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AMENDED NOTICE OF APPEAL.

(Filed Jan. 27, 1927.)

IN CHANCERY OF NEW JERSEY.

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Between	}	On Bill, &c. Amended Notice of Appeal.	10
BRYN BELLA LAND COM- PANY,			
<i>Complainant,</i>			
and			
WILLIAM T. PURNELL, <i>et</i> <i>ux., et als.,</i>			
<i>Defendants.</i>			

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The complainant hereby appeals from an order 20  
made on the twenty-fourth day of January, 1927, by  
the Chancellor on the advice of the Honorable E. B.  
Leaming, Vice-Chancellor, dismissing the bill of com-  
plaint on the application of Palmyra-Riverton Realty  
Company, one of the above named defendants, and  
from the whole and every part thereof, to the Court  
of Errors and Appeals in the last resort in all causes.  
Dated January 26, 1927.

CARR & CARROLL,  
*Solicitors for and of Counsel* 30  
*with the Complainant.*

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

HARVEY F. CARR,  
*Of Counsel with Complainant.*

ACKNOWLEDGMENT OF SERVICE.

(Filed Feb. 5, 1927.)

Service of a copy of amended notice of appeal in the above matter is hereby acknowledged this 27th day of January, nineteen hundred and twenty-seven.

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W. B. WOLCOTT,  
*Solicitor for Defendant, Palmyra-Riverton Realty Company.*

PETITION OF APPEAL.

(Filed Feb. 16, 1927.)

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NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

BRYN BELLA LAND COMPANY,

*Complainant-Appellant,*

and

WILLIAM T. PURNELL, *et ux., et als.,*

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*Defendants-Appellees.*

Petition of Appeal.

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

The petition of Bryn Bella Land Company, the appellant in the above-stated cause, respectfully

shows that your petitioner finds itself aggrieved by an order made in the Court of Chancery by the Honorable Edwin Robert Walker, Chancellor, on the advice of the Honorable E. B. Leaming, Vice-Chancellor, bearing date the twenty-fourth day of January, 1927, wherein the said Bryn Bella Land Company was complainant, and William T. Purnell, *et ux., et als.*, were defendants, in this respect, to wit:

That the said order adjudges that the bill of complaint in said cause be dismissed as to the defendant, Palmyra-Riverton Realty Company, Inc., with costs to be paid by the complainant, upon the ground that the same is erroneous, for that in and by the said order it appears that said order dismissing said bill was based upon an order which provided that "the complainant was required to serve upon the said defendant (Palmyra-Riverton Realty Company, Inc.), or its solicitor, within five days after the service of a copy of the order upon the complainant, a copy of the agreement referred to in the bill of complaint, if such agreement was in writing, or upon failure of the complainant to serve the same, the said bill of complaint should be dismissed, unless good cause could be shown for the failure to serve the copy of said agreement," whereas said bill of complaint disclosed a good cause of action, whether the agreement above referred to was or was not in writing.

Your petitioner, therefore, prays that the order of the said Chancellor may be reversed, set aside, and for nothing holden.

And that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

CARR & CARROLL,  
*Solicitors for and of Counsel with Complainant-Appellant.*

ACKNOWLEDGMENT OF SERVICE OF PETITION OF APPEAL.

(Filed Feb. 23, 1927.)

Service of a true copy of the petition of appeal in  
10 the above matter is hereby acknowledged this nineteenth day of February, A. D. 1927.

WILFRED B. WOLCOTT,  
*Solicitor for and of Counsel  
with Defendant, Palmyra-  
Riverton Realty Company,  
Inc.*

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ANSWER ON APPEAL.

(Filed Feb. 23, 1927.)

The answer of the Palmyra-Riverton Realty Company, Inc., respondent, to the petition of appeal of the above named appellant.

This respondent, not acknowledging all or any of 10  
the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits, that an order was, on the 24th day of January, 1927, last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes, that the said order is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to this respondent. 20

WILFRED B. WOLCOTT,  
*Solicitor for and of Counsel  
with Palmyra-Riverton  
Realty Company, Inc., Respondent.*

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BILL OF COMPLAINT.

(Filed Dec. 18, 1926.)

IN CHANCERY OF NEW JERSEY.

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

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Bryn Bella Land Company, a corporation of the  
State of New Jersey, respectfully shows that:

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1. On the third day of December, 1926, William T.  
Purnell and Mary S. Purnell, his wife, of Cinnamin-  
son Township, Burlington County, New Jersey;  
Thomas R. Bromley (single man), of the Township  
of Palmyra, Burlington County, New Jersey, and  
Palmyra-Riverton Realty Company, a corporation of  
the State of New Jersey (hereinafter called the "Sel-  
lers"), entered into a certain agreement with the  
complainant, whereby Sellers agreed to sell and to  
convey to the complainant, and the complainant  
agreed to buy at the sum or price of \$700 per acre, all  
that certain property located in Burlington County,  
New Jersey, known as the W. S. French Farm, and  
described as follows:

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All those two certain tracts or parcels of land and  
premises situate in the Township of Moorestown  
(formerly Chester), in the County of Burlington and  
State of New Jersey; First: Beginning at a stone in  
the southerly line of the road leading from Moores-  
town to Westfield, near the middle of the Lenola  
Road and corner to lands of Alfred Leeds; and ex-  
tending thence (1) along the line of said lands of

said Alfred Leeds, and along the said Lenola Road,  
south twenty degrees and forty-minutes west, the  
distance of twenty-three chains and sixteen links to  
a stone near the middle of said Lenola Road, corner  
to lands of Walton Leeds; thence (2) along the line  
of said lands of said Walton Leeds, north, sixty-nine  
degrees and twenty minutes west, the distance of sev-  
enteen chains and sixty-eight links to a stake corner  
to the same; thence (3) still along the line of said  
lands of said Walton Leeds, south seventy-three de- 10  
grees and thirty minutes west, the distance of six  
chains and thirty-eight links to a corner to lands of  
Heulings Lippincott; thence (4) along the line of  
said lands of said Heulings Lippincott, north thirty-  
one degrees and five minutes west, the distance of  
ten chains and twenty-five links to a stake corner to  
lands of Anthony Doppler; thence (5) along the line  
of said lands of said Anthony Doppler, north eighty-  
two degrees and forty minutes east, the distance of  
twenty-two chains and seventy-five links to a stone 20  
corner to the same; thence (6) still along the line of  
said lands of said Anthony Doppler, north twenty  
degrees and forty minutes east, the distance of ten  
chains and twenty-six links to a stake in the said road  
leading from Moorestown to Westfield, near the  
southerly line of said road in the line of lands of  
Heulings Lippincott; thence (7) along the said road  
from Moorestown to Westfield and along the line of  
said lands of Heulings Lippincott, south sixty-eight  
degrees east, the distance of ten chains and fifty-nine 30  
links to the place of beginning. Containing forty-  
two acres of land, be the same more or less.

Second: Beginning at a stone in the southerly line  
of the road leading from Moorestown to Westfield,  
near the middle of the Lenola Road, corner to the

lands above described, lands of Heulings Lippincott and lands of Alfred Leeds; and extending thence (1) along the line of said lands of Heulings Lippincott, passing over a stone at the side of the said road from Moorestown to Westfield, at the distance of eighty links from the corner north, twenty-one degrees and thirty minutes east, the distance of fourteen chains and eighty-eight links to a stone corner to said lands of said Heulings Lippincott; thence (2) still along the line of the same north, fifty-three degrees and forty-five minutes west, six chains and eighty-seven links to a black oak corner to same; thence (3) still along the line of the same south sixty-seven degrees and thirty minutes west, the distance of one chain and seventy links to a stone corner to same; thence (4) still along the line of the same north, thirty-four degrees and thirty minutes west, three chains and eighteen links, passing over a stone at the side of the Tom Brown Road to a point for a corner in said Tom Brown Road at the distance of fifty links from said last mentioned stone, in the line of lands of George L. Gillingham; thence (5) along the said Tom Brown Road and along the line of said lands of said George L. Gillingham, north sixty-eight degrees and thirty minutes east, the distance of fourteen chains and seventy-eight links to a stone near the northerly side of said Tom Brown Road, corner to lands of Edward C. Wood, late of Martha Roberts; thence (6) along the line of said lands of Edward C. Wood, late of Martha Roberts, south thirty-six degrees and forty-five minutes east, the distance of fourteen chains and seventy-five links to a stone corner to the same; thence (7) still along the line of the same south twenty-seven degrees and thirty-five minutes west, the distance of twelve chains and seventy-two links to a stone corner to the same; thence (8) still along

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the line of the same and along the line of land of Edward Harmer, south thirty-nine degrees and thirty minutes west, the distance of six chains and fifty-eight links to a stake in the road leading from Moorestown to Westfield near the northerly line of said road, in the line of said lands of Alfred Leeds; thence (9) along the said last mentioned road and along the line of said lands of Alfred Leeds, north seventy-two degrees and fifty minutes west, nine chains and fifty-eight links to the place of beginning. 10  
Containing thirty-four and seven one-hundredths acres of land, be the same more or less; free and clear of all encumbrances, except the following:

Two certain mortgages, one made by the Sellers to Belzora B. French, dated September 15, 1925, payable within five years from its date, bearing interest at six per cent per annum, to secure the sum of \$32,000; the other made by the Sellers to D. W. Black and Charles H. Cloud, dated April 1, 1926, payable within two years from its date, and bearing interest at the rate of six per cent per annum, to secure the sum of \$10,000. 20

2. On December 3, 1926, complainant paid to the Sellers the sum of \$5000 on account of the purchase price, and agreed to pay the balance of the purchase price within sixty days from the third day of December, 1926.

3. After the payment of the said moneys the Sellers repudiated the said agreement, and have stated to the complainant that they will not proceed thereunder, and that they will not sell and convey the said lands to complainant. 30

4. Complainant is able, willing and ready to make settlement as provided in said agreement, and to pay

the balance of the purchase price, in accordance with the terms thereof.

Complainant is without adequate remedy in the courts of law, and, therefore, prays:

10 1. That the said William T. Purnell and Mary S. Purnell, his wife, Thomas Bromley, and Palmyra-Riverton Realty company, who are the defendants to this suit, may answer this bill of complaint and each statement therein made.

20 2. That the said William T. Purnell and Mary S. Purnell, his wife, Thomas R. Bromley, and Palmyra-Riverton Realty Company may be decreed specifically to perform the said agreement, the complainant tendering itself ready and willing and hereby offering specifically to perform the said agreement on its part.

3. That a writ of subpoena commanding the said defendants to answer this bill of complaint and to abide by such decree as the Court may make in the premises.

CARR & CARROLL,  
*Solicitors for and of Counsel  
with Complainant.*

SUBPOENA AD RESPONDENDUM.

(Filed Dec. 30, 1926.)

New Jersey, to wit: The State of New Jersey to William T. Purnell and Mary S. Purnell, Thomas R. Bromley, and Palmyra-Riverton Realty Co., Inc., 10  
(Seal)

Greeting: Whereas, a bill of complaint has lately been exhibited against you in our Court of Chancery by Bryn Bella Land Company, to be relieved touching the matters therein contained;

Therefore, we command you, if you intend to make a defense, that you file an answer to said bill in the office of the clerk of our said court, at Trenton, on or before the expiration of twenty days from and after the thirtieth day of December, 1926, and in default thereof such order or decree will be made against you as the Court shall think equitable and just. 20

Witness, his Honor, Edwin Robert Walker, Chancellor of our said State, at Trenton, the twentieth day of December, in the year of our Lord one thousand nine hundred and twenty-six.

CARR & CARROLL,  
*Solicitors.*

THOMAS BARBER,  
*Clerk.*

[ENDORSED]

Duly served upon William T. Purnell,  
Mary S. Purnell, Thomas R. Bromley;

and Palmyra-Riverton Realty Company, by handing a true copy of the within to Edwin A. Griscom, treasurer of said company, December 21st, A. D. 1926.

Fee \$9.98.

A. Engle Haines,  
Sheriff.

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Roscoe C. Shinn,  
Under-Sheriff.

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NOTICE.

(Filed Jan. 10, 1927.)

*To Messrs. Carr & Carroll, Solicitors of Complainant:*

20 Please take notice that you are requested to serve on the defendant, Palmyra-Riverton Realty Company, in the above cause, within five days after service of this demand upon you, a copy of the agreement (if it be in writing), referred to in the first paragraph of your bill of complaint in this cause.

WILFRED B. WOLCOTT,  
*Solicitor of Defendant, Palmyra-Riverton Realty Company.*

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[ENDORSED]

Due and legal service is hereby acknowledged this 28th day of December, 1926.

Carr & Carroll,  
Sol'rs. of Complainant.

NOTICE.

(Filed Jan. 10, 1927.)

*To Messrs. Carr & Carroll, Solicitors of Complainant:*

Please take notice that on Monday, January 10, 1927, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, I shall apply to the above court at chancery chambers, Camden, New Jersey, as follows:

1. To dismiss the bill of complaint filed in this cause.

2. To order the complainant to serve upon the defendant, Palmyra-Riverton Realty Company, a copy of the agreement referred to in the bill of complaint, as required by a notice served upon the complainant on December 28, 1926. 20

3. To extend the said defendants' time for filing an answer for the period of twenty days, after the service of a copy of said agreement by the complainant. Dated January 3, 1927.

Yours truly,  
WILFRED B. WOLCOTT, 30  
*Solicitor of Defendant, Palmyra-Riverton Realty Company.*

[ENDORSED]

Due and legal service is hereby acknowledged this 4th day of January, 1927.

Carr & Carroll,  
Sol'rs. of Complainant.

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ORDER.

(Filed Jan. 10, 1927.)

It appearing that the bill of complaint filed in this cause refers to an express agreement, and that no copy of said agreement is annexed to said bill, or recited verbatim therein, and that on December 28th, 1926, the solicitor of the Palmyra-Riverton Realty Company, one of the defendant in this cause, served upon the solicitors of the complainant a request that a copy of said agreement, if in writing, be served on said defendant within five days; and it further appearing that a copy of said agreement was not served in compliance with said request, and that on January 4th, 1927, notice was given to the solicitors of the complainant of an application to dismiss the bill of complaint, or to require the service upon the said defendant of a copy of the agreement referred to in the bill of complaint, and to extend the defendants' time for filing an answer for a period of twenty days, after the service of a copy of the said agreement and argument of counsel having been heard, and it appearing that said motion should be allowed;

It is on this 10th day of January, 1927, ordered, that within five days from service of an uncertified copy hereof the complainant serve upon the defendant, Palmyra-Riverton Realty Company, or upon its

solicitor, a copy of the agreement referred to in the bill of complaint, if such agreement be in writing;

And it is further ordered, that if said complainant shall not serve upon the said defendant a copy of said agreement as required by this order, the bill of complaint shall be dismissed with costs, unless good cause be shown for such failure.

E. R. WALKER,  
C.

Respectfully advised,  
E. B. LEAMING,  
V. C.

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NOTICE.

(Filed Jan. 24, 1927.)

*To Carr & Carroll, Solicitors of Complainant,*

Gentlemen:

Please take notice that on Monday, January 24th, instant, at 10 o'clock A. M. or as soon thereafter as counsel can be heard, I shall apply to the above Court at Chancery Chambers, Camden, N. J., to dismiss the bill of complaint in this cause, by reason of the failure of the complainant to serve upon the defendant, Palmyra-Riverton Realty Company, Inc., or upon me, as its solicitor, a copy of the agreement referred to in the bill of complaint, in accordance with the terms of the order made by this Court on January 10th, instant. Annexed hereto is a copy of the affidavit upon which I shall rely in making said motion.

Dated January 18, 1927.

Yours truly,  
WILFRED B. WOLCOTT,  
*Solicitor for Palmyra-Riverton  
Realty Company, Inc.*

## AFFIDAVIT.

(Filed Jan. 24, 1927.)

STATE OF NEW JERSEY, }  
 COUNTY OF CAMDEN, } ss.

10 WILFRED B. WOLCOTT, being duly sworn, on his oath, says:

I am the solicitor of the Palmyra-Riverton Realty Company, Inc., one of the defendants in the above cause. By the terms of an order of this Court, made on the tenth day of January, 1927, the complainant was required to serve upon the said defendant, or upon me as solicitor, a copy of agreement referred to in the bill of complaint, within five days from the service of a copy of the order upon the complainant.

20 On Tuesday, January 11, 1927, I caused to be served upon Messrs. Carr & Carroll, the solicitors of the complainant, a copy of said order, and no copy of said agreement has been served upon the defendant, or upon me, by the said complainant or its solicitor.

WILFRED B. WOLCOTT.

Sworn and subscribed before me this 18th day of January, 1927.

30 (Seal)

EDNA LEVIN,  
*Notary Public.*

## ORDER DISMISSING BILL OF COMPLAINT.

(Filed Jan. 24, 1927.)

This matter being opened to the Court by Wilfred B. Wolcott, solicitor of the defendant, Palmyra-Riverton Realty Company, Inc., and it appearing that by an order of this Court made on January 10, 1927, the complainant was required to serve upon the said defendant, or its solicitor, within five days after the service of a copy of the order upon the complainant, a copy of the agreement referred to in the bill of complaint, if such agreement was in writing, or upon failure of the complainant to serve the same, the said bill of complaint should be dismissed, unless good cause could be shown for the failure to serve the copy of said agreement:

And it further appearing that a copy of said order 20 dated January 10, 1927, was served upon Messrs. Carr & Carroll, solicitors of the complainant, on January 11, 1927, and that no copy of said agreement has been served upon the defendant, Palmyra-Riverton Realty Company, Inc., or upon its solicitor, and no good cause being shown for the failure to serve the same, it is, on this 24th day of January, 1927, ordered that the bill of complaint in this cause be dismissed as to the Palmyra-Riverton Realty Company, Inc., with costs to be paid by the complainant. 30

E. R. WALKER,  
*C.*

Respectfully advised,  
 E. B. LEAMING,  
*V. C.*

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*Opinion*

OPINION.

No opinion filed.

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NEW JERSEY COURT OF ERRORS AND  
APPEALS.

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Between

BRYN BELLA LAND COMPANY,  
*Complainant-Appellant,*  
and

WILLIAM T. PURNELL, *et ux., et als.,*  
*Defendants-Appellees.*

(Palmyra-Riverton Realty Company, Appellee.)

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BRIEF FOR COMPLAINANT-APPELLANT.

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This is an appeal from an order advised by Vice-Chancellor Leaming on the 24th day of January, 1927, dismissing the bill of complaint in the above-entitled cause, on the application of Palmyra-Riverton Realty Company, one of the above-named defendants.

The bill of complaint appears on page 6 of the Record, and sets forth, in substance, that the defendants therein named entered into a certain agreement whereby the sellers (defendants) agreed to sell and convey to the complainant, and the complainant agreed to buy at the sum of \$700 per acre, certain lands in Burlington County, New Jersey, therein particularly described, and that the lands were to be free and clear of all liens and encumbrances except two certain mortgages particularly mentioned in said bill,

and that the complainant on December 3rd, 1926, paid to the defendants the sum of \$5000 on account of the purchase price, and agreed to pay the balance of the purchase price within sixty days from the 3rd of December, 1926, and averred that the defendants had repudiated their agreement, and had stated to the complainant that they would not proceed thereunder, and that they would not sell and convey said lands to the complainant. The complainant tendered itself able, willing and ready to make the settlement as provided in said agreement and to pay the balance of the purchase price in accordance with the terms thereof, and prayed specific performance of the said agreement.

The defendant, Palmyra-Riverton Realty Company, served notice upon the complainant demanding that the complainant furnish a copy of the contract or agreement referred to in the bill of complaint, and later served notice of an application to the Chancellor for an order compelling the complainant to furnish such copy, upon the return of which notice the Court directed the complainant to furnish such a copy within five days from service of an uncertified copy of such order. (S. of C., p. 14.) No copy of such agreement having been furnished within the time fixed by the order, and proof of that fact having been made to appear to the Court by the defendant's affidavit (S. of C., p. 16), the Court entered an order advised by Vice-Chancellor Leaming on the 24th of January, 1927, dismissing the bill of complaint as to the Palmyra-Riverton Realty Company. (S. of C., p. 17.)

From that order this appeal has been taken.

No memorandum or opinion was filed by the Vice-Chancellor. The bill of complaint did not aver affirmatively that the contract therein referred to was in

writing. We are, therefore, compelled to assume, in the absence of any opinion or memorandum filed by the Court, that the Court was of the opinion that there was no written contract, and that, therefore, the action was barred by the statute of frauds.

We understand the statute of frauds to be a rule of evidence and not a rule of pleading. (*Whitehead v. Burgess*, 61 N. J. L. 75, 76.) It is not effective on motion to strike out (in nature of a demurrer), unless, it affirmatively appears in the bill that the agreement was by parol. We further understand that it is necessary on the part of the defendant to affirmatively plead the statute of frauds, and failure to do so constitutes a waiver, and upon the trial, parol evidence, in such a situation, is admissible when relating to a contract otherwise barred by the statute.

Declarations in actions at law and bills, in suits in equity, are not demurrable because they fail to allege affirmatively that the contracts sued on, which are within the operation of the statute are in writing.

"When the declaration or appeal shows on its face that the contract sued on was oral, the statute is available as a defense on demurrer.

If the defendant files an answer admitting or alleging that the contract set forth in the bill was an oral contract, he must expressly plead the statute in defense or he will be deemed to have waived the statute."

*Douma v. Powers*, 111 Atl. p. 401 (N. J. Ch., 1920.) (This case does not appear to have been reported in the official reports.)

*Douma v. Powers* expressly overrules *Titus v. Taylor*, 65 Atl. 1003, and *East Ridgelawn Cemetery Co. v. Frank*, 104 Atl. 594. Vice-Chancellor Steven-

son in his opinion in the *Douma* case makes use of the following language:

"The Chancellor authorizes me to state that the Titus case and the East Ridgelawn Cemetery Company case do not, in his opinion, correctly state the rule of equity pleading under discussion in this present case, and that as to that matter both cases are to be deemed overruled.

A bill of complaint setting up a contract as the basis of the cause of action, is not defective in failing to negative the application of the statute of frauds."

*Kotok v. Rossi*, 94 Eq. 327.

Assuming that the contract referred to in the bill of complaint was by parol, it was still a valid bill and could only be met by an answer, which might or might not have set up the bar of the statute of frauds. Hence the defendant was not entitled to have the bill dismissed whether or not the agreement was in writing or by way of parol.

The statute of frauds is not necessarily conclusive, and the complainant was entitled to have the orderly course of pleading followed in this case in order that a proper issue might be reached. It is a familiar doctrine that the statute of frauds may not be used to perpetrate a fraud, and it is also well settled that there are certain frauds which estop a defendant from setting up the statute of frauds.

"The fraud which will entitle the purchaser to a specific performance, is that which consists in setting up the statute against the performance, after the purchaser has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement upon the supposition that it was to be carried

into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case the vendor is held by force of his acts or silent acquiescence, which have misled the purchaser to his harm, to be estopped from setting up the statute of frauds."

36 Cyc. 644.

In the case *sub judice* the complainant has paid to the defendants the sum of \$5000 on account of the purchase price, and in any aspect of the case he is entitled in equity to have this money returned.

"When the vendor under an oral contract declines to perform and sets up the statute of frauds, an action at law will lie against him for any part of the purchase price which he has received, or, if he pleads the statute to a bill in equity for specific performance, it is open to the Court under a prayer for general relief to decree repayment of the amount paid. In some jurisdictions the purchaser is entitled to a lien upon the land for the consideration paid for it."

27 C. J. 360, Sec. 438.

"If such fraud exists it estops the defendant from setting up the statute as a bar to the right of specific performance, because the agreement to convey was not in writing."

*Cooper v. Colson*, 66 N. J. Eq. 328, 332.

If the defendant had answered setting up the statute of frauds this would not necessarily have been conclusive as a matter of pleading, and it might

easily have been possible for the complainant to have set up such fraud as would estop the defendant from pleading the statute, or to have shown that by reason of the existence of special circumstances the complainant could not have been adequately compensated in money for the defendant's failure to convey.

It is, therefore, respectfully submitted that the decree of the Chancellor should be reversed.

CARR & CARROLL,  
*Counsel with Complainant-Appellant.*

NEW JERSEY COURT OF ERRORS AND APPEALS.

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Between  
BRYN BELLA LAND COMPANY,  
*Complainant-Appellant,*  
and  
WILLIAM T. PURNELL, *et ux., et als.,*  
*Defendants-Appellees.*  
(Palmyra-Riverton Realty Company, Appellee.)

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BRIEF FOR PALMYRA-RIVERTON REALTY COMPANY, APPELLEE.

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The question in this case is not whether the bill of complaint sets forth a good cause of action, but whether the Court of Chancery has power to enforce its rules and orders, and to dismiss a suit where the complainant refuses to comply with the rules and orders of the Court.

Rule 55 of the Court of Chancery provides as follows:

55. When an express agreement, or any document, is referred to in a pleading, and is not annexed thereto, or recited verbatim therein, a copy of the document or of the agreement (if it be in writing) must be served on the adverse party within five days after service of written demand for the same.

The bill of complaint alleges an express agreement. (S. of C., page 6.)

The defendant, Palmyra-Riverton Realty Company, served notice upon the complainant, demanding that the complainant furnish a copy of the contract or agreement referred to in the bill of complaint. (S. of C., page 12.)

This notice was not complied with, and said defendant thereupon, on due notice to the complainant, applied to Vice-Chancellor Leaming for an order dismissing the bill of complaint, or ordering the complainant to serve a copy of said agreement upon the defendant. (S. of C., page 13.)

The complainant's solicitor opposed this motion, but the Court made an order that within five days from the service of an uncertified copy thereof, the complainant should serve upon the defendant, Palmyra-Riverton Realty Company, or upon its solicitor, a copy of the agreement referred to in the bill of complaint, if such agreement was in writing. This order further provided that if the complainant should not serve a copy of the agreement, as required by the order, the bill of complaint should be dismissed, unless good cause should be shown for said failure. (S. of C., pages 14 and 15.)

A copy of this order was served upon the complainant's solicitors, but no copy of the agreement was served by the complainant on the defendant, or its solicitor, as required by the order.

The defendant's solicitor thereupon gave notice that he would apply for an order dismissing the bill of complaint. (S. of C., page 15.) This application was not opposed, and no cause was shown why the copy of the agreement had not been served, and the Court made an order dismissing said bill. (S. of C., page 17.)

The bill of complaint was filed for the purpose of securing specific performance of an alleged contract to purchase certain lands and premises.

The remedy by specific performance is not a matter of strict right, but of sound judicial discretion.

1. *Pyatt v. Lyons*, 51 N. J. Eq. 308, 314;
2. *Ten Eyck v. Manning*, 52 N. J. Eq. 47;
3. *Brisbane v. Sullivan*, 86 N. J. Eq. 411, 413;
4. *Driver v. Smith*, 89 N. J. Eq. 339, 351, &c;
5. *Muller v. Weiss*, 91 N. J. Eq. 321.

Under the rule laid down in the above cases, the Court of Chancery, in the exercise of its sound judicial discretion, had the right to make the service of a copy of the agreement referred to in the bill of complaint a condition which must be complied with before it would entertain the complainant's suit.

Rule 55 of the Court of Chancery, above quoted, and the order made by Vice-Chancellor Leaming on January 10, 1927 (S. of C., page 14), both required the complainant to serve upon the defendant a copy of the agreement referred to in the bill of complaint.

The established and settled rules of practice of a court, while they are in force, are the law of the court, and as such, a part of the law of the land.

- Ogden v. Robertson*, 15 N. J. Law, 124;  
*Hines v. State*, 54 N. J. Law 199, 200.

If the agreement was not in writing, the complainant could have so shown. Its refusal to serve the copy of the agreement, or to show cause why it did not serve it, justified the Court of Chancery in making the order of dismissal.

If the agreement was in writing, and the complainant refused to comply with the rule and order of the Court of Chancery, it is hardly conceivable that it would contend that said Court had no power to dismiss the bill of complaint, by reason of such refusal.

If the agreement was not in writing, the complainant's admission of that fact, as a reason for not serving a copy of said agreement, would bring the case within the rule of *Douma v. Powers*, 111 Atl. Rep. 401.

The appellee respectfully submits that the appeal should be dismissed.

WILFRED B. WOLCOTT,  
Counsel with Palmyra-Riverton  
Realty Company, Defendant-  
Appellee.

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Note. The following petition for bill of particulars should be inserted in the State of the Case in the below entitled cause on appeal from order dismissing bill of complaint on the application of defendants, Thomas R. Bromley, William T. Purnell and Mary S. Purnell, to follow page 12.

PETITION FOR BILL OF PARTICULARS. 10

(Filed January 17, 1927.)

IN CHANCERY OF NEW JERSEY.

Between	}	Bill of Complaint. 20 Petition for Bill of Particulars.
BRYN BELLA LAND COM- PANY,		
Complainant,		
and		
WILLIAM T. PURNELL, et ux., et als.,		
Defendants.		

To the Honorable Edwin Robert Walker, Chancellor  
of the State of New Jersey: 30

The petition of William T. Purnell and Mary M. Purnell, and Thomas R. Bromley of Palmyra, in the County of Burlington and State of New Jersey, respectfully shows that:

1. Your petitioners are three of the defendants herein and have been served with process of subpoena to answer the complainant's bill of complaint.

2. Said bill of complaint alleges that a contract was entered into on the third day of December, 1926, between William T. Purnell and Mary S. Purnell, his wife, Thomas R. Bromley and Palmyra-Riverton Realty Company and the complainant, whereby the  
10 defendants agreed to sell to the complainant a certain tract of land located in Burlington County, New Jersey, known as the "W. S. French Farm."

3. Petitioners have no personal knowledge of the agreement referred to, have never signed an agreement as referred to in paragraph 1 of the complaint; and petitioners cannot, therefore, safely or intelligently answer the complaint without being furnished a bill of particulars setting forth the agreement  
20 designated in said paragraph 1 of the complaint and being advised whether said agreement was in writing.

Petitioners therefore pray that this Court may, by its order, direct said complainant to furnish to petitioners, within such time as may be fixed by this Court, a bill of particulars setting forth the agreement designated in paragraph 1 of the complaint, and whether said agreement was in writing and by  
30 whom signed and giving defendants a reasonable time thereafter to file their answers or other pleadings thereto.

GEO. B. EVANS,  
*Solicitor of Petitioners.*

STATE OF NEW JERSEY, }  
BURLINGTON COUNTY, } ss.

WILLIAM T. PURNELL, being duly sworn according to law, upon his oath deposes and says:

1. I am one of the defendants named in the above entitled cause and reside at Palmyra, in the County of Burlington and State of New Jersey.

2. There was no written contract entered into between the defendants and the complainant for the sale of land set forth in paragraph 1 of the complaint. 10

3. If such a contract was entered into it was without the knowledge or consent of myself, Mary M. Purnell, my wife, and Thomas R. Bromley.

4. I do not know whether there is a written contract or whether some one without authority has signed my name or the names of my wife and  
20 Thomas R. Bromley.

5. The land described in the complaint is owned in common by William T. Purnell, Mary M. Purnell, Thomas R. Bromley and Palmyra-Riverton Realty Company.

6. Before I can safely and intelligently answer the bill of complaint it will be necessary for the complainant to furnish me with a bill of particulars setting forth whether said agreement was in writing  
30 and by whom signed and a copy of the agreement designated in paragraph 1 of the complaint.

WILLIAM T. PURNELL.

Sworn and subscribed to before me this 10th day of January, A. D. 1927.

(Seal)

EMILIE S. GREENWALD,  
*Notary Public.*

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