan Elwood, of the City of Atlantic City, County of Atlantic and State of New Jersey says that:

1. On December 11, 1922, plaintiff and defendant entered into an agreement for the sale of land situate at the southeast corner of Ventnor Parkway and Quincy Street in the City of Ventnor City, County of Atlantic and State of New Jersey, a copy of which agreement is hereto annexed.

2. On and before March 11, 1923, plaintiff demanded a deed of conveyance from defendant in accordance with the terms of said agreement and was ready and willing and offered to defendant to pay and satisfy the balance of said contract price and duly to perform all the terms of said contract upon her part, upon the like performance by the defendant.

3. Defendant refused then to deliver to complainant a deed conveying a marketable title to said land and premises and still refuses so to do. 10

Plaintiff demands \$10,000 damages.

H. W. LEWIS,  
*Attorney for Plaintiff.*

Service of a copy herewith acknowledged this 10th day of March, 1924.

RICHARD H. ROBERTSON,  
*Solicitor of Defendant.*

To the within defendant:

The following is a copy of the agreement referred to in the foregoing complaint and upon which the same, in whole or in part, is founded.

H. W. LEWIS,  
*Attorney of Plaintiff.* 30

ARTICLES OF AGREEMENT, MADE THIS eleventh day of December, in the year of our Lord

one thousand nine hundred and twenty-two BETWEEN Vivian B. Smith of Atlantic City, New Jersey, of the first part and Mary Allan Elwood of Ventnor City, New Jersey, of the second part, WITNESSETH, that the said party of the first part, for and in consideration of the sum of Seven Thousand dollars (\$7000) to be paid and satisfied as hereinafter mentioned and also in consideration of the covenants and agreements hereinafter mentioned, 10 made and entered into by the said party of the second part, does agree to and with the said party of the second part, that the said party of the first part, will well and sufficiently convey to the said party of the second part, her heirs and assigns by Deed of full warranty free from all encumbrance on or before the 11th day of March, 1923, all that lot, tract, or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Margate City in the County of Atlantic and State 20 of New Jersey, Being that parcel of land described on the Map of Margate City as Lot # 1, block 17, running parallel with Ventnor Parkway eighty (80') feet and with Quincy Street ninety feet (90') being in fact, the Southeast corner of Ventnor Parkway and Quincy Street.

AND the said party of the second part for heirs, executors and administrators do covenant, promise and agree to and with the said party of the first part assigns that 30 the said party of the second part, will pay and satisfy or cause to be paid and satisfied unto the said party of the first part, the said sum of as and for the purchase money of the foregoing described land and premises in the following manner, that is to say:  
 One Thousand dollars (\$1.000.) on the signing of

this contract receipt of which is hereby acknowledged.  
 Two Thousand dollars (\$2.000.) at date of settlement, when seller gives buyer a full warranty deed.  
 Twenty-five Hundred dollars (\$2500.) by a purchase money mortgage to run two (2 yrs.) years, and  
 Fifteen Hundred dollars (\$1500.) at present a first mortgage on said premises which matures early in 1925 and to be assumed by the buyer. 10  
 This is the essence of this contract. The party of the first part agrees to deliver to the party of the second part such marketable title as the Chelsea Title Company will insure.  
 AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part heirs and assigns, may enter into and upon the said land and premises on the day of and from 20  
 thence take the rents, issues and profits to and their use  
 AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators, and they hereby agree to pay, upon failure to perform the same, the sum of which they hereby fix and settle as liquidated damages therefor.  
 IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals 30  
 the day and year first above mentioned.  
 Vivian B. Smith  
 Mary Allan Elwood  
 by P. L. Elwood, Atty.  
 SIGNED, SEALED AND DELIVERED,  
 In the presence of

ANSWER.

ATLANTIC COUNTY CIRCUIT COURT.

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MARY ALLEN ELWOOD, <i>Plaintiff,</i> v. 10 VIVIAN B. SMITH, <i>Defendant.</i>	}	Action at Law. Answer.
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The defendant by way of answer to the complaint in the above entitled cause says:

1. Defendant denies paragraph one of the complaint.
- 20 2. Defendant denies paragraph two of the complaint.
3. Defendant denies paragraph three of the complaint.
- 30 4. Defendant further answering the complaint of the plaintiff in the above entitled matter says: The alleged supposed contract was obtained by the plaintiff fraudulently, that there never was a delivery by the defendant to the plaintiff of the said contract and that the said supposed alleged contract purported to have been executed on the eleventh day of December, 1922, was repudiated by the defendant the following day, to wit, the twelfth day of December, 1922. The said plaintiff has sustained no damage.

WM. H. SMATHERS,  
*Attorney for Defendant.*

REPLY.

ATLANTIC COUNTY CIRCUIT COURT.

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MARY ALLEN ELWOOD, <i>Plaintiff,</i> v. VIVIAN B. SMITH, <i>Defendant.</i>	}	Action at Law. Reply.	10
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The plaintiff denies every allegation of the answer.

H. W. LEWIS,  
*Attorney of Plaintiff.*

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AMENDED ANSWER.

ATLANTIC COUNTY CIRCUIT COURT.

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MARY ALLEN ELWOOD, <i>Plaintiff,</i> v. VIVIAN B. SMITH, <i>Defendant.</i>	}	Action at Law. Amended Answer.	30
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The defendant by way of answer to the complaint in the above entitled cause says:

## FIRST DEFENSE.

1. Defendant denies paragraph one of the complaint.
2. Defendant denies paragraph two of the complaint.
- 10 3. Defendant denies paragraph three of the complaint.
4. Defendant further answering the complaint of the plaintiff in the above entitled matter says: The alleged supposed contract was obtained by the plaintiff fraudulently, that there never was a delivery by the defendant to the plaintiff of the said contract and that the said supposed alleged contract purported to have been executed on the eleventh day of December, 1922, was repudiated by the defendant 20 the following day, to wit, the twelfth day of December, 1922. The said plaintiff has sustained no damage.

## SECOND DEFENSE.

1. At the time alleged in paragraph one of the complainant's complaint, defendant was a married man and living with his wife; all of which was 30 known to plaintiff before the signing of the alleged agreement.
2. Defendant informed plaintiff before the signing of the alleged agreement, that defendant's wife might be unwilling and refuse to convey her dower interest in said property.

3. Defendant's said wife notified defendant on the same date as the alleged agreement, that she was unwilling and refused to, and has ever since refused to convey her dower interest in said premises.

4. Defendant, on the next day, December 12, 1922, notified plaintiff that defendant's wife was unwilling and refused to convey her dower interest in said premises, and that defendant was therefore unable 10 to convey to plaintiff, a marketable title, free from encumbrances, as provided by said agreement, and returned to plaintiff, all payments made by plaintiff to defendant on account of said alleged agreement.

5. Plaintiff has refused to accept a conveyance from defendant without defendant's wife's joining in the conveyance.

6. Said refusal by defendant's wife to convey her 20 interest in the premises, to plaintiff, was not through any fraud or connivance of the defendant.

7. Defendant, through no fault of his own, was unable to carry out the terms of said alleged agreement, and plaintiff has sustained no damage.

WM. H. SMATHERS,  
*Attorney for Defendant.*

I hereby consent to the making and filing of the 30 within amended answer, this 24th day of April, 1925, upon condition that reply heretofore filed shall be taken and deemed to deny each and every allegation herein contained.

H. W. LEWIS,  
*Attorney of Plaintiff.*

TESTIMONY.

ATLANTIC COUNTY CIRCUIT COURT.

10 MARY ALLEN ELWOOD,  
*Plaintiff,*  
 v.  
 VIVIAN B. SMITH,  
*Defendant.* } Action at Law.

The above-entitled case was tried June 25, 1926, before LAWRENCE, J., and no jury.

20

APPEARANCES:

H. W. LEWIS, Esq., for the plaintiff.  
WILLIAM H. SMATHERS, Esq., for the defendant.

30

PHILLIP ELWOOD, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Lewis:

Q. Mr. Elwood, where do you reside?

A. 107 South Nashville Avenue, Ventnor.

Q. Are you the husband of Mary Allen Elwood, the plaintiff?

A. Yes, sir.

Q. Have you a power of attorney to transact business for your wife?

A. Just the same as she can herself.

Q. I show you what purports to be a certified copy—

Mr. Smathers: I admit it.

10

Mr. Lewis: I offer it in evidence.

(The paper offered is received in evidence and marked as an exhibit for the plaintiff, P1.)

Q. Are you acquainted with Mr. Smith, the defendant?

A. Well, that was the first time I had met him.

Q. You have known him since then?

20

A. Oh, yes. I would know him by sight.

Q. Did you on December 11th—

A. 1922.

Q. On the 11th of December, 1923, have some business dealings with Mr. Smith involving this lot and the signing of the contract?

A. Yes, sir.

Q. I show you what purports to be a contract signed between Vivian B. Smith of Atlantic City, party of the first part, and Mary Allen Elwood of Ventnor City, New Jersey, the party of the second part—

30

Mr. Smathers: We admit the contract.

The Court: It may be marked.

(The paper is received in evidence and marked as an exhibit for the plaintiff, P2.)

Mr. Lewis: This contract provides for the sale of a lot at the southeast corner of Ventnor Parkway and Quincy Street in the City of Margate, County of Atlantic, State of New Jersey, for the sum of \$7,000. This contract is admitted in evidence.

10

Mr. Smathers: I will also call the Court's attention to the fact that it provides for no liquidated damages.

The Court: I will examine it. Proceed.

Q. Now, Mr. Elwood, what business are you in?

A. For the past ten years exclusively real estate.

Q. Buying and selling real estate?

20

A. Buying and selling, yes.

Q. Have you considerable experience in the buying and selling of real estate?

A. Well, in Atlantic City going back thirty years.

Q. Now, in respect to Margate and Ventnor, have you much experience in the buying of real estate?

A. Yes, both of them.

Q. Have you followed the real estate market?

A. Very closely; made it my business.

Q. At the time of this agreement to purchase, were you the owner of any real estate in the vicinity of this?

A. Why, I had bought a lot some time before that from Charles F. Wall at the corner of Rumson and the Parkway, a lot somewhat analagous to this, not so well located. I made several purchases in Margate up to that time.

Q. What did you do with this lot that you purchased from Mr. Wall?

Mr. Smathers: Objected to.

Mr. Lewis: I want to show by this man when he purchased this lot it was in his opinion the proper value, and also how he arrived at that. The purpose is to show—

10

The Court: You ask him what in his opinion the value was.

Q. What in your opinion, Mr. Elwood, was the value of this lot that you purchased from Mr. Smith at the time?

A. I thought that those lots were worth at that time \$10,000, from a study of the situation.

Q. This was in December, 1921?

A. 1922.

20

Q. Did you think that you were purchasing a bargain for that, for your wife at that time?

A. I felt that the lot was worth more than I was paying for it.

Q. Was that the inducing cause?

A. Absolutely.

Q. Can you give some concrete testimony as to what—wherein you based your opinion at that time?

A. Well, the lot of Wall that I bought I immediately resold for \$8,000. Again, it was resold long before settlement at \$8,750, and I took back a second mortgage on that lot. Those were some of the reasons that prompted me to follow this lot up.

30

Q. Now, during that winter, the winter of 1923, was there much activity in the real estate market?

A. I would say there was a good deal of activity. Margate was just coming on the carpet.

Q. Now what in your opinion is that lot worth today, from your study of the situation?

Mr. Smathers: Objected to.

The Court: How is that material? I think you must confine your testimony and evidence to the date when the deed was to be delivered.

10 Q. Now what in your opinion was that lot worth, say on the 11th of March?

A. At least \$10,000. They were being quoted then at that price, before the 11th of March.

Q. And you say you sold one previous to that for \$8,000 that was afterwards turned for \$8,750?

A. \$8,750.

Q. Was that lot as salable?

A. No; this is a choicer lot in the Parkway.

20 Cross-examination.

By Mr. Smathers:

Q. Mr. Elwood, you say that in 1922 those Parkway lots were worth \$10,000 in your opinion?

A. Yes.

Q. Do you know as a matter of fact that in 1922 Harry Earl sold one of these lots to John Risley for \$6,000?

30 A. No; I do not.

Q. Do you know as a matter of fact in 1922 Anna E. "Henn" and her husband sold one of those lots to John F. O'Neil for \$6,000?

A. How much prior to this time?

Q. July, 1922.

A. It would not happen at this time, though. This

was six months later, not with the activity that was transpiring in Margate.

Q. You said in 1922 in your opinion those lots were worth \$10,000:

A. If I said it, I will change it. I mean in December, 1922. I didn't mean six months prior to that.

Q. Now you say that in March, the 11th, 1923, when you were to obtain a deed to this property, these lots were worth at least \$10,000?

A. They were so quoted at the time.

10

Q. As a matter of fact, didn't you yourself buy one of these lots from the Margate Park Company on March 5, 1923, for \$7,000?

A. I made that contract—

Q. Yes or no. Did you?

A. Yes.

Mr. Smathers: That is all.

Re-direct examination.

20

By Mr. Lewis:

Q. This lot that you bought, was that as valuable a lot as this?

A. It was not, and the contract was made prior to this.

Q. The contract of sale was made prior to this?

A. The contract of sale was made prior to this and values were changing there every day.

Q. Although you took title, the contract was made prior to it?

30

A. I had resold it immediately. I took title and then took back the second mortgage. I resold it immediately for \$8,000.

Q. Was that sale made before the 11th of March; that is, your contract to resell?

A. Oh, yes.

(Witness excused.)

JOSEPH KEENER, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

10

Direct examination.

By Mr. Lewis:

Q. Mr. Keener, where do you reside?

A. 3605 Pacific Avenue.

Q. What business are you in?

A. I am a real estate broker.

Q. How long have you been in that business?

20

A. Since 1920.

Q. What part of the city or island are your activities limited to?

A. Usually all over the island, principally in the lower end of it.

Q. In Margate?

A. Yes.

Q. Have you followed the market values in Margate City since you have been in the brokerage business?

30

A. I have.

Q. Are you acquainted with this lot in question, lot 80 by 90, situated at the southeast corner of Ventnor Parkway and Quincy Street, Margate City?

A. I know the lot by location, yes.

Q. Do you consider it a very desirable lot?

A. Yes, sir.

Q. What is your opinion was the value of that lot as of December 11, 1922?

A. Well, my opinion—I imagine that is one of the choice lots, if not the choicest one on the Parkway, and I imagine at that time it was worth between nine and ten thousand dollars.

Q. Was there considerable activity in the real estate market in Margate City during the winter of 1923?

A. Yes, healthy activity.

10

Q. In your opinion did the market value of this lot increase from December 11th to March 11th, to any appreciable extent?

A. Well, it is hard to define the value of a lot on December 11, 1922, and I would say that the prices advanced right along every month at that time, from then on up to the following year.

Q. How much in your opinion was that lot worth as of March 11, 1923?

A. You are speaking about——

20

Q. This lot in question, southeast corner of Ventnor Parkway and Quincy Street, lot 80 by 90?

A. Well, I would say the lot in my opinion it is that the lot was cheap at \$10,000.

Cross-examination.

By Mr. Smathers:

Q. Mr. Keener, you are familiar with the Park- 30 way layout there; aren't you?

A. I am; yes, sir.

Q. There are certain Parkway lots, aren't there, on the Parkway, one each side of the Parkway?

A. Yes.

Q. And every lot is a corner lot; is it not?

A. It is.

Q. And every lot is 80 by 90?

A. That is right.

Q. So there is very little difference in the location of any of those lots; is that a fact?

A. No. I would say there is some lots that are more desirable than others.

Q. Why?

A. Well, the one reason is that I think the lots on the south side of the Parkway are more desirable because of the fact that most people who live in Margate have children, and the children don't have to cross a wide street to get to the beach.

Q. Well, in your opinion as a realtor, lots on one side of the street, the south side, or the other side, have brought the same thing in appraisal value; have they not?

A. But the ones that sell first are the ones that are on the most desirable side of the street.

Q. Now, you say you imagine that the value of this particular lot in 1922 was nine or ten thousand dollars?

A. That is my opinion.

Q. Well, did you make any sales for nine or ten thousand dollars to have based your imagination on, in 1922?

A. No, I did not.

The Court: Do you know of any sales of that character?

The Witness: At that time? Not at that time, no.

Re-direct examination.

By Mr. Lewis:

Q. Do you know whether or not Mr. Elwood sold a lot for \$8,000 about that time?

A. Yes, he did. I sold him one at Rumson and the Parkway.

The Court: How far away? 10

The Witness: One block.

The Court: Same side of the street?

The Witness: Same side of the street, for \$7,000.

Q. Was that lot afterwards sold?

A. Yes.

Mr. Smathers: Objected to. If your Honor please, Mr. Lewis is continually trying to inject into this case the fact that these lots starting in the fall of 1923, which had nothing to do with this suit, immediately took a roll and a tumble and kept going up. 20

Mr. Lewis: And have been ever since.

The Court: Well, of course the measure of damages, if there is any measure available under the evidence, must be confined to the date of the deed, March 11, 1922, in the immediate vicinity and of a like character. 30

Q. Do you know whether or not that lot was sold

before March 11th for an advance to \$8,000 profit—I mean \$8,000?

A. Mr. Elwood told me that he sold it.

Mr. Smathers: Objected to.

The Court: Strike it out. Elwood himself has testified already that he sold for \$8,000.

10 Re-cross examination.

By Mr. Smathers:

Q. You say you sold Mr. Elwood this lot for \$7,000, or similar lot, on the 5th day of March, 1923?

A. I sold him a lot. I don't remember the exact date.

Q. Well, was that on the 5th day of March, 1923?

A. I think it was.

20 Q. Was it a lot at Rumson Avenue and the Parkway?

A. Yes, sir.

Q. And at the time you sold him this lot for \$7,000 you say the market value was at least \$10,000?

A. In my opinion it was worth \$10,000, yes.

Q. You represented a seller, did you not?

A. I beg pardon?

Q. You represented the seller?

A. Yes, sir.

30 Q. Did you advise the seller that you thought, in your opinion, this lot you were selling to him for \$7,000 was at least worth \$10,000?

A. I represented the seller in conjunction with McCorkle's office. I didn't really have much to do with the seller in that instance.

Q. You didn't advise him in your opinion, that you thought it was worth \$10,000?

A. I don't believe I talked with the seller only through McCorkle's office. I know they got part of the commission.

Q. When Mr. Elwood sold the same lot the following day for \$8,000, you still think it was worth \$10,000?

A. I think so, yes.

By Mr. Lewis:

10

Q. That lot was sold to Mr. Elwood before March 15th, wasn't it—March 11th?

A. Yes, it was. It was sold—the contract was made before that time.

(Witness excused.)

ALFRED H. MILLMAN, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows: 20

Direct examination.

By Mr. Lewis:

Q. Where do you reside?

A. 1711 Atlantic Avenue.

Q. And what business are you in? 30

A. Real estate.

Q. How long have you been in the real estate business?

A. September, 1909.

Q. Do you confine your business to any particular part of the island?

A. Mostly Ventnor and Margate.

Q. In your line of business have you made a study of values in those vicinities, Ventnor and Margate?

A. I did.

Q. Do you know this lot in question, a lot 80 by 90, at the southeast corner of Ventnor Parkway and Quincy Street, in Margate City?

A. Yes, sir.

Q. What is the nature of that lot? What kind of lot is it?

10 A. Just what do you mean by "what kind?"

Q. Do you consider it a very desirable lot?

A. Very. Quincy Avenue is the most desirable Street. It is the widest street and the thoroughfare right straight across the island.

Q. Now, you heard that Mr. Elwood agreed to purchase this lot from Mr. Smith on the 11th of December, 1922, for \$7,000. In your opinion was that lot worth that sum or in excess of that sum at that time?

20 A. Well, my listings at that time called for the lower end of the island,—lots were running around seven thousand, seventy-five hundred. The further east you came the more valuable they got. I had them listed up there in that vicinity as high as twelve thousand, eleven thousand five hundred, eleven thousand, nine thousand five hundred.

Q. What in your opinion was the fair value of this lot as of March 11, 1923?

30 A. March 11, 1923, that lot was easily worth ten or eleven thousand dollars.

Q. How do you arrive at your estimate of that?

A. By listings of adjoining properties.

The Court: Did you take any sales in the immediate vicinity?

The Witness: I didn't have any sales until the

fall of 1923. I made two sales in the Parkway, lots down there.

Q. Were there rapid advances during the time—during the winter of 1923, in values there?

Mr. Smathers: Objected to. The winter of 1923 is a year after.

Q. Well, I mean 1922.

10

A. Yes; there was quite an activity down there. You could buy a lot one day and sell it the next, probably make five hundred to a thousand dollars on it.

· Cross-examination.

By Mr. Smathers:

Q. Mr. Millman, do you recollect whether I listed two lots with you at your office in June or July, Ventnor Parkway lots, at \$8,000 and \$8,500? 20

A. I don't remember the listing. I remember the sale that I made on the two lots, or the trade deal, rather for you.

Q. They weren't Parkway lots; they were side lots. But don't you remember the occasion when I was in your office and listed two Parkway lots with your office in June or July of 1923 for \$8,000 and \$8,500, at the corner of Thurlow—

A. Thurlow. I can recall a Thurlow Avenue lot. 30

Mr. Smathers: All right; that is all.

Re-direct examination.

By Mr. Lewis:

Q. Was that lot as valuable as this lot here in question?

A. It is not as desirable.

10 Q. If he listed that at \$8,500, do you think this lot here was more desirable on Quincy Avenue?

A. I do.

The Court: What was the size of the Judge's lot?

The Witness: Eighty by ninety, all the Parkway lots.

20 The Court: They are all uniform width and depth?

The Witness: Yes.

(Witness excused.)

30 THOMAS DAVIS, called as a witness on behalf of the plaintiff, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Lewis:

Q. Where do you reside?

A. 17 North Plaza.

Q. Whereabouts?

A. Atlantic City.

Q. Atlantic City or Ventnor?

A. Atlantic City, New Jersey.

Q. What business are you in, Mr. Davis?

A. Real estate.

Q. How long have you been in the real estate business?

A. Ten years.

Q. Are you acquainted with values in Margate City? 10

A. I am.

Q. Have you in your business as a real estate dealer had occasion to keep the fluctuation of values down there?

A. I had.

Q. Now, the lot in question at the southeast corner, Ventnor Parkway and Quincy Street, in Margate City, do you consider that a very desirable lot? 20

A. I do.

Q. In your opinion what was the value of that lot as of March 11, 1923?

A. About \$8,750 to \$9,000.

Q. Did you purchase or try to purchase a lot on the side street down there about that time?

Mr. Smathers: Objected to.

The Court: You may reframe your question. 30  
Upon what is your knowledge based as to values there?

Q. Upon what is your knowledge based? How would you arrive at your conclusion?

A. Well, I have tried to buy several parcels over there. I had plots on Mansfield Avenue, 6500, but

not as desirable as Parkway and Quincy; and I offered—well, it does not compare anywhere near the Quincy lot—I offered forty-five hundred and five thousand for different lots in that section on the side streets, 50-foot lots.

Q. You say you could not buy this lot that you tried to on Mansfield Avenue for sixty-five?

A. I could not.

Q. Was that as valuable in your opinion as this  
10 lot?

A. Yes.

Q. If that lot was worth sixty-five, what do you state in your opinion this lot was worth?

A. \$8,750 to \$9,000, I think that lot was worth in March, 1923.

Q. And you think that is a conservative estimate of value?

A. I think it is a fair estimate, fair value of that  
20 lot at that time.

Cross-examination.

By Mr. Smathers:

Q. Did you try to buy this Mansfield Avenue lot at \$6500 in 1922?

A. No, sir; 1923.

Q. What time in 1923?

A. I think it was August or something like—in  
30 the month of July. I recall that.

Q. Do you know as a fact, being one of the realtors here in Atlantic City, that in December, 1922, you could have bought all the Parkway corner lots you wanted for \$7,000?

A. I do not, sir.

Q. You don't know that?

A. No.

Q. Did you ever buy one?

A. No; I didn't, sir.

Q. Did you ever sell one?

A. No, sir.

(Witness excused.)

PLAINTIFF RESTS.

DEFENDANT'S CASE.

VIVIAN SMITH, the defendant, called as a witness in his own behalf, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Smathers:

Q. Mr. Smith, you are the defendant in this case?

A. Yes, sir.

Q. And in December, 1922, you entered into a contract to sell a lot on the Parkway in Margate to the plaintiff?

A. No, I didn't. I would not admit that.

Q. You signed that contract, did you not?

A. That is my signature; yes, sir.

Q. You signed a contract. And after you signed  
30 that contract, did you take it home to procure your wife's signature?

A. Yes, sir.

Q. Did you ask her to sign it?

A. I did.

Q. Did she refuse to sign it?

A. She did.

Q. And the following day what did you do?

A. Notified Mr. Elwood to that effect and returned his check.

Q. At the time the agreement was executed did you have any conversation with Mr. Elwood in respect to your wife's signature?

A. Yes, sir. I told him that my wife had always wanted to keep this lot for building a home on it and I didn't believe that she would sign it. In fact, for some time when Mr. Elwood first came in I told him the lot was not for sale, but after a great deal of persuasion I said that I would go through with this agreement if Mrs. Smith would sign the agreement. Mr. Elwood said that he would go out and get some agreements and have them made up, and brought them to my office, brought them back into my office for me to sign.

20 The Court: What is your business?

The Witness: Architect. I did attach my signature to this agreement and at the same time I told him that I would take the agreements down to my home to have Mrs. Smith sign them if she would. I said that, "I don't believe she will," and he picked one of the agreements off my desk and stuck it in his pocket. He said, "I will take a chance on Mrs. Smith signing," or "I will take a chance on the agreement without her signature." I said, "Well, you are taking a chance because my understanding is that the law requires both signatures, and at least she has to consent to the sale of this land."

30 Q. Did you exercise any influence over your wife in an effort to —

The Court: Pardon me a moment. I understand

that this phase of the matter has been in the Court of Chancery and is *res adjudicata*.

Mr. Smathers: Yes, sir.

The Court: So far as the refusal of the wife to execute the contract is concerned.

Mr. Smathers: Yes, sir.

The Court: The Court of Chancery found there was a valid excuse on her part.

Mr. Smathers: Yes, sir.

The Court: Now, if you put in that record I will regard it as a fact found by the Court of Chancery. Of course, we are bound by it.

Mr. Smathers: I will put the conclusions of the Chancellor in the record wherein he found there was no deceit, no fraud, no connivance practiced on the part of the plaintiffs.

Mr. Lewis: I have no objection to the conclusions of the Vice-Chancellor Ingersoll going in the record, as far as that is concerned; but I claim in this case we are not bound by any findings that he might make upon this question of the wife's signing this agreement. That opinion is not set up in his answer at all, and in order to be *res adjudicata*, in order to be estopped by it, the courts have held that it must be especially pleaded in the answer.

The Court: So far as that is concerned, in order to get at the real issues in the case, I would allow an amendment to the answer, and then if you claim sur-

prise, I would allow you time to get over your surprise.

Mr. Smathers: Our answer to that is that he failed to set up fraud and deceit in his complaint, and how could we answer it unless he set it up?

Mr. Lewis: That is a matter of defense.

10 Q. (Repeated by the stenographer.) Did you exercise any influence over your wife in an effort to have her refuse to sign the deed?

A. No, sir.

Cross-examination.

By Mr. Lewis:

20 Q. Mr. Smith, you say that this agreement was taken by you to your wife to sign?

A. A copy of that agreement; yes, sir. That is a copy of the agreement.

Q. Was there any provision in this agreement for your wife's signature? Look at it.

A. I am not enough of an attorney to answer that question.

Q. Does anything state that "Vivian M. Smith and so-and-so, his wife, parties of the first part —"

30 A. No, sir. I didn't make the agreement up and had nothing to do with the legal terms of the agreement. I stated very thoroughly at the time and so Mr. Elwood could understand it, and he did.

Q. You kept one of the agreements, didn't you?

A. I never delivered that to Mr. Elwood. As a matter of fact, he took it off my desk against my own wish.

Q. And you took the other one?

A. I took the papers. I took two papers down to have them signed.

Q. Now, your wife never before objected to signing any deed or any agreement that you made; did she?

A. I never had any piece of property before that my wife was particularly interested in.

Q. Now, you conveyed a property shortly after that to Peter McGuire; didn't you? 10

A. I conveyed several lots after that.

Q. Your wife signed that deed; did she not?

A. She did.

Q. You conveyed another one soon thereafter to the Mitchell Realty Company?

A. Yes, sir.

Q. Did your wife refuse to sign that?

A. No, sir.

Q. You conveyed one shortly thereafter to Robert B. Williams; did you not? 11

A. That was not my lot. I bought the lot for him and conveyed it.

Q. But the wife signed the deed without any hesitation; didn't she?

A. Yes, certainly.

Q. You conveyed another one to Christopher Clift?

A. That was a similar thing. I bought the lot for him, paid the money and took a mortgage; made no money or anything out of it. 12

Q. Your wife signed that deed?

A. Yes.

Q. You conveyed a lot shortly thereafter to George B. "Einway;" did you not?

A. Yes, sir.

Q. Your wife signed that?

A. Yes.

- Q. Did she make any objection?  
 A. No, sir.  
 Q. You conveyed another to Stella M. Cochran; did you not?  
 A. Yes, sir.  
 Q. Did your wife sign that?  
 A. Yes, sir.  
 Q. Make any objection?  
 A. No, sir.  
 10 Q. You conveyed another soon thereafter to the "Weinoker" Realty Company; did you not?  
 A. I don't remember that.  
 Q. Do you remember conveying one to Louis Macklin?  
 A. About a year ago.  
 Q. Too? Did your wife sign that?  
 A. Yes.  
 Q. Did she make any objections to signing it?  
 A. No, sir.  
 20 Q. Before that time, you conveyed a lot to James Keanes; did you not?  
 A. What was the name?  
 Q. Keanes; James Keanes?  
 A. I don't remember.

Mr. Smathers: We will admit, Mr. Lewis, that he conveyed hundreds of properties and his wife joined in all deeds with him, to save time.

- 30 Q. Do you remember making a conveyance to Joseph M. Gallagher?  
 A. No; I don't remember that; probably did.  
 Q. In April, 1922?  
 A. I don't remember.  
 Q. You don't remember?  
 A. No; I don't remember.

- Q. Do you remember conveying to Adrian W. Phillips, May 8, 1922?  
 A. Yes, sir.  
 Q. Did your wife sign that?  
 A. Yes, sir.  
 Q. Did she make any objections to signing it?  
 A. No.  
 Q. Did you make a conveyance in July, 1922, to William M. Ritter?  
 A. Yes. 40  
 Q. Did your wife sign that deed?  
 A. Yes, sir.  
 Q. Did she interpose any objection?  
 A. No, sir.  
 Q. On August 10, 1922, you made a conveyance to Leonard J. Dietrich; did you not?  
 A. Yes, sir.  
 Q. Did your wife sign that deed?  
 A. Yes, sir.  
 Q. Now, Mr. Smith, you have probably made fifty 20 or one hundred conveyances, have you not, in your line of business in the past few years?  
 A. Probably. I don't know how many.  
 Q. And of all these conveyances your wife joined every one, didn't she, except this one?  
 A. Yes. She was never interested in any other one but this one, never bought any other one for a home.  
 Q. Well, didn't it occur to you quite probable that she should raise an objection to this one particular lot when she signed without any hesitation all the 30 numerous other lots that you conveyed?  
 A. No—it never entered my mind that she would refuse to sign any other lot except this one, which I explained to Mr. Elwood at the time.  
 Q. Now, let me ask you a question right now. You are willing to sell that lot today if you get your price?

A. I can't sell the lot; no, sir. I have had several offers —

Q. Now, wait a minute —

A. I have had several people who offered to buy the lot.

Q. Now, as a matter of fact, hasn't there been a sign "For Sale" on that lot since this affair with Mrs. Elwood?

A. Yes, sir. Some realtor put it on without my  
10 knowledge, and I went down there and took it off with my own hands. I notified —

Q. In fact, there was a sign?

A. I notified the agent to take it off, and he didn't.

Q. Now, you happened to think about this case?

A. No, I didn't.

Q. The dispute you put up in this case—wasn't that the cause that prompted you to ask this agent to take the sign off?

A. Positively not. The agent called me and asked  
20 me if the lot was for sale, over the 'phone. I said no, and he deliberately went and put a sign on it. I called him and asked him to take it off.

Q. Were you advised by counsel to have that sign taken off?

A. No, sir; absolutely no.

Q. But there was a sign "For Sale" on it?

A. Sure. There are three or four signs on all those lots down there. You can't keep the real estate agents away from them, there are so many  
30 real estate agents and so many signs. You never know how many are going to be on your property.

Q. Now, didn't it occur to you very strange that your wife should refuse to go on with this agreement after she had never hesitated before?

A. I have already stated that it did not. I have already stated that I told Mr. Elwood —

Q. She told —

A. Will you let me answer? I have already stated that I told Mr. Elwood the minute he came in the office that that lot was not for sale; that I was positive my wife would not agree to a transfer of this lot, and he persuaded me to at least make the attempt.

Q. You are quite a successful business man; are you not?

A. Well, not always. Sometimes people get the  
10 best of me.

Q. You have a pretty strong will; haven't you?

A. I suppose the average will power.

Q. Well, why didn't you tell Mr. Elwood, if that were so, that you would consult with your wife and let him know the next day, if you had any doubt about your ability?

A. He didn't seem to want to wait for any consultation. He seemed very anxious to get his hands on that agreement. I asked him to wait. I asked Mr. Elwood to wait. I said, "Please don't take that  
20 agreement because I want to take them home and have my wife sign them. They are no good without her signature." Those are the very words I said to him, and he admitted it in the other case that came up before.

Q. You read the agreement over before you signed it, of course?

A. I read the contents.

Q. You were familiar with what it said?

A. I read the contents and I was satisfied with the  
30 contents and told him so.

Q. And you saw that there was no provision in there for your wife—did you tell him the name of your wife?

A. How is that?

Q. Did you tell him the name of your wife?

A. I told him that she had to sign.

Q. Did you tell him the name of your wife?

A. No, I did not.

Q. Where your wife's name was to be filled in or anything?

A. No, sir; I never saw an agreement with her name filled in before. Out of all these transfers that were named I never had an agreement with my wife's name on there.

10 Q. You never asked her to sign any?

A. No.

Q. You took it as a matter of course with all these other transactions?

A. Yes; I took it as a matter of course that the law required her signature on the agreement.

Q. You say you never got it in these other agreements that were made for sale?

A. I always got her name on the agreements.

Q. On the deeds?

A. On the agreements, yes.

20 Q. I thought you said—that you just stated —

A. You asked if she ever refused to sign and I said no; but she always did sign it.

(Witness excused.)

JOSEPHINE SMITH, called as a witness on behalf of the defendant, being sworn, was examined and testified as follows:

30

Direct examination.

By Mr. Smathers:

Q. You are the wife of Vivian D. Smith, the defendant in this case?

A. I am.

Q. Did you refuse to sign the agreement to Elwood for the Parkway lot in Margate?

A. I did.

Q. Did Mr. Smith have anything to do in influencing you to refuse to sign that agreement or the deed?

A. He did not.

Cross-examination.

10

By Mr. Lewis:

Q. Mrs. Smith, you signed a great many deeds and agreements for your husband; have you not?

A. I have.

Q. Did you ever refuse on any other occasion to sign a deed?

A. I did not.

Q. Now, Mrs. Smith, what actuated you to refuse to sign this particular conveyance when you admit 20 having signed numerable other deeds?

A. Why, I wanted to build a home on that particular lot.

Q. That was in 1922; wasn't it?

A. I think that was the date; I am not sure.

Q. Have you built your home there?

A. We have not.

Q. When your husband came to you to sign a deed, did you ever question it generally—anything?

A. No.

Q. Did it as a matter of course, at his request? 30

A. Usually when I found out what it was about, where the lot was, the position of it.

Q. In other words, you have always been a very dutiful wife in doing whatever your husband asked you to do in all those real estate transactions, have you not?

A. Yes, in signing agreements.

Q. Except on this one particular occasion?

A. Except on this one.

Q. And you have signed any number of deeds and agreements for your husband; have you not?

A. It seems a great deal, yes.

Q. And this is the only one you ever refused?

A. Yes, sir.

10 Q. You say you want it for a home?

A. I do.

Q. And you have not built on it yet?

A. I have not.

Q. Do you expect to built on it?

A. Some day.

Re-direct examination.

By Mr. Smathers:

20 Q. As a matter of fact, you have the plans already drawn to build on this lot after this litigation; haven't you?

A. Yes, sir; we have.

Re-cross examination.

By Mr. Lewis:

30 Q. Why are you waiting for this litigation? Why don't you build now?

Mr. Smathers: Maybe if she had you for a lawyer instead of me she would.

Mr. Lewis: That is all.

(Witness excused.)

GORDON WILLIAMS, called as a witness on behalf of the defendant, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Smathers:

Q. Mr. Williams, you are in business as what? 10

A. Real estate broker.

Q. And how long have you been in the real estate business?

A. Oh, seven and a half years.

Q. And you started your career in the very active real estate business in Margate, did you not?

A. Yes, sir.

The Court: You specialize in Margate?

The Witness: I specialize in Margate and Longport. 20

Q. You are the party who put Margate's activity on the map down there in 1922 and 1923; aren't you?

A. I helped to.

Q. And during that time you probably sold fifty lots to any other realtor's one in Margate; did you not?

A. That is right.

Q. What in your opinion would be the fair market value of this particular Parkway lot, Quincy and the Parkway, as of March 11, 1923? 30

A. \$6000.

Cross-examination.

By Mr. Lewis:

Q. Mr. Williams, according to that, Mr. Elwood got stuck in this agreement, in your opinion?

A. A man is never stuck in any transaction.

Q. What?

A. A man is never stuck in any transaction until  
10 he can't get out of it.

Q. Well, when he agreed to pay \$7000 the December before, in your opinion he was paying a good deal more than it was worth?

A. He was paying above the market value.

Q. And three months later instead of being any increment, it was worth less than he agreed to pay, in your opinion?

A. Yes.

20 The Court: On what do you base your opinion?

The Witness: Why, on sales that I have made.

The Court: At or about that time?

The Witness: All during the year of 1922 and 1923.

Q. Do you know any sales that were made for  
30 \$8000 and upwards on the Ventnor Parkway in 1922 and 1923?

A. I made one sale of \$8000 in March.

Q. What year?

A. 1923.

Q. You made a sale—now, if you made that sale of \$8000 in March—this contract—how, then, can you testify this was worth only six?

A. I did answer that question before. When I say the value of six thousand dollars, that was made as of December, not of March.

Q. He was asking you as of March.

A. Well, I misinterpreted the question. As of December, 1922. That is what I am basing that value on. In March, 1923, I made a sale of \$8000.

Q. What is your opinion of the value of this particular lot in March, 1923?

A. \$8000. 10

Re-direct examination.

By Mr. Smathers:

Q. You know that Mr. Elwood himself bought one of the same lots only two blocks away for \$7000, in March, 1923; did he not?

A. I believe he bought one — 20

The Court: Do you know of your own knowledge, you are asked?

The Witness: Only hearsay.

Mr. Lewis: I object.

Q. Well, you heard him admit it here this morning?

A. I heard him admit it here this morning. 30

(Witness excused.)

LOUIS G. McCORKLE, called as a witness on behalf of the defendant, being sworn, was examined and testified as follows:

Direct examination.

By Mr. Smathers:

- 10 Q. You are in the real estate business?  
 A. I do some real estate business.  
 Q. You own a home and live next to this lot in controversy, do you not?  
 A. I do.  
 Q. You are the tax assessor of Margate City?  
 A. I am.  
 Q. You and Mr. Smith and his wife and your wife are very friendly; are you not?  
 A. Yes.
- 20 Q. Mr. Smith was your architect and drew the plans for your home?  
 A. That is correct.  
 Q. Do you know whether or not he bought this lot next door for purposes of building a home of his own on? Was that ever discussed in your family?
- Mr. Lewis: I object to that.
- Mr. Smathers: All right.
- 30 The Court: It is not passed.
- Q. Mr. McCorkle, in your opinion what would you say was the value of this lot in controversy as of March 11, 1923?  
 A. Not more than \$7500.

Cross-examination.

By Mr. Lewis:

Q. You say in your opinion you think \$7500 was a fair price for it in March, 1923?

A. Yes, market price.

Q. You would not take that for yours; would you?

Mr. Smathers: Objected to.

A. I would not like to throw the house in with it.

Mr. Smathers: He has a \$30,000 home on his.

Q. Did you have your \$30,000 on your lot in March, 1923?

A. Yes.

Q. A lot then right next door to your \$30,000 home, 20 in your opinion, is pretty cheap at \$7500; isn't it?

A. My house didn't cost \$30,000.

Q. Well, you have a very magnificent home down there?

A. Well, I think it is a very simple home myself. It is very well located.

(Witness excused.)

DEFENSE RESTS.

30

PHILLIP ELWOOD, recalled in rebuttal.

By Mr. Lewis:

Q. Mr. Elwood, Mr. Smith testified that on the day following he notified you that he was not going on with the contract. Now, is that true?

A. No, sir.

10 Q. You also heard him testify that he told you at the time that these agreements must be taken home for his wife's signature —

A. No, sir.

Q. Is that true?

A. No, sir.

Q. He testified that you took this, anyhow, away from him —

A. It needs stronger language—no, sir. I am in public here.

20 Q. Did you attempt, Mr. Elwood, to carry out this agreement for settlement on the 11th of March?

A. I did.

Q. At the Chelsea Title Company as provided?

A. Yes, sir.

The Court: Were you willing to take this title subject to his wife's estate?

The Witness: Oh, no. I wanted what the contract  
30 called for, Judge, a marketable title.

The Court: You expected a marketable title which would include the wife's estate?

The Witness: Yes, sir.

Mr. Smathers: It is admitted that we refused to make settlement because we couldn't.

Mr. Lewis: Cross-examine.

Cross-examination.

By Mr. Smathers:

Q. He mailed the check back to you; did he not? 10

A. I don't think he mailed it personally. I think it came through a lawyer. My memory on that point is a little vague.

Q. It was sent back to you?

A. Yes.

Q. You say positively there was no talk about Mrs. Smith or anything like taking it home and getting her signature?

A. May I recite my side here —

Q. No, answer my question. 20

A. There was no talk.

Q. No talk about Mrs. Smith?

A. No, sir.

Q. Didn't you admit before Vice-Chancellor Ingersoll in answer to the Court's question, "My recollection is, Judge, that when he turned the contract over to me, he said: 'This will raise some rumpus at home' "?

A. Yes, at the finish.

Mr. Smathers: That is all. 30

The Witness: At the very finish, and he gave me the contract. I didn't take it up from his desk.

Re-direct examination.

By Mr. Lewis:

Q. That was when, after the contract of sale was complete?

A. That was after the contract of sale was complete.

10 Mr. Smathers: Wait a minute, Mr. Lewis.

By Mr. Smathers:

Q. Then you were mistaken when you just testified that there was nothing said about Mrs. Smith?

A. I was going to qualify it and say at the finish, as he stood up and handed me the contract, he said, "This will create ructions at home." Up to that minute I thought the man was a widower.

20 The Court: Sit down now and don't be so emphatic. There is no occasion for any emphasis. There is no jury here at all.

The Witness: I beg your pardon.

Q. Then there was some talk about Mrs. Smith?

A. At the very finish, as I testified before the Vice-Chancellor.

30 Mr. Smathers: That is all.

(Witness excused.)

PLAINTIFF RESTS.

DEFENDANT RESTS.

Plaintiff requests the Court to find, viz:

(The requests are enumerated and stated in the notice of appeal hereof.)

(The plaintiff's requests to find were refused, whereupon the plaintiff prayed exceptions which were allowed.)

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FINDING OF FACTS AND RULE FOR JUDGMENT.

ATLANTIC COUNTY CIRCUIT COURT.

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MARY ALLEN ELWOOD,  
Plaintiff,

v.

VIVIAN B. SMITH,  
Defendant.

Action at Law.  
Finding of Facts and  
Rule for Judgment.

20

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This action was tried before the Court, without a jury, by consent of the parties, and is decided on the law and the facts. 30

The following facts are found:

1. On December 11, 1922, plaintiff, by her husband, Phillip L. Elwood, as attorney, entered into an agreement in writing (offered in evidence) with de-

defendant whereby she agreed to purchase and the latter undertook to convey to her by deed of warranty on March 11, 1923, a lot of land described therein, the title to which was and is in defendant. His wife did not join in the contract for sale and knew nothing of the proposal until informed of it after her husband had signed the agreement. On receiving knowledge of Mr. Smith's action, she announced that she would not consent to the sale for  
 10 the reason that the lot had originally been purchased and was being held as the site for a family dwelling later to be erected thereon. She adhered to this refusal and plaintiff declined to accept the title without Mrs. Smith joining in the execution of the deed or, in the alternative, subject to her inchoate estate in dower.

2. The negotiations in behalf of plaintiff were carried on by her husband, Phillip L. Elwood. Mrs.  
 20 Elwood at no time appearing personally in the transaction. At the time of the execution of the contract, Mr. Elwood was informed that Mrs. Smith's consent would be necessary. She was not present and Mr. Smith testified that the agreement was to be subject to his wife's consent, while Mr. Elwood said the only reference to the subject was that Mr. Smith had said there would be a "rumpus" on his wife learning of the proposal. Defendant on ascertaining that his wife would not join in the execution of the deed  
 30 communicated the fact to Mr. Elwood on or about December 14, 1922, and caused plaintiff's check, signed by Mr. Elwood as her attorney, for \$1000.00, intended as initial payment on the purchase price, which check had not been certified or cashed, to be returned, on January 5, 1923. Mr. Elwood returned the check to defendant's attorney, and the latter, on January 9, 1923, sent it back to Mr. Elwood, by

whom it was produced at the trial. (The correspondence, including the check, was put in evidence.)

3. On March 10, 1924, plaintiff brought this action to recover of defendant damages for a loss representing the difference between the agreed purchase price and an alleged enhancement in value of the lot on March 11, 1923, when the deed was to be delivered. No liquidated damages were stipulated in  
 10 the contract.

4. No fraud or deceit is charged in the complaint and none was proven at the trial. Nor was there any proof of any expense incurred by plaintiff in examining the title, making a survey or any other outlay; while no claim for a deposit of any part of the purchase price was made because the check intended for that purpose had not been used or retained by defendant but returned to Mr. Elwood before the suit  
 20 was instituted.

5. The defense set up was that defendant's signature to the agreement for sale was obtained on condition that his wife consented to the sale and joined in the execution of the deed; that there was to be no consummated delivery of the agreement until such consent was obtained; that she did refuse; that such refusal was voluntary and bona fide, and that Mr. Elwood, representing the plaintiff, was promptly notified and the check returned. The evidence offered disclosed that there was no fraud, deceit, con-  
 30 vivance or procuring involved in Mrs. Smith's conduct.

6. The evidence as to the increased value of the lot of land in question between the date of the agreement for sale and that stipulated for the delivery of

the deed was of uncertain character and widely divergent, but indicated an average increase of \$750.00.

RULING.

(a) The action is not brought within the purview of the Act of 1915 (P. L. p. 316) for the reason that while defendant was unable to carry out the agreement for sale, no claim is made of any expense incurred by plaintiff in examining the title or for survey, nor was any deposit on account of purchase price made and retained by defendant.

(b) Since no fraud or deceit is charged, an action for damages in this respect will not lie.

(c) Moreover, inasmuch as plaintiff declined to accept the title unless defendant's wife joined in the execution of the deed contemplated by the agreement for sale which in turn is found to have been conditional on her consent, of which fact plaintiff's husband, acting for her, had knowledge at the time of the execution of such agreement, the present action cannot be maintained.

RULE FOR JUDGMENT.

Judgment of no cause of action in favor of defendant and against the plaintiff may be entered. No costs will be allowed.

PHILLIP V. LAWRENCE,  
*Judge.*

(Exhibit P2 is the agreement whereof a copy is set forth in the schedule of the complaint.)

OPINION.

(Filed Jan. 18, 1928.)

NEW JERSEY SUPREME COURT.

No. 113, October Term, 1927.

10

MARY ALLEN ELWOOD,  
*Plaintiff-Appellant,*  
v.  
VIVIAN B. SMITH,  
*Defendant-Respondent.*

Submitted October 14, 1927; decided January 1928. , 20

Appeal from Atlantic Circuit Court.

Before JUSTICES PARKER, MINTURN and CAMPBELL. 30

For the plaintiff-appellant, H. W. LEWIS.  
For the defendant-respondent, WILLIAM H. SMATHERS.

The opinion of the Court was delivered by PARKER, J.:

This is a suit for damages brought by the vendee of real estate under a written contract signed by the vendor, and the action was framed as brought under the Act of 1915, P. L. p. 316, and particularly the proviso that the Act shall not limit the recovery where the purchaser seeks to recover for the deceit or fraud of the vendor. Judge Lawrence, who tried the case in the Circuit Court without a jury, held that no deceit or fraud had been shown and that no damages by way of the recovery of the down-money or the expenses of examining the title or survey had been made to appear and, in view of these facts, awarded a judgment for the defendant. He made a specific statement of facts in writing and appended the following rulings:

“(a) The action is not brought within the purview of the Act of 1915 (P. L. p. 316) for the reason that while defendant was unable to carry out the agreement for sale, no claim is made of any expense incurred by plaintiff in examining the title or for survey, nor was any deposit on account of purchase price made and retained by defendant.

“(b) Since no fraud or deceit is charged, an action for damages in this respect will not lie.

“(c) Moreover, inasmuch as plaintiff declined to accept the title unless defendant's wife joined in the execution of the deed contemplated by the agreement for sale which in turn is found to have been conditional on her consent, of which fact plaintiff's husband, acting for her, had knowledge at the time of the execution of such agreement, the present action cannot be maintained.”

The circumstances of the case are about as follows: The plaintiff's husband and the defendant

met with reference to the sale of the property and a written contract was drawn in which the defendant's wife is not named as a party and which she did not sign. The contract was apparently on a printed form containing a clause with relation to liquidated damages in case of failure to perform, but the amount of the liquidated damages was left blank and, consequently, the clause is nugatory. At the time of the negotiations the defendant, who had the contract on his desk, signed in duplicate with his own signature, and warned the plaintiff that he thought Mrs. Smith would refuse to sign the contract, but the plaintiff took one of the copies and said he would take the chances of that. The defendant's wife did refuse to sign, and plaintiff raised an issue of fraud on this subject, which was found adversely by the trial Judge, and in that finding we fully concur. There was no search or survey made; the check for the down-money handed by the plaintiff to the defendant was returned by the defendant, the plaintiff sent it back to him, and the defendant again sent it back to the plaintiff, who, at the time of trial, still had it, if it had not been destroyed.

The plaintiff submitted a number of written requests for findings, but does not discuss them specifically in his brief. He makes the two following points: First, that as a Court question, or as a matter of law, fraud and deceit on the part of the defendant was at issue in the case and proven. We may concede for the purpose of argument that it was at issue in the case, although it was not alleged in the complaint. Assuming this, the facts were found by the trial Judge against the plaintiff, and his finding is impregnable here unless it appears that there was no evidence to support it. We think there was ample evidence.

Secondly, the plaintiff attacks the third finding of the trial Judge to the effect that the delivery of the contract to the plaintiff's husband (and it is admitted on the record that there was a contract) was conditional upon obtaining the signature of the defendant's wife, is erroneous and particularly that the testimony tending to show that such delivery was conditional was incompetent. We incline to think that this point was well taken, for if there was a delivery of the paper to the plaintiff (and the "contract" was expressly admitted on the trial), we fail to see how it could, under the rules of evidence as obtaining in this State, be tied up to any conditions between the plaintiff and the defendant which were a matter of parol. 21 C. J. 874; Black v. Shreve, 13 N. J. Eq., 455; Ordinary v. Thatcher, 41 N. J. L. 403; Lake v. Weaver, 76 N. J. Eq. 280, 288.

It follows, therefore, that there was a valid contract, between the plaintiff and defendant which the defendant failed to perform. It was an agreement to convey a good and sufficient title, and the plaintiff lawfully repudiated the defendant's deed as tendered because it did not cover the inchoate dower of the defendant's wife. Hence, there was a technical breach by the defendant and a technical right of recovery on the part of the plaintiff for that breach.

The judgment for the defendant, therefore, seems to be erroneous, as the plaintiff was entitled to recover nominal damages in the absence of any proof of substantial damages. But this does not require that the case be sent back for a retrial. The findings of Judge Lawrence are full and complete, and have all the effect of a special finding by a jury. Consequently, this Court may enter its own judgment in the premises. *Smith v. Ocean Castle*, 59 N. J. L. 198; *National Bank v. Berrall*, 70 Id. 757; *Sullivan v. Visconti*, 68 Id. 543, 551; *Scheinman v. Bloch*,

97 Id. 408, affirmed 98 Id. 571. The judgment will, accordingly, be reversed and final judgment entered in this Court in favor of the plaintiff and against the defendant for the sum of six cents, without costs.

It may be well to add that, on the theory that at the interview the plaintiff's husband acted as agent of his wife, it may have been proper for the trial Judge to hold that the contract was placed in the hands of the plaintiff's husband as such agent in escrow and not to be delivered until the defendant's wife had signed it. *Bowman v. Brown*, 87 N. J. Eq. 47, affirmed, p. 363. In such a situation, we should be controlled by the finding of the trial Judge that such conditions were imposed and that the plaintiff's husband had no right to deliver the contract to the plaintiff; and this would result in the affirmance of the judgment below. We have preferred to give the plaintiff the benefit of the strict rule relating to judicial admissions, and to regard the admission of the making of the contract as an admission of unqualified delivery. The practical result is the same, except that upon the judgment as now rendered, no costs will be allowed either party, whereas they would be allowed to the defendant in case of an affirmance.

RULE FOR REVERSAL OF JUDGMENT.

NEW JERSEY SUPREME COURT.

10 MARY ALLEN ELWOOD, }  
 Plaintiff-Appellant, } On Appeal.  
 v. } Rule for Reversal of  
 VIVIAN B. SMITH, } Judgment.  
 Defendant-Appellee. }

20 This cause having been duly argued at the October Term of this Court by H. W. Lewis, Esquire, of counsel with the plaintiff-appellant, and William H. Smathers, Esquire, of counsel with the defendant-appellee, and the Court having considered the same, and finding cause for reversal of the judgment as rendered in the Atlantic County Circuit Court:

It is thereupon ordered and adjudged that the judgment of the Atlantic County Circuit Court be and the same is hereby reversed, and that judgment for nominal damages be and the same is hereby entered for the plaintiff-appellant and against the defendant-appellee without costs.

30 On motion of  
 H. W. LEWIS,  
 Attorney of Plaintiff-Appellant.  
 Judgment entered March 26, 1928.

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

MARY ALLEN ELWOOD, }  
 Plaintiff-Appellant, } On Appeal. 10  
 v. } Notice of Appeal.  
 VIVIAN B. SMITH, }  
 Defendant-Appellee. }

To William H. Smathers, Esquire, Attorney of Defendant-Appellee:

20 Take notice that the plaintiff-appellant appeals from so much of the judgment entered in the New Jersey Supreme Court as allows nominal damages only and without costs instead of substantial damages with costs, on the grounds, viz.:

1. There was proof at the trial thereof of actual damages sustained by the plaintiff.

30 2. The trial Judge found as a matter of fact that "the evidence as to the increased value of the lot of land in question between the date of the agreement of sale and that stipulated for the delivery of the deed was of uncertain character and widely divergent, but indicated an average increase of \$750,000."

Yours, &c.,

H. W. LEWIS,  
 Attorney of Plaintiff-Appellant.

[ENDORSED.]

Due and legal service of the within  
notice of appeal hereby acknowledged  
this 7th day of April, A. D. 1928.

Wm. H. Smathers,  
Attorney of Defendant-  
Appellee.

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103 MAY. T. 1928

## New Jersey Court of Errors and Appeals

---

MARY ALLAN ELWOOD,  
*Plaintiff-Appellant,*

v.  
VIVIAN B. SMITH,  
*Defendant-Respondent.*

---

ACTION AT LAW.

---

ON APPEAL.

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BRIEF OF PLAINTIFF-APPELLANT.

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STATEMENT.

This is an action at law to recover upon a breach  
of contract for sale of land. (Case, pp. 5, 6, 7.)

Shortly after the execution of the contract, vendor  
informed vendee that he would not go on with it,  
alleging as a reason that his wife was opposed.  
(Case, p. 30, l. 2, &c.)

Vendee recognizing her bargain, attempted to  
carry out the contract, and upon its breach by de-  
fendant, brought this suit for damages.

The case was tried without a jury, and the Court after refusing to consider the plaintiff's requests as enumerated in the notice of appeal (Case, pp. 1, 2 and 49), found that no fraud or deceit was alleged or shown (Case, pp. 51, 11 and 52), as well as that the agreement of sale was conditioned upon the consent of defendant's wife (Case, pp. 52, 30), whereupon a rule for judgment was entered in favor of the defendant, wherefrom the plaintiff appeals.

While the Supreme Court on appeal held that the judgment rendered below was erroneous, and reversed the same, yet it further held that the plaintiff-appellant in the absence of any proof of actual damage was entitled to a judgment for nominal damages only and without costs, wherefrom she appeals to this Court.

## 1.

As a matter of law, fraud and deceit on the part of the defendant was at issue in the case and proven.

The issues as developed were under the purview of the exceptions as shown in P. L. 1915, Chapter 159, both in respect to fraud and as to the contract itself actually providing for damages.

While fraud or deceit was not specifically charged in the complaint as originally made, such was raised under the amended answer as put at issue in the reply thereto. (Case, p. 11, lines 20 &c., 30 &c.)

Therefore the trial Court erred in holding that fraud or deceit was not in issue, and in the refusal to consider the indicia thereof as requested. (Case, p. 2.)

The agreement provided for a marketable title such as would be insured by the Chelsea Title Insur-

ance Company (Case, p. 7, l. 10 &c.), plaintiff therefore was within her rights in refusing to accept a deed from the defendant not joined in by his wife.

Had the indicia of defendant's fraud or deceit been considered by the Court as requested, the testimony adduced pointed unequivocally to the fact that the defendant did not act in good faith but was rather attempting to hide behind his wife's skirts for an excuse not to perform what to him was not an advantageous contract and thereby became guilty of implied fraud. As the request was made as the result of the testimony showed that on every occasion, both before and after, defendant's wife joined him in conveyances without question—only on this one occasion is she alleged to have balked. If bad faith is an issue as claimed, surely this circumstance should have been properly considered by the Court as an index thereof rather than preemptorily dismissed as was done. Then too, the very form of the instrument itself shows that there was no mention of or provision for the defendant's wife's signature, or that plaintiff's agent even knew that he had a wife until after the execution and delivery of the instrument. (Case, pp. 5 and 6.) Again, as denoted in the requests for findings, defendant had three months wherein to procure his wife's signature to the deed to be delivered under the agreement of sale, while in fact he attempted to repudiate said agreement but a short time after its execution. Not having assigned his wife's refusal in his answer as originally filed but in an amended answer filed considerably thereafter, strongly indicates such a defence to be the result of an after-thought, and as such further index it was the duty of the trial Court to consider as requested rather than brush it aside without explanation as was done in respect to this

element pointing to a lack of good faith or presumptive fraud on the part of the defendant, and which had been made a vital issue under the amended pleadings.

## 2.

The Court erred in overlooking that the contract was under the exception as provided in P. L. 1915, Chapter 159, in that it did specifically provide for damages in case of breach (Case, pp. 7, 11, 20 &c.), the amount of course to be measured by the evidence presented. The contract of sale having so provided, and from the evidence presented, the Court did actually find that there was a substantial increase in the value of the land as between the time of the execution of the contract of sale and the date whereon settlement was provided in the delivery of the deed. (Case, pp. 53, 1 and 2.)

Plaintiff therefore was legally entitled to damages in the amount of such increase.

## 3.

The only testimony that the agreement of sale was likewise to be signed by the defendant's wife was given by the defendant himself and is based upon an alleged conversation had with the plaintiff's agent either prior to or cotemporaneous with the execution thereof (Case, p. 30, lines 4 to 20), hence was legally inadmissible of consideration by the Court. The contract itself contains no mention of or provision for being contingent upon defendant's wife's signature or assent, hence any testimony of a prior or cotemporaneous parol agreement or understanding permitting such addition thereto

was without warrant of law and should not have been considered by the Court.

As this appeal is based particularly upon the finding of the Supreme Court (Case, p. 576, l. 28) that there was an absence of any proof that the plaintiff-appellant had sustained substantial damages, it is respectfully urged that as a matter of law she was entitled to the value of her bargain as measured by the amount which defendant-appellee had agreed to accept for the lot as compared with its value when the deed was to have been given three months thereafter. At the time when title was to have been passed, P. L. Elwood, the plaintiff's agent, testified that its value was at least \$8750 (Case, p. 16, line 16); Joseph Keener (Case, p. 19, lines 23, 24), a value of \$10.00; Alfred H. Millman (Case, p. 24, lines 29, 30), \$11,000; and Thomas M. Davis (Case, p. 27, line 25), from \$8750.00 to \$9000.00.

While the trial Judge in his conclusions (Case, p. 51, lines 34, &c., and p. 52, lines 1 &c.) stated "an average increase in value of \$750.00."

Thus it will be seen that there was no absence of proof that the plaintiff had sustained substantial damages, but quite on the contrary even in the opinion of the trial Judge, such a value was at least \$750.00 as stated.

It is therefore respectfully submitted the Supreme Court erred in its finding in so far as it held that there was an absence of proof that the plaintiff-appellant has sustained actual damages in the breach by defendant-appellee of the contract; and that damages of at least \$750.00 as based on the findings of the trial Judge, and costs should have been awarded instead.

H. W. LEWIS,  
*Attorney of Plaintiff-  
Respondent.*

103 MAY T. 1928

# New Jersey Court of Errors and Appeals

MARY ALLAN ELWOOD,  
*Plaintiff-Appellant,*

vs.

VIVIAN B. SMITH,  
*Defendant-Appellee.*

ACTION AT LAW.

ON APPEAL.

BRIEF OF DEFENDANT-APPELLEE.

STATEMENT.

This is a case to recover at law upon a breach of contract for the sale of land.

The vendee signed the contract and then the vendor signed it and stated that he would take it home and endeavor to have his wife also execute the contract. Whereupon, the vendee stated that she was satisfied with the vendor's signature. The next day, the vendor returned to the vendee the check left by the vendee as the initial payment stating that his wife had refused to execute the contract. Whereupon, the vendee filed a suit for specific performance in the Court of Chancery. In that suit, which was heard and determined by Vice Chancellor Ingersoll, specific performance was

denied, and the Vice Chancellor held in his conclusions that, "I am not convinced that her refusal to execute the agreement (or a deed) was in any way due to connivance of her husband." In these conclusions, the Vice Chancellor offered to the vendee an opportunity to signify her willingness to accept a conveyance subject to the inchoate right of dower. This the vendee refused to accept, electing to bring a suit for damage for the breach of the contract.

## 1.

In view of the fact that the plaintiff did not allege fraud or deceit on the part of the defendant, and in view of the further fact that in the Chancery suit for specific performance, the Chancery Court held that there was no connivance on the part of the husband, and that the wife's refusal to sign the agreement or the deed was not the result of fraud or deceit, the case comes clearly within the purview of the statute of the State of New Jersey, *Laws of 1915, Chapter 159*, which provides as follows:

"Whenever any person shall contract to sell real estate or any interest therein, and shall not be able to carry out such contract because of a defect in the title to such real estate or interest therein, the person with whom such contract was made, or his legal representatives or assigns, shall be entitled to recover from such vendor, in an action for the breach of such contract, not only the deposit money, with interest and costs, but also the reasonable expenses of examining the title and making survey, except where the contract shall provide otherwise; provided, this act shall not limit the recovery where the purchaser may seek to recover for the deceit or fraud of the vendor."

The case was first tried in the Circuit Court by Rulif V. Lawrence, Circuit Court Judge, sitting as court and jury. His findings of facts that there was

no fraud or deceit, and that there was no proof of any expenses incurred by plaintiff-appellant in examining the title and making survey, there being evidence to support such findings, are conclusive and not reviewable on appeal. The Circuit Court Judge found in favor of the defendant and against the plaintiff. On appeal to the New Jersey Supreme Court, the appellate court modified the findings of the Circuit Court Judge Lawrence, so as to enter a verdict for nominal damage, as provided by the laws of 1915, chapter 159, as quoted above.

## 2.

The case at bar is controlled by the opinion of the Court of Errors and Appeals in affirming the case of *Mangonaro vs. Kare*, 84 N. J. L., 408. In this case, the Court of Errors and Appeals refused to permit the recovery by the purchaser of expenses for examining title, and thereafter, the Act of 1915, Chapter 159, mentioned above, was passed, which provided the same principle of law as decided in *Gerbert vs. Trustees*, 59 N. J. L., page 160, with the exception that it permitted recovery for expenses of title and making survey.

There is no claim made in the case at bar for anything except for damages for breach of contract. The case is, therefore, clearly controlled by the statute of the State of New Jersey quoted above.

It is, therefore, respectfully submitted that the opinion of the Supreme Court should be affirmed.

Respectfully submitted,

WM. H. SMATHERS,  
Attorney for Defendant-  
Appellee.