# INDEX.

## BILL OF COMPLAINT.

Filed May 21, 1920.

IN CHANCERY OF NEW JERSEY.

| | |
|---|---|
| *Between*<br>WALTER JANOWSKI and ALICE JANOWSKI, *Complainants,*<br>*and*<br>JOSEPH PRZEBIEGLEC and LUDWIKA PRZEBIEGLEC, *Defendants.* | *On Bill for Specific Performance.*<br>*Bill of Complaint.* |

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*To his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey.* 20

The complainants, Walter Janowski and Alice Janowski, of the City of Newark, County of Essex and State of New Jersey, respectfully show that:

1. On April 10th, 1920, the defendants were seized in fee simple of an estate by the entirety of the following described lands and premises: Beginning at the southwesterly corner of New York avenue and Tyler street (formerly called Sanford street); thence westerly along the southerly line of New York avenue 27.67 feet; thence southerly parallel with Tyler street 100 feet; thence easterly parallel with New York avenue 27.67 feet, to the westerly line of Tyler street; thence northerly along the same 100 feet to the beginning. 30

2. On April 9th, 1920, the said defendants entered into an agreement with the complainants whereby the said defendants did agree to convey the above described premises to the said complainants, free from all debts, on or before the 15th day of May, 1920, for the consideration of $4,700.00 to be paid in the following manner: $100.00 upon the execution of the said agreement, the receipt of which was acknowledged by the defendants, and the balance of the purchase price in cash upon the passing of the title and delivery of the deed; which said agreement was afterwards on April 11th, 1920, by mutual assent reduced to writing and executed by the parties. 40

3. It was further agreed between the parties to the said agreement that rents and taxes were to be adjusted and allowed on the day of passing title and delivery of the deed, and that defendants were to occupy the first floor of the above mentioned premises for a period of three months from the date of the agreement at the monthly rental of $20.00.

4. On April 11th, 1920, the said defendants together with the said complainants, did sign, seal, acknowledge and deliver said agreement as reduced to writing.

5. On or about the 14th day of April, 1920, and thereafter the said defendants personally and through their attorney did notify the complainants, that they the defendants would not carry out their agreement aforesaid for the reason that as they claimed it was made on Sunday.

6. The said lands and premises are at present encumbered by two mortgages, one originally in the sum of $2,800.00 and the other originally in the sum of $500.00 both of these mortgages being held by the Polish National Building and Loan Association of the City of Newark, N. J., besides taxes and water charges.

7. On April 13th, 1920, the written agreement made between the complainants and defendants, was recorded in the Essex County Register's office and now bears serial number 58.

8. Said complainants have been at all times, and are still ready, willing and able, and hereby offer to carry out the said agreement with the said defendants in accordance with the terms and provisions thereof.

9. Complainants are without adequate remedy in the courts of law, and therefore pray:

1. That Joseph Przebieglec and Ludwika Przebieglec the defendants in this suit, may answer this bill without oath, and each statement therein made.

2. That the defendants may be decreed to specifically perform the agreement as aforesaid entered into between them and the complaints, and each and every term thereof; and that they may be ordered and decreed to execute and deliver the deed of conveyance of said lands and premises to these complainants, and in all respects to abide by, and perform the said agreement.

3. That your complainants may have such other and further relief as the nature of the case may require.

4. That a writ of subpoena be issued commanding the said defendants, Joseph Przebieglec and Ludwika Przebieglec to answer this bill of complaint, and to abide by such decree as this Court may make in the premises.

SEYMOUR J. SOLOMON,
*Solicitor for Complainants.* 10

FRANK E. BRADNER,
*Of Counsel with Complainants.*

## NOTICE OF MOTION.

*To Seymour J. Solomon, Esq., Solicitor for Complainants:*

TAKE NOTICE that on Tuesday, June 1, 1920, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, we will apply to the Chancellor at the Chancery Chambers in the City of Newark for an order dismissing the bill of complaint filed in the above-entitled suit on the ground that it discloses no cause of action and in particular upon the following grounds: 20

1. Because the said bill does not disclose the terms of the agreement alleged to have been reduced to writing and executed by the parties.

2. Because the said bill alleges that the said alleged writing was signed, sealed, acknowledged and delivered on April 11, 1920, which said date fell upon Sunday, and that therefore the said alleged agreement was and is absolutely void under the laws of this state. 30

3. Because the said bill alleges that the defendants did agree to convey the premises described in said bill to the complainants on or before May 15, 1920, and that on April 14, 1920, defendants notified complainants that they, the defendants, would not carry out their alleged agreement. The bill does not allege a refusal on the part of the defendants on or after May 15, 1920, nor does it allege any tender of performance by the complainants either on May 15, 1920, or at any time thereafter prior to the filing of the bill. 40

Yours respectfully,

SMITH & SLINGERLAND,
*Solicitors for Defendants.*

## MEMORANDUM OF VICE-CHANCELLOR.

June 30, 1920.

IN CHANCERY OF NEW JERSEY.

10 48-246.

| | |
|---|---|
| *Between*<br>WALTER JANOWSKI, *et al.*, *Complainants,*<br>*and*<br>JOSEPH PRZEBIEGLEC, *et al.*, *Defendants.* | *On Bill, &c.*<br>*On Motion to Dismiss Bill of Complaint.*<br>*Memorandum.* |

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Seymour J. Solomon, Esq., for complainants.

Smith & Slingerland, Esqs., for defendants.

FIELDER, *V. C.:*

The bill of complaint charges that on April 9, 1920, the parties to this suit entered into an agreement whereby the defendants agreed to conevy certain premises to complainants for a specified consideration, of which $100 was to be paid on the execution of the agreement and the balance on the delivery of the deed; that the agreement was on April 11, 1920, reduced to writing and on that day signed, sealed, acknowledged and delivered; that three days thereafter defendants notified complainants that they would not carry out the agreement because it was made on Sunday. Complainants pray specific performance of the agreement.

30

Defendants now move to dismiss the bill on the ground that it discloses no cause of action and in their notice of motion specify as a reason (among others) that the agreement was executed and delivered on April 11, 1920, which date fell upon Sunday and therefore the agreement is void under the laws of this state.

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The Court will take judicial notice that April 11, 1920, fell on a Sunday (*Reed* v. *Wilson,* 41 N. J. E. 29). It appears from the bill of complaint that the negotiations leading up to the written agreement to convey were conducted and concluded on

a secular day, but that the terms were reduced to writing on a Sunday, on which day the written agreement was executed and delivered. The parol agreement made on the secular day is unenforceable, in view of Section 5 of the Statute of Frauds (Compiled Statutes, page 2612) and the only agreement which this Court might enforce is the written one. It is true that where there has been a partial or full performance of a parol agreement to convey lands, equity may enforce such an agreement notwithstanding the Statute of Frauds (*Cooper* v. *Colson,* 66 N. J. E. 328), but the bill alleges no partial or full performance and on the contrary states that on April 14, 1920, defendants notified complainants they would not perform. Prior to the execution of the agreement on Sunday, the parties had done no more than agree on the terms of a contract which would not be binding on defendants in law, until it was reduced to writing and signed by them, and it was evidently agreed that the parties should meet at a subsequent date and conclude their bargain by executing a written agreement. They met again the following Sunday and on that day concluded the bargain by executing and delivering the written agreement set out in the bill. The written and not the parol contract, is the one on which complainants must base their cause of action, and because the written contract was made on Sunday, it is unenforceable (*County Engineering Co.* v. *West,* 88 N. J. E. 109).

The bill of complaint discloses no cause of action, and the motion to dismiss will be granted.

## NOTICE OF APPLICATION TO DISMISS BILL.

Filed.

Take Notice, that on Tuesday, July 20, 1920, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, we will apply to the Chancellor at the Chancery Chambers in the City of Newark for an order dismissing the bill of complaint filed in the above-entitled suit with costs.

To

Seymour J. Solomon, Esq.,
*Solicitor for Complainants.*

SMITH & SLINGERLAND,
*Solicitors for Defendants.*

## ORDER DISMISSING BILL OF COMPLAINT.

Filed.

This matter coming on to be heard in the presence of Seymour J. Solomon, Esq., solicitor for the complainants, and
10 Smith & Slingerland, solicitors for the defendants, and the arguments of counsel having been heard and the Court having duly considered the same;

It is, on this 20th day of July, 1920, on motion of Smith & Slingerland, solicitors for the defendants, ORDERED, that the bill of complaint filed in the above-entitled cause be and the same is hereby dismissed without costs.

E. R. WALKER,
*C.*

20 Respectfully advised,

JAMES F. FIELDER,
*V. C.*

## NOTICE OF APPEAL.

Filed.

The complainants, hereby appeal from the whole and every
30 part of the final decree made in this court in the above-entitled cause, bearing date July 20, 1920, to the Court of Errors and Appeals in the last resort in all causes.

SEYMOUR J. SOLOMON,
*Solicitor for Complainants.*

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

FRANK E. BRADNER,
40 *Of Counsel with Complainants.*

Service of a certified copy of the foregoing notice filed July 23, 1920, is hereby acknowledged this 28th day of July, 1920.

SMITH & SLINGERLAND,
*Solicitors for Defendants.*

## PETITION OF APPEAL.

Filed.

## New Jersey Court of Errors and Appeals

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| | |
|---|---|
| *Between*<br>WALTER JANOWSKI, *et al.*,<br>*Complainants-Appellants,*<br>*and*<br>JOSEPH PRZEBIEGLEC, *et al.*,<br>*Defendants-Respondents.* | *On Appeal from Court of Chancery.*<br><br>*Petition of Appeal.* |

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

The petition of Walter Janowski and his wife, the complainants in the above-stated cause, respectfully show:

That your petitioners find themselves aggrieved by a final decree made in the said cause by his Honor Edwin Robert Walker, Chancellor of New Jersey, bearing date July 20, 1920, in and by which said decree it is adjudged and decreed that the bill of complaint filed in the above entitled cause should be and was thereby dismissed.

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Your petitioners humbly appeal from said final decree, and allege that the said decree is erroneous for the following reason: Because the Court erred in determining that the contract made by and between complainants and the defendants was made on Sunday, and was therefore void.

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*Petition of Appeal.*

Your petitioners, therefore, pray that the said decree may be reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

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SEYMOUR J. SOLOMON,
*Solicitor for Appellants.*

FRANK E. BRADNER,
*Of Counsel with Appellants.*

(Answer filed.)

SMITH & SLINGERLAND,
*Solicitors.*

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Service of a certified copy of the foregoing petition of appeal, filed August 11, 1920, is acknowledged this 17th day of August, 1920.

SMITH & SLINGERLAND.

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Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

# New Jersey Court of Errors and Appeals

| | |
|---|---|
| *Between*<br>WALTER JANOWSKI, *et al.*, *Complainants-Appellants*,<br>*and*<br>JOSEPH PRZEBIEGLEC, *et al.*, *Defendants-Respondents*. | *On Appeal from Court of Chancery.* |

## BRIEF FOR APPELLANTS.

This is an appeal from an order dismissing the bill of complaint, in which the complainants ask specific performance of an agreement to convey certain lands.

The notice of motion to dismiss (p. 3), states as the general ground that the bill discloses no cause of action, and a particular ground among others: "Because the said bill alleges that the said alleged writing was signed, sealed, acknowledged and delivered on April 11, 1920, which said date fell upon Sunday, and that, therefore, the said alleged agreement was and is absolutely void under the laws of this State."

Vice-Chancellor Fielder held (p. 5), that prior to the execution of the agreement on Sunday the parties had done no more than agree on the terms of a contract, which would not be binding on defendants at law until reduced to writing and signed by them, and that it was evidently agreed that the parties should meet at a subsequent date and conclude their bargain by executing a written agreement—and that they met on Sunday and executed a written agreement—and that the written contract is the one on which complainants must base their cause of action, and because the written contract was made on Sunday, it is unenforceable.

The bill of complaint alleges specifically in par. 2, p. 1: "On April 9, 1920, the said defendants entered into an agreement with the complainants, whereby the said defendants did agree to convey the above-described premises to the said complainants free from all debts on or before the 15th day of May, 1920, for the consideration of $4,700, to be paid in the following manner: $100 upon the execution of the said agreement, the receipt of

which was acknowledged by the defendants, and the balance of the purchase price in cash upon the passing of the title and delivery of the deed; which said agreement was afterwards on April 11, 1920, by mutual assent reduced to writing and executed by the parties.

## Specification of Grounds of Appeal.

1. Because the Court erred in determining that the contract made by and between complainants and defendants was made on Sunday, and was therefore void.

## Argument.

The allegation is specific that the agreement was made on April 9, 1920, which was a secular day. The fact that the parties negotiating the contract contemplated that a formal agreement should be prepared and signed, is some evidence that they did not intend to bind themselves until the agreement was reduced to writing and signed; but it is always a question of fact depending upon circumstances of the particular case, whether the parties had not completed their negotiations and concluded a contract definite and complete in all its terms which they intended should be binding upon them, and which for greater certainty or to answer some requirement of the law they decided to have expressed in a formal written agreement.

*Wharton* v. *Stoutenburgh,* 35 Eq. 8 Stew. 266, Ct. of Er.

In the face of the specific allegation that the agreement was made on April 9th, the inference by the Vice-Chancellor that the parties evidently agreed that they should meet at a subsequent date and conclude their bargain, is not justified. The notice operating as a demurrer admits that an agreement was made on April 9th as stated in the bill.

The Statute of Frauds, Comp. Stat. 2612, sec. 5, provides: that

> "no action shall be brought upon any contract for sale of lands, tenements or hereditaments, or any interest in or concerning them—unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, etc."
>
> "An oral contract for the sale of lands was valid before the passage of the Statute of Frauds. The statute does not make the contract void in the sense that an illegal

contract is void, but simply makes it unenforceable. That bar is removed by the production of a writing containing the terms of the oral contract and authenticated by the signature of the party to be charged."

*Browne Statute of Frauds,* par. 344, 5th Ed., p. 467.

If the oral contract were void, that is illegal, an admission in writing that an illegal contract had been made would not be of any force whatever. In this State, the oral contract has been treated as merely unenforceable, and the writing as evidence of the contract.

*Johnson & Miller* v. *Buck,* 35 Law, 6 Vr. 338;
*Whitehead* v. *Burgess,* 61 Law, 32 Vr. 75.

An answer to a bill for specific performance admitting the contract set out in the bill, although it is stated to be oral, is a writing in sufficient compliance with the Statute of Frauds.

*Gough* v. *Williamson,* 62 Eq., 7 Dick. 526.

Part performance of the oral contract takes it out of the statute, which shows clearly that the contract is not void in the sense that it is illegal.

*Cooper* v. *Colson,* 66 Eq., 21 Dick. 328, Ct. of Er.

In this case, therefore, it seems to be clear that an unenforceable oral agreement was made on a secular day, which agreement, however, was not void; and that afterwards the parties put their agreement in writing on a Sunday.

The concrete question is this: was the execution of the writing on Sunday an act prohibited by the Vice and Immorality Act, Comp. Stat. 5712, sec. 1?

The effect of that statute on contracts made on Sunday has been before the courts of this State frequently. The cases in the order of their dates are stated by Vice-Chancellor Leaming: *County Eng. Co.* v. *West,* 88 Eq. 109, at p. 111. The case cited was that of a conditional contract which depended upon its ratification in order to be binding. Quite properly it was held that if the ratification was made on Sunday, the contract was concluded on Sunday.

In *Burr* v. *Nivison,* 75 Eq. 241, Ct. of Er., some of the negotiations for the sale and conveyance of land were made on Sunday; the written memorandum required by the Statute of Frauds was signed by the vendor and delivered to the agent of the vendee, who then delivered the vendee's check, which had been made and

dated on Saturday for the first payment. The memorandum was not delivered to the vendee, nor assented to by him until Monday; it was held that the contract was made on Monday and not invalid as a Sunday contract.

The case *sub judice* seems to be just the converse of *Burr* v. *Nivison,* in that the actual agreement, the meeting of the minds, occurred on a secular day, and the written memorandum required by the Statute of Frauds was afterwards signed and delivered on Sunday.

In *Berry* v. *O'Neill,* 104 At. 25, Sup. Ct., it was held that the mere carrying on negotiations on Sunday will not invalidate a contract completed on a secular day; the actual final consummation of the contract on Sunday is necessary to bring it within the prohibition of the Sunday statutes.

In a note to the case of *Burr* v. *Nivison,* reported in 20 A. & E. Ann cases, 35, at p. 37, it is said: "The objection that a contract is invalid for having been made on Sunday, is not available where there is no meeting of the minds on that day"; citing cases. The test seems to be, whether the minds of the parties met in complete accord in the formation of the contract on Sunday. If they did not the mere drawing up and signing a paper as evidence of what they had agreed to, is not the making of a contract on Sunday, and is not a violation of the statute.

Suppose a case of a vendor concluding an oral agreement on a secular day, and afterwards on a Sunday writes a letter to the vendee stating the terms of the agreement and confirming them; could it reasonably be held that the agreement was illegal because the letter was written on Sunday?

A case in Mississippi seems to be quite in point: Personal property was agreed to be sold on a secular day. Afterwards on a Sunday a bill of sale was executed in pursuance of the former agreement, and it was held that the making of the bill of sale on Sunday did not invalidate the contract of sale.

*Foster* v. *Wooten,* 7 South. Rep. 501.

It is respectfully contended that the order dismissing the bill should be reversed.

SEYMOUR J. SOLOMON,
*Solicitor of Appellants.*

FRANK E. BRADNER,
*Of Counsel with Appellants.*

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

# New Jersey Court of Errors and Appeals

*Between*

WALTER JANOWSKI, *et al.*,
*Complainants-Appellants,*

*and*

JOSEPH PRZEBIEGLEC, *et al.*,
*Defendants-Respondents.*

*On Appeal from Court of Chancery.*

## BRIEF FOR RESPONDENTS.

**The Notice of Motion to Dismiss the Bill of Complaint did not operate as an admission of the enforceability of the alleged verbal agreemnt.**

Appellants in their brief lay stress upon the admissions made by the notice of motion, operating as a demurrer. Their contention is that the notice operates as an admission sufficient to take the verbal agreement out of the statute of frauds. They lose sight, however, of the fact that unless part performance is alleged in the bill of complaint the defendants are entitled to the benefit of the statute, notwithstanding the admission of the facts alleged in the bill. In the instant case there is no allegation whatever in the bill of complaint of part performance nor is any attempt made on the part of the appellants to argue part performance.

In the case of *Van Dyne* v. *Vreeland,* 11 E. 370, at page 378, Chancellor Williamson says:

> "To this bill the defendants have demurred. All the facts are admitted by the demurrer, and must be taken as true. The agreement upon which the bill is founded was in parol, but its performance, or part performance, is set up to avoid the statute. Although the demurrer admits the facts of the bill, the agreement being in parol, the complainant (defendant?) is entitled to the benefit of the statute, unless the part performance, which is set up to avoid its operation, is of a character to have that legal effect. The demurrer admits the parol agreement, and insists that it is not such a parol agreement as will take the case out of the operation of the statute of frauds, and deprive the defendant of the benefit of it as a de-

fense. A defendant may answer and admit the parol agreement; but if, at the same time, he insists on the protection of the statute, no decree can be made against him merely on the ground of the admission of the agreement. A demurrer is in effect the same as an answer which admits the parol agreement, but claims the benefit of the statute. It admits the agreement, but denies the right of the complainant to enforce it. But if the bill alleges such a part performance as will take the agreement out of the statute, the demurrer is such an admission of the part performance as will preclude the defendant from the benefit of the statute. The bill must state the facts which are relied upon as part performance. When the facts are admitted by the demurrer, the Court must determine whether the facts relied upon do constitute part performance."

We think it clear in the light of this decision that the serving of the notice of motion to dismiss the bill of complaint in this cause has not the effect claimed by the appellants and does not deprive the respondents of the benefit of the statute of frauds.

**The oral agreement alleged in the Bill of Complaint was unenforceable until reduced to writing. When reduced to writing the oral agreement became merged in the written agreement.**

It seems hardly necessary to enlarge upon this point. It must be conceded that an oral agreement for the sale of land is unenforceable under our statute. Until the oral agreement alleged in the bill of complaint filed in this cause was reduced to writing it was unenforceable.

It is also well established that when an oral agreement is reduced to writing the oral agreement becomes merged in the written agreement.

In *Hargrave* v. *Conroy,* 19 E. 281, it was held that a contract under seal embracing the whole subject matter of a former contract not under seal supersedes the former.

It follows, therefore, in the present case that when the unenforceable oral agreement relied upon by the appellants was reduced to writing it became merged in that written agreement and any relief sought by appellants must be predicated upon that written agreement.

**The written agreement alleged in the Bill of Complaint was admittedly executed upon a Sunday and is therefore void under the Vice and Immorality Act, Comp. Stat. 5712, Sec. 1.**

As was said in *County Engineering Co.* v. *West,* 88 E. 109:

> "The effect of our statute on contracts made on Sunday has been before the courts of this state so frequently that little doubt touching the law of this state in that respect can be said to exist." In this case, Vice-Chancellor Leaming sets out the cases in the order of their dates and concludes: "In these several decisions the view is consistently maintained that where the contract is concluded on Sunday our courts will not enforce it. I find nothing in Burr *v.* Nivison, 75 E. 241, which departs from that view; in that case the contract was not concluded on Sunday."

In the case of *Burr* v. *Nivison,* referred to by Vice-Chancellor Leaming, and upon which appellants place great dependence, some negotiations for the sale of land were made on Sunday, but, as Vice-Chancellor Leaming points out, the contract was not concluded until Monday.

The case of *Foster* v. *Wooten,* 7 South. Rep. 501, cited by appellants, concerns an agreement for the sale of personal property and is not in point.

As was forcibly stated by Vice-Chancellor Fielder in dismissing the bill of complaint in this cause: "Prior to the execution of the agreement on Sunday the parties had done no more than agree on the terms of a contract, which would not be binding on defendants in law until it was reduced to writing and signed by them * * *. The written and not the parol contract is the one on which complainants must base their cause of action, and because the written contract was made on Sunday it is unenforceable."

We respectfully urge that the decision of the learned Vice-Chancellor in the court below was entirely correct and amply justified by the authorities.

SMITH & SLINGERLAND,
*Solicitors for and of Counsel*
*with Defendants-Respondents.*