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New Jersey
Court of Errors and Appeals

Subpoena to Answer.

10

(Served July 30, 1925)

New Jersey, to wit:—The State of New
(L. S.) Jersey to Edward W. Walder and
Ellen Walder, his wife,

GREETING, Whereas a bill of complaint has
lately been exhibited against you in our Court 20
of Chancery by Northern Real Estate Co., Inc.,
to be relieved touching the matters therein con-
tained;

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 seventh day of August,
1925, and in default thereof such order or decree 30
will be made against you as the Court shall think
equitable and just.

WITNESS, his Honor, Edwin Robert
Walker, Chancellor of our said
State, at Trenton, the seventeenth
day of July, in the year of our Lord,
One Thousand Nine Hundred and
twenty-five.

Wilson and Smock, Sol'rs

40

THOMAS BARBER Clerk.

Bill of Complaint.*(Filed July 15, 1925)*

IN CHANCERY OF NEW JERSEY

10 To his Honor, EDWIN ROBERT WALKER, Chancellor of the State of New Jersey:

The complainant, NORTHERN REAL ESTATE Co., INC., respectfully shows:

1. On or before September 6th, 1924, the complainant and one of the defendants, Edward W. Walder, entered into a negotiation whereby it was proposed that the defendants should convey to the complainant, and the complainant should purchase from the defendants a certain lot located on the southerly side of the Long Branch road in the Village of Eatontown, Monmouth County, New Jersey.

2. On the 6th day of September, 1924, the said complainant and defendants agreed upon the terms of purchase and sale and a memorandum was signed by one of the defendants, Edward W. Walder, and the complainant paid the consideration set forth in the memorandum, namely, \$850, copy of which memorandum is as follows:

Eatontown, N. J.
Sept. 6/24.

40 Received from GEO. A. OHL, JR., Eight Hundred and Fifty Dollars, the receipt of which is hereby acknowledged for plot of ground south of the Braun & Applegate property 70 ft. front more or less and westward

Bill of Complaint

to trees or line fence of Mrs. Jas. Steen's property—eighteen inches from north side of Walder garage, elec. light & gas connections to be allowed. Property to be free & clear.

Signed EDWARD W. WALDER. 10

Witness:

A. Augusta Ohl.

3. On the 15th day of September, 1924, the said defendants pretended to embody the terms of the agreement in a deed which was offered to the complainant.

4. This deed was accepted by the complainant under the misapprehension that it truly described 20 and conveyed the land which the defendants agreed to convey by the terms of the memorandum hereinbefore referred to, the said deed describing the lot as follows:

ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Eatontown, in the County of Monmouth and State of New Jersey, in the Village of Eatontown. 30

BEGINNING at a stake in the westerly side of a roadway at the southeasterly corner of property belonging to A. D. Braun, said point being distant one hundred and ninety-four feet and fifty-eight hundredths of a foot from the southerly side of the Long Branch road as same now exists, thence (1) south sixty-six degrees twenty-eight minutes west at right angles to said roadway, 40 sixty-four feet along property of said Braun to

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the southwesterly corner thereof; thence (2) south sixty-four degrees fifty-eight minutes west along property of Otto Applegate, one hundred and three feet and fifty-seven hundredths of a foot to land of Steen Estate; thence beginning again
10 at the aforesaid beginning point and from thence (3) south twenty-three degrees thirty-two minutes east along the westerly side of said roadway seventy feet; thence (4) south sixty-six degrees twenty-eight minutes west at right angles to said roadway to lands of the Steen Estate; thence (5) northerly along said Steen Estate to the end of the second described course.

20 Reserving, however, to the said Edward W. Walder, his heirs and assigns, the right to maintain, operate and remove a line of gas pipe and a line of water pipe now lying through and over the above described tract immediately west of the roadway first above mentioned.

5. At the time of the negotiation and at the time of the signing of the memorandum above referred to, it was understood and agreed that the complainant was to receive title to a tract of
30 land, the sides of which were to be parallel and at right angles to the road, known as "Byrnes Lane."

6. A deed was offered by the defendants to the complainant which purported to agree with the terms of the contract. It described a tract of land, the sides of which were at right angles to "Byrnes Lane," not only for the use of the words
40 "at right angles," but also by meets and bounds,

Bill of Complaint

which in fact described two lines, parallel to each other and at right angles to "Byrnes Lane."

After examining carefully the description contained in the deed as is above set forth, the complainant accepted the same under the misapprehension that it actually conveyed the land which the defendants had agreed to convey. 10

7. The description of the land bargained to be purchased and wrought out in accordance with the above representations of the complainant is as follows:

ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, 20
situate, lying and being in the Township of Eatontown, in the County of Monmouth and State of New Jersey, in the Village of Eatontown,

BEGINNING at a stake in the westerly side of a roadway at the southeasterly corner of property belonging to A. L. Braun, said point being distant one hundred and ninety-four feet and fifty-eight hundredths of a foot from the southerly side of the Long Branch road as same now exists, thence (1) south sixty-six degrees twenty-eight minutes west at right angles to said roadway, sixty-four feet along property of said Braun to the southwesterly corner thereof; thence 30
(2) south sixty-four degrees fifty-eight minutes west along property of Otto Applegate, one hundred and three feet and fifty-seven hundredths of a foot to land of Steen Estate; thence beginning again at the aforesaid beginning point and from thence (3) south twenty-three degrees thir- 40

Bill of Complaint

ty-two minutes east along the westerly side of said roadway seventy-seven and seventy hundredths feet; thence (4) south sixty-six degrees twenty-eight minutes west at right angles to said roadway to lands of the Steen Estate; thence
10 (5) northerly along said Steen Estate to the end of the second described course.

Reserving, however, to the said Edward W. Walder, his heirs and assigns, the right to maintain, operate and remove a line of gas pipe and a line of water pipe now lying through and over the above described tract immediately west of the roadway first above mentioned.

20 8. After acceptance of said deed by the complainant it discovered that said deed did not convey in its entirety the land which the defendants undertook and agreed to convey by said agreement and the complainant then made a demand upon the defendants to correct the same and refused to place said deed upon record until said correction had been made, but the defendants refused to correct, change or modify said deed.

30 The complainant definitely ascertained by survey that the tract of land which was in fact described in the deed did not comprehend the lot bargained for in the memorandum above referred to. The fourth course in said deed describing the easterly boundary of said lot provides that the course shall run "at right angles to said roadway" as was in accordance with the negotiations between the complainant and the defendants. The third course in said deed which
40 describes the course on the roadway known as

Bill of Complaint

“Byrnes Lane” conveys seventy feet only, which would leave a distance on said roadway of seven and seventy hundredths feet between the beginning point and the fourth course as described in said deed, and the said course would be open ends not tied to each other, and the lot attempted to be described in said deed would be impossible of ascertainment, and if the fourth course should begin at the end of the third course as described in the deed, and continue in such a direction as would bring it within eighteen inches of the Walder garage on the property to the south, it would make a line which is not parallel with the first and second courses and not at right angles to the roadway.

10

20

9. The defendants have not tendered to complainant a deed conveying the property according to the description agreed upon as above set forth in paragraph seven of the bill of complaint. The said defendants fraudulently pretend that the said agreement entered into between the parties intended to convey the land as it is now described in the deed offered by them to the complainant.

30

10. This complainant is without adequate remedy in the court of law, and therefore prays:

A. That the defendants, Edward W. Walder and Ellen Walder, his wife, may answer this bill of complaint without oath and each statement therein made.

B. That the agreement and contract dated September 6, 1924, herein set forth be construed, and that the description of the land described in the

40

Bill of Complaint

10 deed be made to conform to the agreement and understanding between the parties, and that said deed be reformed so that the description therein contained shall convey a tract of land of which the sides are parallel and at right angles to the roadway and the southerly line of which shall be eighteen inches west of the garage referred to in said agreement, and is more particularly described and set forth in paragraph eight of said bill of complaint.

20 To the end that the defendants be directed to convey said land according to said reformed description, and that this complainant may have such further or other relief in the premises as the nature of the case may require, and as shall be agreeable to equity and good conscience.

WILSON & SMOCK,
Solicitors for and of Counsel
with Complainant.

State of New Jersey, } ss:
County of Essex.

30 George A. Ohl, Jr., of full age, being duly sworn according to law upon his oath deposes and says that he is the president of the complainant named in the foregoing bill of complaint and as such president negotiated for the purchase of the land described in the agreement set forth in paragraph two of said bill of complaint and that he has read the said bill of complaint and that the matters and facts set forth therein are true.

40 In the fall of 1924, deponent entered into negotiation with the defendant, Edward W. Walder,

Bill of Complaint

for the purchase of a tract of land in the Village of Eatontown, fronting on Byrnes Lane and south of the highway leading from Eatontown to Long Branch, and agreed to purchase the same for complainant for the sum of Eight Hundred and Fifty Dollars (\$850), and under the terms of the negotiation with said defendant, Edward W. Walder, it was understood and agreed that the two side lines of said lot were to run at right angles to Byrnes Lane and that the said side lines were to be parallel to each other, and the southerly line of said lot was to be so laid out as to be eighteen inches north of the garage located on other lands of the defendants to the south. 10

The substance of the agreement was set forth in a memorandum dated September 6th, 1924, which was duly signed by Edward W. Walder and the consideration named in said agreement, namely, \$850, was paid to the defendant by deponent in behalf of the complainant. 20

Thereafter on the 15th day of September, 1924, a deed was tendered to the complainant which purported to carry out the terms agreed upon in the negotiation and in the agreement. 30

Deponent examined the deed and ascertained that the southerly line according to the said deed, or the fourth course therein described purported to run at right angles to Byrnes Lane and was so described by metes and bounds. In the deed no dimensions were given for the diagonal line which constituted the rear line of the lot and it was impossible from the examination of the deed to discover what the depth of the lot in the rear 40

Bill of Complaint

would be. Deponent assumed that inasmuch as the south line was at right angles with said roadway that as much frontage on the lot was conveyed by virtue of the deed as should have been conveyed, to make the two side lines parallel and
10 at right angles to Byrnes Lane as the understanding between the parties, at the time of negotiation and the agreement.

After the delivery of the deed, however, deponent made a more careful examination and survey of the lot and ascertained that the south line was not at right angles to Byrnes Lane and that the defendants had conveyed a tract of land
20 which had a frontage less than that agreed upon and a distance in the rear which was greater than that agreed upon.

The deponent called this error to the attention of the defendant and requested them to give a corrected deed which would comport with the terms of negotiation and the agreement, but this the defendants refused to do.

GEO. A. OHL, JR.

30 Sworn and subscribed to before me
this day of July, A. D., 1925.

**Answer of Edward W. Walder,
Defendant.**

(Filed Aug. 19, 1925)

IN CHANCERY OF NEW JERSEY

Between: NORTHERN REAL ESTATE Co., INC., Complainant, and EDWARD W. WALDER, <i>et ux.</i> , Defendants.	}	On Bill, &c.
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10

The answer of the defendant, Edward W. Walder, to the Bill of Complaint filed in the above-entitled cause,

20

This defendant, Edward W. Walder, answering the bill of complaint, says that:

1. Paragraph 1 is denied.
2. Paragraphs 2, 3, 4, 5, 6, 7, 8, 9 and 10 are denied.

30

NOTICE TO COMPLAINANT.

This defendant will move at the hearing in this cause to strike out the bill of complaint filed for the following reasons:

- (1) That the said bill of complaint discloses no cause of action in that:

40

Answer of Edward W. Walder, Defendant

(a) The complainant has been guilty of *laches* in filing its bill, as it appears in the bill of complaint that the alleged agreement was made on Sept. 6, 1924, that on Sept. 15, 1924, the complainant accepted from Edward W. Walder a deed
10 carrying out the terms of the paper purporting to be signed by the said Edward W. Walder, dated Sept. 6, 1924, or nearly one year before the filing of said bill of complaint;

(b) Because equity will not specifically enforce a contract for the sale of lands unless it is conclusive and certain as to its parties, the subject-matter, the price and the terms.

20 (c) Because complainant's relief, if any, should be had in a court of law.

(d) Because the paper which the complainant alleges Edward W. Walder signed does not bear either in substance or external form the requisites of a valid contract and does not comply with the terms of the Statute of Frauds.

(e) It nowhere appears that the complainant acquired any interest in the paper dated Sept. 6,
30 1924.

(f) Because no mutual mistake is alleged.

ALSTON BEEKMAN,
Attorney of Edward W. Walder,
Defendant.

Answer of Ellen Walder, Defendant.*(Filed Aug. 19, 1925)*

IN CHANCERY OF NEW JERSEY

Between: NORTHERN REAL ESTATE Co., INC., Complainant, and EDWARD W. WALDER, <i>et ux.</i> , Defendants.	}	On Bill, &c.	10
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The answer of the defendant, Ellen Walder, to 20
 the bill of complaint filed in the above-entitled
 cause:

This defendant, Ellen Walder, wife of Edward
 W. Walder, answering the bill of complaint, says
 that:

1. This defendant has no knowledge or infor-
 mation sufficient to form a belief as to the state-
 ments in paragraph 1.

2. Paragraphs 2, 3, 4, 5, 6, 7, 8 and 9 are de- 30
 nied.

3. This defendant reserves the right at the
 hearing in this cause to strike out the bill of com-
 plaint filed for the following reasons:

(1) That the said bill of complaint discloses no
 cause of action in that:

Answer of Ellen Walder, Defendant

10 (a) The complainant has been guilty of *laches* in filing its bill, as it appears in the bill of complaint that the alleged agreement was made on Sept. 6, 1924, that on Sept. 15, 1924, the complainant accepted from Edward W. Walder a deed carrying out the terms of the paper purporting to be signed by the said Edward W. Walder, dated Sept. 6, 1924, or nearly one year before the filing of said bill of complaint;

(b) Because equity will not specifically enforce a contract for the sale of lands unless it is conclusive and certain as to its parties, the subject-matter, the price and the terms.

20 (c) Because complainant's relief, if any, should be had in a court of law.

(d) Because the paper which the complainant alleges Edward W. Walder signed does not bear either in substance or external form the requisites of a valid contract and does not comply with the terms of the Statute of Frauds.

30 ALSTON BEEKMAN,
Attorney of Ellen Walder,
Defendant.

Amended Bill of Complaint.

(Filed Feb. 29, 1926)

IN CHANCERY OF NEW JERSEY

10 To his Honor, EDWIN ROBERT WALKER, Chancellor of the State of New Jersey.

The complainant, GEORGE A. OHL, JR., respectfully shows:

1. On or before September 6th, 1924, the complainant and one of the defendants, Edward W. Walder, entered into a negotiation whereby it was proposed that the defendants should convey to
20 the complainant, and the complainant should purchase from the defendants a certain lot located on the southerly side of the Long Branch road in the Village of Eatontown, Monmouth County, New Jersey.

2. On the 6th day of September, 1924, the said complainant and defendants agreed upon the terms of purchase and sale and a memorandum was signed by one of the defendants, Edward W.
30 Walder, and the complainant paid the consideration set forth in the memorandum, namely, \$850, copy of which memorandum is as follows:

Eatontown, N. J.
Sept. 6/24:

40 Received from George A. Ohl, Jr., Eight Hundred and Fifty Dollars, the receipt of which is hereby acknowledged for plot of ground south of the Braun & Applegate

Amended Bill of Complaint

property 70 ft. front more or less and westward to trees or line fence of Mrs. Jas. Steen's property — eighteen inches from north side of Walder garage, elec. light & gas connections to be allowed. Property to be free & clear. 10

Signed EDWARD W. WALDER.

Witness:

A. Augusta Ohl.

3. On the 15th day of September, 1924, the said defendants pretended to embody the terms of the agreement in a deed which was offered to the complainant.

4. This deed was accepted by the complainant under the misapprehension that it truly described and conveyed the land which the defendants agreed to convey by the terms of the memorandum hereinbefore referred to, the said deed describing the lot as follows: 20

ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Eatontown, in the County of Monmouth and State of New Jersey, in the Village of Eatontown. 30

BEGINNING at a stake in the westerly side of a roadway at the southeasterly corner of property belonging to A. L. Braun, said point being distant one hundred and ninety-four feet and fifty-eight hundredths of a foot from the southerly side of the Long Branch road as same now exists, thence (1) south sixty-six degrees twenty-eight minutes west at right angles to said road- 40

Amended Bill of Complaint

way, sixty-four feet along property of said Braun to the southwesterly corner thereof; thence (2) south sixty-four degrees fifty-eight minutes west along property of Otto Applegate, one hundred and three feet and fifty-seven hundredths of a foot to land of Steen Estate; thence
10 beginning again at the aforesaid beginning point and from thence (3) south twenty-three degrees thirty-two minutes east along the westerly side of said roadway seventy feet; thence (4) south sixty-six degrees twenty-eight minutes west at right angles to said roadway to lands of the Steen Estate; thence (5) northerly along said Steen Estate to the end of the second described course.

20 Reserving, however, to the said Edward W. Walder, his heirs and assigns, the right to maintain, operate and remove a line of gas pipe and a line of water pipe now lying through and over the above described tract immediately west of the roadway first above mentioned.

5. At the time of the negotiation and at the time of the signing of the memorandum above referred to, it was understood and agreed that
30 the complainant was to receive title to a tract of land, the sides of which were to be parallel and at right angles to the road known as "Byrnes Lane."

6. A deed was offered by the defendants to the complainant which purported to agree with the terms of the contract. It described a tract of land, the sides of which were at right angles to
40 "Byrnes Lane," not only by the use of the words, "at right angles," but also by metes and bounds,

Amended Bill of Complaint

which in fact described two lines, parallel to each other and at right angles to "Byrnes Lane."

After examining carefully the description contained in the deed as is above set forth, the complainant accepted the same under the misapprehension that it actually conveyed the land which the defendants had agreed to convey. 10

7. The description of the land bargained to be purchased and wrought out in accordance with the above representations of the complainant is as follows:

ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Eatontown, in the County of Monmouth and State of New Jersey, in the Village of Eatontown. 20

BEGINNING at a stake in the Westerly side of a roadway at the southeasterly corner of property belonging to A. L. Braun, said point being distant one hundred and ninety-four feet and fifty-eight hundredths of a foot from the southerly side of the Long Branch road as same now exists, thence (1) south sixty-six degrees twenty-eight minutes west at right angles to said roadway, sixty-four feet along property of said Braun to the southwesterly corner thereof; thence (2) south sixty-four degrees fifty-eight minutes west along property of Otto Applegate, one hundred and three feet and fifty-seven hundredths of a foot to land of Steen Estate; thence beginning again at the aforesaid beginning point and from thence (3) south twenty-three degrees thirty-two minutes east along the westerly side of said roadway sev- 30 40

Amended Bill of Complaint

enty-seven and seventy hundredths feet; thence
(4) south sixty-six degrees twenty-eight minutes
west at right angles to said roadway to lands
of the Steen Estate; thence (5) northerly along
said Steen Estate to the end of the second de-
10 described course.

Reserving, however, to the said Edward W.
Walder, his heirs and assigns, the right to main-
tain, operate and remove a line of gas pipe and
a line of water pipe now lying through and over
the above described tract immediately west of
the roadway first above mentioned.

8. After acceptance of said deed by the com-
20 plainant, he discovered that the said deed did
not convey in its entirety the land which the de-
fendants undertook and agreed to convey by said
agreement and the complainant then made a de-
mand upon the defendants to correct the same
and refused to place said deed upon record un-
til said correction had been made, but the de-
fendants refused to correct, change or modify
said deed.

30 The complainant definitely ascertained by sur-
vey that the tract of land which was in fact de-
scribed in the deed did not comprehend the lot
bargained for in the memorandum above referred
to. The fourth clause in said deed describing the
easterly boundary of said lot provides that the
course shall run "at right angles to said road-
way," as was in accordance with the negotiation
between the complainant and the defendants. The
third course in said deed which describes the
40 course on the roadway known as "Byrnes Lane"

Amended Bill of Complaint

conveys seventy feet only, which would leave a distance on said roadway of seven and seventy hundredths feet between the beginning point and the fourth course as described in said deed, and the said course would be open ends not tied to each other, and the lot attempted to be described in said deed would be impossible of ascertainment, and if the fourth course should begin at the end of the third course as described in the deed, and continue in such a direction as would bring it within eighteen inches of the Walder garage on the property to the south, it would make a line which is not parallel with the first and second courses and not at right angles to the roadway.

9. The defendants have not tendered to complainant a deed conveying the property according to the description agreed upon as above set forth in paragraph seven of the bill of complaint. The said defendants fraudulently pretend that the said agreement entered into between the parties intended to convey the land as it is now described in the deed offered by them to the complainant.

10. This complainant is without adequate remedy in the court of law, and therefore prays:

A. That the defendants, Edward W. Walder and Ellen Walder, his wife, may answer this bill of complaint without oath and each statement therein made.

B. That the agreement and contract dated September 6th, 1924, herein set forth be construed,

Amended Bill of Complaint

and that the description of the land described in the deed be made to conform to the agreement and understanding between the parties and that said deed be reformed so that the description therein contained shall convey a tract of land of
10 which the sides are parallel and at right angles to the roadway and the southerly line of which shall be eighteen inches west of the garage referred to in said agreement, and is more particularly described and set forth in paragraph eight of said bill of complaint.

To the end that the defendants be directed to convey said land according to said reformed description, and that this complainant may have
20 such further or other relief in the premises as the nature of the case may require, and as shall be agreeable to equity and good conscience.

WILSON & SMOCK,
Solicitors for and of Counsel
with Complainant.

30

40

Testimony.

Between:

GEORGE A. OHL, JR.,
Complainant,

and

EDWARD W. WALDER and ELLEN
WALDER, his wife,
Defendants.

10

Transcript of testimony taken before the Hon. Maja Leon Berry, Vice Chancellor, at Chancery Chambers, Long Branch, New Jersey, on Friday, the 26th day of February, A. D., 1926, at ten o'clock, A. M.

20

Appearances:

Messrs. Wilson & Smock, for Complainant, appearing by Mr. Henry D. Brinley.

Alston Beekman, Esq., for Defendant, appearing by Mr. Raymond Tansey.

Court: As I recall this matter there was no dispute as to the contract, but it was merely a question as to the dimensions of the land. 30

Mr. Brinley: Yes, sir, the interpretation of the contract as made.

Court: It is just a question of the meaning of this memorandum.

Mr. Tansey: If your Honor please, I would like at this time to ask that the bill be dismissed as to Mrs. Walder, first on the ground that she was not a party to the alleged agreement—

40

Testimony

Court: Have you given any notice of this motion to dismiss?

Mr. Tansey: Yes, your Honor. In the answer I think there was notice given. Paragraph Three, "This defendant reserves the right at the hearing of this cause, etc." In there we reserve the right to move to strike out the complaint.

Court: It says, "This defendant reserves the right to strike out the bill of complaint for the following reasons."

Mr. Brinley: I don't see that it is raised.

Court: That point is not raised by this notice unless it is under subdivision D of Reason 1, "Because the paper which the complainant alleges Edward W. Walder signed, did not contain in substance or in external appearance the requisites of a valid contract, and does not comply with the terms of the Statute of Frauds." Now what about this deed, they say that on the 15th of September, 1924, a deed was executed and delivered by the parties defendant and accepted by the party complainant, the original party complainant—what about that, Mr. Brinley?

Mr. Brinley: You mean as to substitution of the parties? We say that the deed handed to the complainant and then immediately after that the deed was examined; accepted with the theory, of course, that the land conveyed was the land which the defendant agreed to convey.

Court: This is a bill for specific performance. Did you accept a deed and pay the balance of the consideration?

Mr. Brinley: The difficulty was that all the consideration was paid on the day the deed was

Testimony

signed. We took the deed into our possession. I suppose for the moment we accepted it, believing it to comply with the terms and then immediately after that an examination was made of it, to see whether it complied with the terms of the agreement, and it was found that it did not, and it was immediately offered back to Mr. Walder with that explanation. Mr. Walder refused to accept it. 10

Court: Then isn't your action an action to reform a deed rather than specifically perform a contract? The execution and delivery of the deed removes the objection which the defendant makes to the contract, it having been executed by both parties and removes any objection, if there is any objection to the defense of the non-compliance with the Statute of Frauds. 20

Mr. Brinley: Well, in my bill I do pray for a reformation of the contract.

Court: What contract?

Mr. Brinley: For a reformation of the deed. But I do say the deed was offered.

Court: The deed was accepted under a misapprehension?

Mr. Brinley: The prayer of the bill, in Paragraph Three, "That the agreement and contract be construed, and that the description of the land described in the deed be made to conform to the agreement and understanding between the parties, and that the deed be reformed." 30

Court: Then I will deny the motion. I didn't know that you had incorporated that.

Augusta A. Ohl—Direct

MISS AUGUSTA A. OHL, duly sworn for complainant, for

Direct-examination by Mr. Brinley:

10 Q. Miss Ohl, you are a sister of the complainant, George A. Ohl, Jr? A. Yes.

Q. And you live in Eatontown? A. In Eatontown.

Q. Do you live on the premises which are the subject of this controversy? A. I do.

Q. And just describe where it is in Eatontown. A. Well, it is about one hundred and seventy feet east—southeast of the State Highway, on Burne's Lane.

20 Q. In the Village of Eatontown? A. In the Village of Eatontown.

Q. How long have you known the defendants, Miss Ohl, Mr. and Mrs. Walder? A. Several years.

Q. And where do they live? A. Next door to me.

Q. To what would be the south? A. To the south.

30 Q. And immediately adjoining your property? A. Yes.

Q. Were you present at the time an agreement was made between the complainant and the defendant? A. I was.

Q. Respecting the purchase of this land? A. I was.

40 Q. I show you a memorandum "Eatontown, N. J., September 6th 1924," on which appears, "Witness, A. Augusta Ohl." Is that your signature? A. Yes, sir.

Augusta A. Ohl—Direct

Q. And opposite that it says, "Signed, Edward W. Walder." Did you see Mr. Walder sign his name to that? A. Yes, I did.

Q. And in whose handwriting is the body of the agreement? A. My brother's, George A. Ohl, Jr. 10

Mr. Brinley: I would like to offer that in evidence.

Marked Exhibit C-1.

Q. Now, Miss Ohl, having this agreement before you, where were you when that was signed?

A. Sitting at the desk of Mr. Walder's in Mr. Walder's office, in Steele's Nursery.

Q. At Eatontown? A. At Eatontown. 20

Q. And who were present then? A. Mr. Walder, Mr. Ohl, Mr. Walder's assistant and myself.

Q. And do you know when the money was paid? A. That morning.

Q. For this land? A. That morning. Check was given that morning in full.

Q. Was it delivered? A. Yes, \$600 for the land, and \$250 for—

Q. Certain privileges? A. Certain privileges. 30

Q. And when was it given with respect to the signing of the agreement? A. When was it given?

Q. Yes. A. Well, as soon as the agreement was signed, Mr. Ohl wrote out a check in full.

Q. At that time was there any building on the land which was purchased? A. No.

Q. And since then has there been any building placed upon it? A. Yes, a home for myself. 40

Augusta A. Ohl—Direct

Q. And do you reside there now? A. I reside there.

Q. What buildings are on the land? A. Just one house.

Q. No garage or other outbuildings? A. No.

10 Q. And when was the construction of the building started with respect to this memorandum, if you can recall. A. Almost immediately. That same afternoon we called in the contractors, because I was very much in need of a home and we wanted to put it up quickly.

Q. And when did you go in your home? A. The first of December of that same year.

Q. December 1st, 1924? A. Yes.

20 Q. Now after this agreement was signed, what was done with respect to the property? A. Well, the contractors came over, and—

Q. I meant with respect to the deed. A. We all went away and went home, and a few days afterward Mr. Walder brought the deed to me at my home on Tinton Avenue.

Q. In Eatontown? A. Yes, he brought it to my home.

30 Q. And delivered the deed? A. Delivered the deed to me.

Q. To you? A. To me.

Q. I show you deed dated September 15th, 1924, from Edward W. Walder and Ellen Walder, his wife to The Northern Real Estate Company, Inc., and ask you if that is the deed which was delivered to you. A. Yes, that is the deed.

Q. Handed to you in person by Mr. Walder? A. Yes, by Mr. Walder—he came to my home.

40 Q. And when, in respect to the date of the

Augusta A. Ohl—Direct

agreement, was this given to you? A. You mean how soon after the agreement?

Q. After September 6th? A. Well, not so many days, maybe two weeks—maybe ten days or two weeks.

Q. And what did you do with the deed after you received it? A. Well, I kept the deed and wrote to my brother and told him Mr. Walder had delivered the deed to me, because Mr. Ohl lives in Newark. 10

Q. You sent the deed to your brother? A. No, he came down and I gave it to him.

Q. And how soon after you wrote that you had the deed, did your brother come down? A. Mr. Walder came to me in the middle of the week, and Mr. Ohl came down that following Saturday. 20

Q. And what did you do then? A. I said, "Here is the deed", and then we went over to the ground and he had the deed in hand and looked over the ground and we walked over the ground and he said, "This deed is not correct." I said, "What is the matter with it?" He said, "It is not the agreement which we made, and I paid for, and I will not accept it," and he says, "You give this back to Mr. Walder and tell him I will not accept this deed as it is. I want the deed as per our agreement, which I paid for." 30

Q. Well, after that what did you do? A. I then went to Mr. Walder and said, "Mr. Ohl is not going to accept that deed; he is not satisfied with it." "He wants eighteen inches, as per the agreement, from the garage, from your garage, and he will not accept this deed." 40

Augusta A. Ohl—Direct

Q. Did you offer the deed to Mr. Walder? A. Yes, I had the deed with me.

Q. Well, when you offered it to him, what was the result? A. Mr. Walder refused to take the deed and said he would not take the deed,
10 wouldn't change it, nor would his wife sign for another deed.

Q. And what did you do with the deed after that? A. Then I kept the deed until the following week, when Mr. Ohl came down again, and then I gave it to him.

Q. That is all you had to do with the deed? A. That is all I had to do.

Q. Did you have any correspondence or conversation with Mr. Walder about the matter after that? A. Never, after I once told him that Mr.
20 Ohl was not satisfied.

Q. That ended your part in the controversy after that? A. Yes.

Mr. Brinley: I would like to offer that deed in evidence.

Marked Exhibit C-2.

Court: It is admitted by the defendants
30 that this deed was delivered to the complainant in fulfillment as you claim, of the contract, is that correct?

Mr. Tansey: That is right, your Honor.

Court: And that the deed was duly executed by the defendants Edward W. Walder and his wife, Ellen Walder, and duly acknowledged by them both?

Mr. Tansey: Yes, sir.

Augusta A. Ohl—Cross

Q. Miss Ohl, immediately after the agreement was signed at Mr. Walder's office, on the 6th of September, 1294, did the parties go anywhere?

A. Yes, we all—we were in a car—an automobile, and we drove back to the ground just recently purchased and then Mr. Walder followed us in his car, and we all met down on this ground. 10

Q. Were you familiar with the land before the agreement was signed? A. Yes.

Q. And after you got down there, what was done in respect to it? A. Well, Mr. Ohl and Mr. Walder went over the land to show the prospective line—they went over and stood there and talked it over, and stood in line with the lot and walked down to the end of the plot—walked over the ground. 20

Q. Was that on the south side, which is in dispute? A. On the south side of our lot is where Mr. Walder stood. My sister and her husband and Mr. Applegate and I stood in the center of the plot.

Mr. Brinley: I think that is all.

CROSS-EXAMINATION by Mr. Tansey: 30

Q. Miss Ohl, how long after the signing of the alleged agreement was this deed given to you? A. Ten days or two weeks, I can't just remember which it is—two weeks, perhaps. I know Mr. Walder brought it to my home on Tinton Avenue.

Q. And at what time, Miss Ohl, would you say you went to see Mr. Walder and offered to return the deed? A. Well, Mr. Ohl came down Saturday and refused to accept it, and within a 40

Augusta A. Ohl—Cross

day or two I went over and spoke to Mr. Walder about it.

Q. And did you have the deed with you at that time? A. I don't recall—I can't recall that. I think I did, because my brother refused it. I
10 think I must have had it. I did have it because he refused to take it at that time and told me to take it back to Mr. Walder.

Q. But, Miss Ohl, you are not positive you had the deed with you? A. I am now that I recall it because I recall very plainly Mr. Ohl refused to take the deed at that time.

Q. And you offered it to Mr. Walder? A. Yes, sir.

20 Q. And what did you tell him at that time? A. I told him Mr. Ohl wouldn't take the deed, that it was not according to the agreement which he signed and paid for, and wasn't correct, and he wanted another made out to what they both had agreed to.

Q. As I understand it, Miss Ohl, your brother was purchasing this property with the idea in mind of building a home for you, is that right?

A. That is true.

30 Q. And you, of course, prior to the date the agreement was signed, were familiar with the land in question? A. Yes, with the lot.

Q. And your brother had spoken to you before this time about purchasing the land for you? A. Well, not that particular plot. I had been looking around everywhere for a plot of ground, but he seemed to think that was the plot for me, on account of it adjoining my sister's home.

40 Q. Did you make any objection to the construc-

Augusta A. Ohl—Cross

tion of the house after your brother had raised a question as to the deed which was given to you?

A. Did I make any objection to it?

Q. Yes. A. No.

Court: Construction of what house?

Mr. Tansey: The house that was built on the land in question. 10

Court: It was her home, wasn't it?

Mr. Tansey: It was built by her brother, as I understand it.

Court: What has that to do with this?

Mr. Tansey: My only motive for that is to inquire as to whether there was any dissension on the part of Mr. Ohl, as exhibited through his sister, because of the dispute of the property which was conveyed to them, and the property which they should have bought. My understanding of the matter was that the land was familiar to Miss Ohl, familiar to Mr. Ohl, and that if there were any possible dispute over what was purchased and what was conveyed, that it might have been brought up at that time. 20 30

Court: Well, you mean that their acquiescence and entry on the land after this deed was offered back to Mr. Walder constituted an acceptance of the property as conveyed

Mr. Tansey: That is my idea, your Honor.

Court: All right, you may proceed.

Augusta A. Ohl—Cross

Q. How long after the deed which was delivered to you, Miss Ohl, was the dwelling house finished? A. Well, I was very much in need of a home, and we got—we went right to the contractor and contracted for the home, expecting an adjustment of the land in the meantime and of course I was anxious to have the house go up because I was so very much in need of a home.

10

Court: That doesn't answer the question, Miss Ohl. When did you begin?

Witness: I think about the 20th, or 23rd or 24th of September that same month, we started to dig the cellar. It is around in that week.

20

Court: The agreement was signed and the money paid over on the 6th of September?

Witness: Yes, that is correct.

Court: The deed is dated on the 15th of September?

Witness: Yes, that is correct.

Court: How soon after the 15th of September was the deed delivered to you?

30

Witness: Well, I imagine almost immediately, within a day.

Court: Well, you would say on the 16th then?

Witness: Yes, I would say on the 16th.

Court: And then how many days after that was it that you showed the deed to your brother?

40

Witness: Well, it was in that same week, probably Mr. Walder came during the middle of the week.

Argument

Court: Well, along about the 20th, would you say?

Witness: About the 20th.

Court: And then a day or so after that—

Witness: I kept the deed in my possession until he came down. 10

Court: But a day or so after you showed it to your brother you took it to Mr. Walder?

Witness: Yes, sir.

Court: And he refused to accept it?

Witness: Yes.

Court: That would have been along about the 21st or 22nd of September?

Witness: Well, probably. 20

Court: Well, had you actually begun the building at the time you took this deed back to Mr. Walder and he refused to accept it?

Witness: Well, I think we had started our ground.

Court: You mean the cellar?

Witness: Our cellar—I think we had started our cellar.

Court: When was the contract made with the builder? 30

Witness: Well, I couldn't say that—almost immediately.

Court: Immediately after?

Witness: Yes, because the same afternoon we had the contractor called in—the afternoon that we bought the land.

Mr. Tansey: That is all, Miss Ohl.

George F. Randolph—Direct

MR. GEORGE F. RANDOLPH, duly sworn
for complainant, for

Direct-examination by Mr. Brinsley:

10 Q. Mr. Randolph, you are a surveyor having
your business office at Red Bank? A. Yes, sir.

Mr. Brinsley: You don't want me to
qualify him, do you?

Mr. Tansey: No.

Court: His qualifications are admitted
then?

Mr. Tansey: Yes, your Honor.

20 Q. Mr. Randolph, did you make a survey of
the Ohl property at Eatontown? A. Yes.

Q. At whose request? A. At the request of
Miss Ohl.

Q. And when did you make that? A. I was
over there twice—one time in September, 1924,
and at the end of November. I can give you the
exact date if you want it, from my notes.

Court: Yes, let's have it.

30 Witness: September 29th was the first
time I was over there, and then again No-
vember 14th, 1924.

40 Q. And were you given any particular instruc-
tions as to what you were to do? A. I was given
first, on the first time I was over there, a copy
of a contract which was supposed to have been
drawn between Mr. Walder and Mr. Ohl, and was
asked to stake out the ground as per the con-
tract. As I recall I staked the ground; Miss Ohl
was there at that time.

George F. Randolph—Direct

Q. Mr. Ohl? A. Miss Ohl. I never have met Mr. Ohl. I found that by following the contract literally, that is taking—

Q. Well, don't tell us that. A. I tried to stake the ground out according to the contract.

Q. Did you do anything else on that occasion— 10
make any field notes from which any drawings were made? A. Yes, I took notes.

Q. And I show you two tracings and ask you if those tracings were made by you as a result of the field notes which you took at that time?
A. Well, they were made as a result perhaps of a few notes at that time, and then again when I was out the second time, in November.

Q. In November? A. Yes. 20

Q. Now I show you a tracing, showing as having been made by Allen & Randolph, Civil Engineers, November, 1924, and ask you to explain what that tracing shows. A. That tracing shows a plot of ground which would be determined by going along Burne's Lane a distance—

Q. In Eatontown? A. In Eatontown, a distance sufficient to get to a line which would parallel part of, or be at right angles with Burne's Lane and pass at a point eighteen inches from a garage which was on the Walder property. 30

Q. The north side? A. The north side of the garage, yes, sir.

Q. And that is the tracing of the plot of land in controversy here? A. Yes.

Q. And you say this south line of the Ohl property, or the north line of the Walder property is at right angles to Burne's Lane? A. On that drawing, yes. 40

George F. Randolph—Direct

Q. And eighteen inches from the overhanging roof of the Walder garage? A. Yes, sir

Q. And that shows a plot of land how many feet front? A. 77.7 feet.

Q. I notice here on the north line of this property a word "More or less," and two different points of the compass. A. Yes, sir; two courses.

Q. How much do they vary? A. In degrees?

Q. Yes. A. About twenty minutes.

Q. And is the line which forms the south line of the Braun property at right angles to Burne's Lane?

20 Mr. Tansey: I would like to ask Mr. Brinley if he intends to offer this because Mr. Randolph's testimony seems to be from the map which he has drawn.

Court: I assume he is going to offer it. I don't know.

Mr. Brinley: I am going to offer it.

Q. Does the direction you have indicated show a line at right angles to Burne's Lane? A. Yes, sir.

30 Q. So that the line back of the Braun property and the southerly line of the Ohl property are parallel at this point? A. Yes.

Mr. Brinley: I offer that sketch in evidence.

Marked Exhibit C-3.

Court: I don't quite get the significance of your inquiry about parallel lines.

40 Mr. Brinley: The point of it is this, that the agreement says, "A plot of ground shall be conveyed the south line of which

Argument

is eighteen inches north of the Walder Garage.”

Court: Your contention is that the plot of ground which Mr. Ohl purchased was of seventy feet more or less in front, and to extend from the Braun and Applegate property on the one side, between parallel lines, from Burne's Lane, the southerly parallel line being eighteen inches from the garage; is that correct? 10

Mr. Brinley: Yes, sir; that is my contention.

Court: And when you speak of parallel lines you mean the parallel lines, the north and south lines? 20

Mr. Brinley: The north and south lines, the north line being along the Braun and Applegate property, and the south line being eighteen inches from the garage.

Witness: I would like to correct an answer I made when Mr. Brinley asked me the divergence of those two lines. The figure should be about a degree and thirty minutes rather than twenty minutes.

Court: Then the lines are not exactly parallel? 30

Witness: This refers to the line which connects with the line near Burne's Lane and goes back to the rear of the property. That line is not in continuation of the other line between the two locations.

Court: You mean the line along the Applegate property is not parallel with the southerly line? 40

George F. Randolph—Direct

Witness: No, sir, it is not a continuation of the Braun line.

10 Q. At that time did you take field notes as a result of a survey showing a plot of ground seventy feet in front on Burne's Lane and eighteen inches north of the overhang of the westerly corner of the Walder Garage—am I right in saying westerly? A. Yes.

Q. Did you? A. Yes.

Court: You mean northerly?

Witness: Northwesterly corner he is referring to now, your Honor.

20 Q. I show you a tracing marked "Allen & Randolph, Civil Engineers, November, 1924," and ask you if that tracing is made from the field notes taken at that time? A. Yes, sir.

Court: Is that tracing different from this one? (Indicating Exhibit C-3)?

Mr. Brinley: Yes, sir.

30 Court: Let me ask another question. Where is the line fence of this Steen property—that is the rear line of this property, the diagonal line which connects the two parallel lines?

Witness: Yes, sir.

Court: And there is a line of trees along there?

Mr. Brinley: Yes, sir.

40 Court: Then it appears from this agreement that the Braun and Applegate lines are not of the boundary lines of the property and the James Steen property line is

George F. Randolph—Direct

another line, and it is obvious that the street is one boundary line. Now the question is, what is meant to be the southerly boundary line of the property, isn't it? That is the whole question in the case.

Mr. Brinley: The other lines are not in dispute. 10

Mr. Brinley: Any objection to this tracing, Mr. Tansey?

Mr. Tansey: No.

Mr. Brinley: I offer this tracing in evidence.

(Marked Exhibit C-4.)

Court: C-4 then, shows the line with seventy feet front? 20

Mr. Brinley: Yes, sir, and eighteen inches north of the northwest corner of the Walder Garage. That is merely for the matter of argument.

Court: If it is eighteen inches from the northwest corner, Mr. Randolph, how far is it from the southeast corner?

Witness: I don't know, sir.

Court: Can you tell?

Witness: I can tell approximately, by scale; approximately two feet, sir. 30

Q. Now, Mr. Randolph, using this tracing, referring to Exhibit C-4, will you tell me how far from the north side of the Walder Garage will be the southerly boundary of the Ohl property, if it is seventy feet front and at right angles to Burne's Lane? Do you get my question? A. May I refer to my notes. 40

George F. Randolph—Direct

Q. Yes. A. It will be nine and two tenths feet.

Q. I show you Exhibit C-2 and ask you where the southerly line in Exhibit C-2 will come with respect to the northerly side of the Walder Garage? A. The southerly line as described?

10 Q. The southerly line as described in the deed.
A. Well it depends all upon how far you go down Burne's Lane from the seventy foot point. Do you want me to draw it on here? It would be 9.2 feet from the garage.

Q. I want you to look at this deed and then read the description of the southerly line and tell me how far in that actual deed would it carry your southerly line from the Walder Garage? A.
20 It would be 9.2 feet from the garage, where it passes the garage.

Court: Well, it is quite apparent that that was not intended, isn't it, Mr. Tansey?

Mr. Tansey: Why, if your Honor please, the testimony of Mr. Randolph of course would show that there would be quite a substantial piece of land between the garage and the southerly boundary line. Our
30 whole contention is based on our construction of the agreement, that the eighteen inches referred to in the receipt, refers to a state of facts which you may call hypothetical, that is, if there were not seventy feet of land—if there were seventy feet of land, Mr. Ohl would receive a lot seventy feet front.

Court: But for what purpose were the
40 words "eighteen inches from the north

Argument

side of the Walder Garage," put in the receipt?

Mr. Tansey: I can explain that, your Honor, in this way. Mr. Ohl approached Mr. Walder at his office and told him he wanted to purchase this land. 10

Mr. Brinley: It seems to me that Mr. Tansey ought not to supplement what he is going to say now as to evidence of what the negotiations were prior to the actual signing of this memorandum.

Court: All I am asking now, Mr. Tansey, if "Eighteen inches from the north side of Walder Garage," doesn't mean a line parallel with the north side of the Walder Garage and eighteen inches northerly from it, what does it mean? 20

Mr. Tansey: Why it means simply this, that if the lot in question were seventy feet wide, as mentioned in this agreement, Mr. Ohl would receive a deed describing a lot seventy feet in width.

Court: Well, then, why was it necessary to use the words, "Eighteen inches from the north side of the Walder Garage?" 30

Mr. Tansey: If the lot in question were not large enough to give Mr. Ohl seventy feet, then he would receive as much land as possible, so that the southerly line would not come within eighteen inches of Mr. Walder's Garage.

Court: Merely wanted to get your idea of what you thought the agreement meant. You may proceed, Mr. Brinley. 40

George F. Randolph—Cross

Mr. Brinley: That is all, Mr. Randolph.

Court: As I understand, this lot is described in the deed between parallel lines, that is, lines parallel and running at right angles from Burne's Lane?

10 Mr. Brinley: I am not sure it does say parallel, but it does say at right angles to Burne's Lane. The reason it does not say parallel is because of this configuration here.

Court: But the two lines are at right angles at least at the beginning? They extend at right angles from Burne's Lane?

20 Mr. Brinley: In the deed, yes, so many minutes west at right angles to said roadway.

CROSS-EXAMINATION by Mr. Tansey:

Q. Mr. Randolph, at whose request was it that you made the survey of this land on Burne's Lane? A. I made the survey at the request of Miss Ohl.

30 Q. And you stated in your direct testimony that a copy of the agreement was given to you from which you made your survey. I show you Exhibit C-1—is that the copy to which you refer? A. I wouldn't say whether it was or not. I don't remember.

Q. Might it be the copy? A. It might be, yes.

Court: That is the original; he had a copy.

40 Mr. Tansey: I was wondering just what he did mean and whether this was the

George A. Ohl, Jr.—Direct

agreement he had when he did make his survey.

Court: Just take that and see if you can recall whether the paper you had was a copy of that Exhibit C-1.

Witness: It may possibly have been this paper, your Honor. As I recall it I went to the bank to see Mr. Applegate and I think he had the paper in his possession. It is not fresh in my mind. I didn't have this, either time, in my possession. I took notes from it. 10

Q. Mr. Randolph, at the time you made the survey you state Miss Ohl was present? A. Yes. 20

Q. Is that true? A. Yes.

Q. And did you receive any directions from her? A. No, no directions.

GEORGE A. OHL, Jr., duly sworn for complainant, for direct-examination by Mr. Brinley:

Q. Mr. Ohl, you are the complainant in this cause? A. Yes, sir. 30

Q. And you live where? A. Newark, N. J.

Q. And what is your business? A. Manufacturer of machinery.

Q. Miss Ohl, the lady who was previously upon the stand is your sister? A. My youngest sister.

Q. And where she lives now— A. At Eatontown, New Jersey.

Q. Did you undertake to buy a piece of land 40

George A. Ohl, Jr.—Direct

from Mr. Walder in September 1924? A. Yes, sir.

10 Q. I show you Exhibit C-1, "Eatontown, N. J., September 6, 1924," and ask you if you have seen that before? A. Yes, sir, that is the so-called contract I drew up on September 6th, in my own writing.

Q. Did you see Mr. Walder sign it? A. Yes, sir, I was sitting right alongside the table when he signed it.

Q. And where? A. At the office of George Steele, Nurseryman, in Eatontown, N. J. I understand Mr. Walder is superintendent for Mr. Steele.

20 Q. Prior to that had you seen the land which you agreed to buy? A. Before I went to his office.

Q. Where is it? A. On Burne's Lane, about half a block, two or three hundred feet south of the main street, and at the rear, or south of my brother-in-law, Mr. Braun's property. He is on the corner of the lane and the main street. This is directly next to it, south, between the Walder land and the Braun land.

30 Q. When did you pay for this land? A. That morning, possibly ten minutes after we agreed on the price.

Q. Paid how? A. Check.

40 Q. And after you paid for it, what did you do? A. After quite a conversation in reference to the dimensions of the lot, and as to whether his wife would agree to sell it, and other details, that were gone over, then we went, after I gave him the check, first to the contractor, according to what

George A. Ohl, Jr.—Direct

he told me it was and I gave him a check and told him I did business quick and I would trust him in getting out the deed according to what he told me. We went over to the plot of ground, and standing about three feet north of his driveway, which is the northerly part of his property, about 10 three feet north of that he pointed towards the garage and says, "Right here," he says, "This is the line, eighteen inches from that garage." He says, "When I put that garage up I put it away eighteen inches, because I had some trouble with Mr. Applegate's line and I had to take the edge of the roof off it. And he stood there, he and I—my sister was probably ten or twelve feet away with my brother-in-law and with my sister, 20 Mrs. Braun, and he pointed toward the garage and told me the property was eighteen inches from the garage. I says, "What is the front of that?" He says, "I don't know," he says, "Put down seventy feet more or less, the more or less will fix it." I supposed more or less meant eighty or ninety feet. I put the more or less down with the seventy feet, but not more or less with the eighteen inches, because that was the 30 southerly line.

Q. Did he point out the line of his garage? A. Yes, we stood about three feet north of his driveway. He indicated, I would say, a parallel line to the other part of that plot, and my sister was there and my brother-in-law was there and could have seen this.

Q. And at that time had the land anything upon it? A. No, I was starting with one of the contractors and told my sister I would have that 40

George A. Ohl, Jr.—Direct

home up. I told Mr. Walder I wouldn't put up no cheap building.

Q. After that when did you hear from this matter again? A. About two weeks. My sister wrote me a letter that the deed was finished and
10 I told her I would be down Saturday.

Q. Saturday of that same week? A. That same week, I think it was. About two weeks after September 16th.

Q. After September 6th? A. About the 20th. I came down to my summer home at Avon. I stopped at Gussie's and looked the deed over and I saw right away there was a funny description of that southerly line and I knew after I meas-
20 ured the seventy feet with a ten foot pole, that it was wrong. I says, "We got eight or ten or twelve feet coming; you tell Mr. Walder this deed won't do." She did. I told her not to record it with the description that was in it, and I didn't want it recorded. Then the next week after that—

Q. You never did have it recorded? A. No, sir, on account of it not being right. A week later
30 Gussie gave me the deed and said he wouldn't and his wife wouldn't sign to give me a new one. I then wrote him a letter on September 30th.

Mr. Brinley: I would like to call for a letter of September 30th, 1924, addressed to Mr. Walder, from Mr. Ohl.

(Letter produced.)

Q. I show you that letter. A. This is a letter
40 of September 30th, signed my myself.

George A. Ohl, Jr.—Direct

Mr. Brinley: Any objections to this? I offer it in evidence.

Mr. Tansey: No objection.
(Marked Exhibit C-5.)

Q. Mr. Ohl, I show you a letter dated October 2d, 1924, addressed to you and signed by Edward W. Walder, and ask you if that letter was received by you from Mr. Walder in response to the letter of September 30th? A. Yes, that is the letter I received October 2d. 10

Mr. Tansey: No objection to it.

Mr. Brinley: I offer it in evidence.

(Marked Exhibit C-6.)

Mr. Brinley: This is a reply to that letter and the main paragraph is this, "With respect to standing at a point somewhere my line, etc." 20

Q. Mr. Ohl, after that what did you do in respect to the matter? A. After writing that letter and seeing my sister, she always said, "Let's settle it." I then started suit to have a Court—wrote a letter stating we would have someone decide the matter for us. 30

Q. After that did you give any instructions in reference to a survey? A. Yes, sir, I told my sister to get some surveyor they knew and survey the land.

Q. When did you give those instructions? A. Right after then.

Q. Right after that letter? A. After the September 30th letter—right after that.

Q. And as a result of that survey were these 40

George A. Ohl, Jr.—Direct

tracings submitted to you? A. Yes, sir, they were given to me, with a bill in November, 1924.

10 Q. And after that time, Mr. Ohl, without speaking in detail of what passed between you, was there any further correspondence or negotiation between you and Mr. Walder in reference to this matter? A. Yes, sir, I paid him \$250 for certain privileges. He was to allow me the use of the poles. He stated he put them up; and the use of the gas. He said he paid for the gas pipes running in there.

Q. I mean in respect to the size of the lot? A. Since then?

20 Q. Yes, after this letter of October 3d, of Mr. Walder to you did you have any further correspondence or negotiation with Mr. Walder in respect to the southerly boundary line of that lot? A. I don't think so, I went right to Wilson & Smock and engaged them to go ahead and attend to the matter. I don't remember now whether I dropped it immediately or whether I wrote several letters. Yes, I wrote several letters. One, anyway, is here.

30 Q. Then your negotiations continued? A. October 29th is the date of my next letter. December 17th is another one. October 3d is another one. October 14th another one—November 8th—

Q. Just look through them—

Court: This is directed to the question of laches?

Mr. Brinley: Yes, sir.

40 Court: Do you seriously contend any laches in this case, Mr. Tansey?

George A. Ohl, Jr.—Direct

Mr. Tansey: We do, your Honor. We contend there was laches.

Court: Go ahead, give me the letters. Show me what correspondence passed.

Witness: September 30th is one, November 8th, November 25th, November 28th. 10

Court: When did you have the last correspondence, before the matter was referred to your attorneys?

Witness: December 17th.

Q. And when, after that, did you refer the matter to your attorneys for attention? A. I think immediately. I got no correspondence.

Q. Who were they? A. The people that took the case? Wilson & Smock. 20

Q. And they have had the matter in charge since then? A. Yes, sir.

Q. You haven't attempted to negotiate with Mr. Walder since we had the matter in our office? A. No, sir.

Court: Are there any intervening rights between the date of this deed and the time of the filing of the bill, over this property? 30

Mr. Brinley: I think not, if your Honor please.

Q. Now, Mr. Ohl, when was the house—when was the construction of the house started? A. The construction of the house? Possibly two weeks.

Q. The first thing that was done on the ground? A. Within three or four or five days. I immediately went to Avon, that Saturday afternoon, and 40

George A. Ohl, Jr.—Direct

on the Sunday had Mr. Stanton and Mr. Spayd, the contractor, and some of those that have been building for me, and I says, "Get right on the job," and they worked Sundays and got on the job within two or three days.

10 Q. Two or three days from when? A. From September 6th, 1924, and I believe within ten or twelve days they started to dig the cellar.

Q. And who was the contractor? A. Mr. Spayd, of Avon, N. J., was the general contractor. Mr. Stanton was the builder. Mr. Spayd and his sons were the carpenters, masons and plumbers.

Q. Was the work done by one contract? A. He was paid, and he paid the others.

20 Q. The rest was sub-let? A. Yes, sub-contractors.

Q. And when was it that the house was completed? A. It was before the 1st of December. They made very good time, got to give them credit.

30 Q. And why was it you started the house on the land after you knew of this controversy about the land? A. Because my sister told me she would have to lose her home, that the owner's son or daughter got married and she had no home. I told her "I will build you one and make you a present of it." We located there, figuring Mr. Walder would be all right, and knowing Mrs. Walder and my sister were friendly—they are today. He can't see eighteen inches and I can't see nothing else.

George A. Ohl, Jr.—Cross

CROSS-EXAMINATION by Mr. Tansey:

Q. Mr. Ohl, you stated on direct-examination that there was no further correspondence between yourself and Mr. Walder or at your direction—

A. I recalled that; I stated that I thought it over and checked up my memory. 10

Q. After December 17th, 1924, until the matter was referred to your attorneys, is that so? A. As near as I can remember that is true.

Q. Mr. Ohl, did you ever consult Paul F. Girtanner, of Newark? A. He wrote a letter for me. He is my friend, my chum, playing billiards.

Q. And did you direct him to write a letter? A. I did. I have a copy of his letter, that he wrote to Mr. Walder. 20

Q. Mr. Ohl, I show you letter dated December 5th, 1924, purporting to come from the law office of Paul F. Girtanner and directed to Edward W. Walder, Eatontown, and ask you if the contents of that letter were such that you directed to be brought to Mr. Walder's attention?

Mr. Brinley: I don't exactly know what you mean.

A. I gave him the correspondence and told him to get the proper deed made out, that is all. He is a lawyer and I don't know anything about it. 30

Mr. Tansey: I would like to offer this letter.

Mr. Brinley: No objection.
(Marked Exhibit D-1.)

Q. And Mr. Ohl, were you shown a reply coming from Mr. Walder and directed to Paul F. Gir- 40

George A. Ohl, Jr.—Cross

tanner dated December 12, 1924? A. I don't remember now, unless you can refresh my memory.

Q. (Showing him letter.) A. Yes, I remember receiving that letter, where he refused to give me a new deed.

10

Mr. Tansey: I would like to offer that, if there isn't any objection.

Mr. Brinley: No objection.

(Marked Exhibit D-2.)

Q. And Mr. Ohl you state that after December 17th, 1924 there was no further correspondence until the matter was brought to the attention of your attorneys, Wilson & Smock? A. Not that I remember.

20

Mr. Brinley: No correspondence between Mr. Ohl and Mr. Walder?

Witness: I don't remember any.

Q. And you say on direct-examination you referred the matter to Wilson & Smock almost immediately? A. After this correspondence, yes, sir.

30

Court: At the time of this letter, Exhibit D-2, dated December 12th, 1924, the house had been pretty well completed?

Witness: Living in it; of course any dealings I had with Wilson & Smock was through my sister. I have never seen Wilson & Smock, or Mr. Brinley until a few days ago. My sister attended to it.

Q. Mr. Ohl, I believe you have stated on direct-
40 examination that even in spite of your knowledge of the controversy about these lines you in-

George A. Ohl, Jr.—Cross

structed your contractor to proceed? A. Proceed, yes, sir.

Q. And you were satisfied to have him proceed under the circumstances? A. Satisfied that whatever the contract called for is what I would get, and what I wanted. 10

Q. Did you approach Mr. Walder at the time you started the construction of the house and discuss the matter personally with him? A. No, after they started to build that house I don't think I saw the contractors down there once in five or six weeks. I was too busy with my business.

Q. Did you direct your sister, Miss Augusta Ohl to interview Mr. Walder any further in regard to this matter? 20

Mr. Brinley: After when?

Q. After the house had been started? A. Oh up to last week I tried to get the thing settled between us. I went to settle. I don't want to go to Court if I don't have to.

Q. Mr. Ohl, prior to the time the receipt which you prepared was signed in Mr. Walder's office, you had talked over the matter of the sale and had received advice from Mr. Walder as to the size of the lot, etc? A. Yes, sir. 30

Q. And you thoroughly understood it? A. I certainly understood the language I wrote, because I wrote it myself and I must have understood it to write it and when it come to seventy feet I hesitated; I says, "How about that?" He says, "Put down more or less" and I put down more or less after the word seventy was down, as 40

George A. Ohl, Jr.—Cross

you will read there. He went and showed me and laid it out, where it was. He also, before that contract was signed, told me he built his garage eighteen inches from the line so that he wouldn't have the same trouble he had with the Applegate barn.

10 Q. Well, will you explain just what was told you in regard to that Applegate trouble?

Mr. Brinley: I object to its being material.

Mr. Tansey: I would like to show that Mr. Ohl by stating that Mr. Walder had previously had trouble with the Applegates, etc., that he is trying to intimate what he has shown in his correspondence, that he is dealing with someone whose obli-

20 gations. His correspondence shows it, and I would like the Court to be informed as to just what transpired between Mr. Walder and Mr. Ohl in regard to this previous discussion.

Court: I will permit you to show it, but I don't think it is necessary. I don't want to exclude anything you think is proper, if there is any possibility that it might have any bearing on the case, but as I understand the matter now, the only inference to be drawn from Mr. Ohl's reference to the Applegate controversy was that Mr. Wal-

30 der had some controversy, as the result of whose fault I don't know, but over some barn on the Applegate property, and he

40 wanted to avoid any controversy in the fu-

Argument

ture. That is the inference to be drawn from the testimony as it stands now, but you may proceed if you think it is necessary to put in anything else.

Mr. Tansey: I will withdraw my question. May I ask Mr. Ohl whether this Applegate transaction had anything to do with the lines of the lot in question? 10

Witness: Yes, because he owned the property around it. There was a barn and the line showed that there must have been a line that he had purchased from the former owners, because my line had not been set then until he told me the eighteen inches. 20

Court: You attorneys don't know whether this line eighteen inches from the garage is a property line or not?

Witness: I understood it was a property line, because when he said he built his garage eighteen inches away from a line I judged it was a property line.

Court: Was the property out of which Mr. Ohl is buying this lot, and the property on which Mr. Walder's garage was located separate and distinct or was it all out of one tract of land originally? 30

Witness: No, I would call it separate and distinct.

Court: I am not asking you what you understood. I am asking what the fact is and I think the attorneys may enlighten me.

Mr. Tansey: The tract which he is purchasing was a part of the whole tract pur- 40

George A. Ohl, Jr.—Cross

chased from Susan A. Brown. The eighteen inch line is merely a supposed line.

Court: That answers the question.

10 Q. Mr. Ohl, you have stated on direct-examination that Mr. Walder stood about there feet north of his driveway and pointed to a line running west and stated it was approximately the southerly line of the lot in question? A. He mentioned eighteen inches from the garage. He tried to make a parallel line to my observation and looked right about eighteen inches from the roof of his garage.

Q. You are familiar with the lay out of Mr. Walder's driveway? A. Yes, sir.

20 Q. Does it extend to the extreme northerly line of what he contends to be his property? A. No, I think not, because I should have these three or four feet south of this line of eighteen inches from the garage, and this is to the center of his garage.

30 Q. In regards to these privileges, Mr. Ohl, the house at the present time is receiving electric service, is it not, and gas service? A. I believe it is.

Mr. Brinley: I stopped Mr. Ohl on that question. I don't think that is in controversy.

A. I had to get another man to give me water after I paid him for that. Let's drop that.

Mr. Tansey: In some of the letters which Mr. Ohl has written, mention is made of those privileges.

40 Mr. Brinley: That matter is not in controversy now.

George A. Ohl, Jr.—Cross

Q. Mr. Ohl, do you contend, or have you ever contended that the privileges—

Mr. Tansey: I don't like to elaborate on this Mr. Brinley, but there is controversy about water service.

10

Court: There isn't anything in the bill or in the pleadings which the pleadings which shows anything in controversy except this strip 7.7 feet in width.

Mr. Tansey: I will withdraw the question.

Mr. Brinley: Is the house so located on the land now as to interfere with any of these lines in dispute?

Witness: No, sir.

20

Q. The house, as located at the present time, is approximately how far north of the southerly line of the lot as conveyed to you by Mr. Walder?

A. I should judge eight or ten feet, possibly twelve feet. I had it built more to the north, so as to allow a driveway for cars.

Q. That is at the time the contract was given out? A. I left room for the driveway, figuring on that eighteen inches. He stopped her and her friends from going on that property or land.

30

Q. Having in mind the southerly line as stated in the deed which was offered to you? A. Yes, sir; no, not as stated in the deed—no, sir.

Q. Then you want to contradict your answer? A. No, I say it was ten or twelve feet, between the southerly line of this building and the northerly line of the property, which, as I claim is eighteen inches, parallel to the Braun Lot, from the garage.

40

George A. Ohl, Jr.—Cross

Q. My question was, how far north of the southerly line as established in the deed offered to you by Mr. Walder is your house located? A. About nine feet less than I claimed.

10 Court: I think it is quite apparent he misunderstood your first question. He says it is ten or twelve feet northerly from the line as he claims it to be. If that is so, it would be three or four feet northerly from the line as you claim it to be.

Q. Mr. Ohl, how far south of the north line of the property—

20 Court: It doesn't interfere with the property lines, does it?

Mr. Tansey: My object was, if your Honor please—

Court: Go on.

Mr. Tansey: I will withdraw the question.

Mr. Brinley: Complainant rests.

30 Mr. Tansey: At this time I would like to move that the bill be dismissed on the ground that the complainant has failed by a preponderance of the evidence to establish any agreement as to the southerly line of the lot in question, as contended by the bill filed in this cause.

Court: Well, your motion is denied. You need not argue it any further.

40

Edward W. Walder—Direct

EDWARD W. WALDER, duly sworn for defendants, for direct-examination by Mr. Tansey:

Q. Mr. Walder, you are one of the defendants in this cause? A. I am.

Q. And you reside where? A. On Burne's Lane, Eatontown. 10

Mr. Brinley: I just want, if I may, to produce Mrs. Walder on the stand and identify her signature to this deed.

Court: It is admitted that is her signature, and was duly acknowledged by her.

A. South of the State Highway.

Q. And you are the owner of a tract of land which you originally purchased from one Susan A. Brown? A. I am. 20

Q. And the premises in controversy are a portion and part of that tract? A. They are.

Q. On September 6th, 1924, were you approached by one George A. Ohl? A. I was.

Q. In regard to the purchase of a lot on Burne's Lane? A. I was.

Q. Will you, Mr. Walder, in so far as you can state, explain what the receipt by Mr. Ohl means with respect to your agreement? 30

Mr. Brinley: I object.

Witness: I would like to recite—

Mr. Brinley: I object to Mr. Walder explaining what the agreement means. It seems to me that the agreement has been made and signed and it is not a matter for the Court to determine what they meant 40

Edward W. Walder—Direct

by it. I very carefully excluded Mr. Ohl from explaining what he meant by it, thinking it entirely improper.

10 Court: I won't receive any testimony as to what is meant by the writing. I will receive testimony as to what took place between the parties. I will construe the agreement when we get to it. You may tell me what took place between you at the signing of the agreement, and afterwards, but you can't tell what you thought it meant or what you construe it to mean.

20 Mr. Tansey: My question was perhaps poorly framed. I withdraw that question and would like to ask Mr. Walder this question.

Q. Mr. Walder, will you explain what took place prior to the signing of this agreement? A. In reference to the sale of this piece of property? This piece of property is part of the lot surrounding my own private residence on Burne's Lane. Miss Ohl is a lady we have known about eight or nine years. She couldn't get a house.
 30 She had intimated she would like to purchase a plot of land from me to build herself a house—never told me that, directly. This was a part of our lawn, and we had no notion or wish to sell it. Between ten and ten-thirty on the Saturday morning of September 6th, I visited my house, drove out of Burne's Lane and saw Miss Ohl walking across to the house from the lane directly opposite. I made a particular point of stopping at
 40 that time and saying that that land was positively not for sale.

Argument

Court: I am not interested in that. Strike that out about the meeting with Miss Ohl, and about what took place down on the property.

Come down to the time when Miss Ohl and the complainant appeared at your office and tell me what took place there? 10

Witness: Mr. Ohl, accompanied by Miss Ohl, arrived at my office at ten forty-five. He said he had come to see me about purchasing a plot of land. I told Mr. Ohl it wasn't for sale. He mentioned that he had a lot of other lots in mind.

Mr. Brinley: May I just call your Honor's attention to this case of *Shinn v. Black*, 97 Law 219, in which the Court held that where the parties have put their contract in writing the writing shall be the only evidence, and that oral testimony of what was said or done during the negotiations will not be admitted, either to contradict the written contract or supply the terms with respect to which the written contract is silent. 20

Court: That is the rule. There was no objection made to the testimony brought out on cross-examination by Mr. Tansey, from Mr. Ohl, which in my judgment would have been inadmissible if it had been brought out on direct, and he had objected to it. I am not going to permit any testimony which will vary the terms of this contract—I mean testimony prior to the signing of the contract. The contract speaks 30 40

Edward W. Walder—Direct

for itself. You may testify to anything that occurred afterwards or anything in explanation of the contract which occurred at the signing.

- 10 Q. Mr. Walder will you confine your testimony to what took place at the time of the signing and tell the Court exactly what transpired between you and Mr. Ohl? A. The signing of that receipt or agreement took place within a few moments of the things I was citing.

Court: Well, it doesn't make any difference what your prior attitude was—you finally made up your mind to sell it.

- 20 Witness: We agreed to sell, and it was sold.

Court: Now, after the agreement was signed and you had received the money, did you go down on the property?

Witness: Some time afterwards. Mr. Ohl asked me at that time—

Court: How soon afterwards?

Witness: Twenty minutes afterward.

Court: The same day?

- 30 Witness: The same morning.

Court: What took place after you got down there?

Witness: The agreement was signed before that.

Court: Well, after the agreement was signed, and before you went down there, what took place?

- 40 Witness: There was considerable conversation between Mr. Ohl and myself as

Edward W. Walder—Direct

to the sizes of the lot before the agreement was signed, and I think it is very important that the Court should hear that. Mr. Ohl asked me how much land I would sell him. I told him I hadn't the slightest idea of how much land was there. 10

Mr. Brinley: If I have slipped and let any question through regarding anything before the signing of the agreement, I am unaware of it. I now respectfully object to the conversation leading up to the making of this agreement.

Court: Sustained.

Q. Mr. Walder, at the time this agreement was signed was there anyone else present in your office? A. Miss Hall, my stenographer and secretary. 20

Q. And where was she sitting in relation to you people? A. I would say about twelve feet away.

Q. Mr. Walder, at the time the agreement—the receipt—was written by Mr. Ohl, did you make any objection to the language or the contents of it?

Mr. Brinley: I object because of its being immaterial. 30

A. I suggested to Mr. Ohl—

Court: The question you asked may be answered yes or no, without going into any detail.

Q. (Question repeated.) A. No.

Q. Did you read the receipt over, Mr. Walder?

A. Not after it was written. 40

Edward W. Walder—Direct

Q. Then you mean to say you signed the receipt without having read it and understanding its contents? A. I did.

10 Mr. Brinley: I object, if your Honor please; here is a man over twenty-one years of age who signed an agreement. No fraud is charged in the answer, or any defense set up.

Court: He is responsible for his own agreement. If he didn't read it over that was his look out. He wasn't induced to sign it by any fraud.

20 Mr. Tansey: I am in a very peculiar position. As I understood the rule, no parol evidence could be admitted to change or alter the terms of a written agreement, but I was of the impression that parol evidence could be admitted to explain the meaning or relate any circumstances surrounding the signing of the contract.

30 Court: Well, the rule as stated in the case cited by Mr. Brinley is the correct rule. That rule has been reiterated time and time again by the Courts of this state, and there should be no question in anybody's mind of what the rule is. There isn't any question in my mind about it. Anything that took place prior to the signing of an agreement, it is supposed, must have been embodied in that agreement. Now the language of an agreement should be interpreted by the Court, after the
40 agreement has been reduced to writing, and

Edward W. Walder—Direct

I have no difficulty in interpreting this agreement in my own mind. Anything that was done by the parties after the signing of the agreement which might vary the terms of the agreement is, of course, admissible. 10

Q. Mr. Walder, I show you a letter dated May 26th, 1925, purporting to come from the law firm of Wilson & Smock, and directed to you, and ask you if that is—

Court: This is all correspondence which was passed in an effort, I presume to adjust or compromise this matter, was it not?

Mr. Tansey: That is the fact, your Honor. 20

Court: Then I won't receive it.

Q. Mr. Walder, after December 17th, 1924, when was the next time that you were approached by Mr. Ohl, or any of his agents, in regard to a settlement of the dispute in this matter? A. I think the next reference to the matter was a letter from the office of Paul F. Girtanner.

Q. After December 17th? A. When I received the letter from Wilson & Smock's office. 30

Q. How long afterward was that? A. The date would show on the letter. I forget, it is so long ago.

Mr. Tansey: That is all.

Mr. Brinley: No questions.

Adjournment until two o'clock.

Jessie Hall—Direct

Afternoon session.

10 Mr. Brinley: Mr. Tansey has called my attention to these five lines at the end of Paragraph Eight, which he says were not in the original bill. Rather than have any confusion I consent that that be stricken out. My application was to amend the bill by changing the name of the complainant, and rather than be put in any embarrassing position I move to strike that part out.

20 Court: Let it appear upon the record that the last five lines of the first paragraph of section eight, I suppose we will have to call it, of the amended bill of complaint, are stricken out on the motion of the solicitor of complainant.

MISS JESSIE HALL, sworn for defendants,
for direct-examination by Mr. Tansey:

30 Q. Miss Hall, were you present in the office of Steele's Nursery, September 6th, 1924, when Mr. Ohl and Mr. Walder were discussing a business transaction? A. Yes.

Q. Did you hear any of the conversation at all?
A. Why yes. Do you want me to say what I heard?

40 Q. No, not just now. Did you hear any conversation relating to the agreement at the time the agreement was signed? A. That has got me all excited. What was it?

Authorities Cited on Behalf of Defendants

Q. (Question repeated.) A. No.

Mr. Brinley: No questions.

Mr. Tansey: Defendants rest.

Would your Honor hear me for a moment on the question of reformation which was raised in the bill? 10

Court: Yes.

Mr. Tansey: In this case, your Honor, the bill of complaint prays, amongst other things that the defendants be directed to convey certain land according to a certain reformed description. I submit to your Honor that the testimony shows no mutual mistake, and it is my contention that equity will not reform an executed contract unless the mistake is mutual, and I cite as authority, Dougherty v. Greenwich, New Jersey Digest, Chapter 6, page 10898, and I would also cite Whelen v. Osgoodby, 62 Equity 571, as follows: "An instrument will not be reformed for mistake in the absence of fraud unless the mistake was mutual." 20

On the question of specific performance I would like to call to your Honor's attention the case of Muller v. Brautigan, 84 N. J. Eq., 574, "Where a contract for the sale of land was defective as uncertain in reference to the description of the lands to be conveyed, specific performance according to its terms could not be granted." And likewise on the same point the case of Carr v. Passaic Land etc., Company, 22 N. J. Eq., 85, and also in Force v. Dutcher, 18 N. J. Eq. 401, "Specific performance will not be enforced unless the contract designates with certainty the land to be conveyed." 30 40

Authorities Cited on Behalf of Defendants

I would like to also call to your Honor's attention, *McClung Drug Co. v. City Realty & Investment Co., et al.*, 108 Atl. 767, "It is familiar law that equity will not specifically enforce a contract for the sale of lands unless it is conclusive and certain as to parties, subject matter, the price and the terms." And also on the question of specific performance I would like to call your attention to a case which perhaps by analogy might apply to the present situation, *Krah v. Wassmer*, 75 N. J. Eq., 109, "One cannot defeat specific performance of a contract because of the omission of terms therefrom resulting from his own negligence." He prepared the contract and he is responsible for its incompleteness, if it is incomplete. I submit, perhaps by analogy the statement in that case could be applied to the present state of facts.

I would like to call your Honor's attention to *Lippincott vs. Bridgewater*, 55 N. J. Eq. 208, "A receipt which does not so identify the lot of land to be conveyed that it can be distinguished from other lots, and contains no statement by which the intention of the parties with respect to the land can be ascertained, is not such a memorandum in writing of a contract for sale of lands as will satisfy the Statute of Frauds."

In this case, it seems to me, that the proof submitted by the complainants does not seem to be clear and convincing on the question of the intention of the parties to convey the lot of land which the complainants contends he did not receive. In that respect I would like to call your Honor's attention to *Rabinowitz v. Rooney*, 128 Atl. 882,

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BERRY, V. C. (Orally).

10 This bill is filed for the specific performance of an alleged agreement for the sale of land located at Eatontown, New Jersey. It asks that the alleged agreement be construed and that the description of the land which it is alleged the complainant agreed to purchase, and the defendant agreed to sell, as contained in a deed executed and delivered by the vendor to the vendee, subsequent to the date of the contract, be reformed, in order that it may conform to the agreement or understanding which is sought to be enforced.

20 On September 6th, 1924, the defendant agreed to sell, and the complainant agreed to buy, a certain piece of land at Eatontown, New Jersey, for the sum of Eight Hundred and Fifty Dollars (\$850.00). The complainant paid to the defendant the full purchase price of the land on that day and received in return a receipt for the money so paid in the following terms:

“Eatontown, N. J.
Sept. 6/24.

30

Received from Geo. A. Ohl, Jr., Eight Hundred and Fifty Dollars, the receipt of which is hereby acknowledged for plot of ground south of the Braun & Applegate property 70 ft. front more or less and westward to trees or line fence of Mrs. Jas. Steen's property—eighteen inches from north side of Walder garage, elec. light &

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Opinion

gas connections to be allowed Property to be free & clear.

Signed EDWARD W. WALDER."

Witness: A. Augusta Ohl.

10

Immediately after this transaction the complainant arranged for the erection of a house on the land so purchased and operations were begun under his contract almost immediately. His contract for the erection of the house was made within a few days after this agreement was entered into. On or about September 15th the defendant delivered to the complainant's sister a deed which purported to convey the lot which the complainant had agreed to buy. A few days later the sister delivered this deed to the complainant, whereupon he discovered that it did not contain a description of the property which he alleges he agreed to purchase. He therefore sent the deed back to the defendant by his sister, with the request that a new deed, conveying the property which he alleged he was entitled to have, be executed and delivered. The defendant refused to accept the deed and insisted that the deed as prepared completely described the lot which he sold to the complainant.

20

30

The deed, as delivered, described a lot seventy feet in front on Burne's Lane, and extending westwardly to property of one Steen. The defendant contends that this is the lot which he sold and the complainant contends that under the agreement he was entitled to receive a lot with a frontage extending from the Braun line on the

40

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north to a point on a line eighteen inches northwardly, from the north line of the defendant's garage, and if this contention is correct, the complainant would be entitled to receive a conveyance of a lot seventy-seven and seven one-hundredths feet (77.7) on Burne's Lane and extending westwardly between practically parallel lines of that width, to the Steen line.

That there was a contract entered into between the parties is not disputed. And it is admitted that the paper writing, copy of which has been recited, is that contract, and that the deed delivered by the defendant and which was duly executed and acknowledged by him and his wife, was executed and delivered in performance of this agreement.

The whole question at issue here is whether the complainant is entitled to a lot seventy-seven and seven one-hundredths feet (77.7') in front, or a lot only seventy feet in front on Burne's Lane. This involves a construction of the language of the receipt, which was given by the defendant to the complainant. This receipt specifies that the plot of ground lies south of the Braun and Applegate property, that it has a frontage of seventy feet, more or less, and that it extends westward to the line fence of the Steen property. Up to this point there is no dispute between the parties as to the description of the property. The receipt then indicates that the southerly line of the property is to be on a line eighteen inches from the north side of the Walder garage, that is, the defendants' garage. The complainant con-

Opinion

tends that after the payment of the money and the delivery of this receipt, the parties visited the lot which was the subject of the sale, and that there the defendant pointed out to him the respective property lines, and that with respect to the southerly line the defendant took a stand on Burne's Lane, in front of the property, about three feet northwardly from the north line of the defendant's garage, and there indicated by a wave of his hand that the southerly line of the property which he had sold was on a line eighteen inches north from the north line of the defendants' garage. This statement by the complainant is not denied by the defendant. 10

Subsequently, after the controversy between these parties had arisen, some correspondence passed between them and in one of the defendant's letters he stated that his agreement was to convey a lot between parallel lines, but insisted that the southerly line was intended to be not more than seventy feet from the northerly line of the lot to be conveyed. 20

It seems to me perfectly clear, therefore, that the intention of the parties was to convey a lot with a frontage on Burne's Lane of seventy feet more or less, the southerly line of which was to be eighteen inches northerly from the north line of the defendant's garage. I am forced to this conclusion not only by the testimony and exhibits in this case, but also because this construction, to my mind, is the only construction which can be placed upon the receipt which was given by the defendant at the time the purchase money 40

Opinion

was paid over to him. The receipt described the property as having a frontage of seventy feet, more or less. If it had been intended that seventy feet only was to have been conveyed, then the words "more or less" would have no place
10 in the receipt. There would have been no reason for including those words therein. This, to my mind, indicates that the front line of the property which the parties had in mind to sell and buy, was indefinite in width, but that they had in mind a certain plot, the front dimensions of which might be subject to a few feet variation, either way, and that that was the reason for using the words, "more or less."

20 I am also forced to this conclusion by the use of the words "eighteen inches from north side of Walder garage." If this language does not mean exactly what it says, then I am unable to place any interpretation upon it. A line eighteen inches from the north side of the Walder garage does not mean a line nine and two-tenths feet distant northerly therefrom. If it had been intended that this line should run along the northerly line of
30 the garage nine and two-tenths feet distant therefrom, then the agreement could very easily have said so, but it is particularly significant to my mind that the receipt says "eighteen inches from the north side of the Walder garage." That means, to my mind, eighteen inches distant from every point along the north side of the garage, and this, I think, is what was intended by the parties at the time the agreement of sale was made and at the time this receipt was signed. If
40 it was not so intended this Court cannot now

Exhibit "C-1"

aid the parties, because to construe the contract to mean anything else but what I have said it means, would be to make an entirely new contract for the parties.

In view of what I have here said, I will advise a decree in favor of the complainant, in accordance with the prayer of the bill. 10

 Exhibit "C-1."

Eatontown, N. J.

Sept 6/24

20

Received from Geo. A. Ohl, Jr, Eight Hundred and Fifty Dollars, the receipt of which is acknowledged

hereby ✓ for plot of ground south of the Braun & Applegate property 70 ft. front more or less and westward to trees or line fence of Mrs. Jas. Steen's property—eighteen inches from north side of Walder garage—elec. light & gas connections to be allowed—property to be free & clear 30

signed—

Witness

EDWARD W WALDER

A Augusta Ohl.

40

Exhibit "C-2."

DEED

EDWARD W. WALDER, *et ux*,

to

10 NORTHERN REAL ESTATE Co., INC., body
corporate of the State of New Jersey.

Dated, September 15, 1924.

Received in the..... Office of
the County of.....N. J.,
on the.....day of.....
A. D., 19 , at.....o'clock in
20 the.....noon, and Recorded in Book
.....of DEEDS for said County,
on pages.....

ALSTON BEEKMAN

COUNSELLOR AT LAW

Red Bank, N. J.

30

THIS INDENTURE,

Made the fifteenth day of September, in the year
of Our Lord One Thousand Nine Hundred and
Twenty-four.

Between

EDWARD W. WALDER and ELLEN WALDER, his wife,
of the Township of Eatontown, in the County of
40 Monmouth and State of New Jersey, party of the
first part,

Exhibit "C-2"

And

NORTHERN REAL ESTATE Co., INC.,

a body corporate of the State of New Jersey, party of the second part, 10

WITNESSETH, That the said party of the first part, for and in consideration of One Dollar and other good and valuable considerations lawful money of the United States of America, to them in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part 20 being therewith fully satisfied, contented and paid, have given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, its successors and assigns forever, ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Eatontown, in the County of Mon- 30 mouth and State of New Jersey, in the Village of Eatontown,

BEGINNING at a stake in the westerly side of a roadway at the southeasterly corner of property belonging to A. L. Braun, said point being distant one hundred and ninety-four feet and fifty-eight hundredths of a foot from the southerly side of the Long Branch Road as same now ex- 40

Exhibit "C-2"

- ists, thence (1) south sixty-six degrees twenty-eight minutes west at right angles to said roadway, sixty-four feet along property of said Braun to the southwesterly corner thereof; thence (2) south sixty-four degrees fifty-eight minutes west
10 along property of Otto Applegate, one hundred and three feet and fifty-seven hundredths of a foot to land of Steen Estate; thence beginning again at the aforesaid beginning point and from thence (3) south twenty-three degrees thirty-two minutes east along the westerly side of said roadway seventy feet; thence (4) south sixty-six degrees twenty-eight minutes west at right angles to said roadway to lands of the Steen Estate;
20 thence (5) northerly along said Steen Estate to the end of the second described course.

Reserving, however, to the said Edward W. Walder, his heirs and assigns, the right to maintain, operate and remove a line of gas pipe and a line of water pipe now lying through and over the above described tract immediately west of the roadway first above mentioned.

- 30 Being intended as a part of the land and premises described in two certain deeds made to Edward W. Walder, aforesaid, (1) by Susan A. Blair and husband, dated June 18, 1919, recorded in the Monmouth County Clerk's office in Book 1092 of Deeds, Page 287 &c., and (2) from Susan A. Blair, Executrix, etc., dated June 18, 1919, and recorded in the Monmouth County Clerk's office in Book 1092 of Deeds, Page 290, &c.

Exhibit "C-2"

TOGETHER with all and singular the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in any wise appertaining;

ALSO, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof. 10

TO HAVE AND TO HOLD, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, its successors and assigns, to the only proper use, benefit and behoof of the said party of the second part, its successors and assigns forever; and the said party of the first part do for themselves, their heirs, executors and administrators, covenant and agree to and with the said party of the second part, its successors and assigns, that they, the said party of the first part are the true, lawful and right owners of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereunto belonging; and that the said land and premises, or any part thereof, at the time of the sealing and delivery of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever. 20 30

Exhibit "C-2"

AND ALSO, that the said party of the first part now have good right, full power and lawful authority, to grant, bargain, sell and convey the said land and premises in manner aforesaid;

10 AND ALSO, that he, the said Edward W. Walder, will WARRANT, secure, and forever defend the said land and premises unto the said party of the second part, its successors and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever, except as aforesaid.

20 IN WITNESS WHEREOF, the said party of the first part have hereunto set their hands and seals the day and year first above written.

EDWARD W. WALDER (Seal)
ELLEN WALDER (Seal)

Signed, Sealed and Delivered
in the Presence of
Alston Beekman.

30 (U. S. Cancelled Documentary Stamp for 1 dollar.)

State of New Jersey, }
County of Monmouth. } ss:

40 BE IT REMEMBERED, That on this fifteenth day of September, in the year of our Lord One Thousand, Nine Hundred and Twenty-four, before me the subscriber, a Master in Chancery of the State

Exhibit "C-2"

of New Jersey, personally appeared Edward W. Walder and Ellen Walder, his wife, who, I am satisfied, are the grantors mentioned in the within Deed, and to whom I first made known the contents thereof, and thereupon they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed; 10

And the said Ellen Walder (wife as aforesaid), being by me privately examined, separate and apart from her said husband, further acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband. 20

ALSTON BEEKMAN,
Master in Chancery of New Jersey.

Exhibit C-3.

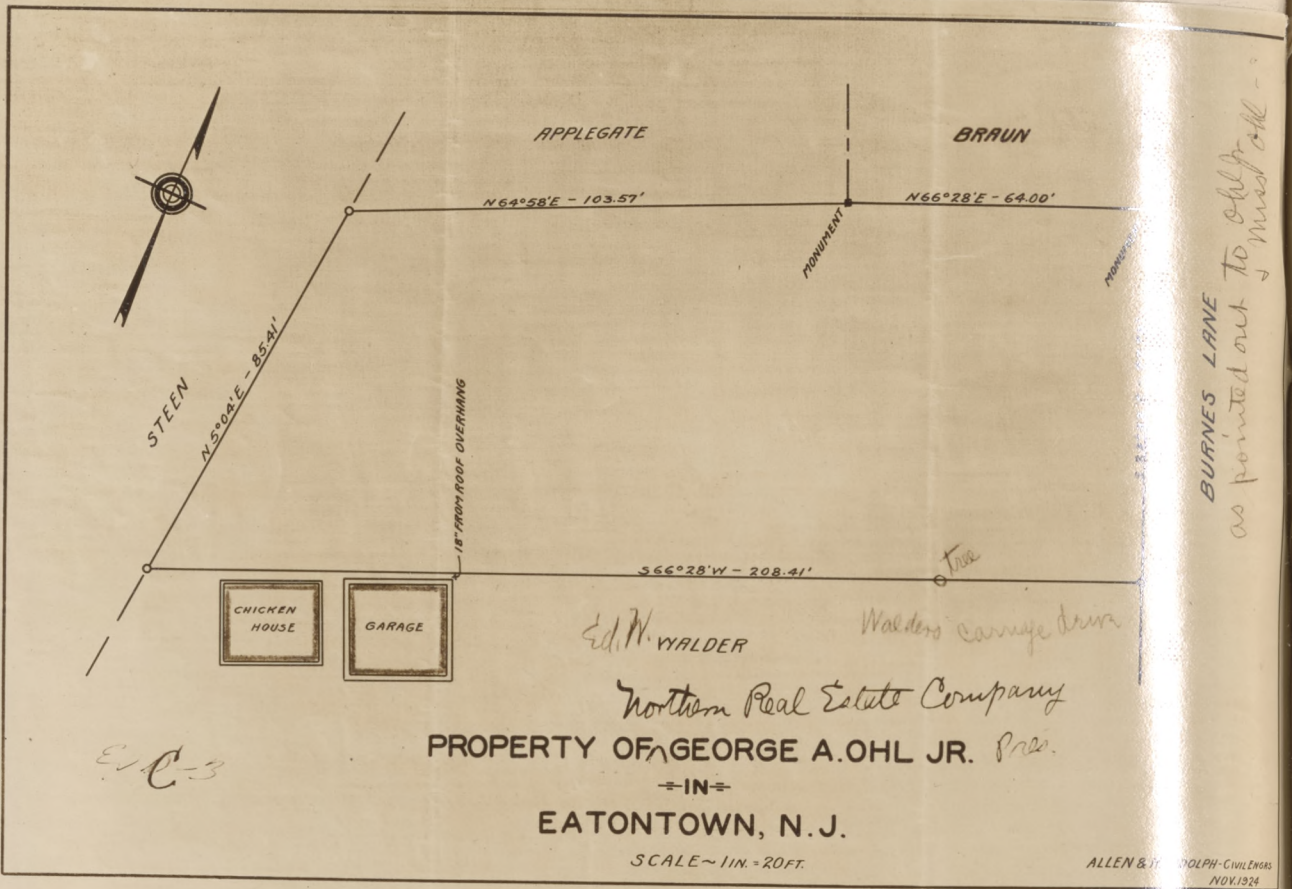


Exhibit C-4.

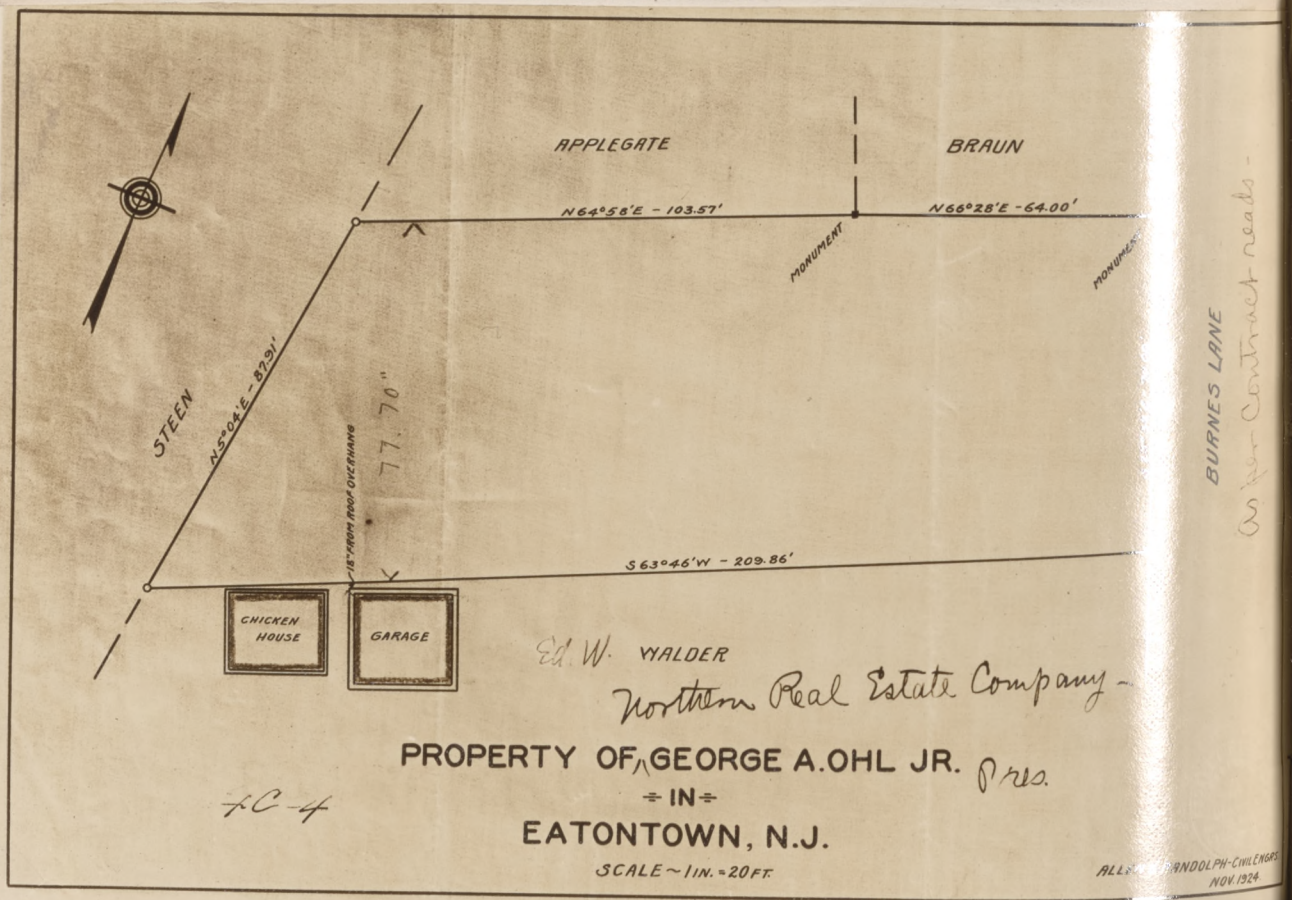


Exhibit "C-5."

George A. Ohl, Jr., Pres. & Treas.
F. W. Theberath, Secretary.

Established 1874.
Incorporated 1890.

10

NOTICE: All agreements are contingent upon
Strikes, Delays of Carriers, and Other De-
lays Unavoidable or Beyond Our Control.

GEO. A. OHL & CO.

FOUNDERS AND MACHINISTS

Manufacturers of

20

ALL MACHINES FOR SHEET METAL WORKERS

151-161 Oration St.

At Newark, take Broad Street Cars to Delavan
Ave. Woodside. From New York, Erie
R. R. to Woodside Station.

Long Distance Phone:
1856 & 1857 Branch Brook.

30

Newark, N. J.,
September 30th, 1924

Ed. W. Walder,
Bryne's Lane,
Eatontown, N. J.

My dear Sir:

There seems to be a little misunderstanding
with reference to the size of the lot you sold me. 40

we pointed out no contract - must add -

CIVIL ENGINEER
1924

As per contract reads -

CIVIL ENGINEER
1924

Exhibit "C-5"

10 You stood about three feet North of your roadway and pointed in line with a small tree to your garage and told me that the line (which, of course, means the Southerly line) came to within 18" of your garage, and such language is stated in the contract and signed, so that surely there can be no misunderstanding on this point.

I supposed from the way you pointed and stood that that Southerly line is at right angles with Bryne's Lane, and I also supposed that that same line is parallel with the rear of A. L. Braun's property.

20 You mentioned 70' more or less, because neither of us measured the land you showed me, and the starting line is 18" from your garage without any dispute. The Westerly line is that Breen property along the fence you showed me, and the Northerly line are the Braun and Applegate properties which you also showed me, which means the fences on the Southerly side of the above two properties.

30 You further stated that you held the land at \$600.00, which amount I put on a memorandum in your office, and, instead of later charging me one-half the expense for digging and draining from your house, and on account of the expense you had in laying water and gas pipes, you figured \$250.00 extra as a charge for the above, to which I agreed, making the total sum of \$850.00, for which I gave you a check and drew up a contract.

40 I do not see how there can be any misunderstanding nor how it is possible that you can place

Exhibit "C-6"

a stake exactly 70' South of the Braun property. Seventy feet South of the Braun property to a point 18" North of your garage would make a very funny line on that lot. If you read the contract you signed you will find the statements contained in this letter are truthful, and I only want what I paid for. 10

Very truly yours,

GEORGE A. OHL, JR.,
For Northern Real Estate Company.

GAO.Jr-S

 Exhibit "C-6."

20

Established 1896

Incorporated 1919

STEELE'S SHREWSBURY NURSERIES
EATONTOWN, N. J.

Telephone 2128

Deciduous and Evergreen
TREES AND PLANTS
For All Purposes

Oct. 2nd, 1924.

30

George A. Ohl,
151-161 Oration St.,
Newark, N. J.

Dear Sir:

It is impossible that there can be any misunderstanding over what my intentions were concerning the lot I recently sold you. It would appear, however, that an attempt is to be made to take advantage of a poorly worded contract. 40

Exhibit "C-6"

10 You are well aware of the fact that I told you I had only a vague idea of the size of the lot, but I would sell you 70' frontage of the land if this did not bring the southerly line within less than 18" of my garage. In that event the lot would be as much less than 70' as a parallel line from the Braun fence brought it within 18" of the garage.

20 I do distinctly remember standing at a point somewhere near my driveway and telling you that a parallel line 18" from my garage would come through approximately in that neighborhood, my sole object being to show you what the limit of the lot would be, supposing the frontage of Byrne's Lane was 70' or less to that point.

On the Monday following, prior to giving instructions to the surveyor, I ran a tape measure along the land, and was very much surprised to find that I had ample property to enable me to give you the full 70' with a southerly line at right-angles with the land, without crowding any buildings on the balance of my property.

30 Never at any time did I state that I would exceed a frontage of 70' and I went to great pains to explain to you that you would probably get less than 70', therefore I contend that the deed as drawn is in absolute fulfillment of our understanding irrespective of what attitude you may take toward a weak clause in a weak contract which states that the southerly line shall be 18" from the Walder garage.

40 Yours very truly,

EDWARD W. WALDER

EWV:JH

Exhibit "D-1."

PAUL F. GIRTANNER

LAW OFFICE

40 Clinton Street

NEWARK, N. J.

10

December 5-1924.

Edward W. Walder, Esq.
Byrne's Lane,
Eatontown, N. J.

Dear Sir:

I have been requested by George A. Ohl, Jr.,
President of Northern Real Estate Company of
Newark, N. J., to say that the deed given by you
and your wife to Northern Real Estate Co., Inc.,
is not acceptable in that it erroneously describes
the property intended to be conveyed. We re-
spectfully request that you incorporate in a new
and corrective deed the description according to
survey made by Allen & Randolph, C. E., Nov.
1-1924, showing a frontage of 77.70' on Burnes
Lane. Said corrective deed, as I understand it,
will be in strict compliance with agreement made
by and between you and Mr. Ohl.

20

30

Thanking you in advance for your kind atten-
tion in this matter,

I am Very Respectfully,

PAUL F. GIRTANNER.

40

Exhibit "D-2."

Dec. 12th, 1924.

Mr. Paul F. Girtanner,
40 Clinton Street,
Newark, N. J.

10

Dear Sir:

If Mr. George A. Ohl, Jr., or the Northern Real Estate Co., Inc., of Newark, N. J., are in any way dissatisfied with the deed given by my wife and myself for the plot of land on Byrne's Lane, Eatontown, to the Northern Real Estate Co., Inc., if they will surrender the said deed, I will gladly
20 refund to Mr. Ohl the amount paid for this property, and for which he has my receipt.

Under no circumstances would it be possible to increase the quantity of land sold to the Northern Real Estate Co., as it would be absolutely impossible to persuade Mrs. Walder to sign a deed for an amount larger than that already given.

Yours very truly,

30

EDWARD W. WALDER.

EWW:JH

40

Final Decree

mately at right angles to the roadway and approximately parallel to each other, the southerly line of which lot shall be eighteen inches west of the garage of the defendants, the accurate description of which lot by metes and bounds is as follows:

10 ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Eatontown, in the County of Monmouth and State of New Jersey, in the Village of Eatontown.

BEGINNING at a stake in the westerly side of a roadway at the southeasterly corner of property
 20 belonging to A. L. Braun, said point being distant one hundred and ninety-four feet and fifty-eight hundredths of a foot from the southerly side of the Long Branch Road as same now exists, thence (1) south sixty-six degrees twenty-eight minutes west at right angles to said roadway, sixty-four feet along property of said Braun to the southwesterly corner thereof; thence (2) south sixty-four degrees fifty-eight minutes west along property of Otto Applegate, one hundred
 30 and three feet and fifty-seven hundredths of a foot to land of Steen Estate; thence beginning again at the aforesaid beginning point and from thence (3) south, twenty-three degrees thirty-two minutes east along the westerly side of said roadway seventy-seven and seventy hundredths feet; thence (4) south sixty-six degrees twenty-eight minutes west at right angles to said roadway to lands of the Steen Estate; thence (5) northerly
 40 along said Steen Estate to the end of the second described course.

Final Decree

Reserving, however, to the said Edward W. Walder, his heirs and assigns, the right to maintain, operate and remove a line of gas pipe and a line of water pipe now lying through and over the above described tract immediately west of the roadway first above mentioned. 10

It is Further Ordered that the defendants do pay to the complainant the costs to be taxed.

E. R. WALKER,
C.

Respectfully Advised.

Maja Leon Berry,

V. C.

20

A true copy.

Thomas Barber, Clerk.

Notice of Appeal.*(Filed April 13, 1926)*

58-531

IN CHANCERY OF NEW JERSEY

10

Between

GEORGE A. OHL, JR.,
Complainant,

and

EDWARD W. WALDER and ELLEN
WALDER, his wife,

Defendants.

On Bill, &c.

20

The defendants, Edward W. Walder and Ellen Walder, hereby appeal from the Final Decree made in the above-entitled cause on April 9, 1926, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

30

ALSTON BEEKMAN,
Solicitor for and of Counsel with
Defendants, Edward W. Walder
and Ellen Walder, his wife.

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

ALSTON BEEKMAN,
Of Counsel with the Defendants,
Edward W. Walder and Ellen
Walder, his wife.

40

Dated, April 9, 1926.

Petition of Appeal.

(58-531)

NEW JERSEY COURT OF ERRORS AND APPEALS

GEORGE A. OHL, JR., Complainant-Appellee, and EDWARD W. WALDER and ELLEN WALDER, his wife, Defendants-Appellants.	}	On Appeal from the Court of Chancery.	10
--	---	--	----

To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes: 20

The petition of Edward W. Walder and Ellen Walder, his wife, the appellants in the above-entitled cause, respectfully shows that:

1. Petitioners find themselves aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date April 9, 1926, in a certain cause in said Court of Chancery, wherein said George A. Ohl, Jr., is complainant, and Edward W. Walder and Ellen Walder, his wife, are defendants, in this respect, to-wit, that the said decree adjudges that the defendants, instead of conveying to the complainant a tract of land 70 feet wide on the westerly side of Byrnes Lane, as they have heretofore done, should convey a lot 77 feet and 70/100 of a foot wide on the

30

40

Petition of Appeal

westerly side of Byrnes Lane, or a lot approximately 7 feet and 70/100 of a foot wider than that already conveyed by defendants to complainant.

10 And petitioners appeal from the decree of the Chancellor, which decree is as aforesaid, upon the grounds that the same is erroneous in that:

(a) because there is no proof that any mutual mistake had been made by the parties and the Court has no authority to reform an executed contract unless the mistake is mutual.

20 (b) because the paper which complainant alleges Edward W. Walder signed, does not bear either in substance or external form the requisites of a valid contract and does not comply with the terms of the Statute of Frauds and specific performance should not be granted where the description of the land is defective or uncertain.

(c) because the complainant has been guilty of laches in filing his bill, it appearing that the alleged agreement was made on Sept. 6, 1924, and that the bill of complaint was not filed until July
30 15, 1925.

(d) because the complainant shows no legal or equitable title over the 7 feet and 70/100 of a foot of land in dispute, which entitles him to the aid of a court of equity.

(e) because the complainant accepted said deed for the 70-foot lot, went into occupation of the land and completed the erection of a dwelling
40 house upon it before beginning this action, and

Petition of Appeal

thus is precluded from excepting to the form of deed tendered him by the defendants.

(f) because the Court, after having permitted the complainant to testify as to what was said at the time of the signing of the informal paper in question, refused to allow the defendant, Edward W. Walder, to testify as to what was said at the time of signing of this paper, in order to explain the ambiguities of the paper or to contradict the testimony of the complainant. 10

(g) As a separate ground of appeal on behalf of Ellen Walder, it is set forth that she, under the evidence, had no dealings whatever with the complainant, that she never signed the paper set up in the pleadings, that because she signed deed conveying a lot 70 feet wide it is not a ground for compelling her to join in conveying a lot 77 feet and 70/100 of a foot wide, that under the facts set forth in her separate answer filed she is entitled to have the bill of complaint dismissed against her. 20

Petitioners pray that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden, and that the petitioners may have such other relief in the premises as to this Court shall seem proper. 30

ALSTON BEEKMAN,
Solicitor for and of Counsel with Appellants.

Answer to Petition of Appeal.

NEW JERSEY COURT OF ERRORS AND
APPEALS

10	GEORGE A. OHL, JR., Complainant-Appellee,	}	On Appeal.
	vs.		
	EDWARD W. WALDER and ELLEN WALDER, his wife, Defendants-Appellants.		

20 The answer of complainant-appellee to the petition of appeal of the above-named appellants.

30 This appellee, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, says and admits, that a final decree was, on the ninth day of April, nineteen hundred and twenty-six, made and entered in the Court of Chancery, in the cause for that purpose mentioned in said petition, as is therein stated; but as to the substance and form thereof, this appellee prays to refer thereto when the same shall be produced. And this appellee, is advised and believes that the said final decree is agreeable to equity and prays that the same may be affirmed, with costs to be adjudged to this appellee.

WILSON and SMOCK,
Solicitors and of counsel with
Complainant-Appellee.

New Jersey Court of Errors and Appeals.

GEORGE A. OHL, JR., <i>Complainant-Appellee,</i>	} <i>On Bill, Etc.</i> <i>On Appeal</i> <i>From</i> <i>Court of</i> <i>Chancery.</i>
<i>vs.</i>	
EDWARD W. WALDER and ELLEN WALDER, His Wife, <i>Defendants-Appellants.</i>	

BRIEF OF DEFENDANTS-APPELLANTS.

Defendants appeal because the Court of Chancery entered a final decree adjudging that both defendants instead of conveying to complainant a tract of land 70 feet wide on the westerly side of Byrnes Lane as they have heretofore done should convey a lot 77 feet and 70-100 of a foot wide on the westerly side of Byrnes Lane, or a lot approximately 7 feet and 70-100 of a foot wider than that already conveyed by defendants to complainant.

PRELIMINARY STATEMENT

A bill of complaint was originally filed in this cause by Northern Real Estate Co., Inc., a corporation, reciting that one of the defendants, Edward W. Walder, on September 6, 1924, entered

into a negotiation whereby it was proposed that the defendants should convey to the complainant, and complainant would purchase of defendants, a lot in the Township of Eatontown, Monmouth County, New Jersey, on the westerly side of Byrnes Lane, for the sum of Eight Hundred and Fifty Dollars (\$850), and that on September 6, 1924, the defendant, Edward W. Walder, signed the following written memorandum:

"Eatontown, N. J.,
Sept. 6|24.

Received from Geo. A. Ohl, Jr., Eight Hundred and Fifty Dollars, the receipt of which is hereby acknowledged for plot of ground south of the Braun & Applegate property 70 ft. front more or less and westward to trees or line fence of Mrs. Jas. Steen's property, eighteen inches from the north side of Walder garage, elec. light & gas connections to be allowed, property to be free & clear.

Signed,
EDWARD W. WALDER.

Witness,
A. Augusta Ohl."

See Exhibit C-1, page 77 of State of Case.

The bill further recites that a few days later, on September 15, 1924, the defendants pretended to embody the terms in a deed which was offered to complainant and recites in Paragraph 4 of the bill of complaint, page 3, line 19, "This deed was accepted by the complainant under the misapprehension that it truly described and conveyed the land which the defendants agreed to convey by the terms of the memorandum hereinbefore referred to." This deed purports to convey a lot 70 feet front on Byrnes Lane, the southerly boundary of which runs at right angles to Byrnes Lane and parallel with the line of Braun, an adjoining property owner, on the westerly side of Byrnes Lane.

It should be kept in mind that Edward W. Walder at the time of signing of this conveyance owned a much larger tract of land on the westerly line of Byrnes Lane, of which the premises in question were a part. Mr. Walder's home is and was on a part of the entire tract fronting on the westerly line of Byrnes Lane and there was located on the entire tract at the time of signing of agreement Mr. Walder's dwelling house and a garage and a chicken house in the rear of the same. The land conveyed and the strip of land 7 feet and 70-100 of a foot wide in controversy formed a part of the Walder yard and was vacant land on September 6, 1924. Mr. Ohl visited Mr. Walder at Mr. Walder's office at Eatontown, New Jersey, on the day the written memorandum was signed and induced Mr. Walder to agree to sell to him a lot on the westerly side of Byrnes Lane. At the time neither of the men knew the exact frontage of the lot on Byrnes Lane. Mr. Walder contends that he agreed to sell and convey to Mr. Ohl a lot 70 feet front on the westerly side of Byrnes Lane, provided a lot of that frontage would not come within 18 inches of the garage on that part of the premises owned by Mr. Walder. As an illustration, had it proven that a line 18 inches from the north side of the Walder garage, being the southerly boundary of the lot to be conveyed, resulted in a 60 foot lot, that was all Ohl was to get, but that in no event was he to get more than 70 foot frontage on the westerly line of Byrnes Lane. A letter from the defendant, Edward W. Walder, written to Paul F. Girtenner, an attorney at law then representing Ohl, on December 12, 1924, and offered in evidence by the defendants, shows that if as a result of any misunderstanding Ohl was dissatisfied, that the defendant Walder was willing to rescind the contract and to pay back the consideration on surrender of the deed given and that he definitely and in writing made such an offer to Ohl's attorney.

After the complainant received the deed, on September 15, 1924, and before beginning any legal action, the complainant took possession of the lot of land described in the deed and erected a dwelling house on the land described in the deed, to be occupied by his sister, Miss Augusta A. Ohl. Miss Ohl moved in this home December 1, 1924 (page 28, line 17). The suit in Chancery was not instituted until July 17, 1925, the subpoena to answer being actually served on July 30, 1925, or nearly one year after the date of the written memorandum.

The bill of complaint recites that at the time of the negotiation and at the time of the signing of the memorandum, it was understood and agreed that the complainant was to receive title to a tract of land the sides of which were to be parallel and at right angles to the road known as Byrnes Lane. (Paragraph 5, Bill of Complaint, page 4.)

Defendants contend that the deed accepted by the complainant describes a lot, the sides of which are as nearly as possible parallel and at right angles to the road known as Byrnes Lane, but it will be noted by Exhibits C-3 and C-4, maps offered in evidence by the complainant, shown on page 84 of State of Case, that under no circumstances could the side lines be exactly parallel for the reason that the undisputed northerly line of the lot runs from Byrnes Lane along property of Braun (1) north 66 degrees 28 minutes east 64 feet to the corner of the Applegate property, and from thence runs north 64 degrees 52 minutes east 103 57-100 feet along the Applegate property; in other words there is a bend in the northerly line of the lot; but in the deed tendered the southerly line of the lot described runs at right angles to Byrnes Lane and is exactly parallel with the line of the Braun property, so that the complainant got everything by the deed which he claims in paragraph 5 of the bill of complaint.

The only line in dispute, therefore, is the southerly line of the property or the boundary between the lot occupied by Miss Ohl at the present time and the lot occupied at the present time by the defendant, Edward W. Walder.

It will be noted that the defendant, Ellen Walder, wife of Edward W. Walder, did not sign the written memorandum and nowhere does it appear in the testimony that she took any part in the negotiations. Her only connection whatever with the case is that she has joined with her husband in the deed made to Ohl by Edward W. Walder and Ellen Walder, his wife, dated September 15, 1924, and delivered to complainant on that day.

It will be shown not only by the evidence but by the facts in the bill of complaint that neither party knew exactly what land was to be conveyed until after a survey had been made by Mr. Randolphs, a civil engineer, who had determined that it was possible to deed to Ohl a lot 70 feet front on the westerly side of Byrnes Lane, the southerly line of which would not come within 18 inches of the Walder garage.

The complainant now insists that because the written memorandum reads "property 70 ft. front more or less westward to trees or line fence of Mrs. Jas. Steen's property, 18 inches from the north side of Walder garage" that he is entitled to have a line established running at right angles to Byrnes Lane and parallel to the south line of the Braun property, notwithstanding the fact that this will give him a lot 77 feet and 70-100 of a foot front or 7 feet and 70-100 of a foot more than Walder claims Ohl should have. The bill of complaint asks for a construction of the agreement or written memorandum, dated September 6, 1924, and asks that the description of land described in deed be made to conform to the written memorandum and understanding between the parties and asks that the said deed be reformed so that the description therein

contained shall convey a tract of land of which the sides are parallel and at right angles to the roadway and the southerly line of which shall be 18 inches west of the garage referred to in the agreement. Before the hearing an amended bill of complaint was filed on February 29, 1926, substantially in the form of the original complaint but substituting George A. Ohl, Jr., as complainant in the place and stead of Northern Real Estate Co., Inc.

REASONS CONSIDERED

REASON I (a)

“(a) Because There is No Proof That Any Mutual Mistake Had Been Made by the Parties and the Court Has No Authority to Reform an Executed Contract, Unless the Mistake is Mutual.”

In effect this is an action to reform a contract for the sale of realty and for its specific performance as reformed. The court is asked to say in plain words what the parties to the contract meant when they embodied their agreement through the pen of Mr. Ohl in its loosely worded form.

To justify the reformation of a deed on the ground of a mistake, the evidence must be clear and satisfactory, and the person asking to have the deed reformed must be able not only to show a mistake has been made, but also what it is and must establish it to the satisfaction of the court. In other words a mutual mistake with respect to the form of the contract is necessary in order to reform a written contract for the sale of realty. *Gough v. Williamson*, 62 N. J. Eq. 526; *Green v. Stone*, 54 N. J. Eq. 387; *Whelen v. Osgoodby*, 62 N. J. Eq. 571.

Attention is called to Exhibits C-3 and C-4 on behalf of complainant, shown on page 84, State of

Case. Exhibit C-3 shows the land according to the description by which the court has decreed the defendants to convey to Ohl. Exhibit C-4, on the same page, just below it, is a copy of a map showing a lot 70 feet front on Byrnes Lane but showing a southerly line which comes within 18 inches of the north side of the Walder garage at its southwest corner. There are certain written markings on these two maps presumably put there by the complainant which are significant. On Exhibit C-3 showing a lot 77 feet and 70-100 of a foot front, will be found written these words: "As pointed out to Ohl, Jr., and Miss Ohl." On Exhibit C-4 showing a lot 70 feet front but showing a southern boundary line not at right angles to Byrnes lane, but nevertheless a line coming to within 18 inches of the Walder garage, are written these words: "As contract reads." It must be remembered that these are exhibits of the complainant and these maps are offered in evidence with these written sentences upon them. *If, therefore the court in this case has entered a final decree ordering the defendants to convey to the complainant according to the description in Exhibit C-3, it has ordered them to convey more than the interpretation complainant himself places on the contract, which very evidently is that shown in Exhibit C-4. These written sentences on the maps indicate one important thing, viz., that it is possible to give Ohl a southerly line which comes 18 inches from the Walder garage and not more than 70 feet frontage on the westerly side of Byrnes Lane, as on Map C-4.* It must be remembered that the contract of sale does not read that this line is to run at right angles to Byrnes Lane or that it is to run parallel to the Braun line. The words "parallel" and "at right angles," it will be found by the evidence, have been sworn into the case by Ohl, who was allowed to testify in effect to explain the contract, which we contend he had no right to do.

It will be noted from the testimony that the house Ohl built on the land is located so as not to interfere with any of the lines in dispute.

REASON II (b)

“(b) Because the Paper Which Complainant Alleges Edward W. Walder Signed, Does Not Bear Either in Substance or External Form the Requisites of a Valid Contract and Does Not Comply With the Terms of the Statute of Frauds, and Specific Performance Should Not be Granted Where the Description of the Land is Defective or Uncertain.”

It is familiar law that equity will not specifically enforce a contract for the sale of lands unless it is conclusive and certain as to parties, the subject matter, prices and the terms.

Specific performance of a contract for the sale of realty, defective or uncertain in the description of the land, cannot be granted. *Muller v. Brautigam*, 84 N. J. Eq. 574.

In *Brown v. Brown*, 33 N. J. Eq. 650, it was held the bargain or promise to be enforced, whether written or verbal, must possess in substance and external form the requisites of a valid contract.

In *Potter v. Hollister*, 45 N. J. Eq. 508, affirmed in 46 N. J. Eq. 609, it was held that equity will always decline to interfere when the evidence leaves the terms of the contract in uncertainty.

In *Carr v. Passaic Land Company*, 22 N. J. Eq. 85, and in *Force v. Dutcher*, 18 N. J. Eq. 401, affirmed in N. J. Eq. 424, it was held that specific performance will not be enforced unless the contract designates with certainty the land to be conveyed. *Bauer v. Victory Catering Co.*, 128 Atl. 262. *Kah v. Wassmer*, 75 N. J. Eq. 109.

In the present case, there was no difficulty in

arriving at the boundaries of the lot to be sold on the east side because it was bounded by Byrnes Lane. Likewise there was no difficulty in arriving at the boundary of the lot on the north side because the Braun and Applegate properties adjoined the lot on the north. Likewise there was no difficulty in arriving at the boundary on the west side because the Steen property adjoined the lot in question on the west side. The difficulty, however, is that the written memorandum signed does not in any way attempt to establish definitely the south line of the lot, simply reading "18 inches from the north side of Walder garage." It does not recite whether this line is to run at right angles to Byrnes Lane or whether it is to be parallel to the Braun line. It does not recite to what portion of the Walder garage the 18 inches is to apply. Likewise the distance in front in the written memorandum is left vague and uncertain: "70 ft., more or less." Likewise the width of the rear line is not given. Under any construction the south line would run along other land of defendant, Edward W. Walder.

Undoubtedly had a survey been made before the memorandum was signed, the parties would not now be in this position.

It will be observed that the memorandum signed does not provide when deed shall be delivered. The name of Mrs. Walder nowhere appears in it and she has not signed it. It does not recite what kind of a deed is to be given or whether any deed is to be given. It does not recite when possession is to be had. It does not use any degree of accuracy describing the land sought to be affected.

The complainant has offered in evidence, under Exhibit C-6, a letter written to Mr. Ohl by Mr. Walder, in which Mr. Walder clearly sets out his understanding. In this letter Mr. Walter states, page 86, line 1, etc. "You are well aware of the fact that I told you I had only a vague idea of the size of the lot, but I would sell you 70 ft. frontage

of land if this would not bring the southerly line within less than 18 inches of my garage. In that event the lot would be as much less than 70 feet as a parallel line from the Braun fence brought it within 18 inches of the garage."

In a letter written by Mr. Ohl, the complainant, to Mr. Walder, Exhibit C-5, page 86, line 20, Mr. Ohl admits that neither of the parties measured the land. Under these circumstances it is contended that the memorandum does not possess the requisites of a valid contract.

REASON III (c)

"(c) Because the Complainant Has Been Guilty of Laches in Filing His Bill, It Appearing that the Alleged Agreement was Made Sept. 6, 1924 and that the Bill of Complaint was Not Filed Until July 15, 1925."

In this case the complainant accepted from the defendant, Edward W. Walder, a warranty deed describing a lot 70 feet front on the westerly line of Byrnes Lane, on September 15, 1924. The memorandum of agreement was dated September 6, 1924, and it appears from the testimony that Mr. Walder awaited only the report of his surveyor, Mr. Randolph, before making and delivering this deed.

The bill of complaint was not filed until July 15, 1925, the subpoena to answer being served on July 30, 1925.

In *Massie v. Asbestos Brake Co.*, 95 N. J. Eq. 298, it was held "Equitable principles governing the relief of specific performance limits its award to those who seek it promptly." We contend that the complainant in this case is guilty of laches.

REASON IV (d)

“(d) Because the Complainant Shows No Legal or Equitable Title Over the 7 ft. and 70-100 of a Foot of Land in Dispute Which Entitles Him to the Aid of a Court of Equity.”

In this case the complainant takes his whole stand on the fact that he inserted in the memorandum of agreement the following language: “18 inches from the north side of Walder garage.” I contend that the memorandum must be construed as a whole, if construed at all; that we must keep in mind that it reads “70 ft. front more or less” and I contend that when the defendant Walder tendered to the complainant what is conceded to be a good and sufficient deed for exactly 70 feet front in width, that he performed his part of the agreement.

The complainant asks the court now to engage in the singular office of doing a right to one party at the cost of a precisely equal wrong to the other, if we take the complainant's theory as being the true one. In other words the receipt is relatively infinite as to the frontage to be conveyed. “70 feet more or less” means exactly what it says. It shows that the parties were in doubt when the memorandum was signed as to what the front of the land should be, but it shows one thing, which is that the parties were to have approximately 70 feet of land. For the sake of argument, let us suppose that the Walder garage was located 100 feet further south of its present location than it now is. Would the court then in construing this contract decree that Walder instead of deeding a lot 70 feet front should deed to the complainant a lot 177 feet and 70-100 of a foot front on the westerly line of Byrnes Lane?

Or, let us suppose, for the sake of argument, that at the time the paper was filed, the Walder garage

was 1,000 feet further south of its present location than it then was. Would the court still hold that the southerly line of this property should come within 18 inches of this garage and should run at right angles to Byrnes Lane (although the memorandum does not use the word parallel or at right angles) and hold that the complainant instead of getting a lot 70 feet front should get a lot 1,077 feet and 70-100 of a foot front on the westerly line of Byrnes Lane? If holding the last theory is consistent with the agreement in question, then it is just as consistent to hold that the complainant instead of getting 70 feet frontage should get 77 feet and 70-100 of a foot frontage.

REASON V (e)

“(e) Because the Complainant Accepted Said Deed for the 70 ft. Lot, Went Into Possession of the Land and Completed the Erection of a Dwelling House Upon It Before Beginning This Action, and Thus is Precluded from Excepting to the Form of Deed Tendered Him by the Defendants.”

It appears from the testimony, page 34, line 15, that about the 20th, 23rd, or 24th of September, 1924, which was after the date and delivery of deed in question, the complainant started to dig a cellar on the lot described in the deed, and that Miss Ohl moved in the house in question on December 1, 1924, and that she has been occupying this house ever since. The house, of course, is located wholly within the lines of land conveyed by defendants to the complainant. Yet after accepting the land described in the deed, going into possession of the same and occupying it in this manner, the complainant does not begin his action in the Court of Chancery until over six months after his sister has occupied the house. We claim, therefore, that

the complainant is estopped by the acceptance of the deed in question and by the actual exercising of dominion and control over the land described in the deed from now making complaint.

The following language is from Story's Equity Jurisprudence where he says: "Also the mistake must be as to fact, not only not known to the party but one which he could not by reasonable diligence, have ascertained. Where a party ought in the exercise of ordinary procedure, to have made inquiries, and neglects to ascertain the facts upon which his contract is based, in cases where it is not necessary to repose confidence in the other party, or where it is as much his duty as that of the other party with whom he deals to know the facts, courts of equity will not relieve against his own negligence."

REASON VI (f)

"(f) Because the Court, After Having Permitted the Complainant to Testify as to What was Said at the Time of the Signing of the Informal Paper in Question, Refused to Allow the Defendant, Edward W. Walder, to Testify as to What was Said at the Time of Signing of This Paper, In order to Explain the Ambiguities of the Paper or to Contradict the Testimony of the Complainant."

On pages 46, 47, 48, 49, 50, 51 and 52, Mr. Ohl is permitted at length to recite what he (Ohl) said and what Walder said to amplify the memorandum of agreement and to explain it. Mr. Ohl states (page 47, line 12) that Walder pointed exactly where the line was to go and was allowed to testify as to what Ohl claims Walder said at the time, yet when Mr. Walder was sworn he was asked (page 62, line 22) as to what took place prior to the signing of the agreement and was not permitted to tell

what took place in order to contradict the testimony of Ohl. On page 65, line 15, it was held that he could not recite any of the conversation leading up to the making of the agreement. We contend that if Ohl was permitted to testify as he did testify (page 47) the defendant should have been permitted to introduce testimony to contradict this evidence.

On page 75 of the opinion, the court recites this testimony which the complainant was allowed to give as to what took place after the signing of the written memorandum, and recites "the defendant pointed out to him the respective property lines," etc.

We contend that any testimony to extend or vary the contract was absolutely illegal.

Likewise, on page 76 of the opinion, the court says this: "The receipt described the property as having a frontage of 70 feet more or less. If it had been intended that 70 feet only was to have been conveyed, then the words 'more or less' would have no place in the receipt. There would have been no reason for including these words therein. This, in my mind, indicates that the front line of the property which the parties had in mind to sell and buy was indefinite in width, but that they had in mind a certain plot, the front dimensions of which might be subject to a few feet variation, either way, and that was the reason for using the words 'more or less.'" It will be observed that the court says "if it had been intended that 70 feet only was to have been conveyed then the words 'more or less' would have no place in the receipt." In other words, the court lays all the emphasis on the word "more" and attaches no significance whatever to the inclusion of the word "less" in the contract. We contend that both words are of equal significance and that the inclusion of the word "less" would mean that under certain conditions Ohl might get less than 70 feet.

There is only one set of circumstances which by any human possibility could result in Ohl getting less than 70 feet, viz., if the southerly line of the property came within 18 inches of the Walder garage. In that event Ohl would get less than 70 feet, which I think must be admitted beyond any question.

Does not this, therefore, prove the contention of Walder, as set out in his letter offered as Complainant's Exhibit C-6, as shown on page 87, State of Case? The Court, however, in its opinion absolutely ignores the usage of the word "less" in the contract and places all the emphasis on the word "more."

REASON VII (g)

"(g) As a Separate Ground of Appeal on Behalf of Ellen Walder, It is Set Forth that She, Under the Evidence Had No Dealings Whatever with the Complainant, and that She Never Signed the Paper Set Up in the Pleadings, That Because She Signed Deed Conveying a Lot 70 feet Wide it is Not a Ground for Compelling Her to Join in Conveying a Lot 77 feet and 70-100 of a foot Wide: That Under the Facts Set Forth in Her Separate Answer Filed, She is Entitled to Have the Bill of Complaint Dismissed Against Her.

The situation of Ellen Walder, the wife, is so clear that it seems to me there is no room for any argument, that arguing of this point is simply a waste of time.

Nowhere in the State of Case does it appear that Ellen Walder had any conversation whatever with Ohl. It nowhere appears that she ever signed anything except the deed in question for the 70 feet front on Byrnes Lane. It does appear in the testimony, Exhibit D-2, page 90 that Walder repre-

sented it would be absolutely impossible to persuade Mrs. Walder to sign a deed for an amount of land larger than that already conveyed.

Attached to the bill of complaint is an affidavit of complainant, in which he states that he read over the bill of complaint and that the matters and facts therein set forth are true. In the bill of complaint, he recites, (page 2, line 25) that "on September 6, 1925, the complainant and the *defendants* agreed upon the terms of purchase and sale" but Ohl's written testimony does not show he had any transaction whatever, either verbal or in writing, with Mrs. Walder.

The court below evidently acted on the theory that as long as Mrs. Walder signed the deed with her husband for 70 feet she should be compelled to sign a deed for 77 feet and 70-100 of a foot. I am unable to find any decisions whatever which will uphold such a decree.

In Ohl's affidavit, attached to the original bill of complaint, Ohl says (page 8, line 40) "deponent entered into negotiation with defendant, Edward W. Walder." He does not say he entered into any negotiation with Mrs. Walder.

In Ohl's affidavit (page 9, line 20), Ohl states the *substance* of the agreement was set forth in a memorandum dated September 6, 1924, which was duly signed by Edward W. Walder, and the consideration named in said agreement, viz., \$850, was paid to the *defendant* by deponent.

In this affidavit, which is significant, deponent then recites that a deed was tendered to him which "purported to carry out the terms agreed upon in the negotiation and in the agreement." His language follows: "Deponent examined the deed and ascertained that the southerly line according to the said deed, or the fourth course therein described purported to run at right angles to Byrnes Lane and was so described by metes and bounds. In the deed no dimensions were given for the di-

agonal line which constituted the rear line of the lot and it was impossible from the examination of the deed to discover what the depth of the lot in the rear would be. Deponent assumed that inasmuch as the south line was at right angles with said roadway that as much frontage on the lot was conveyed by virtue of the deed as should have been conveyed, to make the two sides parallel and at right angles to Byrnes Lane as the understanding between the parties, at the time of the negotiation and the agreement." He continues in this affidavit (page 10, lines 13, etc.), "After the delivery of deed, however, deponent made more careful examination and survey of the lot and ascertained that the south line was not at right angles to Byrnes Lane and that the defendants had conveyed a tract of land which had a frontage less than that agreed upon and a distance in the rear which was greater than that agreed upon." "Deponent called this error to the attention of the *defendant* and requested *them* to give corrected deed which would comport with the terms of the negotiation and the agreement, but this the *defendants* refused to do." It will be observed in this clause of the affidavit, the complainant alludes to the defendant first in the singular number and later in the plural number, but his testimony on the stand was that he had no dealings whatever with Ellen Walder, defendant.

In passing it might also be noted that this affidavit tends strongly to contradict some of Mr. Ohl's testimony given. On page 46, line 36, Ohl says: "A. After quite a conversation in reference to the dimensions of the lot, *and as to whether his wife would agree to sell it, and other details* that were gone over, we went, after I gave him the check, first to the contractor," etc. He then recites, in reference to seeing the deed (page 48); line 15), "I stopped at Gussie's (Ohl's sister Augusta) and looked the deed over and I saw right away there was a funny description of the southerly line and

I knew after I measured the 70 feet with a ten-foot pole, that it was wrong. I says, 'We got 8 or 10 or 12 feet coming; you tell Mr. Walder this deed wont do.' She did." In other words, Mr. Ohl's testimony tends to contradict his own affidavit attached to the bill of complaint, the attempt evidently being made to show that he did not actually accept the deed.

In any event, there is nothing whatever in the case to show any participation of Ellen Walder, defendant, in the matter, except the fact that she did join her husband in signing the deed in question.

For the foregoing reasons, it is respectfully urged that the decree of the court of chancery be reversed.

Respectfully submitted,

ALSTON BEEKMAN,
Of Counsel With Defendants-Appellants.

