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**Notice of Appeal.**

(Filed July 18, 1931.)

**In Chancery of New Jersey**

80—516.

Between	10
COMMERCIAL TRUST COMPANY OF NEW JERSEY, a corporation of the State of New Jersey, Ex- ecutor under the last will and testament of WILLIAM C. YOUNG, deceased, Complainant,	
<i>and</i>	
CONO ZUNNI, Defendant.	20
On Bill, &c. Notice of Appeal.	

The complainant, Commercial Trust Company of New Jersey, Executor under the last will and testament of William C. Young, deceased, hereby appeals from the final decree made in the above entitled cause by the Chancellor on the advice of Vice-Chancellor Maja Leon Berry on July 14, 1931, and from the whole and every part thereof to the Court of Errors and Appeals in the Last Resort in all causes. 30

Dated: July 15, 1931.

J. FISHER ANDERSON,  
Solicitor for and of Counsel with  
Complainant Commercial Trust  
Company of New Jersey, Executor  
under the last will and testament of  
William C. Young, deceased. 40

*Notice of Appeal.*

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

10 J. FISHER ANDERSON,  
Of Counsel with Complainant Commercial Trust Company of New Jersey, Executor under the last will and testament of William C. Young, deceased.

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**Bill of Complaint.**

(Filed September 10, 1930.)

20 IN CHANCERY OF NEW JERSEY.

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

30 The complainant, Commercial Trust Company of New Jersey, a corporation of the State of New Jersey, executor under the last will and testament of William C. Young, deceased, having its principal office in the City of Jersey City, County of Hudson and State of New Jersey, respectfully shows that:

1. At the times hereinafter stated complainant was and still is a corporation of the State of New Jersey, having its principal office in the City of Jersey City, County of Hudson and State of New Jersey.

40 2. On October 17, 1929, William C. Young, a resident of the City of Jersey City, County of Hudson and State of New Jersey, was seized in

*Bill of Complaint.*

fee of all those certain lots, tracts or parcels of land and premises situate, lying and being in the City of Jersey City, County of Hudson and State of New Jersey, described as follows:

ALL those lots, tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, and which are more particularly described as follows:

FIRST TRACT: Beginning at a point in the southerly line of Pavonia Avenue distant one hundred and seventy-five (175) feet easterly from the southeasterly corner of Brunswick Street and said Pavonia Avenue; thence running (1) southerly and parallel with Brunswick Street one hundred (100) feet; thence (2) easterly and parallel with Pavonia Avenue twenty-five (25) feet; thence (3) northerly and parallel with Brunswick Street one hundred (100) feet to the southerly line of Pavonia Avenue, and thence (4) westerly along the said southerly line of Pavonia Avenue twenty-five (25) feet to the point or place of beginning; being known and designated as lot 28, in block 252 and colored Yellow on a certain map on file in the office of the Register of the County of Hudson showing the partition of the land at Pavonia, in the said City of Jersey City, among the heirs of John B. Coles, deceased.

SECOND TRACT: Beginning at a point in the southerly line of Pavonia Avenue distant one hundred and seventy-five (175) feet westerly from the southwesterly corner of Monmouth Street and said Pavonia Avenue; thence running (1) southerly and parallel with Monmouth Street one hun-

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*Bill of Complaint.*

dred (100) feet; thence (2) westerly and parallel with Pavonia Avenue twenty-five (25) feet; thence (3) northerly and parallel with Monmouth Street one hundred (100) feet to the southerly line of Pavonia Avenue, and thence (4) easterly along the said southerly line of Pavonia Avenue twenty-five (25) feet to the point or place of beginning; being known and designated as lot 29, in block 252 on a certain map on file in the Register's office of the County of Hudson, showing the partition of the land at Pavonia, in the said City of Jersey City, among the heirs of John B. Coles, deceased.

3. On said seventeenth day of October, 1929, said William C. Young entered into a certain agreement in writing with Cono Zunni wherein and whereby the said William C. Young agreed to convey the said lands and premises by deed of warranty on or before the fourteenth day of November then next to the said Cono Zunni in consideration of the payment by the said Cono Zunni of the sum of \$12,000.00, and the said Cono Zunni agreed to pay said William C. Young said purchase price of \$12,000.00 by the payment of \$500.00 at or before the execution of said agreement and the balance of said purchase price upon the delivery of said deed to the said Cono Zunni by the payment of \$4,500.00 in cash and the execution and delivery by said Cono Zunni to the said William C. Young of a purchase money mortgage on said lands and premises in the sum of \$7,000.00, payable five years after date, with interest at the rate of six per cent per annum, payable semi-annually, said mortgage and a bond to accompany the same to contain the usual interest, tax, assessment, insurance and installment default clauses

*Bill of Complaint.*

and an agreement not to claim credit on the interest payable on bond and mortgage, by reason of any tax assessed, or to be assessed against said premises, and a clause that the said Cono Zunni may make payment on account of the principal of said mortgage on any interest day in multiples of \$100.00, provided that none of said payments shall be less than \$500.00 in amount at any one time. 10  
The said agreement provided that said deed should be delivered at the office of Charles Young, 921 Bergen Avenue, Jersey City, New Jersey, on November 14th then next between the hours of two in the afternoon and four o'clock in the afternoon. The said agreement was duly acknowledged by the said William C. Young and the said Cono Zunni before Charles Young, a Master in Chancery of New Jersey, on October 17, 1929. A copy of said written agreement is hereto annexed and made a part hereof, and is marked Schedule "A". 20

4. The said Cono Zunni paid to the said William C. Young the said sum of \$500.00 at the time of the execution and delivery of the said agreement in writing.

5. Thereafter, before and after November 14th, 1929, numerous meetings and conferences were held by the parties to said contract at which it was mutually agreed by said parties to said contract that the time for closing said contract should be postponed. Finally, it was mutually agreed by the parties to the contract that the title should be passed on February 19th, 1930. In the meantime, the said William C. Young had become ill and was taken to Bergen Sanitarium. When the parties met on said nineteenth day of February, 1930, at the said Bergen Sanitarium the said William C. Young was in such weakened condition due to his 30  
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illness that he was unable to execute the necessary papers or close the title, and it was thereupon agreed that the closing should be postponed to some future date.

10 The said William C. Young died at said Bergen Sanitarium on February 19, 1930, on which date, by mutual agreement, the title was to have been closed.

20 6. The said William C. Young died testate, leaving a Last Will and Testament wherein and whereby he did appoint Commercial Trust Company of New Jersey, a corporation of the State of New Jersey, having its principal office and place of business at 15 Exchange Place, Jersey City, New Jersey, his executor. Said Last Will and Testament was duly admitted to probate by the Surrogate of Hudson County on March 3, 1930, and the said Commercial Trust Company of New Jersey thereupon duly qualified as executor thereof. A copy of said Last Will and Testament is hereto annexed and made a part hereof and marked Schedule "B". Subsequently an appeal was taken from the order of said Surrogate admitting said Last Will and Testament to probate, and on June 18, 1930, a decree was made by the  
30 Hudson County Orphans' Court affirming the order of the said Surrogate.

40 7. Since March 3, 1930, the complainant, through its solicitor, has on numerous occasions demanded of the said Cono Zunni through his attorney, one Anthony V. R. Avallone, of 15 Exchange Place, Jersey City, New Jersey, that an appointment be made for closing said title and for closing said title, but said Cono Zunni has refused and still refuses to make such an appoint-

*Bill of Complaint.*

ment or to carry out the terms of said written agreement.

8. Said William C. Young was always from said seventeenth day of October, 1929 to February 19th, 1930, the date on which he died, ready and willing to perform his part of said agreement, and the complainant has always, since the third day of March, 1930, the date on which the said Last Will and Testament of said William C. Young was admitted to probate, been ready and willing, and now tenders itself, ready and willing to perform its part, as such executor, of said agreement, and on being paid the remainder of the said purchase money with interest, to convey said lands and premises to the said Cono Zunni by deed duly executed by it as such executor. 10  
20

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

1. That Cono Zunni who is the defendant to this suit may answer this bill of complaint and each statement therein made.

2. That the said Cono Zunni may be compelled by the decree of this Court specifically to perform the said agreement with the said William C. Young and to pay to complainant as executor under the Last Will and Testament of the said William C. Young the remainder of the said purchase money as in and by said agreement provided with interest from the time said purchase money ought to have been paid on the delivery by complainant as executor as aforesaid to the said Cono Zunni of a deed executed by it as executor as aforesaid as in said agreement provided. 30  
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*Bill of Complaint.*

3. That in case the said defendant Cono Zunni should within the time limited by this Court for such performance of said contract fail and neglect upon the tender of said deed to pay the said remainder of said purchase money as aforesaid, that then and in that event the said sum together with interest and costs may be and become a lien upon the said lands and premises in favor of the said complainant as executor as aforesaid and that the said lands and premises may be sold under the direction of this Court for the satisfaction of such lien so impressed on said lands and premises and in case a deficiency should arise upon said sale that the said defendant may be ordered by this Court to pay said deficiency together with interest and costs to this complainant as executor as aforesaid.

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

J. FISHER ANDERSON,  
Solicitor of and of Counsel with  
Complainant.

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**Schedule A, Annexed to Bill of Complaint.**

ARTICLES OF AGREEMENT, made the seventeenth day of October, in the year of our Lord One thousand Nine Hundred and Twenty-nine Between WILLIAM C. YOUNG, widower, of the City of Jersey City, in the County of Hudson and State of New Jersey, party of the first part; and CONO ZUNNI, residing at 350 Pavonia Avenue, in the

*Schedule A, Annexed to Bill of Complaint.*

City of Jersey City, in the County of Hudson and State of New Jersey, party of the second part.

WITNESSETH: That the said party of the first part, for and in consideration of the sum of Twelve thousand dollars (\$12,000.00), to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that he, the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by deed of warranty, free from all encumbrances except as hereinafter mentioned, on or before the fourteenth day of November next ensuing the date hereof, ALL those lots, tracts, or parcels of land and premises, hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, and which are more particularly described as follows:

FIRST TRACT: Beginning at a point in the southerly line of Pavonia Avenue distant one hundred and seventy-five (175) feet easterly from the southeasterly corner of Brunswick Street and said Pavonia Avenue; thence running (1) southerly and parallel with Brunswick Street one hundred (100) feet; thence (2) easterly and parallel with Pavonia Avenue twenty-five (25) feet; thence (3) northerly and parallel with Brunswick Street one hundred (100) feet to the southerly line of Pavonia Avenue, and thence (4) westerly along the said southerly line of Pavonia Avenue twenty-five (25) feet to the point or place of beginning; being known and designated as lot 28, in block 252 and colored Yellow on a certain map on file in

*Schedule A, Annexed to Bill of Complaint.*

the office of the Register of the County of Hudson showing the partition of the land at Pavonia, in the said City of Jersey City, among the heirs of John B. Coles, deceased.

10 SECOND TRACT: Beginning at a point in the southerly line of Pavonia Avenue distant one hundred and seventy-five (175) feet westerly from the southwesterly corner of Monmouth Street and said Pavonia Avenue; thence running (1) southerly and parallel with Monmouth Street one hundred (100) feet; thence (2) westerly and parallel with Pavonia Avenue twenty-five (25) feet; thence (3) northerly and parallel with Monmouth Street one hundred (100) feet to the southerly line of Pavonia Avenue, and thence (4) easterly  
20 along the said southerly line of Pavonia Avenue twenty-five (25) feet to the point or place of beginning; being known and designated as lot 29, in block 252 on a certain map on file in the Register's office of the County of Hudson, showing the partition of the land at Pavonia, in the said City of Jersey City, among the heirs of John B. Coles, deceased.

30 The first tract was conveyed to William C. Young and Henry W. Young by Henry A. Neilson and others, by deed dated March 9th, 1888, and recorded in the Hudson County Register's office in Book 454 of Deeds for said County, on page 452.

The second tract was conveyed to the said William C. Young and Henry W. Young, by Frank C. Hollins and wife, by deed dated December 10, 1888, and recorded in the said Register's office in Book 472 of Deeds for said County, on page 150 &c.

40 The said Henry W. Young conveyed his undivided one-half interest in said two tracts to William C. Young by deed, dated January 24th,

*Schedule A, Annexed to Bill of Complaint.*

1916, and recorded in said Register's Office in Book 639 of Deeds for said County on page 312.

And the said party of the second part for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, his heirs, executors, administrators and assigns, that he, the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of Twelve thousand Dollars (\$12,000) as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On execution of this agreement for which this is also a receipt.....	\$ 500.00	
On delivery of deed, cash.....	4,500.00	20
On bond and mortgage, same containing usual interest, tax, assessment, insurance and installment default clauses, and an agreement not to claim credit on the interest payable on bond and mortgage by reason of any tax assessed, or to be assessed against the said premises, with interest at 6% payable semi-annually for five years.....	7,000.00	
and containing a clause that the party of the second part may make payments on account of the principal of said mortgage on any interest day in multiples of \$100 provided that none of said payments shall be less than \$500 in amount at any one time.		30

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

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second

*Schedule A, Annexed to Bill of Complaint.*

part, his heirs and assigns, may enter into and upon the said land and premises from and after the date of closing title and from thence take the rents, issues and profits to and their use.

10 AND IT IS FURTHER AGREED, by the parties hereto that the said Deed shall be delivered and received at the office of Charles Young, 921 Bergen Avenue, Jersey City, New Jersey, between the hours of two in the afternoon and four o'clock in the afternoon on the said fourteenth day of November next ensuing the date hereof.

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

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

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

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

40 It is understood and agreed that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Supervision to be shown by the report of the department or board enforcing the same where such ordinances, regulations and said act apply.

*Schedule A, Annexed to Bill of Complaint.*

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

If at the time for the delivery of the deeds, the premises or any part thereof shall be or shall have been affected by an assessment or assessments which are or may become payable in annual installments of which the first installments is then due or has been paid, then for the purpose of this contract all the unpaid installments of any such assessment, including those which are to become due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged by the seller thereof, upon the delivery of the deed. Unconfirmed improvements or assessments, if any, shall be paid and allowed by the seller on account of the purchase price, if the improvements or work has been completed on or before

AND for the performance of all the singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators.

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

WM. C. YOUNG (L. S.)  
CONO ZUNNI (L. S.)

Signed, sealed and delivered  
in the presence of

CHARLES YOUNG,  
ANTHONY AVALLONE,  
As to Conno Zunni.



### Schedule B, Annexed to Bill of Complaint.

I, WILLIAM C. YOUNG, residing at No. 337½ Pavonia Avenue, Jersey City, New Jersey, do make, publish and declare this to be my last will and testament, hereby revoking all other wills and codicils by me heretofore made.

10

FIRST: I order and direct my executor to pay my funeral expenses and just debts as soon as convenient after my decease.

SECOND: I give and bequeath to the corporation, board or body owning, controlling or operating Bayview Cemetery, Jersey City, New Jersey, the sum of Six Hundred Dollars (\$600) to be applied to the care and maintenance of the graves in my family plot in said cemetery.

20

THIRD: I give and bequeath to the corporation, board or body owning, controlling or operating St. Matthews Church on Wayne Street, Jersey City, New Jersey, the sum of Five Hundred Dollars (\$500) to be expended for flowers for the decoration of the altar in that church.

FOURTH: I give and bequeath to Henry Fidler of No. 15 Friedlander Place, Nutley, New Jersey, if he survives me, my diamond ring, or if he does not survive me, I give and bequeath the same to Mrs. Henry Fidler, residing at the same place.

30

FIFTH: I give and bequeath to William Rossman of 511—28th Street, Cairo, Illinois, my gold watch and chain, or if he predeceases me, I give and bequeath the same to Edward Wagner of 337½ Pavonia Avenue, Jersey City, New Jersey.

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*Schedule B, Annexed to Bill of Complaint.*

SIXTH: I give and bequeath to Mrs. Louis A. Rossman of 511—28th Street, Cairo, Illinois, if she survives me, my household furniture, furnishings and effects, clothing, personal effects, books, pictures and the remainder of my jewelry and automobiles. If she predeceases me, I give and bequeath the same to William Rossman residing at the same place.

SEVENTH: I give and bequeath the following money legacies to the following legatees:

(a) William Rossman, 511—28th Street, Cairo, Illinois, one thousand dollars (\$1,000).

(b) Mrs. Edward Wagner, 337½ Pavonia Avenue, Jersey City, New Jersey, one thousand dollars (\$1,000).

(c) To the Board, corporation or body owning, controlling or operating St. Matthews Church on Wayne Street, Jersey City, New Jersey, for the use of said Church, one thousand dollars (\$1,000).

(d) To the Board, corporation or body owning or controlling "Nelson Home" on Nelson Avenue, Jersey City, New Jersey, five hundred dollars (\$500.).

EIGHTH: I give and devise to Mrs. William Costello of No. 337 Pavonia Avenue, Jersey City, New Jersey, if she survives me, my real property located at and known as No. 337 Pavonia Avenue, Jersey City, New Jersey, or if she predeceases me, I give and devise the same to Mrs. John Larkins residing at the same address.

NINTH: I give, devise and bequeath all the rest, residue and remainder of my estate, real

*Schedule B, Annexed to Bill of Complaint.*

and personal, of whatever nature and wherever situate in equal shares to the following persons: Mrs. Edward Wagnor, 337½ Pavonia Avenue, Jersey City, New Jersey, Genevieve Larkin, 337 Pavonia Avenue, Jersey City, New Jersey, Julia Wagner, 337½ Pavonia Avenue, Jersey City, New Jersey, and William Rossman 511—28th Street, Cairo, Illinois, to have and to hold the same to them, their heirs, executors, and administrators and assigns forever, provided, however, that if any one or more than one of said four persons predecease me, the legacy or devise to the one or ones so dying shall lapse and the survivors and survivor of said four persons shall take my said residuary estate. 10

TENTH: I give to my executor full power of sale as to any and all real property of which I may die seized, excepting such real property as may have been specifically devised above in paragraph "EIGHTH" to Mrs. William Costello or in the event she predeceases me to Mrs. John Larkins, and full power of sale as to any personal property I may leave excepting such as is specifically bequeathed above and power to execute and deliver such instruments as may be necessary for the execution of such power. 20 30

ELEVENTH: I order and direct that all inheritance, estate and succession taxes shall be paid out of my residuary estate.

TWELFTH: I nominate and appoint Commercial Trust Company of New Jersey, a corporation of the State of New Jersey having its principal office and place of business at 15 Exchange Place, Jersey City, New Jersey, executor of this will 40

*Schedule B, Annexed to Bill of Complaint.*

without bond or other security in any court, jurisdiction or proceeding.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 10th day of October, 1928.

WM. C. YOUNG (Seal)

10

Signed, sealed, published and declared by the said testator, William C. Young, as and for his last will and testament, in our presence, who, at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

Raymond A. Lipscomb  
158 Whitehall Blvd.,  
Garden City, N. Y.

Edward Groth  
319—56th St.,  
Union City, N. J.

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**Answer.**

(Filed October 3, 1930.)

## IN CHANCERY OF NEW JERSEY.

Between

COMMERCIAL TRUST COMPANY OF  
NEW JERSEY, a corporation of  
the State of New Jersey, Exec-  
utor, &c., of William C. Young,  
Complainant,

*and*

CONO ZUNNI,  
Defendant.

On Bill, &c.  
Answer.

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The answer of the defendant, Cono Zunni.  
This defendant, Cono Zunni, answering the bill  
of complaint, says that:

1. This defendant has no knowledge or belief  
as to the statements in paragraph 1.

2. Paragraphs 2, 3 and 4 are admitted.

3. This defendant admits so much of para-  
graph 5 as sets forth that numerous conferences  
were had at which it was mutually agreed to post-  
pone the time for closing the contract and so much  
of the said paragraph 5 that sets forth it was  
agreed that title may be passed on February 19th,  
1930, and so much of the said paragraph 5 as sets  
forth that William C. Young was in too weak a  
condition to close the title on February 19th,  
1930, and so much of said paragraph 5 as sets  
forth that it was agreed to postpone the closing  
of the title to a date later than February 19th,  
1930.

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*Answer.*

This defendant has no knowledge of the allegation which sets forth that William C. Young died on February 19th, 1930.

10 4. This defendant has no knowledge or information sufficient to form a belief as to the statements set forth in paragraph 6.

20 5. This defendant does not deny the allegations set forth in paragraph 7, but states that he refuses to take title to the premises in question because the complainant has never been ready to give a clear and marketable title as required under the contract, and because the complainant refused and still refuses to make any allowances on the purchase price for the damage to the property (beyond the reasonable wear and tear) which has occurred since the signing of the contract, as provided in the contract between the parties, attached to the complaint and marked "Schedule A".

6. This defendant denies the allegations in paragraph 8.

## FIRST SEPARATE DEFENSE.

30 1. On February 19th, 1930, William C. Young departed this life, at which time he was seized in fee of the lands and premises which are the object of this suit. By the terms of the statute in such case made and provided the lands of the decedent are and will remain liable for the payment of his debts for one year after his decease (Compiled Statutes 3838, Section 81) and as such are encumbered and will continue to be encumbered for a period of one year after decedent's death.

40

*Answer.*

## SECOND SEPARATE DEFENSE.

1. On or about the 17th day of October, 1929, defendant and complainant's testator entered into the contract referred to in paragraph 2 of the complaint and annexed to the complaint and marked "Schedule A". The said contract, amongst other things, provided that the premises were to be conveyed free of all encumbrances except as stated in the contract. 10

2. The premises referred to as the second tract of land in paragraph 2 of the bill of complaint filed herein, and known as #337 Pavonia Avenue, Jersey City, N. J. at all times since the making of the said contract have been occupied by a tenant and at no time has the complaint or the complainant's testator been ready to convey the premises to the defendant free from the rights and possession of the said tenant in and of the said premises, as provided for in the said contract. 20

*Third Separate Defense.*

1. On or about the 17th day of October, 1929, the said William C. Young, complainant's testator, died leaving a last will and testament which will was duly admitted to probate by the Surrogate of Hudson County on March 3rd, 1930. A copy of said will is annexed to the complaint filed in this cause, and marked "Schedule B". By a decree entered June 18th, 1930, the Hudson County Orphans Court confirmed the order of the Surrogate admitting the said will to probate. 30

2. By the 8th paragraph of said will complainant's testator gave and devised unto Mrs. William 40

*Answer.*

Costello his real property known as 337 Pavonia Avenue. The said 337 Pavonia Avenue, Jersey City, N. J. is the same property referred to as the second tract in paragraph 2 of the bill of complaint filed herein and is part of the premises which are the subject matter of the contract, and this suit, to enforce the same. By reason of paragraph 8 of the said last will and testament, Mrs. William Costello claims an interest in the premises, which are the subject matter of this suit. This defendant does not deny or affirm the claim of the said Mrs. William Costello in the lands and premises in question, but says that since the time of the death of the complainant's testator, up to the time of the filing of the bill of complaint in this cause, the said Mrs. William Costello has refused and still refuses to pay any rent to the complainant and has refused and still refuses to vacate or surrender possession of the premises known as #337 Pavonia Avenue, and referred to as the second tract in paragraph 2 of the bill of complaint, claiming an interest in them, under the will of the complainant's testator. If the prayer of complainant's bill is allowed and it was to be decreed that this defendant be compelled to take title to the premises this defendant will have to proceed at law or in equity to determine the claim of the said Mrs. William Costello, and/or to recover possession of the premises known as 337 Pavonia Avenue, and referred to in the complaint as the second tract in paragraph 2, which premises are now occupied by her and which she claims to hold under the last will and testament of complainant's testator as the owner thereof.

By way of counterclaim against the complainant Commercial Trust Company of New Jersey, a corporation of the State of New Jersey, the exec-

*Answer.*

utor under the last will and testament of William C. Young, deceased, this defendant says that:

1. On or about the 17th day of October, 1929, William C. Young, complainant's testator entered into the contract for the sale of land and premises with this defendant, which contract, with the description of the land and premises, are set out in the bill of complaint filed herein and for the sake of brevity are referred to as contained and set forth in the said bill of complaint.

10

2. The said contract provided amongst other things that the premises were to be conveyed free of all incumbrances except as stated in the contract.

3. The said William C. Young, Complainants testator, or the complainant, have never been ready to convey the said property free and clear of incumbrances since the making of the contract, but to the contrary, said property has always been and still is incumbered within the meaning of the contract.

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4. The said contract provided amongst other things that in case the premises should suffer injury beyond the ordinary wear and tear, the party of the first part (William C. Young, Complainant's testator), should repair the damage before the date set for delivery of said deed, or make a proper deduction from the purchase price.

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5. The said premises have been greatly damaged beyond the ordinary wear and tear since the signing of the said contract, so that it would cost Fifteen Hundred (\$1,500.00) Dollars or more to repair the same and restore them to the condition

40

*Answer.*

they were in at the time of the signing of the said contract.

10 The defendant therefore prays (1) That the complainant, Commercial Trust Company of New Jersey, a corporation of the State of New Jersey, Executor of the Last Will and Testament of  
20 William C. Young, Deceased, may answer this counterclaim and each statement herein made, (2) That the contract between the parties be rescinded and that the complainant be decreed to refund to the defendant, the deposit of Five Hundred (\$500.00) Dollars paid to the complainant's testator at the time of signing the said contract, together with this defendant's search fees, reasonably entailed in searching the title to the premises and that the complainant be decreed to pay  
20 unto Anthony V. R. Avallone, the Solicitor of the defendant, such Counsel fees as this Court may allow,

Or, in the event that this defendant shall be decreed by this Court to take title to the premises, then in that event, the complainant be ordered to repair the damage to the premises before conveying the same to this defendant, or, failing that, that this defendant be allowed a reasonable deduction in the purchase price of said premises, or  
30 such other relief as this Court shall deem just and equitable.

ANTHONY V. R. AVALLONE,  
Solicitor of Defendant.

THOMAS R. ARMSTRONG,  
Of Counsel.

**Replication and Answer to Counterclaim.**

(Filed October 27, 1930.)

IN CHANCERY OF NEW JERSEY.

80-516.

<p>Between</p> <p>COMMERCIAL TRUST COMPANY OF NEW JERSEY, a corporation of the State of New Jersey, Exec- utor under the last will and testament of WILLIAM C. YOUNG, deceased, Complainant,</p> <p style="text-align: center;"><i>and</i></p> <p style="text-align: center;">CONO ZUNNI, Defendant.</p>	<p>On Bill &amp;c. Replication and Answer to Counterclaim.</p>	<p>10</p> <p>20</p>
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The complainant joins issue on the answer of the defendant.

AS TO COUNTERCLAIM contained in said answer, complainant says.

1. It admits paragraph 1 of said counterclaim. 30
2. It admits paragraph 2 of said counterclaim but says that the contract for sale of the premises described in the bill of complaint filed herein between William C. Young and Cono Zunni dated October 17, 1929, provides that the rent of the premises described therein shall be apportioned and allowed as of the day of delivery of the deed.
3. It denies paragraph 3 of said counterclaim. 40

*Replication and Answer to Counterclaim.*

- 4. It admits paragraph 4 of said counterclaim.
- 5. It denies paragraph 5 of said counterclaim.

J. FISHER ANDERSON,  
 Solicitor of and of Counsel  
 with Complainant.

10

**Note.**

(Filed December 26, 1930.)

IN CHANCERY OF NEW JERSEY.

80-516.

20

Between  
 COMMERCIAL TRUST COMPANY OF  
 NEW JERSEY, a corporation of  
 the State of New Jersey, Exec-  
 utor under the last will and  
 testament of WILLIAM C.  
 YOUNG, deceased,  
 Complainant,

On Bill &c.  
 Note.

30

*and*  
 CONO ZUNNI,  
 Defendant.

The defendant Cono Zunni joins issue on the answer of the complainant, Commercial Trust Company of New Jersey to the counterclaim of this defendant.

40

ANTHONY V. R. AVALLONE,  
 Solicitor for Defendant.

**Testimony.**

## IN CHANCERY OF NEW JERSEY.

Between COMMERCIAL TRUST COMPANY OF NEW JERSEY, Executor of Wil- liam C. Young, deceased, Complainant,  <i>and</i>  CONO ZUNNI, Defendant.	}	10
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Transcript of proceedings taken in the above 20  
 entitled cause before Hon. Maja Leon Berry, Vice-  
 Chancellor, at the Chancery Chambers, Newark,  
 New Jersey, on April 28, 1931.

## Appearances:

For Complainant—J. FISHER ANDERSON, Esq.,  
 by FRED W. RUGGE, Esq., and MELOSH,  
 MORTEN & MELOSH, by LOUIS G. MORTEN,  
 Esq., representing Mrs. Edward Wagner. 30

For the Defendant—ANTHONY V. R. AVAL-  
 LONE, Esq., by JOHN J. CORCORAN, Esq.,  
 and CHARLES YOUNG, Esq., of Counsel.

J. HARRY O'BRIEN, Esq., representing Mrs.  
 Nora Costello (not a party to the suit).

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Mr. Young: I would like to ask permission to 40  
 amend the answer of the defendant by substitut-

*Opening of Case.*

ing a separate defense, to the effect that subsequent to the execution of the written contract in question, a parole contract was substituted, waiving the written contract.

10 Mr. Ruge: I have objection to that. I am not prepared to meet it, and I don't know how they can vary the terms of the written contract by parole.

Court: You say you are surprised by that defense?

Mr. Ruge: I am not prepared to meet that. I have prepared my case on the complaint and answer and counterclaim which are in.

Mr. Young: He knew the elements of this defense, and has known them for months.

20 Court: The case was at issue in October of last year. It seems to me if you had wanted to introduce any different defense than the one that was introduced at that time, you had plenty of opportunity to do it. You are a little bit late now to offer a defense which is totally different and which will change entirely the character of proof which the complainant may be called upon to present.

Mr. Ruge: I merely address myself to your Honor's discretion.

30 Court: It is discretionary matter, and I think I shall have to deny your application at this time, and go to hearing on the pleadings as they stand.

Mr. O'Brien: I might state that on Friday I filed a bill, representing Mrs. Nora Costello, who is the tenant, and under the will left by this testator she was to receive this property, and I have filed a bill in this court, praying that if it be decreed that this man take the property, that a lien be impressed upon the money—that part of the consideration which represents the value of this  
40 particular house in which my client lives, and

*Opening of Case.*

that it be decreed that if he is not to take the property, then in that event that the executor be decreed to convey the property, if necessary, to my client; and a further prayer that if it be decreed that the purchaser is to take the property, and if he fails to perform or is incapable of performing, that then and in that event, the property be conveyed to my client. 10

Court: That issue is not before me.

Mr. O'Brien: No, I filed the bill; the case is not at issue. We are not a party to this case.

Court: I don't see that I have anything to do with that particular cause now.

Mr. Rugge: In view of what Mr. O'Brien said, I would call the Court's attention to some decisions which state that immediately upon the signing of a contract for the sale of a property, the character of the property as far as the vendor is concerned is changed from realty to personalty, and the signing of such a contract is practically a revocation of a devise of that particular property which might appear in the will of the then owner which was made at some earlier date. 20

Court: The question is not before me now.

Mr. Rugge: Most of the allegations in the complaint can be stipulated.

The second paragraph is admitted. 30

On October 17, 1929, William C. Young was the owner of the property which is involved in this suit. That is admitted.

The third paragraph, that on the seventeenth of October, 1929, Young entered into a contract to convey the property to Zunni, which is the contract we are seeking to enforce. That is also admitted. A copy of it is annexed to the bill, and the original I will offer. 40

*Opening of Case.*

The fourth paragraph is that Zunni paid \$500 on account of the purchase price at the time the contract was signed, and that is admitted.

This contract called for closing title on the fourteenth of November, 1929.

10 The fifth paragraph alleges that both before and after the fourteenth of November, 1929, the parties to the contract got together from time to time, and the time for closing was postponed until finally it was set down to be closed on the nineteenth of February, 1930. In the meantime Young took sick and was taken to a hospital, and when the parties met at the hospital on that day to close the title, he was in such bad shape that he couldn't close it.

Court: Whom do you mean by "Young"?

20 Mr. Rugge: He is the man who was the then owner of the property, and of whose estate the Commercial Trust Company is now executor.

Mr. Young: That is admitted only so far as the reduced price was concerned.

Mr. Rugge: There is nothing said in here of any reduced price.

Mr. Young: That was the purpose of my application to set up this separate defense.

30 Mr. Rugge: "The said William C. Young died at said Bergen Sanitarium on February 19, 1930, on which date, by mutual agreement, the title was to have been closed."

They deny knowledge in their answer, but in their first separate defense they admit that very thing.

Reading: "This defendant has no knowledge of the allegation which sets forth that William C. Young died on February 19th, 1930."

40 You will admit now that Young died February 19th, 1930?

*Opening of Case.*

Mr. Young: Yes, we do admit that Mr. Young died on the morning of February 19, 1930. We do admit, also, that that morning was agreed upon between the parties for the passing of title of this property, upon this new alleged agreement, which I ask leave to introduce.

Court: That is not before the Court.

10

You admit in your answer, as I understand it, the postponement for closing title to February 19, 1930?

Mr. Young: The agreement between the parties was that the title was to be passed——

Mr. Ruge: On November 14, 1929.

Mr. Young: That was the original time fixed by the contract itself, and that subsequently these various matters arose between this vendor and vendee, which absolutely changed the written contract; and then on——

20

Mr. Ruge: There is nothing in the papers to show that anything arose to change the terms of the contract.

Mr. Young: It was agreed that the title was to be closed on the date alleged in the answer—February 19, 1930.

Mr. Ruge: There is nothing before the Court to show that there was any change.

Court: The fact is that the contract was entered into and hasn't been performed.

30

Mr. Ruge: That is right.

Court: This bill is for specific performance?

Mr. Ruge: Yes.

Court: What is the defense?

Mr. Ruge: The sixth paragraph sets forth that he did appoint the Commercial Trust Company as his executor, and they qualified as executor under that will. A copy of the will is annexed to the bill, and I will offer a certified copy of the

40

*Opening of Case.*

will only, as an exhibit; and that an appeal was taken from the order admitting to probate, and on June 18, 1930, the Hudson County Orphans' Court affirmed the order of the Surrogate admitting the will to probate.

10 They deny knowledge of that, but will admit it now, and do admit it later on in their answer.

You admit that Mr. Young died leaving this last will and testament and the Commercial was appointed as executor and qualified as such?

Mr. Young: That is admitted, and I offer a certified copy of the will and letters testamentary in evidence.

20 Mr. Rugge: The seventh paragraph is that the complainant, the Commercial Trust Company, as executor, since the third of March, 1930, the date on which it qualified as executor, through its solicitor, has demanded from time to time of Zunni, through his attorney, that this contract be carried out, and that Zunni would never make an appointment for that purpose.

They do not deny that, but they set up certain reasons in their answer why they would not make an appointment to close the title.

You admit, Mr. Young, that we have from time to time made an appointment to close title?

30 Mr. Young: I do not admit that.

Mr. Rugge: The eighth paragraph is denied by their answer, which sets forth that Young in his lifetime from the time of making this contract to the date of his death, was always ready and willing to perform this contract, and that the Commercial Trust, as executor of his estate, since the date of its appointment and qualification as executor, was ready and willing and able to carry out the terms of the contract.

40 That paragraph is denied.

Court: You may proceed with your proof.

*Edward T. Purcell, for Complainant—Direct.*

Mr. Rugge: I offer in evidence contract between William C. Young and the defendant, dated the seventeenth of October, 1929, for the premises described in the bill.

(Marked Exhibit C-1.)

I want to call to your attention that the contract calls for a conveyance free from all encumbrances except as hereinafter mentioned, and then goes on to say, "The rents of said premises, insurance premiums, water rents, taxes, and interest on mortgage, if any, shall be adjusted." 10

I offer in evidence a certified copy of the will of William C. Young, dated October 10, 1928, in which he nominates and appoints the Commercial Trust Company of New Jersey, the complainant in this suit, as executor; and a copy of the letters issued by the Surrogate of Hudson County. 20

(Marked Exhibit C-2.)

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EDWARD T. PURCELL, sworn for complainant.

*Direct examination by Mr. Rugge:*

Q. Where do you live, Mr. Purcell? A. 260 Harrison Avenue, Jersey. 30

Q. By whom are you employed? A. Commercial Trust Company of New Jersey.

Q. In what capacity? A. Assistant trust officer.

Q. Commercial Trust Company of New Jersey is executor of the Estate of William C. Young?

A. Yes.

Q. Are you familiar with that estate? A. Yes.

Q. With reference to the premises on Pavonia Avenue, Jersey City, described in the contract 40

*Edward T. Purcell, for Complainant—Cross.*

made by Young in his lifetime with Zunni, wherein Young agreed to convey that property to Zunni, will you tell us, please, if the Trust Company has since its appointment as executor of that estate, been ready, willing and able to carry out the terms of that contract?

10

Mr. Young: I object as calling for a conclusion.

Court: The objection is overruled. I don't see any reason why he should not tell whether they were willing to carry out the contract.

A. It has.

20

Mr. Young: Can I except to your Honor's ruling?

Court: You don't need it.

*Cross-examination by Mr. Young:*

Q. You say that you are assistant trust officer for the Commercial Trust Company? A. One of the assistant trust officers.

Q. And were such at the time of the making of this contract? A. I don't know the date of the contract.

30

Mr. Young: October 17, 1929.

Mr. Ruge: He is not concerned with the date of the making of the contract. He has been since——

Q. How long have you been assistant trust officer of the Commercial Trust Company? A. About April, 1929.

40

Q. Do you know that there is someone in possession of one of those houses? A. Yes.

*Edward T. Purcell, for Complainant—Cross.*

Q. Her name is Mrs. Costello? A. Yes.

Q. You do know that she claims to be the owner?

Mr. Rugge: I object as improper cross-examination.

Court: I don't think it is. You asked if the Trust Company had been ready and willing and able to convey in accordance with the contract, or perform the contract. It is perfectly proper.

10

Q. —of one of those two houses? A. I don't know that she claims to be the owner, but she has been mentioned as being the devisee of the property.

Q. Did you collect any rent? A. We collected one month's rent from Mrs. Costello after Mr. Young died.

20

Q. And when was that collected? A. I presume in March; Mr. Young died in February, 1930.

Q. A month after Mr. Young died. Have you collected any rents since then? A. No.

Mr. Rugge: I object. I don't know that that has any bearing on this case.

Court: He has answered the question. I think it is proper.

30

Q. Have you already taken any steps to remove Mrs. Costello from possession?

Mr. Rugge: I object to that.

Court: Objection overruled.

A. We have notified her attorney about having Mrs. Costello to pay the rents to the executor, and having received a refusal, we notified our attorney of the fact.

Q. To do what? A. To proceed to collect the rent or enforce the payment.

40

*Fred W. Ruge, for Complainant—Direct.*

Q. Or to remove her from possession? A. I don't know what the procedure is.

Q. Did you yourself give that notice to the attorneys? A. I presume I did.

Q. And that comes within the line of your duty as assistant trust officer? A. Yes.

10 Q. So that you gave the notice to your attorney to either remove this party or collect? A. Not to remove, but to proceed to collect rents, and do whatever was necessary to collect the rent.

Q. Have they reported to you as to what action they took, if any? A. They told me that if Mrs. Costello was adjudged the owner of the property, he wouldn't get any rents. If the contract is to be carried out, we would probably have to sue Mrs. Costello for the back rents.

20

---

FRED W. RUGGE, sworn for complainant:

*Direct examination by Mr. Morten:*

Q. What is your occupation? A. I am a lawyer.

Q. And since March, 1930, have you acted for the complainants in this case with reference to this contract? A. I have.

30

Q. Have you had any negotiations with the defendant, or his attorney, with reference to the closing of the title as described in the contract annexed to the bill of complaint? A. I have made several demands upon Mr. Anthony Avallone, who appears as the solicitor for the defendant in this suit, to make an appointment with me, when this contract for the conveyance by the Commercial, or rather when this contract could be carried out and the title closed.

40

*Fred W. Rugge, for Complainant—Cross.*

Q. What has been the result of those demands?  
 A. No appointment has been made, although I have been trying all the while to make one, down to the time of the institution of this suit.

Q. Has there ever been any effort on the part of the defendant or his solicitor to arrange with you for the closing of this title? A. There has not. 10

Q. So far as you know, the complainant in this case has always tendered itself as ready, willing and able to carry out this contract? A. It has.

*Cross-examination by Mr. Young:*

Q. Mr. Rugge, did you know that Mrs. Costello was in possession? A. Not of my own knowledge.

Q. Do you know it? A. I have heard it. 20

Q. Have you spoken to Mrs. Costello about the matter? A. No, sir.

Q. Did you speak to Mr. O'Brien, her solicitor, about it? A. On the appeal from the order of the Surrogate admitting the will to probate, on the trial of that appeal, Mr. O'Brien was in the court room, and he may have referred to it at that time, but as far as I know, that was the only talk I have ever had with Mr. O'Brien.

Q. Didn't Mr. O'Brien tell you that Mrs. Costello was the owner of that property and intended to claim ownership? A. He may have said so. 30

Q. And she intended to stay there unless she was ejected by an order of some tribunal? A. He may have.

Q. Didn't he? A. I wouldn't say he did it.

Q. And on that occasion didn't you speak also to Mrs. Costello? A. We were all together; we may have spoken; I don't know.

Q. Didn't she then say to you that she was the owner? A. I don't think she did. 40

*Mrs. Nora Costello, for Defendant—Direct.*

Q. Is she still in possession? A. I don't know of my own knowledge.

Q. Did Mr. Costello tell you that she was? A. Yes.

Q. How lately? A. A week ago he told me that she was still residing there.

10 Q. Tell you that she was paying rent? A. I know that she isn't.

Q. When was the will admitted to probate? A. On March 3, 1930.

Q. That was after the will contest? A. No, the will was admitted by the Surrogate of Hudson County on March 3, 1930; thereafter an appeal was taken from the order admitting that will to probate, and the Orphans' Court confirmed the appointment in the month of June, 1930.

20

Mr. Rugge: We rest.

---

MRS. NORA COSTELLO, SWORN FOR DEFENDANT:

*Direct examination by Mr. Young:*

Q. Where do you live? A. 337 Pavonia Avenue.

30 Q. Is that one of the two houses owned by Mr. William C. Young in his lifetime? A. Yes.

Mr. Rugge: In order that the Court might not be confused, I would like to state we owned another lot in that vicinity—two lots of 25 foot frontage each, that have since been cut up into three lots of  $16\frac{2}{3}$  feet, on which there are two houses, one on each of those two lots, and a vacant lot in between. So when they refer to 337 Pavonia Avenue, I don't want the Court to be of the impression that that covers one

40

*Mrs. Nora Costello, for Defendant—Direct.*

entire tract. It is only a portion of the tract as described in the bill of complaint and contract. The contract describes two tracts of 25 feet each.

- Q. Which one of those houses do you live in?  
 A. 337. 10  
 Q. And you still live in it? A. Yes.  
 Q. Do you pay rent? A. No.  
 Q. Do you claim to be the owner of that property?

Mr. Morten: I object. If she has any right of title, she should assert it.

Court: She is asked if she claims to own it. The question is proper. The objection is overruled. 20

A. Yes.

Q. Have any proceedings been brought against you by the executors of the estate of William C. Young, to remove you from possession?

Mr. Morten: I object on the ground that it is immaterial.

Court: The objection is overruled.

A. No. 30

Q. Do you intend to pay any rent for that property?

Mr. Morten: I object on the ground that that is immaterial.

Court: I will permit the question. I think it follows from what she has said, she doesn't intend to, unless she is obliged to.

A. The house was willed to me.

Q. Willed to you by whom? A. By Mr. Young. 40

*N. Costello, for Defendant—Cross—Re-direct.*

Q. Did you have any talk with Mr. Young prior to his death?

Mr. Morten: I object.

Court: Objection sustained.

10 *Cross-examination by Mr. Morten:*

Q. You have no deed for this property, have you? A. No.

Q. You were in this property during Mr. Young's life—the testator—and paid rent to him?

A. Yes.

Q. You were one of his tenants? A. Yes.

Q. And you paid rent for the month of March, after his death, to the Commercial Trust Company, the executor? A. Yes, one month.

20 Q. And the only reason you claim title to this property is because you are named as a devisee in the will, isn't it? A. Yes.

30 Court: In order that it may clearly appear what the claim is, now that it has been suggested by both sides, you are claiming under the will of Mr. Young, the eighth paragraph, I take it, where he says, "I give and devise to Mrs. William Costello of No. 337 Pavonia Avenue, Jersey City, New Jersey, if she survives me, my real property located at and known as No. 337 Pavonia Avenue, Jersey City, New Jersey"; is that right?

Witness: Yes.

*Re-direct examination by Mr. Young:*

40 Q. Do you know on what date you paid the March rent? A. I don't know; it was after March; I don't know the date.

*J. Harry O'Brien, for Defendant—Direct.*

Q. Was it before or after the will was admitted to probate? Do you know the date of probate? Was it before or after the will was admitted to probate? A. I think it was after.

Q. Was it before this proceeding was brought? A. Yes.

Q. And before the Orphans' Court suit contesting the will; was it made before the appeal was taken from the Surrogate's probate? A. Yes. 10

---

J. HARRY O'BRIEN, sworn for defendant:

*Direct examination by Mr. Young:*

Q. What is your business or profession? A. Counsellor at law of the State of New Jersey. 20

Q. And do you represent Mrs. Costello? A. I do.

Q. Have you instituted a suit in her behalf in the Court of Chancery? A. I have.

Q. For what purpose? A. For the purpose of decreeing that if this present suit which is being heard before this Court now—should it be decreed that the purchaser be obliged to take the property—the defendant—in that event a lien be impressed upon so much of the consideration as represents the value of 337 Pavonia Avenue, the house occupied by my client. 30

Mr. Young: I move to strike that out, on the ground that it is immaterial.

Court: The motion is denied, for two reasons, and it is necessary, perhaps, to express only one reason. This very witness made the statement in open court, before this case was begun, that he had filed a bill for the very purpose which he now has ex- 40

*J. Harry O'Brien, for Defendant—Direct.*

10 pressed. The question which was answered called for that statement. You had knowledge in advance of why he had filed the bill. When the question was asked what the purpose of the bill was, you knew what his answer was going to be, and you didn't object. That is sufficient.

Q. When did Mrs. Costello first retain you in this matter? A. I represented Mrs. Costello on the appeal from the probate of the will in the Orphans' Court, and she at that time spoke to me about her rights in this property.

20 Q. And did you at various times speak to Mr. Rugge, acting on behalf of the Commercial Trust Company, executor? A. I exchanged correspondence with the office of J. Fisher Anderson, in which Mr. Rugge is associated.

Q. And on June 28, 1930, did you write Mr. J. Fisher Anderson a letter, of which I show you a copy?

30 Mr. Morten: I object; that cannot have any materiality in this case on the rights of the parties, whatever the correspondence may have been between the solicitors in this matter.

Court: I don't know what the letter is, or whether it has any bearing on this case, or not. It suggests a matter which should not be put in.

Mr. Morten: I suggest that the letter be submitted to the Court.

(Letter handed to the Court.)

40 Court (after reading letter): I think this letter would be admissible, providing the letter to which it is a reply were also

*J. Harry O'Brien, for Defendant—Direct.*

offered in evidence, but it is not admissible alone. If you offer them both,—

Mr. Young: I will offer both.

Mr. Morten: I object on the ground that they are not material to the issue.

Court: The objection is overruled.

(Letter dated June 28, 1930, from J. Harry O'Brien to Mr. J. Fisher Anderson, marked Exhibit D-1.)

10

(Letter from J. Fisher Anderson to J. Harry O'Brien marked Exhibit D-2.)

Q. I show you another letter, Mr. O'Brien, dated June 16, 1930, "Refer to No. 5894 Young Estate", and ask you if you received this letter from Mr. J. Fisher Anderson? A. I did.

20

Q. Were those letters received by you, and your reply to one of those letters sent by you as solicitor or attorney for Mrs. Costello? A. They were.

Mr. Young: I offer the letter of June 16, 1930, in evidence.

Mr. Morten: We object on the ground that the letter is immaterial.

Court: Objection is overruled.

(Marked Exhibit D-3.)

30

Q. I believe you testified a moment ago that you had several conferences with Mr. Rugge pertaining to the matter? A. Yes.

Q. Do you recall what those conversations referred to? A. Permit me to state that most of it was by correspondence; in fact, practically all of it. I think the day in the Orphans' Court we did exchange a few words about it.

Q. As to what, Mr. O'Brien?

40

*Colloquy.*

Mr. Morten: I object on the ground that the conversations with Mr. Rugge are immaterial to this issue.

10 Court: It already sufficiently appears what the controversy is about. I don't think it is necessary to go into it any further.

No cross-examination.

Court: The tenth paragraph of this will which has been offered in evidence reads: "I give to my executor full power of sale as to any and all real property of which I may die seized, excepting such real property as may have been specifically devised above in paragraph 'EIGHTH' to Mrs. William Costello",—

20 Aren't there two questions which must be decided under this will, in order to determine whether or not Mrs. Costello is the owner of the property: first, whether the devise to Mrs. Costello was revoked by the execution of the contract, as has been suggested; and second, whether this reservation or restriction on the power of sale doesn't put this executor in the position where it is not qualified to carry out the contract? It has no power.

30 Mr. Morten: In reply to that, we will say we are not standing on the power in the will. We wouldn't even argue that. There is only one question: either this contract made after the execution of this will, abrogated the devise in the will or it didn't. If it did, then we have a perfect right to carry out the contract. That is the only question here.

40 Court: Assuming that there is one question,—

*Colloquy.*

Mr. Morten: That is all.

Court: —is not that question of itself sufficient to defeat the suit for specific performance; because does it not appear quite evident that if this defendant takes the property, he is buying a lawsuit?

Mr. Morten: Absolutely not. If that were the case, then every time an owner of a property sold a house where he had tenants, the purchaser might be buying a lawsuit. 10

Court: This isn't a question of the tenancy. This is a question of the right of ownership claimed under the will.

Mr. Morten: How can a person claim under a will, if the contract abrogated the language of the will? The cases are so well settled on that. How can that right be said to be a reasonable question of title? 20

Court: I am merely suggesting that that question is open. Will this specific performance suit settle the controversy between this executor, or the representatives of this estate, whoever they may be, and Mrs. Costello?

Mr. Morten: Absolutely.

Court: How can it? 30

Mr. Morten: For the law is so well settled that Mrs. Costello's right absolutely ceases. We have case after case upon it. This defendant is not justified in coming in here and refusing a title which he knows cannot be assailed, and if Mrs. Costello's right is so well determined by these cases that it cannot be asserted, there is no lawsuit. Otherwise, if you want to do that, then all I have to do in any specific per- 40

*Colloquy.*

formance suit is to have any nondescript come in and attack the title of my vendor, and say there is a lawsuit.

10 Court: The lawsuit must be meritorious. I am not deciding anything, but I am pointing out some of the difficulties you have got to surmount. In the first place, Mrs. Costello, as has been suggested, and as appears by the file itself, is not a party to this suit. Any rights which she may have in this property, if she has any right, cannot be abrogated or affected in any way by the conveyance of the property by the complainant. Now, if she has any rights, why could she not immediately bring ejectment proceedings against the purchaser?

20 Mr. Morten: Any person in the world might do that with any title, if they wanted to do that.

Court: Her rights would depend upon the construction of the will, would they not?

Mr. Morten: I don't know how her rights would depend on the construction of the will.

30 Court: It would depend on the construction of the will in the light of the contract.

Mr. Morten: The contract superseded the will. If there is any question about it, there are innumerable cases upon it, and if that question is absolutely settled, that the making of a contract for the sale of property absolutely abrogates a provision in a will previously made, how can Mrs. Costello have any more rights than I might have, if you attempted to sell your house to Mr. Young and I came in and started an

40

*Colloquy.*

ejection suit? It is so far-fetched there isn't any merit in the question at all.

Court: It may seem perfectly plain to you, but it doesn't seem so plain to me. I think there is an arguable question here. There is sufficient in it, that I wouldn't attempt to dispose of the question offhand without examining the authorities. I think the decisions of the Court of Chancery are to the effect that the purchaser under a contract of sale cannot be compelled to purchase a lawsuit. If that is going to be the effect of this, of course there will be no decree. 10

Mr. Morten: I will concede that if there was any merit in it, then there would be justification for refusing decree, but if there is not, and cannot be, and never was, any merit in the claim, then there would be no justification for refusing decree, it seems to me. Otherwise, any specific performance suit, it matters not what it is, must have the decree refused upon the mere presentation of a claim that has no merit and never did have. 20

BOTH SIDES REST. 30

Court: You may each submit memorandums.

You may submit your memorandum, Mr. Ruge, within a week, and serve it on your opponent, and a week for the defendant to reply.

### Complainant's Exhibit C-1.

ARTICLES OF AGREEMENT, made the seventeenth day of October, in the year of our Lord One thousand Nine Hundred and Twenty-nine Between William C. Young, widower, of the City of Jersey City, in the County of Hudson and State of New Jersey, party of the first part; and Cono Zunni, residing at 350 Pavonia Avenue, in the City of Jersey City, in the County of Hudson and State of New Jersey, party of the second part.

WITNESSETH: That the said party of the first part, for and in consideration of the sum of Twelve thousand dollars (\$12,000.00), to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that he, the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by deed of warranty, free from all encumbrances except as hereinafter mentioned, on or before the fourteenth day of November next ensuing the date hereof, ALL those lots, tracts, or parcels of land and premises, hereinafter particularly described, situate, lying and being in the City of Jersey City, in the County of Hudson and State of New Jersey, and which are more particularly described as follows:

FIRST TRACT: Beginning at a point in the southerly line of Pavonia Avenue distant one hundred and seventy-five (175) feet easterly from the southeasterly corner of Brunswick Street and said Pavonia Avenue; thence running (1) southerly and parallel with Brunswick Street one hundred (100) feet; thence (2) easterly and parallel with Pavonia Avenue twenty-five (25) feet; thence (3)

*Complainant's Exhibit C-1.*

northerly and parallel with Brunswick Street one hundred (100) feet to the southerly line of Pavonia Avenue, and thence (4) westerly along the said southerly line of Pavonia Avenue twenty-five (25) feet to the point or place of beginning; being known and designated as lot 28, in block 252 and colored Yellow on a certain map on file in the office of the Register of the County of Hudson showing the partition of the land at Pavonia, in the said City of Jersey City, among the heirs of John B. Coles, deceased.

10

SECOND TRACT: Beginning at a point in the southerly line of Pavonia Avenue distant one hundred and seventy-five (175) feet westerly from the southwest corner of Monmouth Street and said Pavonia Avenue; thence running (1) southerly and parallel with Monmouth Street one hundred (100) feet; thence (2) westerly and parallel with Pavonia Avenue twenty-five (25) feet; thence (3) northerly and parallel with Monmouth Street one hundred (100) feet to the southerly line of Pavonia Avenue, and thence (4) easterly along the said southerly line of Pavonia Avenue twenty-five (25) feet to the point or place of beginning; being known and designated as lot 29, in block 252 on a certain map on file in the Register's office of the County of Hudson, showing the partition of the land at Pavonia, in the said City of Jersey City, among the heirs of John B. Coles, deceased.

20

30

The first tract was conveyed to William C. Young and Henry W. Young by Henry A. Neilson and others, by deed dated March 9th, 1888, and recorded in the Hudson County Register's office in Book 454 of Deeds for said County, on page 452.

The second tract was conveyed to the said William C. Young and Henry W. Young, by Frank C. Hollins and wife, by deed dated December 10,

40

*Complainant's Exhibit C-1.*

1888, and recorded in the said Register's office in Book 472 of Deeds for said County, on page 150, &c.

10 The said Henry W. Young conveyed his undivided one-half interest in said two tracts to William C. Young by deed dated January 24th, 1916, and recorded in said Register's Office in Book 639 of Deeds for said County on page 312.

20 And the said party of the second part for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, his heirs, executors, administrators and assigns, that he, the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of Twelve thousand dollars (\$12,000) as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

	On execution of this agreement for which this is also a receipt.....	\$ 500.00
	On delivery of deed, cash.....	4,500.00
30	On bond and mortgage, same containing usual interest, tax, assessment, insurance and installment default clauses, and an agreement not to claim credit on the interest payable on bond and mortgage by reason of any tax assessed, or to be assessed against the said premises, with interest at 6% payable semi-annually for five years.....	7,000.00

40 And containing a clause that the party of the second part may make payments on account of the principal of said mortgage on any interest day in multiples of \$100. provided that none of said payments shall be less than \$500.00 in amount at any one time.

*Complainant's Exhibit C-1.*

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

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises from and after the date of closing title and from thence take the rents, issues and profits to and their use. 10

AND IT IS FURTHER AGREED, by the parties hereto that the said Deed shall be delivered and received at the office of Charles Young, 921 Bergen Avenue, Jersey City, New Jersey, between the hours of two in the afternoon, and four o'clock in the afternoon on the said fourteenth day of November next ensuing the date hereof. 20

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

Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, screens, shades, ash cans, heating apparatus, if any, and all other personal property appurtenant to or used in the operation of said premises is represented to be owned by seller and is included in this sale. 30

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

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part, shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated. 40

*Complainant's Exhibit C-1.*

10 It is understood and agreed that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Supervision to be shown by the report of the department or board enforcing the same where such ordinances, regulations and said act apply.

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

20 If at the time for the delivery of the deeds, the premises or any part thereof shall be or shall have been affected by an assessment or assessments which are or may become payable in annual installments of which the first installments is then due or has been paid, then for the purpose of this contract all the unpaid installments of any such assessment, including those which are to become due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged by the seller thereof, upon 30 the delivery of the deed. Unconfirmed improvements or assessments, if any, shall be paid and allowed by the seller on account of the purchase price, if the improvements or work has been completed on or before

40 AND for the performance of all the singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators.

*Complainant's Exhibit C-1.*

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

WM. C. YOUNG (L. S.)  
CONO ZUNNI (L. S.)

Signed, sealed and delivered  
in the presence of

10

CHARLES YOUNG,  
ANTHONY AVALLONE  
as to Conno Zunni.

In consideration of mutual promises and agreements herein stated, we hereby agree to extend the date for the delivery of deed and execution of this contract to at the same hour and place.

20

WITNESS our hands and seals this            day of  
A. D. 19            .

STATE OF NEW JERSEY, }  
COUNTY OF HUDSON,    } SS.:

BE IT REMEMBERED, that on this seventeenth day of October in the year of our Lord One Thousand Nine Hundred and Twenty-nine before me the subscriber, a Master in Chancery of New Jersey, personally appeared William C. Young, widower, and Cono Zunni, who, I am satisfied are the grantors mentioned in the within instrument, 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.

30

CHARLES YOUNG,  
Master in Chancery of New Jersey.

40

### Complainant's Exhibit C-2.

STATE OF NEW JERSEY, }  
 COUNTY OF HUDSON, } ss.:

10 I, CHRISTIAN H. RITTER, Surrogate of the County of Hudson do certify the annexed to be a true copy of the last will and testament of Wm. C. or William C. Young late of the County of Hudson, deceased, and that Commercial Trust Company of New Jersey the executor therein named, proved the same before me, and is duly authorized to take upon itself the administration of the estate of said testator agreeably to said will.

20 WITNESS my hand and seal of Office the third day of March in the year of our Lord, One thousand nine hundred and thirty.

(SEAL) CHRISTIAN H. RITTER,  
 Surrogate.

30 I, WILLIAM C. YOUNG, residing at No. 337½ Pavonia Avenue, Jersey City, New Jersey, do make, publish and declare this to be my last will and testament, hereby revoking all other wills and codicils by me heretofore made.

FIRST: I order and direct my executor to pay my funeral expenses and just debts as soon as convenient after my decease.

40 SECOND: I give and bequeath to the corporation, board or body owning, controlling or operating Bayview Cemetery, Jersey City, New Jersey, the sum of Six Hundred Dollars (\$600.) to be applied to the care and maintenance of the graves in my family plot in said cemetery.

*Complainant's Exhibit C-2.*

THIRD: I give and bequeath to the corporation, board or body owning, controlling or operating St. Matthews Church on Wayne Street, Jersey City, New Jersey, the sum of Five Hundred Dollars (\$500.) to be expended for flowers for the decoration of the altar in that church.

10

FOURTH: I give and bequeath to Henry Fidler of No. 15 Friedland Place, Nutley, New Jersey, if he survives me, my diamond ring, or if he does not survive me, I give and bequeath the same to Mrs. Henry Fidler, residing at the same place.

FIFTH: I give and bequeath to William Rossman of 511-28th Street, Cairo, Illinois, my gold watch and chain, or if he predeceases me, I give and bequeath the same to Edward Wagner of 337½ Pavonia Avenue, Jersey City, New Jersey.

20

SIXTH: I give and bequeath to Mrs. Louis A. Rossman of 511-28th Street, Cairo, Illinois, if she survives me, my household furniture, furnishings and effects, clothing, personal effects, books, pictures and the remainder of my jewelry and automobiles. If she predeceases me, I give and bequeath the same to William Rossman residing at the same place.

30

SEVENTH: I give and bequeath the following money legacies to the following legatees:

(a) William Rossman, 511-28th Street, Cairo, Illinois, one thousand dollars (\$1,000).

(b) Mrs. Edward Wagner, 337½ Pavonia Avenue, Jersey City, New Jersey, one thousand dollars (\$1,000).

40

*Complainant's Exhibit C-2.*

(c) To the Board, corporation or body owning, controlling or operating St. Matthews Church on Wayne Street, Jersey City, New Jersey, for the use of said Church, one thousand dollars (\$1,000).

10 (d) To the Board, corporation or body owning or controlling "Nelson Home" on Nelson Avenue, Jersey City, New Jersey, five hundred dollars (\$500.).

EIGHTH: I give and devise to Mrs. William Costello of No. 337 Pavonia Avenue, Jersey City, New Jersey, if she survives me, my real property located at and known as No. 337 Pavonia Avenue, Jersey City, New Jersey, or if she predeceases me, I give and devise the same to Mrs. John Larkins residing at the same address.

20

NINTH: I give, devise and bequeath all the rest, residue and remainder of my estate, real and personal, of whatever nature and wherever situate in equal shares to the following persons: Mrs. Edward Wagner, 337½ Pavonia Avenue, Jersey City, New Jersey, Genevieve Larkin, 337 Pavonia Avenue, Jersey City, New Jersey, Julia Wagner, 337½ Pavonia Avenue, Jersey City, New Jersey, and William Rossman 511-28th Street, Cairo, Illinois, to have and to hold the same to them, their heirs, executors, and administrators and assigns forever, provided, however, that if any one or more than one of said four persons predecease me, the legacy or devise to the one or ones so dying shall lapse and the survivors and survivor of said four persons shall take my said residuary estate.

30

TENTH: I give to my executor full power of sale as to any and all real property of which I

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*Complainant's Exhibit C-2.*

may die seized, excepting such real property as may have been specifically devised above in paragraph "EIGHTH" to Mrs. William Costello or in the event she predeceases me to Mrs. John Larkins, and full power of sale as to any personal property I may leave excepting such as is specifically bequeathed above and power to execute and deliver such instruments as may be necessary for the execution of such power.

10

ELEVENTH: I order and direct that all inheritance, estate and succession taxes shall be paid out of my residuary estate.

TWELFTH: I nominate and appoint Commercial Trust Company of New Jersey, a corporation of the State of New Jersey having its principal office and place of business at 15 Exchange Place, Jersey City, New Jersey, executor of this will without bond or other security in any court, jurisdiction or proceeding.

20

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 10th day of October, 1928.

WM. C. YOUNG (Seal)

Signed, sealed, published and declared by the said testator, William C. Young, as and for his last will and testament, in our presence, who, at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

30

Raymond A. Lipscomb  
158 Whitehall Blvd.,  
Garden City, N. Y.

Edward Groth  
319-56th St.,  
Union City, N. J.

40

**Defendant's Exhibit D-1.**

June 28, 1930.

J. Fisher Anderson, Esq.,  
15 Exchange Place,  
Jersey City, N. J.

10                    *Re: Estate of William C. Young.*

Dear Sir:—

Referring to your letter of June 23rd, your file  
No. 5894, I have read Vice Chancellor Fallon's  
opinion in the Heinen v. Stubenrauch case and I  
believe you will agree with me that this case very  
properly sustains an elementary point of law, in  
that a Will only affects property of which a tes-  
tator dies seized.

20

Where a person has disposed of his property  
by a legal conveyance there of course is nothing  
left to be devised by Will.

However, in the Young-Costello matter, Mr.  
Young contracted for the sale of his Pavonia Ave-  
nue property some months before his death but,  
as you know, no deed was delivered and in fact  
the vendee would not accept a deed under the  
terms of the contract and did not desire to go  
through with his bargain.

30

I am not questioning the duty of the Executor  
to institute a specific performance suit, if in the  
honest opinion of the Executor, and its counsel,  
it believes such suit will be successful, but, in my  
opinion, there are many points of fact which will  
enure to the benefit of the vendee.

The question before us now is whether or not  
Mrs. Costello should pay rent during the litiga-  
tion and in my opinion, I do not think she should.

40    It is true the vendee may have an equitable inter-

*Defendant's Exhibit D-1.*

est in the property, but the legal interest and fee is vested in Mrs. Costello. Certainly a legal interest is greater than an equitable interest.

The testator died seized of this property and by his Will devised the same to Mrs. Costello. This devise, perhaps, is subject to any equitable interest Mr. Zunni may have therein, but, as he did not desire to go through with the contract during the lifetime of Mr. Young, and does not at this time desire to press any equitable interest he may have, I consider Mrs. Costello's interest paramount.

Very truly yours,

O'B/VB

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**Defendant's Exhibit D-2.**

J. FISHER ANDERSON

COUNSELLOR-AT-LAW

15 Exchange Place  
Commercial Trust Company Building

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Jersey City, N. J., June 23, 1930.

Refer to No. 5894 Young Estate.

Mr. J. Harry O'Brien,  
68 Hudson St.,  
Hoboken, N. J.

Dear Sir:—

20

Referring to property on Pavonia Avenue left to Mrs. Costello under Mr. Young's will, I call your attention to the case of Heinen *vs.* Stubenrauch, 106 Equity, 300, decided by Vice Chancellor Fallon June 3, 1930, holding that a conveyance by the testatrix subsequent to the execution of her will of property devised in the will revokes the will to the extent of the property conveyed.

Yours very truly,

30

J. FISHER ANDERSON.

JFA/McC

40

**Defendant's Exhibit D-3.**

J. FISHER ANDERSON

COUNSELLOR-AT-LAW

15 Exchange Place  
 Commercial Trust Company  
 Building

10

JERSEY CITY, N. J.

June 16, 1930

JFA/P

Refer to No. 5894 Young Est. ,

Mr. J. Harry O'Brien  
 58 Hudson Street,  
 Hoboken, N. J.

Dear Sir:

20

Answering yours of the 12th inst., it may be that in the specific performance suit Mr. Zunni will be able to prove that the contract had been abrogated. I doubt very much if this is the fact because I understand that the day Mr. Young died he was preparing to close the contract. It is the executor's duty to bring the specific performance suit. I suggest that Mrs. Costello pay rent without prejudice to her rights, if any, and it may be if we lose the specific performance suit that she will get the property. If Mrs. Costello refuses to pay rent, it will be necessary for me to bring an action against her for the same.

30

As to her claim against the estate for services rendered to Mr. Young, such services were apparently rendered without any agreement for compensation. The executor does not insist that Mrs. Costello has no interest in the property but simply states that it must bring the specific performance suit irrespective of what the result of

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*Defendant's Exhibit D-3.*

the same will be. Please advise me definitely as soon as possible that Mrs. Costello will or will not pay the rent so that I will know what to do. If the executor loses the specific performance suit, if Mrs. Costello is entitled to the property, the rent will be refunded without interest.

10

Yours very truly,

J. FISHER ANDERSON

**Conclusions.**

IN CHANCERY OF NEW JERSEY.

20

Between

COMMERCIAL TRUST COMPANY OF  
NEW JERSEY, a corporation,  
Executor of William C. Young,  
Deceased,

Complainant,

*and*

CONO ZUNNI,  
Defendant.

30

On Bill for  
Specific  
Performance.

On Final Hearing.

Conclusions.

Docket 80,  
Page 516.

Mr. J. FISHER ANDERSON, for Complainant.

Mr. ANTHONY V. R. AVALLONE, for Defendant.

**SYLLABUS.**

40

1. Where a contract for the sale of land provides for delivery of possession to vendee upon delivery of deed, the vendor's inability to do so

*Conclusions.*

will preclude specific performance by the vendor against the vendee.

2. An executor whose testator contracted to sell lands the subject of a devise in his will, cannot have specific performance against an unwilling vendee where the devisee is not a party to the suit and refuses to join in a conveyance. 10

3. Ordinarily when the devisee is not a party to such a suit the cause would be allowed to stand over until the devisee was brought in; but where the outstanding interest in the devisee has been pleaded as a defense, and no attempt has been made by the complainant to join the devisee as a party, the premises having meanwhile materially depreciated in value, the court will not of its own motion stay the proceedings, but will dismiss the bill. 20

4. Inability of a vendor to perform his contract for sale of land necessarily precludes specific performance by him against his vendee.

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BERRY, V. C.

Complainant's testator contracted to sell certain lands to the defendant for \$12,000, but at the time of his death the contract had not been performed. By his will testator devised the premises to "Mrs. William Costello," who was then, and is now, in possession and claims title. She is not a party to this suit. The legal title to the premises is in her by virtue of the provisions of the will, subject, of course, to the equitable rights of the parties to this suit. Obviously, possession cannot be delivered in accordance with the terms of the contract as Mrs. Costello refuses to vacate 30  
40

*Conclusions.*

the premises, and has given notice of her intention to stand on her rights, whatever they may be; in fact, she has already filed a bill in this court against the complainant to establish her alleged rights in the premises. Ordinarily delivery of possession is essential to the transfer of a good title, unless the agreement provides otherwise. Here, the agreement expressly provides for delivery of possession upon delivery of the deed. This the vendor cannot do, and as the vendor is unable to deliver such possession with title, the vendee may refuse to perform. *Dobbs v. Norcross*, 24 N. J. E. 327; *Eisler v. Halperin*, 89 N. J. L. 278. To compel performance by the defendant under these circumstances would force him to purchase a law suit, and this the court will not do. *Barger v. Gery*, 64 N. J. E. 263; *Methodist Episcopal Church v. Roberson*, 68 N. J. E. 431; *Potter v. Ogden*, 68 N. J. E. 409; *Zelman v. Kaufherr*, 76 N. J. E. 52; *Desemeur v. Rondel*, 76 N. J. E. 394; *Kohltrepp v. Ram*, 76 N. J. E. 386; *Gosman v. Pfister*, 80 N. J. E. 432; *Breitman v. Jaehnal*, 99 N. J. E. 243; *Standard Realty Company v. Gates*, 99 N. J. E. 271.

It also seems plain that the complainant is not in a position to perform and therefore cannot require performance by the defendant. While the will gives the executor power of sale of real property, the premises here involved are expressly excepted from such power and it cannot deliver good title because the legal title is vested in Mrs. Costello. In equity, every party interested in sustaining or defeating the object of the suit should be a party and be heard before decree. 2 Story's Equity Jurisprudence, Sec. 1526. As Mrs. Costello is not a party here the court has no jurisdiction to direct a conveyance by her and her in-

*Conclusions.*

terest in the property would not be barred by a decree in his suit. *Coles v. Feeney*, 52 N. J. E. 493; *Kempton v. Bartine*, 59 N. J. E. 149; *Reddish v. Miller's Administrator*, 27 N. J. E. 514. Ordinarily the court might direct this cause to stand over until Mrs. Costello was brought in as a party defendant, the spirit of equitable procedure being to settle once and for all in one suit all disputes concerning the subject of the litigation. *Kempton v. Bartine* and *Coles v. Feeney*, *supra*. But the circumstances do not warrant that procedure. The contract is dated October 17, 1929, and calls for performance on November 14, 1929; the bill was filed September 10, 1930; the inability of the complainant to perform because of the outstanding legal estate in Mrs. Costello was pleaded by the defendant as a defense to this action on October 3, 1930, and no attempt has been made by the complainant to join Mrs. Costello as a party. At the final hearing on April 28, 1931, the evidence showed that since the making of the contract the property had materially depreciated in value and that it would be a hardship to compel the defendant to accept title at this time. Under these circumstances the title should not be forced upon an unwilling vendee. *Reddish v. Miller's Administrator*, *supra*. The defendant counterclaims for his down money and it should be awarded to him. I will advise a decree accordingly.

June 25, 1931.

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**Final Decree.**

(Filed July 14, 1931)

IN CHANCERY OF NEW JERSEY

80—516

10

Between

COMMERCIAL TRUST COMPANY OF  
 NEW JERSEY, a corporation,  
 Executor of WILLIAM C.  
 YOUNG, Deceased,  
 Complainant,

On Bill &c.  
 Final Decree.

*and*

20

CONO ZUNNI,  
 Defendant.

30

This cause coming on to be heard in the presence of J. Fisher Anderson, Solicitor of Complainant, and Anthony V. R. Avallone, Solicitor of the Defendant, and the Court having examined the pleadings and having taken proofs orally in an open Court and having heard and considered the arguments and briefs of counsel thereon; and it appearing to the satisfaction of the Court that William C. Young, Complainant's Testator, on or about the 17th day of October, 1929, entered into a written agreement with the Defendant Cono Zunni, whereby he, the said William C. Young, agreed to convey to the said defendant for the sum of Twelve Thousand Dollars (\$12,000) by Deed of Warranty on or before the 14th day of November, 1929, premises described in the bill of complaint, and that the sum of Five Hundred

40

*Final Decree.*

Dollars (\$500) was duly paid by the said Cono Zunni to the said William C. Young as the deposit for the faithful performance of said agreement upon the execution of the said agreement.

And it further appearing that the said William C. Young departed this life on the 19th day of February, 1930, without having conveyed the said premises to the defendant, and it further appearing that the said William C. Young, left a last Will and Testament appointing the Complainant, Commercial Trust Company of New Jersey, a corporation, Executor thereof.

10

And it further appearing that the Complainant has not been ready or in a position to perform the said agreement by reason of an outstanding interest in the property in a person not made a party to this suit.

20

And it further appearing to the Court that the Complainant is not entitled to the relief sought and prayed for by it, in its bill of complaint.

It is, thereupon, on this 14th day of July, 1931, Ordered, Adjudged and Decreed that the Complainant's bill be and the same is hereby dismissed, and it is further Ordered, Adjudged and Decreed that the Complainant pay to the defendant, Cono Zunni, the sum of Five Hundred Dollars (\$500) with interest thereon from the 17th day of October, 1929, being the amount of the deposit paid to the Complainant's Testator by the Defendant at the time of the execution of the said agreement.

30

And it is further Ordered, Adjudged and Decreed that the Complainant, Commercial Trust Company of New Jersey, a corporation, pay to the Defendant, Cono Zunni, the costs of this suit to be taxed, including a counsel fee of Two Hundred Fifty Dollars which is hereby allowed to the

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*Final Decree.*

said Defendant, within the five days after the service upon it of true but uncertified copies of this decree and of said taxed costs.

E. R. WALKER,  
C.

10 Respectfully advised,

MAJA LEON BERRY,  
V. C.

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**Petition of Appeal.**

(Filed July 30, 1931.)

20 NEW JERSEY COURT OF ERRORS  
AND APPEALS

Between

COMMERCIAL TRUST COMPANY OF  
NEW JERSEY, a corporation of  
the State of New Jersey, Exec-  
utor under the last will and tes-  
tament of William C. Young,  
Complainant-Appellant,

and

CONO ZUNNI,  
Defendant-Respondent.

On Appeal from  
the Court of  
Chancery.

Petition of  
Appeal.

30

*To the Honorable the Court of Errors and Ap-  
peals in the Last Resort in All Causes:*

40 The petition of Commercial Trust Company of  
New Jersey, Executor under the Last Will and

*Petition of Appeal.*

Testament of William C. Young, deceased, the appellant in the above entitled cause, respectfully shows that

Petitioner finds itself aggrieved by a final decree, made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the advise of Vice Chancellor Maja Leon Berry, bearing date the 14th day of July, 1931, in a certain cause in said Court of Chancery wherein the said Commercial Trust Company of New Jersey, Executor under the Last Will and Testament of William C. Young, deceased, is complainant and Cono Zunni is defendant, by which it was decreed that the complainant's bill be dismissed, that the complainant pay to the defendant the sum of Five Hundred Dollars (\$500.00) with interest thereon from the 17th day of October, 1929, being the amount of the deposit paid to the Complainant's testator by the Defendant at the time of the execution of the agreement for the sale of Real Estate sought to be specifically enforced in said suit, and that the Complainant pay to the Defendant the costs of said suit including a counsel fee of Two hundred fifty dollars which was thereby allowed to the said defendant, and petitioner appeals the aforesaid final decree of the Chancellor on the ground that the same is erroneous in the following respects:

1. The Lower Court erred in dismissing the complainant's bill of complaint.

2. The Lower Court erred in directing the complainant to pay to defendant the sum of Five Hundred Dollars (\$500.00) with interest from the 17th day of October, 1929, being the amount of

*Petition of Appeal.*

deposit paid to complainant's testator by the defendant at the time of the execution of the agreement for the sale of real estate sought to be specifically enforced in said suit.

10        3. The Lower Court erred in directing the complainant to pay to the defendant the costs of said suit, including a counsel fee of Two hundred fifty dollars, which was thereby allowed to the said defendant.

4. The Lower Court erred in failing to decree that the defendant be compelled to perform specifically the agreement sought to be enforced.

20        5. The Lower Court erred in failing by its decree to compel the defendant to pay to complainant, as executor under the Last Will and Testament of William C. Young, the remainder of the purchase money as in and by said agreement provided, with interest from the time said purchase money ought to have been paid upon delivery by complainant and as such executor to the said Cono Zunni of a deed executed by it as such executor for the premises referred to in said agreement.

30        6. The Lower Court erred in failing to decree that in case the defendant should within the time limited by the Lower Court fail and neglect upon tender of such deed to pay the remainder of such purchase money, that then said sum together with interest and costs shall become a lien upon said lands and premises in favor of complainant, and that said lands may be sold under the direction of said Court for the satisfaction of such lien and  
40        that in case a deficiency should arise upon such

*Petition of Appeal.*

sale that the defendant be ordered by said Court to pay the deficiency to complainant.

7. The Lower Court erred in finding that the legal title to the premises involved in said suit was in "Mrs. William Costello" by virtue of the provisions of the Will of the said testator. 10

8. The Lower Court erred in finding that possession could not be delivered in accordance with the terms of said contract.

9. The Lower Court erred in finding that ordinarily delivery of possession is essential to the transfer of a good title unless the agreement otherwise provides, and that here the vendor could not deliver possession and that therefore the vendee might refuse to perform. 20

10. The Lower Court erred in holding that to compel the defendant to perform the contract in this case would force him to purchase a law suit.

11. The Lower Court erred in holding that complainant was not in a position to perform and could not therefore require the defendant to perform. 30

12. The Lower Court erred in holding that the circumstances did not warrant that the Court direct said cause to stand over until Mrs. Costello was brought in as a party defendant.

13. The Lower Court erred in finding that since the making of the contract the property materially depreciated in value and that it would be a hardship to compel the defendant to accept title at this time. 40

*Petition of Appeal.*

14. The Lower Court erred in failing to find that Mrs. Costello had no interest in the premises in question.

10 15. The Lower Court erred in failing to hold that at the time the contract for sale was executed the character of the property was converted from real property to personal property and therefore the devise to Mrs. Costello lapsed.

Wherefore your petitioner prays that the said Final Decree of the Chancellor, hereinabove referred to, dated July 14, 1931, may be wholly reversed, set aside and for nothing holden, and for such other relief in the premises as this Court shall deem proper.

20

J. FISHER ANDERSON,  
Solicitor and of Counsel with  
Commercial Trust Company  
of New Jersey, Executor  
under the Last Will and  
Testament of William C.  
Young, Deceased, Complain-  
ant-Appellant.

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## New Jersey Court of Errors and Appeals

Between

COMMERCIAL TRUST COMPANY OF  
NEW JERSEY, a corporation of  
the State of New Jersey, Ex-  
ecutor under the Last Will  
and Testament of WILLIAM C.  
YOUNG, deceased,  
Complainant-Appellant,

*and*

CONO ZUNNI,  
Defendant-Respondent.

On Appeal  
from Final  
Decree.

### APPELLANT'S BRIEF.

The appeal in this case is taken by the complainant below, from a final decree of the Court of Chancery (Case, p. 66) dismissing its bill of complaint. The bill was filed to compel defendant to specifically perform a certain agreement (Case, pp. 8 and 48) made and entered into on October 17, 1929, wherein and whereby William C. Young, complainant's testator agreed to convey to the defendant Cono Zunni, and the said Cono Zunni agreed to purchase from the complainant's testator the lands and premises therein described and also described in the bill of complaint filed in this cause (Case, p. 3).

### Statement of Facts.

On October 17, 1929, and for some time prior thereto William C. Young, being then a resident of the City of Jersey City, Hudson County, New Jersey, was the owner in fee of the lands and premises described in the bill of complaint filed in the court below. On October 17, 1929, the said William C. Young entered into a contract in writing with Cono Zunni, the defendant in this cause wherein and whereby the said William C. Young agreed to convey the said lands to Cono Zunni for the sum of \$12,000 by warranty deed on or before the 14th day of November then next. Said contract has been offered in evidence and marked Exhibit C-1 (Case, p. 48). For some reason the time to close the title was postponed from time to time until finally it was agreed by the parties thereto that said title should be closed on the 19th day of February, 1930 (Case, p. 31, l. 25). Prior to the 19th day of February, 1930, William C. Young became ill and was taken to a hospital or sanitarium (Case, p. 30, l. 14) and when the parties met at that hospital or sanitarium on the 19th of February, 1930, the said William C. Young was in such a weakened condition due to his illness that it was impossible for him to execute the necessary papers, and it was thereupon agreed that the time for closing should be postponed to some later date. The said William C. Young died at said hospital or sanitarium on the 19th day of February, 1930 (Case, p. 30, l. 30) leaving a last will and testament dated October 10, 1928, and admitted to probate by the Surrogate of the County of Hudson on March 3, 1930. A certified copy of said last will and testament and of letters testamentary thereon has been admitted in evidence and marked Exhibit C-2 (Case,

p. 54). In and by said last will and testament the said William C. Young nominated and appointed Commercial Trust Company of New Jersey Executor thereof (Case, p. 57, l. 18).

Some time after March 3, 1930, an appeal was taken from the order of the Surrogate of the County of Hudson admitting said will to probate, and on June 18, 1930, a decree was made by the Hudson County Orphans' Court affirming the order of the Surrogate of the County of Hudson admitting said will to probate (Case, p. 32, l. 10) (Case, p. 21, l. 35). All of the foregoing facts were admitted by the defendant-respondent in his answer and at the trial of this cause in the court below on April 28, 1931.

Said William C. Young by the eighth paragraph of his will (Case, p. 56, l. 13) gave and devised

“to Mrs. William Costello of No. 337 Pavonia Avenue, Jersey City, New Jersey, if she survives me, my real property located at and known as No. 337 Pavonia Avenue, Jersey City, New Jersey, or if she predeceases me, I give and devise the same to Mrs. John Larkins, residing at the same address”.

The premises known as No. 337 Pavonia Avenue, Jersey City, Hudson County, New Jersey, referred to in the 8th paragraph of the will of William C. Young, form a part of the premises mentioned and described in the contract for property sought to be specifically performed in this cause and in the bill of complaint filed in this cause.

Between March 3, 1930, and the date of the filing of the bill of complaint in this cause the complainant-appellant through its solicitor on numerous occasions demanded of the defendant-respondent through his attorney Mr. Anthony V. R. Avalone of 15 Exchange Place, Jersey City, New Jer-

sey, that an appointment be made for closing title and for the closing of said title (Case, p. 32, l. 17) but the said defendant-respondent refused to make such appointment or carry out the terms of the contract hereinbefore referred to.

The only defense to this suit interposed by the defendant-respondent is that by reason of the devise above quoted said Mrs. Costello has or claims some interest in the premises known as No. 337 Pavonia Avenue, Jersey City, New Jersey, and that for that reason the complainant-appellant cannot give to the defendant-respondent a marketable title to the premises in question.

#### **Outline of Brief.**

- POINT I. Mrs. Costello has no interest in the premises in question, the real property having been converted to personal property at the time the contract for sale was executed.
- POINT II. Defendant, if decree is made compelling him to carry out the terms of his contract, would not be compelled to buy a lawsuit, since Mrs. Costello has no interest in the property.
- POINT III. Equity regards as done that which should have been done.
- POINT IV. Delivery of possession was not necessary under the terms of the contract sought to be enforced.
- POINT V. The lower court erred in finding that since the making of the contract the property materially depreciated in value and that it would be a hardship to compel the defendant to accept title at this time.

## POINT I.

**Mrs. Costello has no interest in the premises in question, the real property having been converted to personal property at the time the contract for sale was executed.**

It has long been established in this State that the execution of a contract for sale of real estate worked an equitable conversion of the land described in that contract into personalty from the time when it was made.

In the case of *Miller's Administrator vs. Miller and others*, 25 N. J. Eq., page 354, suit was brought by the administrator of John B. Miller, praying that a contract for the sale of certain real estate entered into by John Miller in his lifetime, wherein he agreed to convey certain lands and premises to Hoyt, be specifically performed. Chancellor Runyon, in his opinion at page 365, said:

“The contract was a valid one, and it  
 “worked an equitable conversion of the land  
 “into personalty from the time when it was  
 “made and on the principle of equitable con-  
 “version the purchase money became a part  
 “of John B. Miller's personal estate and as  
 “such would be distributable to his widow and  
 “next of kin.”

In the case of *Keep vs. Daniel L. Miller and others*, 42 N. J. Eq., page 100, Chancellor Runyon, at page 105, said:

“A valid and binding contract for sale such  
 “as a Court of Equity will specifically en-  
 “force against an unwilling purchaser, op-  
 “erates as a conversion.”

In the case of *Marion vs. Wolcott*, 68 N. J. Eq., page 20, the defendant, being the owner of cer-

tain premises, made an agreement in writing for the sale thereof to complainants, who agreed to purchase the same at a fixed price to be paid in certain installments. Chancellor McGee, in his opinion, at page 22, said:

“It is the settled doctrine of our Courts of Equity that under a contract for the sale of lands the purchaser becomes the equitable owner of the lands and the seller the equitable owner of the purchase money.

“It is also declared to be doctrine of equity that when under such a contract for sale the equitable beneficial interest passes to the buyer and he becomes in the contemplation of equity the real owner, he takes the benefit of all subsequent improvements and increase in value, but he will also be subject to losses and depreciation not occasioned by the neglect or default of the seller in carrying out the contract.”

In the case of *Coles et al. vs. Feeny*, 52 N. J. Eq., page 493, the suit was brought for specific performance of a contract for the sale of land by the testatrix to the defendant Feeny by which the testatrix agreed to convey to defendant land of which she was the owner. After the date of the execution of the contract and before the date fixed in that contract for closing the title the testatrix died testate. By the first item of her will she devised “so much of my real estate situate in Jersey City, in the State of New Jersey derived by me from my son William F. Coles lately deceased, as at my decease *shall remain unsold* and shall not then be improved by dwelling houses or other buildings”. This devise included the premises covered by the contract above referred to. Vice-Chancellor Pitney, in his opinion, said:

“If this contract for sale was a valid contract its effect was to work a conversion of the land from real to personal property.

"This it was in the power of the testatrix to  
 "do, notwithstanding her will which was  
 "made before the date of the contract. Such  
 "conversion, if made, had effect of taking the  
 "land out from under the operation of the  
 "first clause of her will and giving the pro-  
 "ceeds of it to her residuary legatees and  
 "devisees as a part of her personal estate,  
 "and, in the absence of any power of sale, it  
 "seems to me entirely clear that the execu-  
 "tors would have the right, and it would be  
 "their duty, to take proper proceedings to  
 "perfect the conversion by completing the  
 "transfer of the legal title to the purchaser  
 "and obtaining from him the purchase  
 "money."

In the case of *Stockfleth vs. Britten*, decided  
 June 21, 1929, 105 N. J. Eq., page 5, Vice-Chan-  
 cellor Church said:

"The chief point raised by the defendant  
 "for not accepting title is that the property  
 "is liable to be sold at any time during one  
 "year from the date of decedent's death to  
 "pay any debts that may be against the  
 "estate, and the title therefore is unmarket-  
 "able. There is no merit in this contention.  
 "Mrs. Stockfleth signed a valid contract for  
 "the sale of her property. From that time  
 "there was an equitable conversion of the  
 "property from real to personal. As she  
 "died intestate, the property, being personal,  
 "went to the next of kin and not to heirs at  
 "law. This being so, there is no real estate  
 "to be sold for payment of debts."

In the case of *Heinen vs. Stubenrauch*, 106 N. J.  
 Eq., page 300, Lina Schaeffer died on November  
 6, 1928, leaving a last will and testament dated  
 September 29, 1927, in which she named the com-  
 plainant as executrix. The will was probated on  
 March 8, 1929. At the time of making the will  
 testatrix owned certain lands in Hoboken and by

deed dated June 1, 1928, after the date of the will Lina Schaeffer and her husband conveyed said lands. The question before the Court was whether the beneficiaries named in paragraphs 4 and 5 of said will had any right, title or interest in the premises involved in this suit. Vice-Chancellor Fallon said:

“It is clearly manifested that the defend-  
 “ants have no rights whatever therein or  
 “thereto. It is a well established principle  
 “of law that a will is to be regarded as  
 “ambulatory until the death of the testator  
 “or testatrix, and that it speaks in reference  
 “to that time, and that it can only operate  
 “on things as they exist at the time of the  
 “death of the testator or testatrix. During  
 “the lifetime of the above named testatrix  
 “her property and the disposition she wished  
 “to make thereof were subjects entirely  
 “within her own control and at her discre-  
 “tion. The conveyance by her, after the  
 “execution of her aforesaid will, of the lands  
 “and premises referred to in paragraphs 4  
 “and 5 thereof and therein devised by her  
 “removed such property from the operation  
 “of the will and in legal effect operated as a  
 “revocation of the will to the extent of the  
 “property conveyed. The fact that the testa-  
 “trix did not die seized of said lands and  
 “premises and that she alienated same to the  
 “above named corporation after the making  
 “of her will, is conclusive evidence of a  
 “change of intention by her with regard to  
 “testamentary disposition by her will.”

Thus it will be seen that the doctrine of equitable conversion has been strictly adhered to in our Courts of Equity. The same doctrine has been followed in our Courts of Law.

In the case of *Grunauer, et al. vs. Westchester Fire Insurance Company*, 72 N. J. L., page 289

(Court of Errors and Appeals) Judge Vredenburg held:

“Undoubtedly such a contract (a contract  
 “for the sale of lands) creates the relation  
 “of trustee and *cestui que trust* between ven-  
 “dor and vendee. It produces in equity a  
 “complete transition of the vendor’s holdings  
 “from real to personal and gives the vendee  
 “the equitable ownership. After such a con-  
 “tract the vendor’s interest is no longer real  
 “estate and the unpaid purchase money is  
 “personalty and goes to the vendor’s per-  
 “sonal representative in case of death \* \* \*  
 “Although the vendor still retains the legal  
 “title to the land agreed to be sold and con-  
 “veyed, he thereafter holds it only as trus-  
 “tee for the vendee who becomes the equita-  
 “ble and beneficial owner.”

## POINT II.

**Defendant, if decree is made compelling him to carry out the terms of his contract, would not be compelled to buy a lawsuit, since Mrs. Costello has no interest in the property.**

It has long been the established principle in our Courts that the Court will not compel a defendant to specifically perform a contract where such an order or decree would compel the defendant to buy a lawsuit. *Doherty vs. Egan Waste Co.*, 91 N. J. Eq., page 400; *Potter vs. Lumsden*, 93 N. J. Eq., page 476; *Richman vs. Standard Oil Company*, 95 N. J. Eq., page 745; *Elmore Development Company vs. Binder*, 97 N. J. Eq., page 126; *Shayse vs. Stretch*, 98 N. J. Eq., page 224; *Van Riper vs. Wickersham*, 77 N. J. Eq., page 232; *Joachim vs. Belfus*, 107 N. J. Eq., page 240; *Snyder vs. Rogers-Ebert Company*, 144 Atl., page 18; *Assman vs. Friedman*, 142 Atl., page 422; *Smith vs. Neill*, 145 Atl., page 537.

In all of the above cited causes several questions were involved which actually created a possible cloud on the title or in some other manner made the title unmarketable. It has also been held in this State that the doubts affecting the title to the premises involved in the suit must be real and not fanciful.

In the case of *Eckhouse vs. Bircuyn Estates*, 106 N. J. Eq., page 485, Vice-Chancellor Berry held:

“Defendant’s argument is based upon a proposition that equity will not compel the purchaser to specifically perform his contract for purchase where there is a doubtful question of law or fact affecting the title of the vendor. There is no doubt about this rule, but the doubt must be real and not fanciful and where it appears that a complete and unassailable title has been vested by virtue of statute specific performance will not be refused even though without the statute the Court would refuse its aid.”

In this case the petition to open a final decree decreeing specific performance of a contract was dismissed.

In the case of *Standard Realty Company vs. Gates*, 99 N. J. Eq., page 271, Vice-Chancellor Berry, at page 280, said:

“Any impending litigation which might excuse the vendee from performance, it seems to me, must be litigation which has some possibility of success. The fact that the City of Asbury Park has indicated that it desires to indulge itself in a lawsuit at the expense of its taxpayers does not necessarily excuse the defendant from performance, especially when it is so clearly apparent that the City’s claim is without any basis either in fact or law.”

Professor Pomeroy, in his work on Spec. Perf. Cont. (at p. 524) 204, has this to say on this subject:

“Whatever be the cause from which the  
 “doubt arises, whether from an unsettled  
 “principal of the general law, or from the dif-  
 “ficulty of construing instruments, or from  
 “past facts and events, it must be something  
 “more than a mere speculation, theory or  
 “possibility. A court of justice, in all its in-  
 “vestigations, deals with arguments more or  
 “less based upon a balance of probabilities,  
 “and in rendering its decisions must be satis-  
 “fied if it reaches a conclusion which is  
 “morally certain. To admit of objections  
 “which were purely speculative, or mere pos-  
 “sibilities, would destroy the practical effi-  
 “cacy of all judicial proceedings. A doubt  
 “covering the vendor’s title, therefore, which  
 “can avail to defeat his remedy of specific  
 “performance, must be reasonable, and, so  
 “far as it depends upon contingent events or  
 “uncertain facts, their occurrence or exist-  
 “ence must be fairly probable.”

In the case of *Breitman vs. Jaehnal*, 99 N. J. Eq., page 243, in a suit for specific performance, the defense was that the complainant was unable to convey a marketable title and that there was a strong possibility that the defendants will be subjecting themselves to litigation if they took title and would be obliged at some future time to defend their title against claims of persons not then *sui juris*. Vice-Chancellor Berry held, at page 248:

“It has been uniformly held in this State  
 “that a Court will never compel a purchaser  
 “to take title unless it be one which puts the  
 “purchaser in all reasonable security that no  
 “flaw or doubt will come up to disturb its  
 “marketable title, *provided that the doubt be*  
 “*real and not fanciful.*”

In the case of *Doherty vs. Egan Waste Company*, 91 N. J. Eq., page 400, was one brought to compel specific performance.

In the case, Vice-Chancellor Griffin, at page 406, said:

“It is inconceivable how, under the facts of  
 “this case there is even a remote chance of  
 “the owner of the premises in question being  
 “subject to litigation by reason of the alleged  
 “mislocation. There is no doubt, either of  
 “law or fact, as to the title.”

In that case the Court made its decree in favor of the complainant who was seeking to compel the performance of the contract.

In the case herein considered there can be no doubt as to the question of the devise in favor of Mrs. Costello having been wiped out or annulled by the subsequent execution of the contract for sale by William C. Young. That contract operated as a revocation of that portion of William C. Young's will, insofar as it refers to the premises known as 337 Pavonia Avenue, Jersey City.

As above shown, the possibility of a lawsuit must be real and not fanciful. In the suit by Mrs. Costello against this complainant-appellant, referred to by the Court below in his conclusions (Case, p. 64, l. 3), Mrs. Costello has not made the defendant-respondent herein a party. In her suit she prays for no relief against Cono Zunni. In her suit she asks that if it be decreed in this suit that Cono Zunni be compelled to specifically perform the contract which is the subject matter of this suit that then that part of the purchase money which represents the value of 337 Pavonia Avenue be impressed with a lien in favor of the said Mrs. Costello. *Therefore I submit that fear of a lawsuit in this case is fanciful and not real.* Should this alleged claim of Mrs. Costello be permitted to operate as a bar to this complainant's right to a decree for specific performance against

the defendant in this suit, then in all cases of contract for the sale of real estate all that would be necessary in order to relieve a vendee from the terms of the contract would be for the vendee to find someone to make some groundless claim of an interest in the premises described in that contract and thus defeat the suit for specific performance.

### POINT III.

#### **Equity regards as done that which should have been done.**

One of the principles and maxims of equity is that "equity regards as done that which should have been done". Applying this doctrine to the present case we have the following situation. William C. Young entered into a valid contract to convey the premises on a date fixed in that contract. Under the maxim equity considers the title to have been closed on that day, viz.: November 14, 1929, which was prior to the date of the death of William C. Young. If the conveyance had been completed and the deed delivered on that date (and it is nowhere charged that the closing on that date was held up by the said William C. Young) then relying on the case of *Heinen vs. Stubenrauch*, 106 N. J. Eq. 300, above cited, there could be no question that Mrs. Costello's interest in the premises (if she ever had any interest therein or claim thereto) was wiped out, since then the conveyance would have been made before the death of the said William C. Young and that conveyance would have "in legal effect operated as a revocation of the will to the extent of the property conveyed".

The same maxim was applied by Justice Depue in writing the opinion for the Court of Errors

and Appeals in the case of *Haughwout vs. Murphy*, 22 N. J. Eq., page 531, at page 546:

“In equity, upon an agreement for the sale of lands, the contract is regarded, for most purposes, as if specifically executed. The purchaser becomes the equitable owner of the lands, and the vendor becomes the equitable owner of the purchase money. After the contract, the vendor is the trustee of the legal estate for the vendee. Before the contract is executed by conveyance, the lands are devisable by the vendee, and descendible to his heirs as real estate; and the personal representatives of the vendor are entitled to the purchase money.”

In the case of *Miller's Administrator vs. Miller*, 25 N. J. Eq., page 354, John B. Miller made a contract to convey certain lands to Hoyt. Before the title was closed the said John B. Miller died intestate. Thereafter the purchaser refused to receive a deed unless the administrator of John B. Miller would cause to be cancelled of record certain judgments against David L. Miller, the heir-at-law of the said John B. Miller. Chancellor Runyon, at page 366, held:

“It (the contract) can, and ought to be, performed. As the case stood at the filing of the Bill, a complete title could have been made to the purchasers. The judgments against David L. Miller would have been decreed to be no liens upon the property, for, in equity, on the execution of the contract, John B. Miller became trustee of the property for the purchasers, and, at his death, David L. Miller became such trustee in his stead.”

This case was later reversed by the Court of Errors and Appeals (27 N. J. Eq. 514) on other grounds.

#### POINT IV.

**Delivery of possession was not necessary under the terms of the contract sought to be enforced.**

Mrs. Costello, the occupant of premises known as No. 337 Pavonia Avenue, Jersey City, New Jersey, was, at the time the contract sought to be enforced in this suit and for a long period prior thereto, a tenant of William C. Young, now deceased, having rented said premises from the said William C. Young as a tenant from month to month. She did not occupy said premises after the death of said William C. Young as devisee thereof, since, as above stated, as far as the said William C. Young was concerned, the property involved in this suit no longer existed as real property, the same having been converted to personal property at the time of the execution of the contract, and she paid to the complainant-appellant one month's rent after the death of the testator (Case, p. 40, l. 17).

The contract further provided (Case, p. 11, l. 40 and Case, p. 51, l. 9) that the said Cono Zunni, his heirs and assigns

“may enter into and upon the said land and  
“premises from and after the date of closing  
“title and from thence take the rents, issues  
“and profits to their use”.

Nothing can be found in these words to indicate that the said William C. Young in his lifetime or his executor after his death was called upon to deliver the premises in question free from all tenancies.

Again the contract (Case, p. 12, l. 16 and p. 51, l. 23) provides

“the rents of said premises \* \* \* if any, shall  
“be adjusted, apportioned and allowed as of  
“the delivery of said deed”.

If it was not the intention of the parties to the contract that this tenancy of Mrs. Costello should continue, what then did said clause mean? Was it simply the use of so many idle words which had no meaning and which should be absolutely ignored by the parties? *I submit that the above quoted clause means that Mrs. Costello should remain as far as the said William C. Young during his lifetime, and his executor after his death were concerned as a monthly tenant, and her rent apportioned as of the day of delivery of the deed.* It matters not, as far as this suit is concerned if the complainant-appellant temporarily withheld enforcement of payment of rent by the tenant in said premises. Mere failure to bring suit to enforce collection of said rent cannot be construed as a recognition of Mrs. Costello's alleged claim of ownership.

#### POINT V.

**The lower court erred in finding that since the making of the contract the property materially depreciated in value and that it would be a hardship to compel the defendant to accept title at this time.**

Nowhere in this case does it appear that the premises in question have depreciated in value.

It is true that said Cono Zunni in his answer (Case, p. 20, l. 16) alleges that he refuses to take title because

“complainant refused and still refuses to  
“make any allowances on the purchase price

“for the damage to the property (beyond the  
 “reasonable wear and tear) which occurred  
 “since the signing of the contract”

and in his counterclaim (Case, p. 23, l. 36) alleges

“the said premises have been greatly dam-  
 “aged beyond the ordinary wear and tear  
 “since the signing of the contract”

but nowhere in the record of this case do I find  
 any proof of such damage.

Finally I respectfully submit that the court be-  
 low has based its conclusions upon findings of  
 fact not supported by the proofs in this case and  
 that therefore the final decree of the court below  
 should be reversed.

Respectfully submitted,

J. FISHER ANDERSON,  
 Solicitor and of Counsel with  
 Complainant-Appellant.



**New Jersey Court of Errors and Appeals**

Between

COMMERCIAL TRUST COMPANY OF  
NEW JERSEY, a corporation of  
the State of New Jersey, Ex-  
ecutor under the Last Will  
and Testament of WILLIAM C.  
YOUNG, deceased,

*Complainant-Appellant,*

*and*

CONO ZUNNI,

*Defendant-Respondent.*

On Appeal From  
Final Decree

**RESPONDENT'S BRIEF**

**Statement of Facts**

The statement of facts at the head of the ap-  
pellant's brief accurately sets forth the facts on  
the whole, but in two respects, the respondent re-  
spectfully desires to submit the following:

FIRST.—Mrs. Costello was in possession of the  
property and has been at all times, since the pro-  
bate of the will of the testator, under a claim of

right (Case, p. 39, lines 11 to 21, inclusive), and since the death of the testator, she has paid no rent for the premises, although often requested to by the complainant-appellant, and that the complainant-appellant has taken no steps to recover possession from Mrs. Costello, or to determine Mrs. Costello's rights (Case, p. 35, lines 40-41; p. 36, lines 4 to 10, inclusive).

SECOND.—The last paragraph of the state of facts, set forth at the head of complainant-appellant's brief, states that the only defense to the suit is "that by reason of the devise above quoted, said Mrs. Costello has or claims some interest in the premises known as No. 337 Pavonia Avenue, Jersey City, New Jersey, and that for that reason the complainant cannot give to the defendant a marketable title to the premises in question," whereas that statement does not correctly state defendant-respondent's position.

The defendant-respondent's position is that the complainant, in the court below, failed to make out a case calling for the exercise of the power of the Court of Chancery, to compel the defendant-respondent to specifically perform the contract. The only defense on which evidence was offered by defendant-respondent, at the hearing, was to that defense referred to by the complainant-appellant in the last paragraph of its statement of facts. But, however, the defendant-respondent has not, by his answer filed with the court below, or his conduct at the hearing, waived the necessity of the complainant-appellant establishing its right to relief.

### Outline of Brief

- POINT I. Answer to Point I of appellant's Argument.
- POINT II. Answer to Point II of appellant's Argument.
- POINT III. Answer to Point III of appellant's Argument.
- POINT IV. Answer to Point IV of appellant's Argument.
- POINT V. Answer to Point V of appellant's Argument.
- POINT VI. The complainant - appellant was never ready to tender a good and marketable title and was never ready to tender a proper deed to the premises.
- POINT VII. Complainant-appellant was never ready to tender a good and marketable title, for delivery of possession is normally essential to the transfer of a good title, and the complainant-appellant was never ready to tender possession.
- POINT VIII. The defendant-respondent, if the decree of the Court below was reversed, and he was compelled to carry out the terms of his contract, would be subject to the hazards of litigation.

POINT IX. The complainant - appellant was never ready to tender a good and marketable title, for it had not established the contract against the heirs at law and devisees.

## POINT I

### **Answer to Point I of Complainant-Appellant's Argument**

There is no question that the execution of a contract for the sale of real estate works an equitable conversion of the real estate into personalty. That is fundamental and the defendant-respondent does not deny it, but the courts have also held such doctrine will not be applied where the contract is one, the specific performance of which can not be enforced.

*Cropper v. Brown*, 76 N. J. Eq. 406;  
*Miller's Administrators v. Miller*, 25 N. J. Eq. page 254.

It is then seen that the complainant-appellant's contention that Mrs. Costello has no interest in the premises depends entirely on the question of whether or not the Court below would enforce the contract and not alone on the proof of the execution of the contract. Mrs. Costello, because of this, has the right to question this contract, which right she has not had in this suit or in any other action. If the contract was obtained by fraud, duress, or undue influence, if the contract was a fraud upon Mrs. Costello, or if in any way she was able to have this contract set aside, she would have an absolute fee in the premises. The

decision of this Court in this case, can not in any way affect her right to attack that contract, since she is not a party to this action.

## POINT II

### **Answer to Point II of Complainant-Appellant's Argument**

Since complainant-appellant's proposition in Point II, "that the defendant would not be compelled to buy a law suit" depends on the supposition that Mrs. Costello has no interest in the property, this contention of the complainant-appellant must fail of application, for as it appears from the defendant-respondent's answer to Point I of the complainant-appellant's brief, Mrs. Costello's interest is a depending one, depending upon the outcome of an action, in which Mrs. Costello was a party and her interest was in question.

## POINT III

### **Answer to Point III of Complainant-Appellant's Argument**

The maxim cited by the complainant-appellant as Point III of its brief is not denied by the defendant-respondent, but the application that the complainant-appellant seeks to make of it, in reference to the case at bar, has no merit. It seeks to show that Mrs. Costello has no claim. That might be so if Mrs. Costello could not attack the contract. In an action against Mrs. Costello it might dispose of her rights, but in an action in which Mrs. Costello is not a party, the mere re-

cital of such a maxim cannot operate to deprive her of her right to seek to set aside the contract and to establish her claim as absolute owner of the premises.

#### POINT IV

##### **Answer to Point IV of Complainant- Appellant's Argument**

The argument advanced by the complainant-appellant under Point IV of its brief, namely "Delivery of possession was not necessary under the terms of the contract sought to be enforced," is based upon the theory that Mrs. Costello was a tenant in possession and the contract, among other things, provided for the apportionment of rents, as of the date of the delivery of the deed, and in consequence thereof, delivery of the premises free from tenancy was not required, and as a further consequence, delivery of the premises free from the possession of Mrs. Costello was not required.

This the defendant-respondent would not deny if Mrs. Costello was a tenant, but Mrs. Costello was more than a tenant. She was in possession under her claim of right and is the legal title holder. As to the reasons advanced by the complainant-appellant, "that there has been an equitable conversion of the property and she was therefore, in possession as a tenant, and not as devisee,"—the answer of defendant-respondent set forth in Point I of this brief shows that the doctrine of equitable conversion would not be applied when the contract was one, the specific performance of which can not be enforced.

*Cropper v. Brown*, above cited;  
*Miller's Administrators v. Miller*, above  
cited.

## POINT V

### **Answer to Point V of Complainant-Appellant's Argument**

The learned Vice-Chancellor, who sat below, in his conclusions states that "AT THE FINAL HEARING ON APRIL 28, 1931, THE EVIDENCE SHOWED THAT SINCE THE MAKING OF THE CONTRACT, THE PROPERTY HAD MATERIALLY DEPRECIATED IN VALUE" (Case, p. 65, lines 23 to 26 incl.). As stated by the complainant-appellant in its brief, there is no proof of such a fact in the testimony of this case. This, in itself, would not be sufficient reason for reversing the decision of the Court below, for such a finding is only an incident upon which the Court based its conclusions, and further, as was urged by the respondent in his brief filed below, all real estate today, as a general thing, has depreciated in value since the date of the testator's death.

## POINT VI

**The complainant-appellant was never ready to tender a good and marketable title, for it was never ready to tender a proper deed.**

Under the will of the complainant-appellant's testator, the legal title to the property was not in the complainant-appellant (Case, pp. 54-55-56-57). It was in the devisee, under the eighth paragraph of the will, namely, Mrs. Costello (Case, p. 56, lines 14 to 20 incl.). Complainant-appellant had no title that could be conveyed by its deed,—legal title being in Mrs. Costello.

Nor did the executor have power of sale of this property under the will. It was expressly withheld from it, under the tenth paragraph of the will (Case, p. 56, lines 40-41; p. 57, lines 1 to 12 incl.).

**At no time was the complainant-appellant ready to tender a deed executed by Mrs. Costello.**

It may well be that the Court below would, by its decree, compel Mrs. Costello to execute a proper deed to the defendant-respondent, and it may be that the decree of the Court below would in itself operate and transfer the legal title to the defendant-respondent, if Mrs. Costello refused to convey the property, but Mrs. Costello has not been made a party to this action.

In all the cases cited by the complainant-appellant, in its brief, in no case does it appear that a deed from the personal representatives of the deceased vendor would operate to transfer the legal title. Rather in all the cases, it has been the uniform practice to tender a deed from the heir-at-law or devisee (the one holding the legal title) or to join that party (the heir-at-law or devisee) in the suit for specific performance, praying that the Court compel the party holding the legal title to convey the premises to the vendee.

In the case of *Coles v. Feeney*, 52 N. J. Eq., page 493, Vice Chancellor PITNEY has this to say:

“In the contemplation of equity, the title to the property vested in the purchaser as soon as the contract was executed and delivered, subject, however, to a lien in favor of Mrs. Coles, (the vendor in that action) for the unpaid purchase money and that lien is capable

of being enforced by her executors against the *specific devisees* of the particular land, even in the absence of any power of sale, *by compelling them to convey to the purchaser and by compelling the purchaser to pay to the executors the purchase money.*"

In the case of *Miller's Administrators v. Miller*, 25 N. J. Eq., page 354, before action was commenced the heir-at-law tendered to the vendee a deed. The vendee refused to accept. When a suit was brought for specific performance by the administrator of the vendor the heir-at-law was made a party defendant. The prayer in the bill of complaint against the heir-at-law was "to compel him to convey to the vendee."

The decree was "that Daniel L. Miller (the heir-at-law) convey in fee simple \* \* \*."

If the decree of the Court below was that the defendant-respondent take the deed offered to him by the complainant-appellant, the defendant-respondent would have secured no title, as the complainant-appellant had none to convey by its deed.

## POINT VII

**The complainant-appellant was never ready to tender a good and marketable title, for delivery of possession is normally essential to the transfer of a good title and complainant-appellant was never ready to deliver possession.**

"Delivery of possession is normally essential to the transfer of a good title." *Eisler v. Halperin*, 89 N. J. Law, page 278.

The evidence at the hearing in the Court below clearly shows that Mrs. Costello was in possession under a claim (Case, p. 39, lines 11 to 21 incl.; p. 35, lines 24 to 41 incl.; p. 36, lines 4 to 10 incl.). This possession can not be disturbed, only by a law suit. This the defendant-respondent did not bargain for, and this the defendant-respondent should not be compelled to take.

### POINT VIII

**The defendant-respondent, if decree was to have been made compelling him to carry out the terms of the contract and to take title to the property, would be subject to the hazards of litigation.**

Mrs. Costello is the owner of the legal title and is in possession, and the defendant-respondent would have to take steps to remove her, or to determine her rights in the premises. She is in possession and with the legal title in her name.

In the case of *Dobbs v. Norcross*, 24 N. J. Eq. page 327, the Court refused specific performance. In that case, the complainant once owned the land and it was sold at a Sheriff's sale to one Daniels, who was supposed to convey it to the complainant. Certain proceedings were then had in the courts of Pennsylvania, whereby the property was supposed to escheat to the State and letters patent were thereafter issued to the complainant.

The legal title was still in Daniels. Daniels claimed the property and said no one could get possession of the premises without a suit at law, "that he would fight the suit to the bitter end."

That is the only case in New Jersey where the premises were in the possession of another party claiming title to same.

The defendant-respondent respectfully submits that the law in that case is applicable to the case involved.

It may well be, that Mrs. Costello would not be able to succeed in any action brought against her, by the complainant-appellant as executor, but until such an action be brought, she has an outstanding claim. The defendant-respondent should not be compelled to institute this action to determine her claim.

In the case of *Standard Realty Co. v. Gates*, 99 N. J. Eq. page 271, the situation is somewhat different than in the present case. In that case, while the burden was placed on the defendant to resist any claim of the one in possession, the complainant had performed everything it could do to put the vendee in possession *in accordance with the terms of the contract*. It gave the party in possession the notice required by statute to determine its tenancy in accordance with the time set forth in a contract for the termination of that party's tenancy.

In the present case, fourteen months have passed from the death of the complainant-appellant's testator, to the time of the final hearing, and in that time, complainant-appellant had the opportunity of having the rights of Mrs. Costello passed upon.

It is a familiar maxim in equity, "that he who seeks equity must do equity." Again, the Court has said, "it is the vendor's duty to sweep the house. *Burke v. Dorfan*, 137 Atlantic Reporter, page 844." The complainant-appellant now seeks in its suit to compel the defendant-respondent to

take the property, and also, to institute the litigation against Mrs. Costello. In this, the complainant-appellant would not be doing equity; it would be compelling the vendee to sweep the house.

### POINT IX

**The complainant-appellant was never ready to tender a good and marketable title, for it had not established the contract against the heirs-at-law and devisees.**

A devisee should be made a party defendant to a bill filed to enforce the specific performance of the contract of his Testator. *Kempton v. Bartine*, 59 N. J. Eq., page 149. *Coles v. Feeney*, 52 N. J. Eq., page 493.

The case of *Coles v. Feeney* (above cited) is right in point with the case at bar, and the action of the Court in that case would be dispositive of the whole issue, except that to now reverse the decree of the Court below and to direct that the bill be held over until the devisee was made a party to it and then compel the defendant-respondent to perform, would be inequitable, in this case, for the property has greatly depreciated in value. That is, all real estate today, as a general thing, has depreciated in value, since the date of the testator's death. The defendant-respondent did not bring about the situation whereby the complainant-appellant has failed to have Mrs. Costello's rights determined. He is innocent of any fault. Since the death of the complainant-appellant's testator, although fourteen months had expired up to the time of the hearing, the

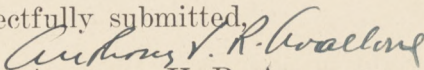
complainant-appellant has taken no steps to have the outstanding claims to the property in question determined.

Following the case of *Reddish v. Miller's Administrators*, 27 N. J. Eq. page 514, the decree of the Court below should be affirmed and the defendant-respondent should not be compelled to perform, at this late date.

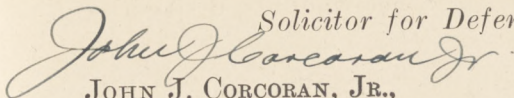
### SUMMARY

**For the above several reasons, the defendant-respondent respectfully submits that the Court below did not err in its conclusions and that the final decree of said Court should be affirmed in all particulars.**

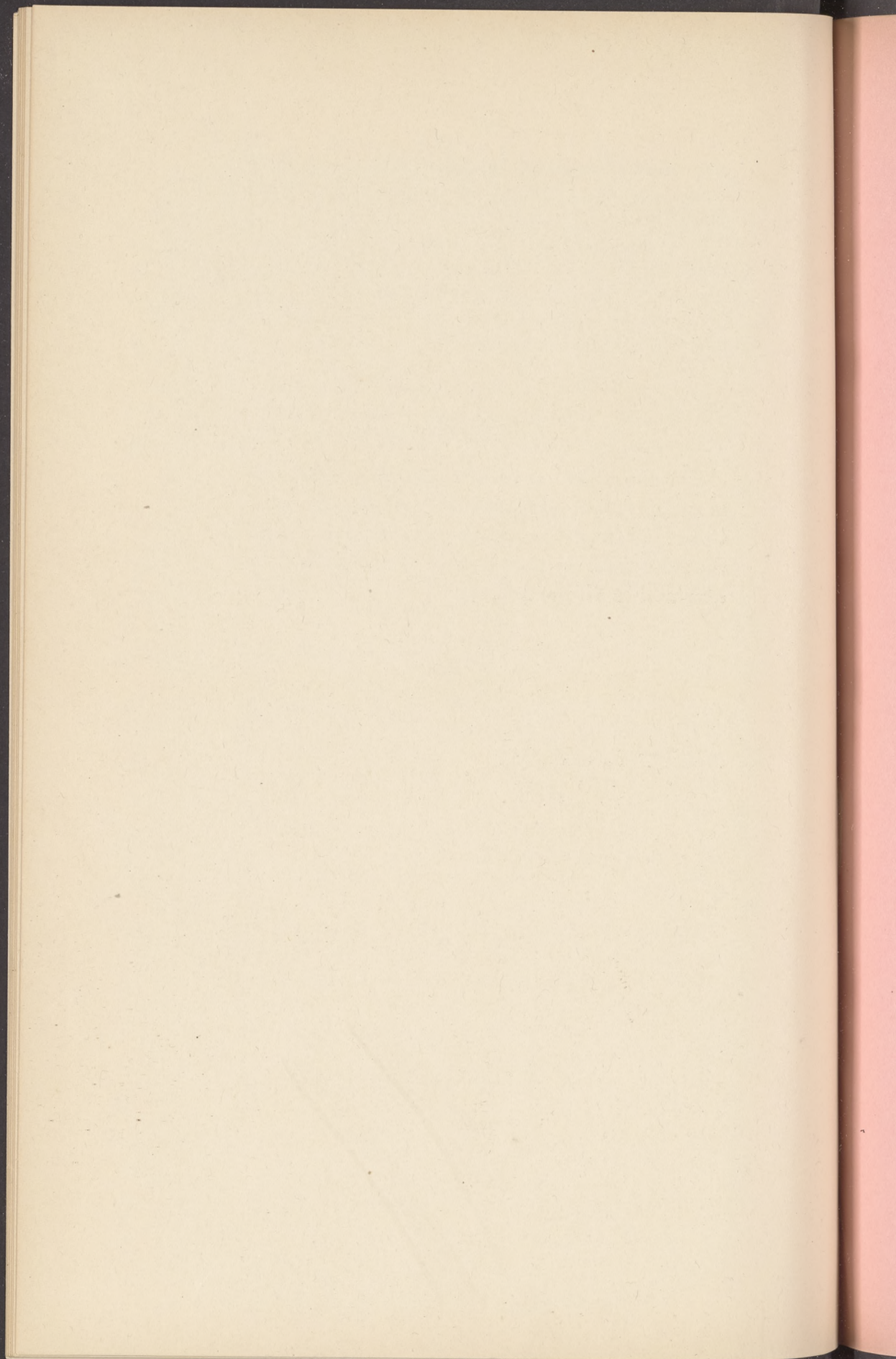
Respectfully submitted,

  
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JOHN J. CORCORAN, JR.,  
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