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BILL OF COMPLAINT.

Filed September 5, 1925.

In Chancery of New Jersey

To His Honor, Edwin Robert Walker, Chancellor 10
of the State of New Jersey.

Complainant, John N. McGarvey, of the City
of Philadelphia and State of Pennsylvania, re-
spectfully shows unto your Honor:

1. On or about the 22nd day of November,
1923, Charles W. Young, one of the defendants
herein, who had been engaged in the business
of buying and selling real estate, approached
complainant, who had been engaged in the busi- 20
ness of a real estate operator and builder, and
suggested to complainant that he had information
of a parcel of ground belonging to the Interna-
tional Speedway Association, a corporation, lo-
cated on the Absecon Boulevard in the County
of Atlantic and State of New Jersey, which
was a desirable piece of property to acquire
and suggested that inasmuch as he, the said
Charles W. Young, could not himself supply or 30
obtain the funds wherewith to purchase said
property and that inasmuch as said complainant
was one experienced in the buying and selling of
real estate and that his experience would be
valuable to an enterprise of buying said real
estate above referred to for re-sale or develop-
ment, that said complainant become interested
with the said Charles W. Young in the purchase
of said property and that the property be pur-
chased, if possible as a joint enterprise.

2. In compliance with the suggestion of the 40
said Charles W. Young, the said complainant

Bill of Complaint.

did investigate the said property and did on or about the 25th day of November, 1923, agree to join with the said Charles W. Young in a joint enterprise of purchasing said property. It was agreed between the said defendant, Charles W. Young, and the complainant that the said complainant would advance the amount of money necessary to pay as a down payment upon the purchase of said property and to secure the contract for the purchase of said property and that the said defendant, Charles W. Young, would proceed to Cleveland, in the State of Ohio, at which place the negotiations for the purchase of said property had to be conducted and would there conduct said negotiations and secure a contract for the purchase of said property. Thereupon the said Charles W. Young for and on behalf of the joint enterprise proceeded to Cleveland for the purpose of securing the contract for the purchase of said property. Thereafter and about the 28th day of November, 1923, the said complainant, at the request of the said Charles W. Young, sent to the said Charles W. Young at Cleveland, Ohio, a check for the sum of \$1,000.00 for the purpose of making a down payment upon such contract as might be negotiated and the said complainant received a receipt contained in a letter from the said Charles W. Young, a copy of which is annexed hereto and made a part hereof, and marked Exhibit One.

3. The said Charles W. Young then returned from Cleveland and stated that he had difficulty in negotiating said contract and that he did not think that the property could be acquired for \$25,000.00, the price which complainant and the said Charles W. Young had agreed to pay, and

Bill of Complaint.

thereupon the complainant authorized the said Charles W. Young to advance the price, but not over \$40,000.00. Complainant then advanced on or about the 3rd day of December, 1923, the sum of \$2,500.00 to be used as a down payment on said contract and thereupon the said Charles W. Young returned to Cleveland and did negotiate a contract with the said International Speedway Association, the owner of said property, for the purchase of said property for the sum of \$28,000.00, \$2,500.00 to be paid upon the signing of the agreement, \$25,500.00 to be paid in cash at the time of the closing of the contract, a copy of which contract is annexed hereto and made a part hereof and marked Exhibit Two. The moneys used for the down payment referred to in said contract were the moneys of complainant and the identical cashier's check sent by complainant to defendant, Charles W. Young, was turned over by the defendant, Charles W. Young, to the said International Speedway Association. Upon the return of the said Charles W. Young to Philadelphia after negotiating said contract, the said complainant paid to the said Charles W. Young an additional sum of \$625.00 to reimburse the said Charles W. Young for expenses incurred by him. The agreement of sale was duly recorded on or about the 12th day of December, 1923, in the proper office of the County of Atlantic in the State of New Jersey.

4. The agreement of sale was in the name of Charles W. Young alone as purchaser. Complainant inquired of the said Charles W. Young as to why his name did not appear in the said agreement of sale and the said Charles W. Young informed him that it was because he represented himself in dealing with the seller as a capitalist

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Bill of Complaint.

and he did not want it to appear to them that he was in fact not acting for himself. Said complainant, having implicit trust and confidence in the said Charles W. Young, accepted the explanation.

10 5. It was the purpose of the said complainant and the said Charles W. Young to re-sell said property and complainant set about endeavoring to re-sell said property when he was informed on or about the 15th day of December, 1924, that the said Charles W. Young denied the interest of the said complainant in said property and denied that he was acting otherwise than for himself alone and thereupon the said complainant served a notice on the Chelsea Title and Guaranty Company, a trust company of Atlantic
20 City, with whom the agreement provided the deed of said property was to be placed in escrow to be delivered when the balance of the purchase price should be paid, of the equitable interest of said complainant in said contract and property. The agreement provided that title should be closed not later than the 7th day of February, 1924.

30 6. Negotiations took place between the said Charles W. Young and the said complainant, and the said complainant and the said Charles W. Young agreed that if the property was sold prior to the time when complainant would be obliged to put up the balance of the purchase price the interest of said complainant in said joint enterprise should be fixed at the sum of \$25,000.00 in addition to the money which he had invested therein and there should be paid to the said complainant the said sum of \$25,000.00
40 plus the moneys which he had invested in liquidation of his rights in said joint enterprise.

Bill of Complaint.

7. Thereupon and almost immediately thereafter the said Charles W. Young formed a plan of defeating any rights of the said complainant in said joint enterprise and on or about the 29th day of December, 1923, the said International Speedway Association, at the request of the said Charles W. Young, made a deed of said lands and premises to Clarence E. Safford, which said deed was duly recorded upon the 4th day of January, 1924, in book 735, of deeds, page 104; and thereupon and on the 9th day of January, 1924, the said Charles W. Young and his wife made a quitclaim deed to the International Speedway Association, which said deed was recorded on the 12th day of January, 1924, in book 731 of deeds, page 435, by which said quitclaim deed the said Charles W. Young, quitclaimed his interest in the property described in the contract of sale heretofore referred to and thereupon and on the 5th day of January, 1924, the said International Speedway Association made another deed to Clarence E. Safford, which said deed was recorded on the 15th day of January, 1924, in book 733 of deeds, page 149. On the 29th day of December, 1923, the said Clarence E. Safford made a deed to the defendant, Charles W. Young, which said deed was not recorded, however, until the 18th day of May, 1925, in book 771 of deeds, page 259. Complainant says that all of the aforementioned instruments were executed in pursuance of a plan conceived by the said Charles W. Young and in which said plan said International Speedway Association joined to deprive complainant of his interest in the said joint enterprise and in the said property. That notwithstanding the fact that the contract of sale required that the

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Bill of Complaint.

10 balance of the purchase price should be paid in cash the International Speedway Association accepted as full consideration of the aforesaid property a mortgage for \$28,000.00 made by Clarence E. Safford to the International Speedway Association dated December 29, 1923, and recorded January 4, 1924, in book 290 of mortgages, page 87. That said Clarence E. Safford was but a dummy of said Charles W. Young. Complainant says that all of the money used in the purchase of said property was money of complainant and that the said Charles W. Young did not advance any moneys of his own and that complainant supplied the said Charles W. Young with the moneys aforesaid for the express purpose of purchasing said property as aforesaid.

20 8. When the time provided for by said contract of sale for the closing of said title arrived, to wit: the 7th day of February, 1924, complainant tendered to the Chelsea Title and Guaranty Company the sum of \$25,500.00 in cash, the balance due upon said contract but the said Chelsea Title and Guaranty Company could not deliver the deed therefor in accordance with the provisions of said contract and complainant has been, and the said Charles W Young knew at all
30 times that he was, willing, able and anxious to pay the balance of said contract price as required by said contract.

9. On or about the 16th day of May, 1925, the said Charles W. Young and Irene Young, his wife, conveyed said lands and premises to Max Grossman and Alfred W. Westney, which said deed was recorded on the 18th day of May, 1925, in book 771 of deeds, page 258. Complainant
40 says that neither the said Max Grossman nor Alfred W. Westney paid any consideration for

Bill of Complaint.

said conveyance and that they and each of them hold title to said property in trust for the said Charles W. Young and that they and each of them had full and complete knowledge of the rights of complainant.

10. Complainant further says that no person whomsoever has invested any moneys whatever in said lands and premises except the said complainant. 10

11. The lands and premises referred to in said contract of sale and in said deeds aforesaid and the subject matter of this suit, may be described as follows:

“All that or those lots, tracts, or parcels of land and premises hereinafter particularly described, situate, lying and being in the City, Borough or Town of Atlantic City (formerly Egg Harbor Township) in the County of Atlantic and State of New Jersey, bounded and described as follows, to wit: BEGINNING at the lower mouth of Newfoundland Thoroughfare where it empties into the Beach Thoroughfare and is the beginning corner of a survey of 292 acres (of marsh and oyster beds) that was made July 7, 1810 to Daniel Adams and others in company and is recorded in the Surveyor General’s Office at Burlington in Lib. C. C. folio 272 and runs from thence 20 30

(1) North $36\frac{1}{2}$ degrees West $15\frac{1}{2}$ chains; thence

(2) North 60 degrees and 30 minutes East 68 chains and 50 links; thence

(3) North 25 degrees and 30 minutes East 22 chains; thence

Bill of Complaint.

(4) North 80 degrees and 30 minutes
West 24 chains and 50 links; thence

(5) South 64 degrees and 30 minutes
West 77 chains and 50 links; thence

(6) South 30 degrees and 39 minutes
West 36 chains; thence

10 (7) South 50 degrees and 30 minutes
East 10 chains; thence

(8) South 30 degrees and 30 minutes
West 12 chains; thence

(9) South 86 degrees and 30 minutes
East 45 chains and 50 links; thence

(10) North 20 degrees and 30 minutes
East 13 chains to the place of beginning.

CONTAINING 378½ acres and the usual
allowances for highways.

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No. 2 BEGINNING at a stake standing at
the southeast side of Forked Creek above the
Fork and in the 6th line of the survey of
Peter Boice and runs thence

(1) South 37 degrees West 5 chains;
thence

(2) South 78 degrees West 12½ chains;
thence

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(3) North 10 chains; thence

(4) North 78 degrees East 13 chains;
thence

(5) North 15 chains and 70 links; thence

(6) North 75 degrees West 9 chains and
70 links; thence

(7) North 10½ chains; thence

(8) South 75 degrees East 10 chains and
30 links; thence

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(9) South 32 chains and 60 links; thence

Bill of Complaint.

(10) North 78 degrees East 2 chains to the place of beginning.

CONTAINING 23 acres, more or less, with the usual allowance for roads.

12. Complainant charges that the said Max Grossman and Alfred W. Westney hold title to said lands and premises solely as trustees for the joint benefit of the said Charles W. Young and the complainant as joint adventurers or for the complainant under a resulting trust or in any event to secure complainant for the return to complainant of the moneys invested by complainant in said property and the sum of \$25,000.00 agreed upon by the said complainant and the said defendant, Charles W. Young, as aforesaid as the value of complainant's interest in said property if said property should be re-sold prior to the time when complainant would be obliged to pay the balance of the purchase price. Nevertheless the said Charles W. Young, Max Grossman and Alfred W. Westney deny any interest of said complainant in said lands and premises and complainant can only obtain relief in this court, his remedy at law being inadequate.

Complainant therefore prays:

1. That the defendants who are Charles W. Young, Max Grossman and Alfred W. Westney may answer this bill and each statement therein contained, but without oath.

2. That it may be determined that the said Max Grossman and Alfred W. Westney hold said property as trustees for complainant under a resulting trust or in the alternative for the said Charles W. Young and the complainant as

Bill of Complaint.

joint adventurers and that the rights and interests of the said Charles W. Young and the complainant may be fixed and determined or in the alternative to secure to complainant the repayment to complainant of the amount of money invested by complainant in said lands and premises and the sum of \$25,000.00 with interest as the value of complainant's interest in said joint adventure.

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3. That complainant may have such other and further relief as may be proper.

4. That a writ of subpoena may issue, commanding said defendants to answer this bill of complaint and to abide by and perform such order or decree as this court may make in the premises.

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CASSMAN & GOTTLIEB,
Solicitors for and of Counsel with
Complainant.

MERRITT LANE,
Of Counsel.

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Bill of Complaint—Exhibit II.

EXHIBIT I.

HOTEL CLEVELAND,
Cleveland, Ohio.

Dear Mr. Garvey/

Yours of the 28th enclosing check for \$1000. arrived 11 P. M. tonight. If I do not secure agreement duly "signed, sealed and delivered by proper officers" your check will not be cashed and returned to you "as is" 10

Am dealing with real men here and in Akron and we all think the poor fellow will come clean—I may have to stay over next week. Will keep you informed.

Many thanks.

Sincerely yours,

Chas. W. Young. 20

EXHIBIT II.

ARTICLES OF AGREEMENT, MADE THIS Eighth day of December in the year of our Lord one thousand nine hundred and twenty-three (1923) BETWEEN INTERNATIONAL SPEEDWAY ASSOCIATION, a Corporation of the State of Delaware, party of the first part, and CHARLES W. YOUNG, of the City and County of Philadelphia, or his nominee party of the second part; 30

WITNESSETH, that the said party of the first part, for and in consideration of the sum hereinafter stipulated, to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by and 40

Bill of Complaint—Exhibit II.

between the parties hereto, do agree to and with the said party of the second part, that the said party of the first part, will well and sufficiently convey or, in the event that the party of the first part is not at the date of expiration of this agreement then vested with the fee simple title to the herein described property under a now existing agreement by deed of conveyance delivered to him, her, it or them at or before said date, said party of the first part may by proceedings for specific performance had and by or before said date instituted, and within a reasonable time after the termination hereof concluded (to permit of a reasonable time for the prosecution and termination of such suit for specific performance begun as aforesaid) or otherwise, cause to be conveyed to the said party of the second part, his, her, its, or their successors, heirs and assigns, by Deed of Special Warranty, a fee simple title to the within described property free from all incumbrance, zoning conditions excepted, if any, and further excepting as may be hereinafter mentioned, on or before the day and hour hereinafter mentioned for settlement, all that or those lots, tracts, or parcels of land and premises hereinafter particularly described, situate, lying and being in the City, Borough or Town of Atlantic City (formerly Egg Harbor Township) in the County of Atlantic and State of New Jersey, bounded and described as follows, to wit:—

BEGINNING at the lower mouth of Newfound Thoroughfare where it empties into the Beach Thoroughfare and is the beginning corner of a survey of 292 acres (of marsh and oyster beds) that was made July 7, 1810 to Daniel Adams and others in company and is recorded

Bill of Complaint—Exhibit II.

in the Surveyor General's Office at Burlington
in Lib. C. C. folio 272 and runs from thence

- (1) North 36—1/2 degrees West 15—1/2
chains, thence
- (2) North 60 degrees and 30 minutes, East
68 chains and 50 links, thence
- (3) North 25 degrees and 30 minutes East 10
22 chains, thence
- (4) North 80 degrees and 30 minutes West
24 chains and 50 links, thence
- (5) South 64 degrees and 30 minutes West
77 chains and 50 links, thence
- (6) South 30 degrees and 3 (minutes West
36 chains, thence
- (7) South 59 degrees and 30 minutes East
10 chains, thence
- (8) South 30 degrees and 30 minutes West 20
12 chains, thence
- (9) South 86 degrees and 30 minutes East
45 chains and 50 links, thence
- (10) North 20 degrees and 30 minutes East
13 chains to the place of beginning.

CONTAINING 378—1/2 acres and the usual
allowances for highways. No. 2—BEGINNING 30
at a stake standing at the southeast side of
Forked Creek above the Fork and in the 6th line
of the survey of Peter Boice and runs thence

- (1) South 37 degrees West 5 chains, thence
- (2) South 78 degrees West 12—1/2 chains,
thence
- (3) North 10 chains, thence
- (4) North 78 degrees East 13 chains,
thence
- (5) North 15 chains and 70 links, thence 40

Bill of Complaint—Exhibit II.

- (6) North 75 degrees West 9 chains and 70 links, thence
 (7) North 10—1/2 chains, thence
 (8) South 75 degrees East 10 chains and 30 links, thence
 (9) South 32 chains and 60 links, thence
 10 (10) North 78 degrees East 2 chains to the place of beginning.

CONTAINING 23 acres, more or less, with the usual allowance for roads.

It is under and agreed by and between the parties hereto that the International Speedway Association is to furnish a topographical and outline survey of the within described ground and also a title insurance policy of the Chelsea Title & Guaranty Company of Atlantic City, at their own cost and expense, which said topographical and outline survey and title insurance, the said vendee is hereby authorized and empowered to order.

A deed of said property shall be property executed and delivered to the said The Chelsea Title and Guaranty Company of Atlantic City, New Jersey, on or before Dec. 18, 1923, to be held in escrow, and when the full purchase price of said property is paid to said Title Company, as hereinbefore provided, said deed may be delivered to said Party of the Second part, upon the disbursement of the said purchase price hereinafter agreed upon as hereinafter provided. AND the said party of the second part, for himself, herself, itself or themselves, his, her, its or their successors, heirs, executors and administrators, do covenant, promise and agree to and with the said party of the first part, his, her, its or their successors, heirs, executors, administrators,

Bill of Complaint—Exhibit II.

and assigns, that 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 sum of Twenty-eight Thousand Dollars (\$28,000.00) as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

Two Thousand Five Hundred Dollars (\$2,500.00) on the signing of this agreement, the receipt of which is hereby acknowledged, the same to be held in escrow by the Chelsea Title and Guaranty Company, and to be returned to said vendee or his nominee, should said title Company refuse to insure title to the said premises clear of all liens and outstanding interests and estates for which shall be their sufficient warrant; otherwise to be disbursed as provided in the next succeeding paragraph hereof.

Twenty-Five thousand Five Hundred Dollars (\$25,500.00) in cash to be paid to said Title Company for Party of the First Part at the time of settlement and said sum, together with said down payment shall be disbursed by said Title Company as follows:

First: In liquidation of any encumbrance, except taxes, found to be liens upon said premises.

Second: In liquidation of all legitimate claims now due and owing by said Party of the First Part, as shown by the list hereto attached, and marked "Exhibit A;"

Third: The balance remaining shall be paid to The Security Savings and Loan Company of Cleveland, Ohio, for the account of the Party of the First part.

It is further understood and agreed that said Title Company is hereby appointed the agent

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Bill of Complaint—Exhibit II.

of all parties hereto to whom tender shall be made as its offices in Atlantic City. Tender to said Title Company to be construed as tender to the parties in interest.

10 This agreement shall be extended to such time as delay may be caused by the Title Company in its examination of title to said property. Possession at time of settlement.

This agreement expires 3 P. M. Seventh day of February A. D. 1924.

20 Adjustments of taxes, water rents, sewer rents, insurance premiums, interest, rents, building and loan stock, dues, interest and premiums, and all other carrying charges to be made and pro-rated and to be charged to and allowed to the parties hereto respectively as of date of settlement unless herein otherwise stipulated; the tax year to be considered to run from January First to December Thirty-first of the current year.

Settlement to be made at the office of and title to the within described property to be insured by the Chelsea Title and Guaranty Company, and the title to said property to be good and marketable and such as will be insured by it at its regular rates of insurance.

30 **AND IT IS FURTHER AGREED**, by the parties to these presents, that the said party of the second part, his, her, its or their successors, heirs and assigns, may enter into and upon the said land and premises on the day of settlement, if not herein otherwise stipulated and from thence take the rents, issues and profits to his, her, its and their use for ever.

40 **AND IT IS FURTHER UNDERSTOOD AND AGREED**, subject as aforesaid that time is to be considered as of the essence of this agreement.

Bill of Complaint—Exhibit II.

AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective successors, heirs, executors and administrators, and they hereby respectively agree to pay upon failure to perform the same, the sum of \$2500.00 which they hereby fix and settle as liquidated damages thereof, provided, however, that if proceeding for specific performance is begun as is hereinbefore provided, a reasonable time be allowed for its termination. 10

IT IS UNDERSTOOD AND AGREED by and between the parties hereto that this agreement and all provisions hereof bind and extend to the heirs, executors, administrators, successors and assigns of the parties hereto respectively. 20

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals and any corporation parties hereto have caused their corporate seals to be affixed hereto duly attested the day and year first above mentioned.

The International Speedway Assn.	(SEAL)	
by C. H. Berlekamp, Pres.	(SEAL)	
Herbert S. Fry Secretary	(SEAL)	30
Chas. W. Young	(SEAL)	

Witness

Chas/ W. Young
W. H. Conger

SIGNED, SEALED AND DELIVERED in the presence of

J. H. Van Derveer
H. H. Holloway attest

Bill of Complaint—Exhibit II.

STATE OF OHIO, }
 CUYAHOGA COUNTY, } ss.

BE IT REMEMBERED, that on this 8th day of December in the year of our Lord one thousand nine hundred and twenty-three before me J. H. Van DerVeer a Notary Public personally ap-
 10 peared the International Speedway Association by C. H. Berlekamp, president, and Herbert S. Fry, Secretary, who, I am satisfied, is or are the vendor mentioned in the above agreement, deed or conveyance, and I having first made known to
 him, her or them the contents thereof, he, she or they acknowledged that he, she or they signed, sealed and delivered the same as his, her or their voluntary act and deed, to the end that the
 20 same may be recorded as such. All of which is hereby certified.

J. H. VAN DERVEER,
 Notary Public.

THE STATE OF OHIO, }
 CUYAHOGA COUNTY, } ss.

I, GEORGE WALLACE, Clerk of the Court of Common Pleas, a Court of Record, of Cuyahoga County aforesaid, do hereby certify that J. H. Van Derveer was and now is a duly appointed,
 30 commissioned and qualified Notary Public in and for said County, for the full term of three years; that his commission is dated March 11 A. D. 1923, and expires March 10, 1926, as appears of record, and is duly authorized by the laws of Ohio, to take acknowledgements of deeds to be recorded in this State, and to administer oaths for general purposes, and that his signature above written is genuine.

Bill of Complaint—Exhibit II.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at Cleveland, this 8th day of Dec. A. D., 1923.

GEORGE WALLACE,
Clerk.

(SEAL) By A. T. Hopkins, 10
Deputy Clerk.

STATE OF OHIO, }
CUYAHOGA COUNTY, } ss.

BE IT KNOWN, that on this 8th day of December one thousand nine hundred and twenty-three before me, the subscriber, a notary public personally appeared the undersigned deponent who, being by me duly sworn according to law, did on his oath say that he is the Secretary of the International Speedway Association the grantor mentioned in the foregoing indenture; that he knows the seal of said Corporation; that the seal affixed to the said Indenture is the common seal of the said corporation; that C. H. Berlekamp is the President of said corporation and did by its order sign, seal and deliver the said Indenture as its voluntary act and deed in the presence of said deponent, pursuant to a resolution of the Board of Directors of said Corporation; and that the said deponent did, at the execution thereof, subscribe his name as a witness thereto. 20 30

HERBERT S. FRY.

Sworn and subscribed to before me
the day and year aforesaid.

J. H. VAN DERVEER,
(SEAL) Notary Public. 40

*Bill of Complaint—Exhibit A.***EXHIBIT "A"**

	Anderson Empire Towel Supply	
	513 Artic Ave., Atlantic City, N. J.	\$18.00
	The Delaware & Atlantic Tel. & Tele-	
	phone Co. Mt. Vernon & Pacific Ave.,	
10	Atlantic City, N. J.	57.96
	Security Bank Note Co.	
	223 Chestnut St., Philadelphia, Pa.	146.80
	Gravelle Pictorial News Service	
	157 No. Illinois St., Indianapolis, Ind.	11.25
	Landry's Photo Laboratory,	
	254 N. Juniper St., Philadelphia, Pa.	166.60
	Alfred Smith & Co.	
	Cor. 13th & Cherry St., Philadelphia, Pa.	35.56
	Enterprise Engraving Co.	
	815-17 Sansom St., Philadelphia, Pa.	45.26
20	Luce Press Clipping Bureau	
	56 Warren St., New York, N. Y.	23.30
	Saml. L. Jeffries & Sons,	
	3203 Atlantic Ave., Atlantic City, N. J.	29.30
	Brooks & Idler	
	38 So. New York Ave., Atlantic City, N. J.	512.50
	Corporation Trust Co.	
	(Franchise and Annual State Repre-	
	sentations)	77.29
30	Franchise and Annual State Repre-	
	sentations	100.00
	Botte Sooy & Gill Attorneys	250.00
	" " " "	150.00
	J. H. Van Derveer, Attorney	1060.00

Motion to Dismiss.

MOTION TO DISMISS.

Filed September 21, 1925.

To Cassman & Gottlieb, solicitors to complainant.

TAKE NOTICE, that on Tuesday, September 29, 1925, at the Chancery Chambers, Real Estate and Law Building, Atlantic City, New Jersey, at 10 o'clock in the forenoon, or as soon thereafter as said matter can be heard, I shall move before the Vice-Chancellor, Honorable Robert H. Ingersoll, to dismiss the bill of complaint heretofore filed in the above stated cause. 10

EMERSON RICHARDS,
Counsellor-at-Law for Defendants Max Grossman, Shirley Grossman, Alfred W. Westney and Laura Westney. 20

This motion was argued and denied.

MOTION TO DISMISS.

Filed October 13, 1925.

To Cassman & Gottlieb, solicitors of complainant: 30

TAKE NOTICE, that I shall move before the Chancellor at the Chancery Chambers, Atlantic City, New Jersey, on Tuesday, October 20, 1925, at 10 o'clock in the forenoon to strike out the bill of complaint heretofore filed in the above cause.

AND TAKE NOTICE, that the reasons for such notice are

(a) That all of the matters and things alleged in said bill of complaint and all of the 40

Motion to Dismiss.

prayers for relief therein prayed for have been adjudicated in a certain cause heretofore pending in the Court of Chancery of New Jersey, entitled John N. McGarvey, complainant, *v.* Charles W. Young, *et als.*, defendants.

10 (b) Because said bill of complaint presents the same cause of action and sets up the same facts, but with inconsistent prayers for relief to the bill already filed in a certain cause wherein the said plaintiff John N. McGarvey was complainant, and the said Charles W. Young was defendant, and because the complainant in this complaint presents no new cause of action and prays for no relief not already prayed for in the cause heretofore decided in this Court.

20 (c) Because the complainant in the pending bill is estopped from making affirmance therein, contrary to, contradictory of, or inconsistent with the facts averred or adjudicated in the former proceeding in Chancery wherein the said John N. McGarvey was complainant and the said Charles W. Young, *et als.*, defendants.

30 EMERSON RICHARDS,
Counsellor-at-Law for Defendants Max Grossman, Shirley Grossman, Alfred W. Westney and Laura Westney, and for Charles W. Young.

This motion was argued and denied.

Answer of Defendants Max Grossman, et al.

**ANSWER OF THE DEFENDANTS MAX
GROSSMAN AND HIS WIFE SHIRLEY
GROSSMAN; ALFRED W. WESTNEY AND
HIS WIFE LAURA WESTNEY.**

Filed May 6, 1926.

Answering said bill by way of plea defendants 10
say:

1. The defendants by protestation, not confessing or acknowledging the matters and things in and by said bill, set forth and alleged to be true, in such manner and form as the same are thereby and therein set forth and alleged, for answer by way of plea, to the whole of the said bill, say that heretofore and before said complainant exhibited his present bill in this Honorable Court, to wit: 20

On December 27, 1923, the said complainant did exhibit his bill of complaint in this Honorable Court against Charles W. Young, in manner and form as follows:

“IN CHANCERY OF NEW JERSEY.

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

Complainant, John N. McGarvey of Philadelphia, Pennsylvania, respectfully shows that:

1. On December 8, 1923, International Speedway Association, a corporation of the State of Delaware, entered into an agreement in writing with Charles W. Young, of the City and County of Philadelphia, Pennsylvania, or his nominee, in which it agreed to sell certain lands and premises in Atlan- 40

Answer of Defendants Max Grossman, et al.

tic City, New Jersey, as will appear by copy of said agreement hereto attached, made a part hereof and marked Exhibit 'A.'

10 2. The sum of \$2,500 earnest money named in said agreement was paid by complainant and said Charles W. Young was his, complainant's agent in procuring said agreement.

3. Said Young paid no part of said consideration, has no financial interest in the agreement or the land and premises described therein and negotiated said agreement as agent and for the benefit solely of complainant.

20 4. The original of said agreement is now on file with the Chelsea Title & Guaranty Company, who has been requested by complainant to search and insure the title to the premises described.

5. Said Charles W. Young now repudiates his agency, denies that complainant has any interest in the agreement, and has refused to assign said agreement to complainant as the nominee referred to in said agreement.

30 6. The action of said Young is a fraud upon complainant and an attempt to deprive complainant of his rights in the agreement which was procured while said Young was acting solely as agent for complainant.

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

40 1. That Charles W. Young and International Speedway Association, a corporation of the State of Delaware, who are the defendants in this suit, may answer this bill

Answer of Defendants Max Grossman, et al.

of complaint, without oath, and each statement herein made.

2. That it be decreed that in procuring the agreement referred to in the bill the defendant Young was acting as agent for complainant, that he holds said agreement in trust for complainant, that he has no interest legal or equitable in the same or the lands and premises described, that he be commanded to assign, transfer and set over said agreement to complainant and that the International Speedway Association be required to execute and deliver a deed to complainant for the lands and premises described in the agreement upon complainant's complying with the terms and conditions thereof, and that complainant may have such other and general relief as may be agreeable to equity. 10 20

3. That a writ of subpoena may issue commanding said defendants to answer the bill of complaint and abide by such decree as shall be made in the premises.

COLE & COLE,
Solicitors of Complainant.

C. L. COLE, 30
Of Counsel."

Answer of Defendants Max Grossman, et al.

EXHIBIT "A."

Same as Exhibit II annexed to bill of complaint.

AND THEREAFTER, on the 3rd day of March, 1924, the said Charles W. Young did make answer to complainant's bill of complaint, in manner and form as follows:

"IN CHANCERY OF NEW JERSEY.

Between

John N. McGarvey,
Complainant,

and

Charles W. Young, *et al.*,
Defendants.

On Bill, etc.

Answer.

20

The answer of Charles W. Young to the bill of complaint in the above-stated cause.

Defendant answering says:

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1. He admits that on the eighth day of December, 1923, International Speedway Association, a corporation of the State of Delaware, entered into an agreement in writing with defendant, Charles W. Young, but denies that said agreement was entered into with the nominee of said Charles W. Young.

2. He denies the allegations in paragraph 2.

3. The allegations in paragraph 3 are each and every one of them denied.

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4. He admits that a duplicate copy of said agreement was sent to the Chelsea Title

Answer of Defendants Max Grossman, et al.

& Guaranty Company, but denies that said Chelsea Title & Guaranty Company was requested by complainant to search and insure the title to said premises, and avers that this defendant requested the Chelsea Title & Guaranty Company to search and insure the title of said premises for this defendant. 10

5. He admits the allegations contained in paragraph 5.

6. He denies the allegations contained in paragraph 6, and says that said alleged agency concerns an interest in land, and that there is no writing evidencing the same, as is required by the Statute of Frauds and Perjuries of this State; and denies that complainant has any interest in said land. 20

BOURGEOIS & COULOMB,
Solicitors of Defendant,
Charles W. Young."

30

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Answer of Defendants Max Grossman, et al.

4. It neither admits nor denies that allegation contained in paragraph 4, as it has no knowledge or information, and leave complainant to prove the same.

5. It neither admits nor denies the allegation contained in paragraph 5 of said bill, as it has no knowledge or information, and leaves complainant to prove the same. 10

6. It neither admits or denies the allegation contained in paragraph 6, as it has no knowledge or information, and leaves complainant to prove the same, except that it denies that it entered into any agreement with Young as agent for another person.

This defendant prays to be dismissed.

JOSEPH A. CORIO,

Solicitor for and of Counsel with Defendant, International Speedway Association." 20

And issue being joined thereon, between the said complainant and the said defendants, and the Chancellor having referred the said cause to the Honorable Robert H. Ingersoll, one of the Vice-Chancellors of this Honorable Court.

AND on the 19th day of June, 1924, the said Vice-Chancellor did proceed to hear witnesses produced on the part of the complainant and on the part of the defendants, and did on the 4th day of October, 1924, advise a decree ordering that complainant's bill of complaint be dismissed. 30

AND THEREAFTER, to wit: On the 4th day of October, 1924, a final decree in the above cause was filed in this Court, in manner and form as follows:

Answer of Defendants Max Grossman, et al.

AND THEREAFTER, on the 4th day of October, 1924, the complainant filed his notice of appeal in the Court of Chancery of New Jersey, whereupon said record of the Court of Chancery was removed into the New Jersey Court of Errors and Appeals, and on the 21st day of October, 1924, complainant filed his petition of appeal in the New Jersey Court of Errors and Appeals, whereby and whereunder he appealed from every part of said decree last above set out, and thereafter, to wit: at the January Term, 1925, the said appeal was duly argued in the presence of the New Jersey Court of Errors and Appeals, and on the 18th day of May, 1925, the following opinion was handed down from the New Jersey Court of Errors and Appeals, affirming the order heretofore set out:

“TRENCHARD, J. Complainant’s bill averred that the defendant Charles W. Young entered into an agreement with the defendant the International Speedway Association, a corporation, for the purchase from the latter of certain lands in Atlantic City; that the \$2,500 Young paid as earnest money was complainant’s; that Young was complainant’s agent in procuring such agreement, having no financial interest in the agreement or in the land; and that, after procuring such agreement, he refused to assign same to complainant, the real and only purchaser.

The prayer of the bill was that ‘it be decreed that in procuring the agreement referred to in the bill defendant Young was acting as agent for complainant; that he holds said agreement in trust for complainant; that he has an interest, legal or equi-

Answer of Defendants Max Grossman, et al.

10 table, in the same or the lands and premises described; that he be commanded to assign, transfer and set over said agreement to complainant; and that the International Speedway Association be required to execute and deliver a deed to complainant,' etc. Both defendants answered, denying the material allegations of the bill. Upon final hearing the Vice-Chancellor considered that the bill should be dismissed. Such a decree was entered, and the complainant appeals. We are of the opinion that the decree should not be disturbed.

20 To warrant the relief asked for in the complaint the evidence must be of such weight and sufficiency as will reasonably justify the court in finding (among other things) the existence of the agency charged in the bill.

30 Apparently the Vice-Chancellor thought that such proof was not adduced, and we think that was right. No documentary evidence was presented in support of complainant's contention that the defendant Young acted solely as his agent in the transaction. True, the complainant himself testified in support of such claim, and there was some corroboration, the preponderance of the evidence was to the contrary. The fact that Young procured from complainant the \$2,500 which he used as cash payment on the contract is far from conclusive upon the question of agency since, as we think, the greater weight of the evidence is that it was procured as a loan. It is undisputed that the complainant knew nothing of the land in question, nothing of the possibility

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Answer of Defendants Max Grossman, et al.

of its purchase, until it was called to his attention by Young, who had an option to purchase it. Young testified that, needing money to finance the purchase, he first went to one Smith, and was by him referred to the complainant. He is corroborated as to that. Young says in effect that his agreement with the complainant was that he should borrow the money from the complainant, procure the contract of sale, and, in the event of a resale within a specified time, the profits were to be divided; otherwise complainant was to have his money returned, less his portion of the expense. 10

It is unnecessary for present purposes to determine precisely what were the contractual relations between the parties. It is sufficient to say that we find that complainant's claim of agency was not made out. We think that a careful consideration of complainant's own testimony indicates that Young was not acting solely as his agent. He unconsciously reveals the fact that he did not regard himself as the owner of the land, but on the contrary recognized Young as having a real interest. He makes repeated reference to 'security for my money.' Moreover, complainant's conduct seems to show that he did not regard Young as his agent. When the contract of sale arrived in Atlantic City from the 'West,' where it had been negotiated by Young, it was examined by complainant, and his attention was drawn to the fact that it was made out to Young or his nominee. With this knowledge complainant and Young went to Mays Landing and had the agreement recorded and it is significant that at this 20 30 40

Answer of Defendants Max Grossman, et al.

10 very time, according to a seemingly disinterested witness, Young declared in complainant's presence, that 'he (Young) had purchased the speedway tract,' and this the complainant did not deny. Finally we call attention to the fact that complainant's later talk with Mr. MacCain in Philadelphia is quite inconsistent with his present claim for relief.

Since the bill was properly dismissed for want of proof of the agency essential to relief, therein alleged, it will be unnecessary to consider other objections leveled against the relief asked for in the bill.

The decree below will be affirmed, with costs."

20 Wherein it appears from the said complaint, answers, testimony, conclusions and final decree, that the said complainant, did complain against said defendants, Charles W. Young, and International Speedway Association for the same matters and to the same effect and for a like relief as the said complainant doth, by his present bill, demand and set forth and which said bill was as aforesaid dismissed and the said relief denied by the final decree of this Honorable Court, entered and enrolled, being affirmed
30 in New Jersey Court of Errors and Appeals, and before complainant's bill of complaint was exhibited in this Court.

All of which matters and things this defendant doth aver to be true and of record in this Honorable Court and that the said matters and things heretofore complained of by the said complainant, are as these defendants doth aver, *res adjudicata* and they do plead the aforesaid
40 final decree between John N. McGarvey, com-

Answer of Defendants Max Grossman, et al.

plainant and Charles W. Young, and International Speedway Association, &c. defendants, entered October 4, 1924, in bar to the said complainant's bill and prays the judgment of this Honorable Court order they should not be compelled to make any other or further answer to the said bill and prays to be hence dismissed with from costs and charges in that behalf most wrongfully sustained. 10

Defendants further answering by way of plea say:

2. That said contract relied upon by the complainant and set forth in paragraphs 1-2-3-4-5-6-7-8 of complainant's bill of complaint, is unenforceable and invalid by reason of the provisions of an Act of the legislature of New Jersey entitled "An Act for the Prevention of Fraud and Perjuries," and especially the third and fifth sections thereof; Compiled Statutes, Volume No. 2, pages 2611 and 2612. 20

Defendants further answering say:

3. The defendants say that they have no knowledge or information sufficient to form a belief as to the matters and things set forth in paragraph 1.

4. The defendants say that they have no knowledge or information sufficient to form a belief as to the matters and things set forth in paragraph 2. 30

5. The defendants say that they have no knowledge or information sufficient to form a belief as to the matters and things set forth in paragraph 3.

6. The defendants say that they have no knowledge or information sufficient to form a 40

Answer of Defendants Max Grossman, et al.

belief as to the matters and things set forth in paragraph 4.

7. The defendants say that they have no knowledge or information sufficient to form a belief as to the matters and things set forth in paragraph 5.

10 8. The defendants say that they have no knowledge or information sufficient to form a belief as to the matters and things set forth in paragraph 6.

9. The defendants say that they have no knowledge or information sufficient to form a belief as to the matters and things set forth in paragraph 7.

20 10. The defendants say that they have no knowledge or information sufficient to form a belief as to the matters and things set forth in paragraph 8.

30 11. The defendants admit that on the 16th day of May, A. D. 1925, Charles W. Young and Irene Young, his wife, conveyed said lands and premises unto Max Grossman and Alfred W. Westney, the answering defendants. Further answering paragraph 9, these defendants deny that they did not pay any consideration for said conveyance, but aver and show the truth to be, that these defendants purchased said lands and premises directly from Charles W. Young and Irene Young, his wife, for a valuable consideration, without NOTICE of complainant's rights, and that they further aver and show the truth to be that they are innocent purchasers for value, without NOTICE of the complainant's rights of the lands and premises in question. Further answering paragraph 9, defendants say
40 either of them, hold title for said property in

Answer of Defendants Max Grossman, et al.

trust for the said Charles W. Young; and further answering paragraph 9, defendants say that they deny that they and each of them or either of them had full and complete knowledge of the rights of complainant and aver and show the truth to be that they had no knowledge of any rights of complainant.

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12. Defendants deny each and every allegation of fact contained in paragraph 10.

13. The defendants admit that the premises in question are correctly described in paragraph 11.

14. The defendants admit the facts contained in paragraph 12.

11½. The defendants further answering aver and show the truth to be, that when they purchased said lands and premises from Charles W. Young and Irene Young, his wife, they paid a valuable consideration for the same and that said purchase was made upon an agreement by and between the said Charles W. Young and Max Grossman and Alfred W. Westney, that a corporation should be organized and that they should convey the lands and premises unto said corporation, and that the capital stock of said corporation should be issued sixty per cent. (60%) unto the defendants Max Grossman and Alfred W. Westney or their nominee and forty per cent. (40%) unto Charles W. Young or his nominee.

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11¾. Defendants further answering complainant's bill of complaint by way of an affirmative defense say:

That the moneys mentioned in the complainant's bill of complaint as having been advanced to the said defendant Charles W. Young, were advanced by the complainant to the said Charles

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Answer of Defendants Max Grossman, et al.

W. Young as a loan, to be repaid by Charles W. Young.

15. The defendants deny each and every allegation of fact contained in paragraph 13.

Defendants pray to be hence dismissed with their reasonable costs and charges in this behalf,
10 most wrongfully sustained.

EMERSON L. RICHARDS,
Solicitor for and of Counsel with Defendants Max Grossman, Shirley Grossman, his wife, Alfred W. Westney and Laura Westney, his wife.

I certify that I have perused the complainant's bill in the above stated cause and the above answer is well founded in point of law.

20 EMERSON L. RICHARDS,
Solicitor for and of Counsel with Defendants Max Grossman, Shirley Grossman, his wife, Alfred W. Westney and Laura Westney, his wife.

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Answer of Defendant Charles W. Young.

**ANSWER OF CHARLES W. YOUNG, ONE OF
THE DEFENDANTS.**

Filed May 6, 1926.

Charles W. Young, one of the defendants in the above proceeding, files this, his answer to complainant's bill in the above matter, to such part thereof as he is advised is material, saving and reserving to himself all benefit and advantages of exceptions to the manifold errors, uncertainties and other imperfections in the plaintiff's bill of complaint contained. 10

1. Denied. I admit that on or about the 22nd day of November, 1923, I told the complainant that a certain parcel of ground then owned by the International Speedway Association, a corporation, and situate on Absecon Boulevard, County of Atlantic and State of New Jersey, was a desirable piece of property to acquire; but deny and say it is not true that I suggested or requested the complainant at that time or at any time to become interested with me in the purchase of the said property "as a joint enterprise." 20

2. Denied. I deny and say it is not true that on or about the 25th day of November, 1923, I agreed with the complainant to join with him "in a joint enterprise of purchasing said property," or that it was agreed between us that complainant was to advance "the amount of money necessary to pay as a down payment upon the purchase of said property," or that I would proceed to Cleveland and carry on negotiations "for the purchase of the said property" as a joint enterprise with the said complainant. I further deny and say it is not true that I "pro- 40

Answer of Defendant Charles W. Young.

ceeded, for and on behalf of the joint enterprise" between complainant and me, to Cleveland.

10 I admit that I carried on negotiations for the purchase of the said land with the proper representatives and officers of the Speedway Association for and on behalf of myself as sole purchaser thereof, and that while there I received a check from the complainant payable to me in the sum of \$1,000.00; but deny and say it is not true that the said check was for the purpose of making a "down payment" on account of the purchase price of the said land as and under an alleged joint venture with complainant. On the contrary, I aver that the said sum of \$1,000.00 was by me received as a part of a loan by the said complainant to me, the total amount of which loan was not to exceed the sum of
20 \$5,000.00.

3. Denied. I deny and say it is not true that upon my return from Cleveland I told complainant that the property could not be purchased for \$25,000.00, or that complainant "authorized" me to "advance the price, but not over \$40,000." I admit that on or about the 3rd day of December, 1923, complainant loaned to me the further sum of \$2,500.00, being a part of the total loan which was not to exceed \$5,000.00, which I negotiated with complainant. I aver that the said sum of \$2,500.00 was in the form of a banker's or cashier's check which by me was used as a payment on account of the purchase price of the said land which I individually and alone purchased from the International Speedway Association. I further admit that I received the further sum of \$625.00 from complainant as another payment on account of the said loan by
30 complainant to me, the total of which was not to
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Answer of Defendant Charles W. Young.

exceed the sum of \$5,000.00. I admit that the agreement of sale for the property was recorded on or about the 12th day of December, 1923, at Mays Landing, in the County of Atlantic, State of New Jersey.

4. Denied. I admit that the agreement of sale was in my name alone as purchaser and aver that the vendor and the complainant well knew that I was the purchaser of the said property. I deny and say it is not true that I ever informed complainant that the title was in my name because I did not want it to appear that I was acting for complainant or any person else, for the complainant well knew I was acting for myself alone in the negotiations and purchase of the said land. 10

5. Denied. I admit that at the time of my negotiation of the loan with complainant, not to exceed the sum of \$5,000.00, it was agreed by and between us that in consideration of the said loan, and in event I became the purchaser of the property, he should have the privilege, as my agent, of reselling the property for a sum in excess of \$75,000.00, until the 5th day of February, 1924; and in event of the resale of the said property by the complainant for the said sum, or any sum in excess thereof before the said date, that the proceeds of the sale, after deducting the purchase price and expenses incident thereto, should be equally divided between complainant and me; but that, in event complainant did not make the resale of the said property for the said price on or before the said 5th day of February, 1924, complainant should be repaid the money actually loaned by him to me, together with interest thereon at the rate of 6%. 20 30 40

Answer of Defendant Charles W. Young.

I admit that I always denied that the complainant had any interest in said land, or in said agreement for its purchase, and also admit that I always stated under all circumstances and to all individuals that I was acting in the purchase of the said land for myself alone.

10 6. Denied. I deny and say it is not true that there was at any time an agreement consummated whereby complainant should receive "the sum of \$25,000.00 plus the moneys which he had invested in liquidation of his rights in said joint enterprise." I admit that after complainant had filed his so-called *lis pendens* at Mays Landing on or about December 15, 1923, I was informed, believe and aver that in certain negotiations carried on between the complainant and Christian S.
20 MacCain, Esquire, the complainant offered to accept the sum of \$25,000.00 and the money which he had loaned to me, and withdraw the alleged *lis pendens*.

30 7. Denied. I deny and say it is not true that I at any time formed a plan of defeating any rights of the complainant in any joint venture between him and me, relating to or growing out of the said land. I admit the execution; acknowledgment and recording of the deeds referred to in the 7th paragraph of complainant's bill; but deny and say it is not true that any or all of the said instruments in writing or deeds were executed "in pursuance of a plan * * * to deprive complainant of his interest in any alleged joint enterprise and in the said property." I deny and say it is not true that "all of the money used in the purchase of the said property was money of the complainant and that the said
40 Charles W. Young did not advance any moneys

Answer of Defendant Charles W. Young.

of his own"; but, on the contrary, I aver that all of the money used in the purchase of said property was my individual money, a part of which had been borrowed from the complainant as hereinbefore set forth.

8. I have no knowledge of the facts averred in the 8th paragraph of complainant's bill and, therefore, neither admit nor deny the facts as therein averred, and if deemed material, ask for formal proof. 10

9. Denied. I admit that by deed dated the 16th day of May, 1925, I, with the joinder of my wife, conveyed title to the said lands and premises to Max Grossman and Alfred W. Westney, and that the said deed was recorded on the date in the book and at the place as averred in the 9th paragraph of complainant's bill. I deny and say it is not true that neither "the said Max Grossman nor Alfred W. Westney paid any consideration for said conveyance and that they and each of them hold title to the said property in trust" for me alone. I aver that the said deed of conveyance for the said land was made to the said Max Grossman and Alfred W. Westney for good and valuable consideration and that they, as of the date of the recording of the said deed, held title for themselves and others to the said property. 20 30

10. Denied. I aver that all money paid on account of the purchase price of the said land, to the International Speedway Association as the purchase price, was by me paid alone and with my funds.

11. Admitted. I admit the general description as set forth in the 11th paragraph of complainant's bill, but not as to the accuracy either 40

Answer of Defendant Charles W. Young.

of metes, bounds, directions or quantities, but believe the same to be approximately correct.

12. Admitted.

10 13. Denied. I deny and say it is not true that the complainant has any interest whatever as a joint venture in and to the whole or any part of the said land.

14. For further answer I aver that on December 27, 1923, the said complainant did exhibit his bill of complaint in this Honorable Court against Charles W. Young, in manner and form as follows:

Then follows the same as in Grossman Answer.

20 Wherein it appears from the said complaint, answers, testimony, conclusions and final decree, that the said complainant did complain against said defendant, Charles W. Young, for the same matters and to the same effect and for a like relief as the said complainant does, by his present bill, demand and set forth and which said bill was as aforesaid dismissed and the said relief denied by the final decree of this Honorable Court, entered and enrolled, being affirmed
30 before complainant's bill of complaint was exhibited in this Court.

And I further aver that all of the said matters and things are true and of record in this Honorable Court and that the said matters and things heretofore complained of by the said complainant, are as I now aver, *res adjudicata*, and I do plead the aforesaid final decree between John N. McGarvey, complainant, and Charles W. Young and International Speedway Association, &c., defendants, entered October 4, 1924, in bar
40 to the said complainant's bill.

Answer of Defendant Charles W. Young.

15. For further answer, I aver that the alleged agency as averred in complainant's bill relates to and concerns an interest in land; that complainant does not allege a writing, and I aver there is no writing evidencing the said alleged interest as is required by the Statute of Frauds and Perjuries of the State of New Jersey; and I further deny and say it is not true that the complainant has any interest in the said land. 10

WHEREFORE, defendant denies that the complainant is entitled in any way to any relief of any kind whatsoever and prays to be dismissed by your Honorable Court with his costs in this behalf sustained and he so makes answer.

CHAS. W. YOUNG, himself (sgd) 20
 4512 Chestnut Street, Phila.
 for Charles W. Young,
 one of the defendants.

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

CHARLES W. YOUNG, of full age and being duly sworn according to law, deposes and says that the foregoing answer is not interposed for delay, but in good faith for the causes therein set forth. 30

Deponent further says that all the facts and statements contained in the said answer, so far as the same are within his knowledge, are true, and when averred on information, he believes them to be true.

CHARLES W. YOUNG (Sgd)

Replication to Answer of Max Grossman, et al.

Sworn to and subscribed before me
this 22nd day of April, A. D. 1926.

JNO. ENNIS, JR.,

A foreign Commissioner of
Deeds for New Jersey in
Pennsylvania.

10

**REPLICATION TO ANSWER OF MAX GROSS-
MAN AND HIS WIFE SHIRLEY GROSSMAN;
ALFRED W. WESTNEY AND HIS WIFE
LAURA WESTNEY.**

Filed May 20, 1926.

20 In reply to the defenses stated in the answer
of the defendants, Max Grossman and his wife,
Shirley Grossman, and Alfred Westney and his
wife, Laura Westney, and not anticipated in the
bill of complaint, complainant by leave of Court,
says:

30 1. He admits that on the 27th day of De-
cember, 1923, he filed a bill of complaint in this
Court against Charles W. Young but as to the
contents of said bill he refers to the records of
this Court. He admits that on the 3rd day of
30 March, 1924, the said Charles W. Young an-
swered the complainant's bill of complaint but
as to the contents of said answer he refers to the
record. He admits that on the 12th day of
March, 1924, the International Speedway Associa-
tion answered complainant's bill of complaint
but as to the contents of said answer, he refers
to the record. He admits that issue was joined
upon said answers and that the cause was re-
ferred by the Chancellor to the Honorable
40 Robert H. Ingersoll, one of the Vice-Chancellors

Replication to Answer of Max Grossman, et al.

of this Court and that on the 19th day of June, 1924, the said Vice-Chancellor did proceed to hear witnesses produced on the part of the complainant and on the part of the defendants to said litigation and did on the 4th day of October, 1924, advise a decree which dismissed the bill of complaint of complainant but as to the form of said decree complainant refers to the record. He admits that on the 4th day of October, 1924, he filed a notice of appeal to the Court of Errors and Appeals and on the 21st day of October, 1924, did file his petition of appeal in the New Jersey Court of Errors and Appeals and that said appeal was duly argued and that on the 18th day of May, 1925, an opinion was handed down by the New Jersey Court of Errors and Appeals which resulted in an affirmance of the decree appealed from but as to the terms of said opinion he refers to the record in the New Jersey Court of Errors and Appeals. He denies that it appears from the said complaint, answers, testimony, conclusions and final decree that the said complainant did complain against said defendants, Charles W. Young and the International Speedway Association for the same matters and to the same effect and for like relief as he doth, by his present bill, demand and set forth.

2. Complainant says that from the said complaint, answers, conclusions, final decree, opinion of the Court of Errors and Appeals and remittitur and the testimony taken in the said cause referred to in the 1st paragraph of the answer herein, but not set forth in full therein, it will appear that the matter in issue in the suit brought by complainant against the said Charles W. Young referred to in the said first

Replication to Answer of Max Grossman, et al.

10 paragraph of said answer was not the same as the matter in issue in the present suit and that the matter in issue in the present suit was not determined in said suit; that the present suit brought by complainant is for a claim and demand different from that upon which the suit referred to in the first paragraph of the answer was brought; that the parties in the suit referred to in the first paragraph of the answer are not and were not the same as the parties in the present suit.

20 3. Further replying to the matters set forth in paragraph 1 of the said answer by way of plea, complainant says that the said answer does not set forth facts sufficient to constitute a bar to relief by complainant herein and that said answer by way of plea, is not good in law and the same benefit of this objection to the answer by way of plea is reserved to complainant as if it had been interposed by motion to strike the said answer by way of plea.

Complainant, further replying to paragraph 2 by way of plea, says:

4. He denies the statements contained in paragraph 2.

30 Further replying, complainant says:

5. He denies the affirmative matter set up in paragraph 11 of the answer and further says that the statements contained in said paragraph are not sufficient to constitute a bar to complainant's right to relief.

40 6. He denies that when said lands were conveyed to the said Max Grossman and Albert W. Westney, the said Max Grossman and Albert W. Westney paid a valuable consideration therefor.

Replication to Answer of Charles W. Young.

With respect to the other matters and things set forth in paragraph 11½ he has no knowledge. He further says that if in fact 40% of the stock of the corporation therein referred to was to be issued to the said Charles W. Young or his nominee, at least complainant is entitled to relief against that 40% interest. He further says that the statements contained in paragraph 11½ are not sufficient to constitute a bar to complainant's right to relief. 10

7. He denies the statements contained in paragraph 11¾.

Complainant joins issue on the remainder of the answer.

CASSMAN & GOTTLIEB,
Solrs. of Complainant. 20

**REPLICATION TO ANSWER OF
CHARLES W. YOUNG.**

Filed May 20, 1926.

In reply to the matters stated in the answer of Charles W. Young and not anticipated in the bill of complaint, complainant by leave of Court, says: 30

1. He denies the statements contained in paragraph 2 that the negotiations of the said Charles W. Young with the officers of the International Speedway Association were on behalf of himself as sole purchaser.

2. He denies the statements contained in paragraph 3 that complainant loaned to the said Charles W. Young the said sum of \$2,500.00 40

Replication to Answer of Charles W. Young.

therein referred to and denies the statements that the property was purchased on the sole account of the said defendant, Charles W. Young, and denies that the further sum of \$625.00 was paid by complainant on account of any loan.

10 3. He denies the statements contained in paragraph 4 that he knew that the said Charles W. Young was the purchaser of the said property and denies that he knew the said Charles W. Young was acting for himself alone in the negotiations of purchasing the said lands and he re-asserts the statements contained in the bill of complaint with respect thereto.

20 4. He denies the statements contained in paragraph 5 with respect to any loan from complainant and denies that he was to act as agent of the said Charles W. Young upon any re-sale and denies that there was any agreement whatever that in the event the complainant did not make a re-sale of said property for the price of \$75,000.00 before the 5th day of February, 1924, complainant should be repaid the money actually loaned by him, together with interest thereon at the rate of six per cent. He denies the remaining affirmative statements contained in paragraph 5.

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5. He denies the affirmative statements contained in paragraph 6.

6. He denies the affirmative statements contained in paragraph 7.

7. He denies the affirmative statements contained in paragraph 9.

40 8. He denies the affirmative statements contained in paragraph 10.

Replication to Answer of Charles W. Young.

9. Further replying to the answer complainant admits that on or about the 27th day of December, 1923, he filed a bill of complaint in this Court against the said Charles W. Young but with respect to the contents of said bill he refers to the record. He admits that on or about the 3rd day of March, 1924, said Charles W. Young made answer to complainant's bill but as to the contents of said answer he refers to the record. He admits that on or about the 12th day of March, 1924, said International Speedway Association made answer to complainant's bill but as to the contents of said answer he refers to the record. He admits that issue was joined upon said answers and that the Chancellor referred the said cause to the Honorable Robert H. Ingersoll, one of the Vice-Chancellors of this Court and that on the 19th day of June, 1924, the said Vice-Chancellor did proceed to hear witnesses produced on the part of the complainant and on the part of the defendants and did on or about the 4th day of October, 1924, advise a decree which had the effect of dismissing complainant's bill of complaint and that on the 4th day of October, 1924, a final decree dismissing the bill of complaint was filed but as to the contents of said decree he refers to the record. He admits that on or about the 4th day of October, 1924, he filed his notice of appeal to the New Jersey Court of Errors and Appeals and on or about the 21st day of October, 1924, filed his petition of appeal in the New Jersey Court of Errors and Appeals and that thereafter at the January term, 1925, said appeal was heard and that on or about the 18th day of May, 1925, an opinion was filed in the New Jersey Court of Errors and Appeals which directed the affirmance of the decree of

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Replication to Answer of Charles W. Young.

the Chancellor but as to the wording of said opinion, complainant refers to the record. He denies that it appears from the said complaint, answers, testimony, conclusions and final decree that the said complainant did complain against the said defendant, Charles W. Young, for the same matters and to the same effect and for the same relief as he does by his present bill demand and set forth. He says that an inspection of the said bill of complaint, answers, testimony, conclusions and final decree and remittitur of the Court of Errors and Appeals and particularly the testimony taken in said cause, which is referred to but not set forth in said answer, it will appear that the issues tendered in the present proceedings were neither tendered nor decided in the case referred to in paragraph 14 of the answer and that the matters now tendered were not within the issues and were not intended to be decided.

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10. Complainant says that the said paragraph 14 of the answer does not set forth facts constituting a bar to complainant's right to relief and he prays the same benefit as if he had moved to strike said paragraph 14 of the answer.

11. He denies that the statements contained in paragraph 15 of the answer are sufficient to constitute a bar to complainant's right to relief.

12. Complainant further replying says that the defendant, Charles W. Young, has not tendered repayment to complainant of the amount of money admittedly advanced by complainant which was used in the purchase of said lands and premises and that in any event complainant is entitled to a lien upon said lands and premises

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Notice.

for the amount of money admittedly so advanced by him and used in the purchase of said lands and premises.

Complainant joins issue upon the remainder of the answer.

CASSMAN & GOTTLIEB, 10
Solsrs. of Complainant.

NOTICE.

Filed July 21, 1926.

To the Complainant, John N. McGarvey:

TAKE NOTICE that on the 27th day of July, A. D. 1926, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard at the Chancery Chambers in the City of Atlantic City, New Jersey, I shall apply to the Chancellor for a final decree adjudging that the bill of complaint filed by you in the above entitled cause, is *res adjudicata*, you having joined issue on an answer in lieu of a plea, setting up the defense of *res adjudicata*. 20

Dated July 21, A. D. 1926. 30

EMERSON RICHARDS,
Solicitor for and of Counsel for the
Defendants.

Conclusions.

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Filed October 17, 1926.

Messrs. Cassman & Gottlieb for the complainant.

10 Mr. Emerson Richards, Mr. John C. Reed and
Mr. Ruby R. Vale for the defendants.

INGERSOLL, *V.-C.*

20 On December 27, 1923, John N. McGarvey filed a bill in this Court against Charles W. Young, and the International Speedway Association, a corporation, in which he alleged that the International Speedway Association had entered into an agreement with the defendant, Young, by which it agreed to sell certain lands therein described to said Young. This agreement is attached to the bill of complaint as Exhibit "A." That Young was complainant's agent in procuring said agreement, and that Young had acted only as agent and for the benefit solely of complainant; that Young had fraudulently repudiated the contract with complainant.

The prayer of the bill, in addition to those praying for answer and subpoena was:

30 "That it be decreed that in procuring the agreement referred to in the bill the defendant Young was acting as agent for complainant, that he holds said agreement in trust for complainant, that he has no interest legal or equitable in the same or the lands and premises described, that he be commanded to assign, transfer and set over said agreement to complainant and that the International Speedway Association be required to execute and deliver a deed to complainant for the lands and premises described in the agree-
40 ment upon complainant's complying with the

Conclusions.

terms and conditions thereof, and that complainant may have such other and general relief as may be agreeable to equity."

Answer and replication were filed; hearing was had, opinion was filed, in which this Court held, "Should the complainant accept a decree for the repayment of the money advanced by him in the enterprise such decree will be advised, otherwise the bill must be dismissed." 10

In accordance therewith a final decree dismissing the bill was advised on October 4, 1924.

An appeal was taken with the result that the decree was affirmed. May 18, 1925, 3 Ad. Rep. No. 21, page 932, 129 Atl. 199.

On September 4, 1925, the complainant (by other counsel than those who represented him in the former suit) filed a bill in much greater detail alleged the facts set forth in the former bill. The same agreement is attached to the bill of complaint and marked Exhibit II. 20

In said bill it is averred that title of the International Speedway Association has been conveyed to one Safford and by Safford to Young. The International Speedway Association is therefore not made a party defendant.

The bill also alleged that Young and his wife conveyed said premises to Max Grossman and Alfred W. Westney, and that they hold said property in trust for Young. Grossman and Westney, and their wives have therefore been made party defendants. 30

The prayers of the bill, in addition to those for answer and subpoena are:

"2. That it may be determined that the said Max Grossman and Shirley, his wife, and Alfred W. Westney and Laura, his wife, hold 40

Conclusions.

10 said property as trustees for complainant under a resulting trust or in the alternative for the said Charles W. Young and the complainant as joint adventurers and that the rights and interests of the said Charles W. Young and the complainant may be fixed and determined or in the alternative to secure to complainant the repayment to complainant of the amount of money invested by complainant in said lands and premises and the sum of \$25,000.00 with interest as the value of complainant's interest in said joint adventure.

3. That complainant may have such other and further relief as may be proper."

20 In the former bill, the complainant in clause 6, said "The action of said Young is a fraud upon complainant and an attempt to deprive complainant of his rights in the agreement which was procured while said Young was acting solely as agent for complainant."

30 The defendant moved to dismiss the bill because: a. That a previous proceeding estops the complainant from proceeding in this cause. b. That the decree in the former action was *res adjudicata* as to the present action. c. That the complainant's case is within the statute of frauds.

After hearing arguments the motion was denied and the defendants were given time to file answer.

*The reason impelling me to deny this motion was that there was nothing before me to prove the facts alleged in the motion; the motion of course being upon the facts stated in the bill.

40 The defendants then filed an answer by way of plea, in which they set forth the pleadings in the

Conclusions.

previous case, the appeal and the opinion of the Court of Errors and Appeals and alleging *res adjudicata*, with prayer for dismissal.

Replication is filed admitting the pleadings in the previous case, but denying *res adjudicata*, and alleging new parties. A reply is filed presenting not only the pleadings in, but the testimony in the previous hearing. 10

Motion is now made to dismiss the bill.

The Court of Errors and Appeals *In re Walsh Estate*, 80 N. J. Eq. 565, on p. 569, said:

“The doctrine of *res adjudicata* has been clearly defined in this state, and it is the law ‘that the judgment of a court of competent jurisdiction on a question of law or fact or on a question of mixed law and fact, once litigated and determined, is, so long as it remains unreversed, conclusive upon the parties and their privies, not only as to the particular property involved in the suit in which it is pronounced, but as to all future litigation between the same parties or their privies, touching the subject-matter, though the property involved in the subsequent litigation is different from that which was involved in the first.’ ‘All that is required in cases where the prior and subsequent litigations involve different things, to render the judgment in the first conclusive upon the parties in the subsequent, is that there shall be substantial identity in the subject-matter of the two, and that must always be the case, as is obvious where the judgment in the first rests on a decision of the same question substantially which is presented for decision by the subsequent.’ *City of Paterson v. Baker*, 51 N. J. Eq. (6 Dick.) 57. All that is necessary upon the same point or 20
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Conclusions.

question which, in essence and substance, was litigated and determined in the first suit, and in such a case the parties and those in privity with them are concluded, 'not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to
 10 any other admissible matter which might have been offered for that purpose.' *Ibid*, 51 N. J. Eq. (6 Dick.) 53; *Cromwell v. Sac County*, 94 U. S. 351, 352; 24 L. Ed. 195.

"Where the second action is upon a different claim or demand, but between the same parties, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered. *City of Paterson v. Baker*, 51 N. J. Eq. (6 Dick.) 54.
 20 See, also, *Mershon v. Williams*, 63 N. J. Law (34 Vr.) 401; *Clark Thread Co. v. William Clark Co.*, 55 N. J. Eq. (10 Dick.) 662; *Mercer County Traction Co. v. U. R. R. & Co.*, 64 N. J. Eq. (19 Dick.) 594. The judgment is final between the parties as to all defenses which were or could have been set up in the earlier suit. *Thompson v. Williamson*, 67 N. J. Eq. (1 Robb.) 212, 214.
 30 'It is not necessary that the action in which the judgment is found, and that in which it is relied on as an estoppel, should be of the same kind, or for the same cause of action.' *Sawyer v. Woodbury*, 7 Gray (Mass.) 502; 66 Am. Dec. 518; *City of Paterson v. Baker*, 51 N. J. Eq. (6 Dick.) 54. The doctrine is not a mere rule of procedure, but a rule of justice unlimited in its operation, which must be enforced whenever its enforcement is necessary for the protection and security of rights and for the preservation of the repose
 40 of society. *City of Paterson v. Baker*, 51 N. J.

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Eq. (6 Dick.) 59; *Putnam v. Clark*, 34 N. J. Eq. (7 Stew.) 540. It is a rule of law based upon two grounds: The first, that there should be an end to litigation, and the second, that a person should not be twice vexed for the same cause. 24 Am. & Eng. Encycl. L. (2d ed.) 713, 714, and cases cited.

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 “Referring now to the exceptions, it will be seen that the first is to the prayer for allowance of \$1,000, and that the second is to the prayer for allowance of the proceeds of a mortgage claimed to have been advanced to the deceased, amounting to \$816.80. This is the Abigail F. Hugg mortgage, with the proceeds of the sale of which the accountant charges herself. The conclusion which I have reached with regard to these items is that they are *res adjudicata*. An examination of the record of the chancery suit will show that each was included in the bill of complaint, and that the plea makes no exception, but alleges that all of the said bonds, mortgages, shares of stock and other personal property, in the bill of complaint mentioned, passed to the said Ida E. Wagner for a good and valuable consideration. The decision of the Court was unquestionably adverse to this contention and necessarily included everything 20
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 If they had not been in her possession, would

Conclusions.

10 she have adopted a procedure which admitted possession? After having alleged in the chancery suit that she had them in possession, and having submitted the ownership thereof to the decision of that Court, she would not now be allowed to play fast and loose with courts, and with the administration of justice, and be permitted to deny that which she admitted in the previous suit. Otherwise we would strike at the basic principle of the doctrine of *res adjudicata*, would justify trifling with legal procedure and with the stability of legal decisions. Lord Rose-
 20 dale once said that it was more important that an end should be put to litigation than that justice should be done in every case. *Beteman v. Willoe*, 1 Sch. & L. 201; *Dunham v. Downer*, 31 Vt. 250, 256; *Schumann v. Weatherhead*, 1 East 537; *Claggett v. Simmes*, 25 N. H. 402."

Vice-Chancellor Backes in *Sarson v. Maccia*, 90 N. J. Eq. 433, said: "Nor in order to raise the estoppel, is it necessary that the pleadings in the first suit should have counted upon the precise false representations set up as the cause of action in the second. It is enough if the matter was triable in the first suit, and that it was actually litigated and adjudicated."

30 "This defense can be interposed by way of plea in bar." *Wala v. Meirs*, 80 N. J. Eq. 488, at page 499.

As recently as November, 1925, the Chancellor in *Cashin v. Alamac Hotel Co.*, 131 Atl. 117, at page 121, said: "In *City of Paterson v. Baker*, 51 N. J. Eq. 49, 26 A. 324, Vice-Chancellor Van Fleet, quoting from *Cromwell v. Sac County*, 94 U. S. 351, 24 L. Ed. 195, said (51 N. J. Eq. at page 53, 26 A. 325), that parties and
 40 those in privity with them are concluded, "not

Conclusions.

only as to every matter * * * offered and received to sustain or defeat the * * * demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery," etc. Again, the same Vice-Chancellor in the same cause, quoting from *Beloit v. Morgan*, 7 Wall. 619, 19 L. Ed. 205; said (51 N. J. Eq. at page 56, 26 A. 326):

"That the judgment of a Court having jurisdiction of the parties and the subject-matter of the suit, is conclusive, not only as to the *res* of that case, but as to all further litigation between the same parties touching the same subject-matter, though the *res* itself may be different."

The second bill is based upon exactly the same subject-matter as was the first bill.

In the present bill, it is alleged that the purchase was a joint enterprise. The prayer for relief in the original bill included a prayer for general relief.

All the questions of fact arising, in connection with the transaction between complainant and defendant, have been litigated and determined in the former suit, and the parties and their privies are therefore concluded—not only as to every matter which was offered and received to sustain or defeat the claim, but as to any other admissible matter which might have been offered for the purpose. *Ibid*, 51 N. J. Eq. 53.

The complainant has once presented his case, failed in this Court, appealed and failed in the Court of Errors and Appeals, and now presents

Conclusions.

the same facts—changing only his conclusions as to the effect of such facts, and asks the Court to again hear the same case. It would be a travesty on Court procedure, were complainants permitted to repeatedly present the same facts to the Court, only claiming different forms of relief. Such procedure would strike at the basic principle of the doctrine of *res adjudicata*, and would be trifling with legal procedure, and with stability of legal decisions. In *re Walsh, Ibid*, 80 N. J. Eq. 565.

Objection is made to the timeliness of the present motion to dismiss.

It is sufficient to say, that the question of *res adjudicata* is clearly presented by the replication, wherein the complainant admits the pleadings by reference to the record, the issue, the hearing, the decree, the appeal, and the affirmance of the decree appealed from.

An examination of the respective pleadings results in the conclusion above reached, and it would only be trifling with legal procedure to say that it is necessary to proceed to a final hearing, to determine the present question.

The bill will be dismissed.

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Order Dismissing Bill.

ORDER DISMISSING BILL.

Filed November 3, 1926.

This cause coming on to be heard before the Honorable Robert H. Ingersoll, one of the Vice-Chancellors of this Court, on motion to dismiss complainant's bill and the said motion having been heard in the presence of Emerson L. Richards, John C. Reed and Ruby R. Vale, Esquires, of counsel with the defendants, and Cassman & Gottlieb, Esquires, of counsel with the complainant, and the pleadings having been read and argument having been heard and the Court being of the opinion that the complainant is not entitled to the relief prayed for in his bill; 10

IT IS, THEREFORE, on this third day of November, A. D. 1926, on motion of Emerson L. Richards, John C. Reed and Ruby R. Vale, Esquires, solicitors for and of counsel with the defendants, ORDERED, ADJUDGED and DECREED, that the bill in the above cause be and the same is hereby dismissed with costs. 20

E. R. WALKER,
C.

Respectfully advised,

R. H. INGERSOLL, 30
V.-C.

"Filed: Nov. 3, 1926. Ingersoll, V.-C."

Notice of Appeal.

NOTICE OF APPEAL.

Filed December 5, 1926.

To Emerson L. Richards, solicitor of Max Grossman and Shirley Grossman, his wife; Alfred W. Westney and Laura Westney, his wife:

10 To:

The complainant, John N. McGarvey, hereby appeals from the whole and every part of the order and decree of the Chancellor made upon the advice of the Honorable Robert H. Ingersoll, Vice-Chancellor, in this cause on the 3rd day of November, 1926, which ORDERS, ADJUDGES and DECREES that the bill in this cause be and the same is hereby dismissed with costs, to the New Jersey Court of Errors and Appeals in the last
20 resort in all causes.

CASSMAN & GOTTLIEB,
Solicitors of Complainant.

Dated: November 5, 1926.

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

30 MERRITT LANE,
Of Counsel with Complainant-Appellant.

Petition of Appeal.

PETITION OF APPEAL.

Filed December 5, 1926.

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

The petition of John N. McGarvey, complainant-appellant, in the above-entitled cause, respectfully shows that your petitioner finds himself aggrieved by an order or decree made in the Court of Chancery by his Honor Edwin Robert Walker, upon the advice of the Honorable Robert H. Ingersoll, Vice Chancellor, bearing date the 3rd day of November, 1926, in a cause wherein your petitioner, John N. McGarvey, was complainant and the said Charles W. Young, Max Grossman and Shirley Grossman, his wife; Alfred W. Westney and Laura Westney, his wife, were defendants, in this respect, to wit: That the said order or decree directs that the bill in the said suit be dismissed with costs upon the ground that the same is erroneous for that the order should have denied the motion to dismiss the bill or should have decreed that the complainant was entitled to the relief prayed for by the pleadings and should have overruled the answers filed and answers in lieu of plea filed by the defendants for the reason that as matter of law, upon the pleadings as filed, the defense of *res adjudicata* was not made out and did not constitute a bar to the relief prayed for by complainant in his bill and for the reason that the Court erred in holding that upon the pleadings the defense of *res adjudicata* had been made out and for the reason that the Court should not have, at the then stage of the proceedings, considered the motion to dismiss the bill, the cause

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Petition of Appeal.

being at issue and for the reason that the Court did not have before it a sufficient record to determine whether the defense of *res adjudicata* had been made out and for other reasons.

10 Petitioner therefore prays that the said decree of the said Chancellor may in the particulars aforesaid, be reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as the Court shall deem proper.

CASSMAN & GOTTLIEB,
Solicitors for Complainant-Appellant.

MERRITT LANE,
Of Counsel with Complainant-Appellant.

20 Formal answer to petition of appeal filed January 5, 1926.

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*Offer of Documentary Evidence.***Testimony in Previous Suit.**

IN CHANCERY OF NEW JERSEY.

*Between*JOHN N. MCGARVEY,
*Complainant,**and*CHARLES W. YOUNG, *et al.*,
*Defendants.**On Bill, &c.* 10
Final
Hearing.

Atlantic City, N. J., June 19, 1924.

TESTIMONY

Before HON. ROBERT H. INGERSOLL, Vice- 20
Chancellor.

Appearances:

For the complainant: Messrs. Cole & Cole.

For the defendant, Young: Emerson L.
Richards, Esq.For the defendant, International Speedway
Association: Ruby R. Vale, Esq.Mr. Cole: I want to offer the copy of the 30
agreement referred to in the bill between Inter-
national Speedway and Young.(Paper admitted in evidence and marked Ex-
hibit P1.)I want to offer in evidence a certified copy of
the *lis pendens* filed in this case.(*Lis pendens* admitted in evidence and marked
Exhibit C2.)Also certified copy of a quitclaim deed dated 40
January 9, 1924, between Charles W. Young and

John N. McGarvey, direct.

Irene M. Young, his wife, and International Speedway Association, recorded January 12, 1924, Deed Book 731, page 435.

(Certified copy of deed admitted in evidence and marked Exhibit C3.)

10 JOHN N. MCGARVEY, the complainant, sworn.

Direct examination by Mr. Cole.

Q Are you the complainant in this suit? A Yes, sir.

Q Where do you live? A 4814 Trinity Place, Philadelphia.

Q How long have you lived in Philadelphia? A All my life, about fifty years.

20 Q What is your business? A Real estate operator and builder.

Q Do you know Charles W. Young, one of the defendants in this case? A I have met him. I know him.

Q About when did you first meet him? A On or about the 22nd of November last Mr. Young came to my office.

30 Q That is the date, November 22nd? A About that time; I am not certain about the date of his first coming to my office; about the 22nd.

Q Had you known him before then? A No, sir.

Q Did he come uninvited, by arrangement or how? A He came to me and said that he was sent to me by J. Willison Smith, the president of the West End Trust Company of Philadelphia.

40 Q Tell us what occurred between you there? A He came into the office and after introducing himself as Mr. Young, stating that Mr. Smith had sent him, he stated that he was a close per-

John N. McGarvey, direct.

sonal friend of Mr. Smith. He then delivered a harangue on the love and respect—

Mr. Richards: I object and ask that be stricken out.

The Court: Sustain the objection.

Q Don't characterize what he did or said, tell us what he said as near as you can recall it. A That is what I am trying to do. He came and said to me that Mr. Smith had sent him, then proceeded to tell me how well he knew Mr. Smith, and why Mr. Smith had sent him, because of the close intimacy between himself and Mr. Smith, and a number of successful transactions that he had with Mr. Smith, and then he proceeded to offer some letters or other credentials, supposedly from his friend Stotesbury, John Wanamaker, and somebody connected with Pierpont Morgan, and I said that was unnecessary, that Mr. Smith's introduction was sufficient to me, it didn't make any difference or how many important other credentials he had, that that had no influence with me, Mr. Smith's introduction was sufficient. And then he proceeded to tell me that I had been recommended by Mr. Smith as a man who was acquainted with values in Atlantic City and I might be interested in the proposition that he had, and his proposition was: There was a piece of ground over on the Absecon Boulevard belonging to a company called the International Speedway Association, supposedly a subsidiary of Durant, and he thought it was a wonderful opportunity, and he wanted to know whether I would be interested in the purchase of that property, and I said to him, "Well, why do you come to me?" I said, "If it is so good and you think so well of it, why don't you buy it your-

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John N. McGarvey, direct.

self?" "Well," he said, "I very reluctantly have to tell you that I am broke," and that is about the only truthful statement that I found.

Mr. Richards: I object.

The Court: Let that be stricken.

10 Q Just tell us what occurred. A I am trying to do that.

Q We will decide the facts later on, the Court will. A I am permitted to say he told me he was broke, am I not?

Q You have testified to that. A He said if I would investigate this property and first satisfy myself as to its value, would I be interested in the purchase of the property? A lot of other stuff took place which I presume has no bearing
20 on this case.

Q So long as it is not essential we can eliminate that. A I want to get right down to facts; I don't want to go into any of these harangues.

The Court: Let that be stricken.

Q Mr. McGarvey, answer the questions, and the facts, what occurred, and not your comment upon the result of those facts. A All right, I
30 will try to do so, your Honor. Mr. Young then made an arrangement for me to meet him at Atlantic City, I think it was the next day after his visit to my office, or perhaps an additional day, I am not certain about the exact day, but I met Mr. Young at Atlantic City and he had a car in front of the Reading, and he and another gentleman, they wheeled me out to the ground on Absecon Boulevard. I said to him that I would
40 like to have an opportunity to investigate the value from some friends of mine in Atlantic City,

John N. McGarvey, direct.

and when we returned we parted, and I inquired from those friends in Atlantic City.

Q You can't tell us that. Was the land which he took you to the land that is involved in this case? A Absolutely.

Q Now, when did you next meet Mr. Young? A Why, in the evening of that same day I had dinner with Mr. Young at the Chalfonte Hotel. 10

Q What took place then? A Well, a general conversation about the ground and about its possibilities.

Q When next? A The next time I saw Mr. Young might have been the next day or the following day because he had some business that detained him over night here in Atlantic City. Whether it was the next day or the following day I do not recall now, but he then said he would go to Cleveland—the price that he had quoted to me on the ground I think was around fifty thousand dollars, and I said no I wouldn't give that for it, I would give twenty-five thousand dollars for the property. He wanted a check of five thousand and I said twenty-five hundred ought to be enough, so he went to Cleveland— 20

Q Just before you come to him going to Cleveland, you say he had mentioned Mr. Smith's name; did you meet Mr. Smith with him touching this matter before Mr. Young went to Cleveland? A No, I talked to Mr. Smith. 30

Q When Mr. Young was present? A No.

Q All right. Then he went to Cleveland. Now before he left for Cleveland did you give him any money or a check? A No, he went to Cleveland some time about the—well, I don't know what time he left for Cleveland, but he called me up on the phone at half-past two in the morning from Cleveland, I think that was the 27th of November. 40

John N. McGarvey, direct.

Q All right. Now right there, did you receive any communications from him while he was in Cleveland? A Oh, yes; several letters and telegrams.

10 Q I show you a letter addressed "Dear Mr. McGarvey" signed "Charles W. Young," and ask you if you know in whose handwriting A That is Mr. Young's handwriting.

Q How did that reach you? A By mail. The envelope is there.

Q Now, here appears to be an envelope postmarked— A Two envelopes.

20 Q First of all an envelope postmarked Cleveland, Ohio, November 29th, the letter has no date; what is your recollection as to when you received that, about? A Prior to me sending a check; he has no date on this letter, and there are two envelopes there.

Mr. Cole: There are two sheets; I will offer that letter in evidence.

Mr. Richards: We have no objection.

(Letter admitted in evidence and marked Exhibit C4.)

30 Q I show you another letter purporting to come from Cleveland, Ohio, sent to you and signed "Charles W. Young"; it is without date, and I ask you— A The date is fixed by—

Q Wait a moment—in whose handwriting is that? A Mr. Young's.

Q Do you know about when you received that? A I received that day, evidently the day after Thanksgiving because it indicates that it was written on Thanksgiving day.

40 Q I show you an envelope postmarked Cleveland, Ohio, November 30th, what is your judg-

John N. McGarvey, direct.

ment as to whether the letter was enclosed in that envelope?

Mr. Richards: I object to what his judgment was, let him testify to facts.

A I will testify—

Q Wait just answer the question.

10

Mr. Cole: I offer the letter in evidence.

(Letter admitted in evidence and marked Exhibit C5.)

Q I show you an envelope postmarked Cleveland, Ohio, November 30th, addressed to Mr. John W. McGarvey and ask you if you know in whose handwriting that is? A Mr. Young's.

Q Did you receive a letter with that envelope?

20

A I did.

Mr. Cole: Offer the envelope.

(Envelope admitted in evidence and marked Exhibit C6.)

Q Did you on or about November 28th write Mr. Young at Cleveland, Ohio? A I did.

Mr. Cole: Will you produce the original letter of November 28, 1923, from McGarvey to Young of which this is a copy?

30

(Letter produced by defendant's counsel.)

(Letter offered and admitted in evidence and marked Exhibit C7.)

Q I show you a letter purporting to come from Cleveland, addressed to you and signed Charles W. Young and ask you in whose handwriting is that? A Mr. Young's.

40

John N. McGarvey, direct.

Mr. Cole: Offer the letter in evidence.

(Letter admitted in evidence and marked Exhibit C8.)

10 Mr. Cole: This letter reads: "My dear Mr. McGarvey: Yours of the twenty-eighth enclosing check for one thousand, arrived eleven p. m. tonight. If I do not secure agreement duly signed, sealed and delivered by proper officers your check will not be cashed and will be returned to you. I am dealing with real men here and we all think the poor fellow will come clean. I may have to stay over here next week. Will keep you informed. Sincerely yours, Charles W. Young. Many thanks."

20 Q How did that letter reach you? A By mail.

Q I show you an envelope postmarked Cleveland, Ohio, November twenty-ninth, addressed to John N. McGarvey and ask you in whose handwriting? A Mr. Young's.

(Envelope admitted in evidence and marked Exhibit C9.)

30 Q I show you a telegram dated December seventh from Cleveland, Ohio, addressed to you and signed Charles W. Young and ask you whether you received the telegram? A I received that telegram.

Q Where? A 4814 Trinity Place.

Q Philadelphia? A Philadelphia.

Mr. Cole: Offer the telegram.

40 (Telegram admitted in evidence and marked Exhibit C10.)

John N. McGarvey, direct.

Q Did you receive a telegram after that? A I received another telegram after the signing of the agreement.

Q Is that it? A That is it.

Q December the eighth? A December the eighth.

Mr. Cole: I offer that telegram. 10

Mr. Richards: We have no objection to the copy of the telegram offered in evidence.

Q Is this what you received yourself? A No, they gave me the usual telephone message, as they do, and then I asked for the sending of the telegram and they sent that.

(Telegram offered and admitted in evidence and marked C11.) 20

Mr. Richards: Let's agree, Mr. Cole, as to the interpretation, it is important. As I understand the three words, my Latin is still with me, "I came, I saw, I conquered." Is that right?

Mr. Cole: Julius Cæsar, something like that.

Mr. Richards: It is a quotation and the interpretation of the quotation is, "I came, I saw, I conquered." 30

Q I show you an envelope postmarked Philadelphia, December 8th, addressed to John N. McGarvey. A Yes, sir.

Q Whose handwriting is that? A Mr. Young's.

Q Did that contain anything? A That contained a silly postal card. 40

John N. McGarvey, direct.

Q Strike that out. A Contained a postal card.

Q Is that the postal card? A That is the postal card.

10 Mr. Cole: Offer in evidence envelope and postal card.

(Envelope and postal card admitted in evidence and marked respectively Exhibits C12 and 13 without objection.)

Q This postcard is mostly typewritten, but at the bottom there is written in ink the words "Enclosed in envelope." Was that on the postcard when you received it? A Yes, sir.

Q Do you know whose handwriting that is? A Mr. Young's.

20 Q I show you a check number C5354 of the Girard Trust Company, to the order of Charles W. Young for a thousand dollars, and ask you whether that is your thousand dollar check referred to in the letter already offered in evidence? A Yes, sir.

Mr. Cole: Offered in evidence.

30 Mr. Richards: I object to the offer, if your Honor please, on the ground it is not supported by the testimony. The check is a cashier's check and his testimony that it was his check.

(Question repeated.)

Q Make that the thousand-dollar check referred to. A It is.

Mr. Cole: I offer it.

40 (Check admitted in evidence without objection and marked Exhibit C14.)

John N. McGarvey, direct.

Q Whose money was it represented by that check? A My money.

Q How did your money come to pay for this check? A Why I went to the Girard Trust Company and gave them the money to get a New York draft, because it had to be cashed in Cleveland, with that letter.

10

Q Then you gave the Trust Company a check? A Absolutely.

Q Or cash, I mean. A The cash.

Q And they gave you this for that? A They gave me that check or that draft.

Q I show you your own check on the Ocean City Title and Trust Company, dated December tenth, 1923, to the order of Young, and ask you whether that check was cashed and charged to your account? A Yes, sir.

Q Who endorsed it? A Charles W. Young.

20

Q In connection with this transaction? A Yes, sir.

Mr. Cole: Offer that.

The Court: What is the amount of that?

Mrs. Cole: \$625.

Mr. Richards: No objection.

(Check offered and admitted in evidence and marked Exhibit C15.)

30

Q I didn't ask you, but whose endorsement is on the back of the draft for a thousand dollars? A Charles W. Young.

Q I show you a receipt dated December tenth and ask you who signed that receipt? A Charles W. Young.

Q Who drew the body of it? A I did.

Mr. Cole: Offer this in evidence.

40

John N. McGarvey, direct.

Mr. Richards: No objection.

(Receipt offered in evidence and marked Exhibit C16.)

Q Do you know how that \$1125 was made up?

A Yes, sir.

10 Q How? A On November twenty-seventh, he called me over the long distance phone from Cleveland at half-past two in the morning and said that the deal did not look very good, that Mr. Berlekamp was in financial difficulty, and of course I knew about his other difficulty in Atlantic City, and he said that if I could spare a thousand dollars and send it on, that it would aid materially in closing up this deal because of the fact that Mr. Berlekamp and his brother and his brother's wife controlled the company, and
20 that he was in financial distress and if I could aid him in any possible way it would help the deal. I said, "I don't know Mr. Berlekamp, and why should I send money to Mr. Berlekamp?" Well he said, "You know me." He says, "Will you send a draft to me, payable to my order out here, New York funds, so as I can have cash in Cleveland?" I said, "All right, I will send you that tomorrow accompanied by a letter
30 of instructions as you and I understand."

Q Is your mind addressed to this receipt? A No.

Q I am asking you —. A No, I am leading up to why that receipt —

Q I didn't ask you that, I asked you how the \$1125 of that receipt was made up? A That was made up by the thousand dollars and the six hundred and twenty-five dollar check, constituting \$1625 Mr. Young, when he came back—
40 may I bring in the \$625 now?

John N. McGarvey, direct.

Q I want you to explain how that \$1125 is made up. A I don't want to be called down by the Court.

Q I am telling you what I want you to explain. A \$1125 was made up by a deduction of \$500 from the two checks. He asked me if I did not think that I ought to agree to stand some part of the expense to which he had been put, and I said, "Well, how much do you think that I ought to stand?" And he said, "Five hundred dollars." I said, "All right," and he gave me a receipt for the \$1125 which constitutes the difference between the \$1000 and the \$625 check. 10

Q Now when did you first see Mr. Young after he returned from Cleveland? A Well, after I sent the check of a thousand dollars and got this receipt, he returned—let me see, the check was sent on the twenty-eighth of November, and his letter of receipt I think shows by the envelope dated the thirtieth of November, let's see just what date that was on, that was on a Thursday — 20

Mr. Richards: I object to the witness consulting a memoranda unless we know something about the memoranda. 30

A I am consulting a calendar, not a memoranda.

Mr. Richards: Then I object to that.

Mr. Cole: He has a perfect right to consult a calendar.

Mr. Richards: I object, if your Honor please.

Mr. Cole: I will withdraw it. 40

John N. McGarvey, direct.

Q Will you please tell me, as near as you can recall when you saw Mr. Young? A I saw Mr. Young I imagine, about, on this trip, about the first or second day of December.

Q I am talking about now after he came back from Cleveland? A Right.

10 Q Is that correct? A Yes.

Q Where did you see him? A He came to my office.

Q What took place between you then? A He then recited to me the difficulty he was having in closing the deal up out there, that some of the stockholders were objecting to selling the property at so low a price, and he thought he ought to have leeway. I had given him a price of twenty-five thousand dollars, and thought he
20 ought to have some leeway, and he wanted to know how far I would go beyond the twenty-five thousand dollars rather than lose the deal. Well, I said, possibly thirty-five thousand dollars but not over forty, but I said, "You hold fast to the twenty-five thousand dollars." And then he said, "I have arranged so that you won't have to put up five thousand dollars, twenty-five hundred will be sufficient at this time, later, if you need an extension, then we can put up the
30 twenty-five hundred dollars additional" and it was on that trip back from Cleveland, I gave him the \$2500 draft drawn to the order of the International Speedway.

Q I show you what purports to be a draft dated Philadelphia, December third, 1923, for \$2500, and ask you whether that is the draft to which you refer? A That is the draft to which I refer.

John N. McGarvey, direct.

Mr. Cole: Offer that in evidence.

(Draft admitted in evidence and marked Exhibit C17.)

Q Whose money was represented by that draft? A My money.

Q Has it been charged up against your account? A I bought that from the West End Trust Company, yes, sir. 10

Q With your money? A With my money.

Q When do you say you delivered this to Mr. Young? A Whatever the date of the draft is.

Q On the day of its date, December third? A Day of its date.

Q Did you see Mr. Young after that date before the agreement came back executed? A No, sir. 20

Q When was it when you next saw him? A When he returned to Philadelphia following those telegrams, which I think was on December tenth, Monday.

Q And where did you see him? A At my office.

Q What occurred then? A He came back, of course talked at great length about the deal and all that sort of thing, and I said, "Did you— was the original agreement and the draft sent on to Atlantic City?" He said, "Yes." I said, "Was the clerk of the court's certificate there so it could be recorded?" He said, "Yes." So I called Mr. Conger up at the Chelsea Title and Trust Company that day with Mr. Young sitting at my elbow and I asked Mr. Conger if he had — 30

Mr. Richards: I object to any conversation with Mr. Conger. 40

John N. McGarvey, direct.

Mr. Cole: Mr. Young being present at his side.

The Court: That is Mr. Young could hear the conversation?

Q Was he there? A Absolutely. He prompted me.

10 Q Could he hear? A He heard everything I said.

The Court: What this witness said is admissible, but not the reply that came over the telephone.

Q Tell what you said to Mr. Conger. A I asked Mr. Conger —

Q Just a moment, did you report to Mr. Young—you say he was sitting by your side—what Mr. Conger told you? A Absolutely.

Q Proceed. A I asked Mr. Conger if they had received the original agreement of sale, the draft with the clerk of the Court's certificate, and he says, "We have the agreement, we have the draft, but I don't see the clerk's certificate," and Mr. Young says, "Tell him I saw Mr. Vanderveer put it in the envelope. Look around." So Mr. Conger replied to me that he looked around and could not find it, and then Mr. Young says, "I have a duplicate agreement and an additional copy of the clerk's certificate. Tell them we will be down tomorrow and let them use that clerk's certificate."

30 Q Did you after that see the original agreement, what you call the original? A Yes, sir.

Mr. Cole: I produce an agreement from the representative of the Title Company and ask you to look at that and tell me whether

40

John N. McGarvey, direct.

that is the agreement to which you refer as the original agreement?

A That is the agreement to which I refer as the original agreement.

Mr. Cole: Offer it.

The Court: How can this man identify that agreement? 10

Mr. Richards: I was going to say in the first place, your Honor please, the agreement would be the one that was on record. This doesn't appear to be recorded.

Mr. Cole: I am not attempting to prove the agreement. It is admitted in the pleadings, but I am giving this —

The Court: He talked over the telephone concerning an agreement and you ask if this is the agreement he referred to, nothing to show that he ever saw any agreement, and I am just wondering how this man can, in the present state of the case — 20

(Question withdrawn.)

Mr. Cole: I offer in evidence an agreement between International Speedway Company and Charles W. Young.

Mr. Richards: I object to the offer of that agreement on the ground that the pleadings set up an agreement which is admitted, which is recorded. Now, this is not the recorded agreement and we are entitled to the recorded agreement, if one exists, because that is the one set up in the pleadings, and this is a variation of that, and we therefore object to it. 30

Mr. Cole: The bill sets up an agreement between International and Young, nothing 40

John N. McGarvey, direct.

was said about the record, and they admit it, and they have admitted a copy of this original, upon an inspection it will be found is an exact copy of what we have offered. It only has bearing, may it please your Honor, as a matter of sequence. I don't think it goes to the fundamentals of this case at all.

10

Mr. Richards: What is the necessity of introducing it? The agreement is in the pleadings, and there is no objection to that, what is the object in putting this in, and this is not the agreement purported, and consequently —

The Court: There is nothing in the bill that indicates that any agreement was ever recorded. The bill alleges that the original agreement is on file with the Chelsea Title and Guaranty Company.

20

Mr. Cole: Exactly, and we produce it from the Chelsea Title representative.

Mr. Richards: That is not shown by anyone here yet.

The Court: No, but counsel states so.

Mr. Cole: Do you mean that?

Mr. Richards: I am not sure.

30

(Agreement marked C18 for identification.)

Mr. Richards: If you will say, Judge, that is the duplicate of the other agreement, all right.

Q I ask you whether you ever saw that agreement before? A Yes, sir.

Q Where did you see it? A In the Chelsea Title and Trust Company.

40

Q How did you —

John N. McGarvey, direct.

The Court: I take it that there will probably be some confusion later, if you attempt to identify this as the paper that was in the Chelsea Title and Guaranty Company.

Mr. Cole: Yes, I am going to offer them to show it.

The Court: The witness said he saw it in the Chelsea Title and Trust Company, and there will probably be some confusion. 10

Q Mr. McGarvey, where is the building in which you saw this agreement? A On Atlantic Avenue, where the Chelsea Title and Trust Company has its office, I don't know the name of the building.

Q Atlantic Avenue near what? A Atlantic Avenue near, whatever this avenue is here, or where is the Chelsea — 20

Q I don't know where you saw it, I am trying to find out. A I saw it in the building where the Chelsea Title and Trust Company has its offices on Atlantic Avenue, or across the street, I don't recall.

Q Now I say to you, as a matter of fact there is a Chelsea Title and Trust Company and there is a Chelsea Title and Guaranty Company. A There is where I saw it. I don't know its title, corporate title, I don't know. 30

Q Was it Atlantic avenue near North Carolina, or South Carolina, rather, above here? A Wherever that office is located at.

Q You don't know where it is? A I don't know the cross streets. I might say North Carolina, might be South Carolina or some other street, I don't know the name.

Q We are playing very fine this morning and have to be careful. A I see. 40

John N. McGarvey, direct.

The Court: No, the Court raised that question and I don't think that comment is justified, the Court knows —

Mr. Cole: I had your Honor in mind when I made that statement.

10 The Court: The Court knows there is a Chelsea Trust Company which is many squares from the Chelsea Guaranty and Title Company, and I simply called counsel's attention to it so later in the trial if it would be testified it was in one office, and that testimony was contradicted as existing, I wanted the attention of counsel called to it, that is all.

20 Q Was that all the conversation you had at that time with Mr. Conger over the telephone that you have related? A At that time.

Q Did you have any further talk with Mr. Young at that time? A No.

Q Did he on that occasion produce to you what he said was a copy of the agreement and a certificate? A Yes.

30 Q And what did he do with them? A Why he and I went the next day to Mays Landing and recorded that agreement. No, the next day he and I came to the Chelsea Title and Guaranty Company, if that is the corporate title, and when we came into the office —

Q Just a moment, then you came together, did you, to the Chelsea Title and Guaranty? A Yes, sir.

Q What took place then? A We came down with the intention of giving Mr. Conger —

40 Mr. Richards: I object.

John N. McGarvey, direct.

A We came down to give Mr. Conger the copy of the clerk's certificate which Mr. Young had, and when we got down there the copy of the clerk's certificate sent with the draft and the agreement were lying on Mr. Conger's desk, and Mr. Young said to Mr. Conger, "There is the clerk's certificate" and Conger looked around and said "I thought that belonged to some other matter." 10

Q Then what happened? A Then I said, "We want that recorded," and the Chelsea Title and Guaranty Company took the money from me, for the recording.

Q Who took the money, what individual? A Mr. Conger.

Q Is he an employee of the company? A He was at that time.

Q You say you paid it to have him record it? 20
A I did.

Q What happened? A Then I said to Mr. Conger, "Do these matters of record become published in the papers?"

Q Was Mr. Young there? A He was there.

Q Proceed. A And he said, "Yes, there is a man up in Mays Landing named Johnson who takes the abstracts for the Atlantic City Newspapers," and I think he said the Real Estate Board. Well I said, "In Philadelphia we have a way of keeping the recording of certain papers out of the newspapers, I don't know whether you do that down here or not," and I said, "If it can be done, I would like to have this kept out of the newspapers," so he turned me over to a young lady employed in that company who was a former deputy recorder, I don't know her name, and I asked her whether — 30

Q Was Mr. Young there? A Mr. Young was still there all the time. 40

John N. McGarvey, direct.

Q Proceed. A I asked her whether she knew from her experience as a deputy recorder of papers, that were recorded being kept out of the newspapers. Well she said, "You will have to see Mr. Johnson," and smiled. Now I turned to Mr. Conger and I says, "Give me that money back," and I says, "We will go to Mays Land-
 10 ing and see Mr. Johnson," and he gave me the money back and gave me the original agreement, and I had it in my possession, and wanted Mr. Young to go with me to Mays Landing that day, but he had a very important engagement in West Philadelphia that required his going back on the eleven or eleven-thirty train at the Reading Station, and I went into the Reading Station with Mr. Young, saw him on the train, came back to the Chelsea Title and Guaranty
 20 Company, and Mr. Conger very anxiously waited for me to come in, and says, "Give me back that" —

Mr. Richards: Wait a minute. I object.

Q You can't tell that. A All right.

Q What did you do with this agreement? A I returned that agreement to the Chelsea Title and Guaranty Company at their request.

30 Q Who requested it? A Mr. Conger.

Q Did he tell you why he wanted it back? A Yes, sir, he said that he had —

Mr. Richards: I object.

Q He told you, did he? A He told me. You will have to pardon these rules of evidence. I am not a lawyer.

40 Q We will get along, Mr. McGarvey. A Mr. Conger told —

John N. McGarvey, direct.

The Court: No.

Q There is no question pending. Did he tell you why he wanted it back? A Yes, sir.

Q Did you deliver it personally to him after he told you? A I did.

Q And where has it been since, so far as you know? A In the Chelsea Title and Guaranty Company. 19

Q What did he say to you as to why he wanted that agreement back?

Mr. Richards: I object.

Mr. Cole: I won't pursue it.

Q Now a copy of this agreement, it appears, was recorded; how did that happen, if you know? 20

The Court: Is there anything to indicate such?

Mr. Cole: Counsel said so.

Q Do you know whether there was a copy recorded? A Yes, sir.

Q Tell us what happened. A The next day Mr. Young and I met at Camden, having previously an appointment with the Franklin Engineering Company who were to come down and make an initial survey of this ground. The Franklin Engineering Company's representative had not shown up and Mr. Young and I took the electric train and came to Mays Landing for the purpose of recording the copy that Mr. Young had, and we got to Mays Landing and went in and inquired about a Mr. Johnson, to see who Mr. Johnson was, neither of us knowing him at the time, and he said to me, "You ought to give him twenty-five dollars." I said, "No, that is 40

John N. McGarvey, direct.

too much money for a little act of this kind." I says, "In Philadelphia we very rarely give over ten dollars, frequently a five-dollar bill is all the clerk at the recorder's seeks," and I says, "Ten dollars is plenty." Well, he says, "We want to appear big." He said, "Twenty-five dollars." I said, "I didn't object to the twenty-five dollars," and then he said, "Well, I haven't got any money on me, I just have a few dollars." He says, "Have you got the twenty-five dollars?" I said, "Yes," and I gave him the twenty-five dollars, two new ten dollar bills and one old five." Now I said, "Don't give the man twenty-five dollars unless you have to. It is too much money for a little courtesy of this kind," so he went and had a talk with Mr. Johnson back of the court house.

20 Q Did you hear that? A No, I did not.

Q Let's eliminate that for the moment. A All right.

Q Was that copy which he had, which you saw delivered in the clerk's office to be recorded? A The copy that he had?

Q Of this agreement, to deliver that to the clerk's office, in the clerk's office, to be recorded? A Yes, sir.

30 Q Have you seen it since? A No, sir.

Mr. Cole: I call on the other side to produce a recorded agreement about which the witness has testified.

Mr. Richards: We don't seem to have it here. We have assumed that the pleadings settled that.

Mr. Cole: All right, if you haven't got it.

40 Mr. Richards: At the noon recess we will get it, your Honor.

John N. McGarvey, direct.

Q Having left the agreement, you say, what became of you and Mr. Young on that date? A After?

Q Let me ask you, was there any talk with anyone at the clerk's office concerning the recording of this agreement? A Yes, sir.

Q Was Mr. Young there? A Yes, sir.

10

Q Did you hear it? A Yes, sir.

Q What was the conversation? A When Mr. Young offered that copy of the agreement for recording, the clerk said to him, "Is this the copy of the agreement of the Chelsea Title and Guaranty Company?" Mr. Young said, "Yes." He said, "We received a phone message yesterday to hold up the recording of this agreement, there was some dispute." He says—it was the lady—she says, "Has that dispute been settled?" Mr. Young said, "Yes," and on the strength of those two statements she recorded that agreement.

20

Q What became of you after that, that day? A After that was done we had to wait for an electric train, I think an hour or two to come to Atlantic City, and we walked up and down the bank of that body of water, whatever you call it, and I said to Mr. Young, "Did you pay Mr. Johnson twenty-five dollars?" and he said, "Yes." I said, "That was too much money."

30

Q Well, that is not worth while. A Well —

Q Stop for a moment on that. I am not sure I asked you, so I will ask you again, if I did before, the date when you saw the original agreement in this Title and Guaranty Company's office, the date you were there. A That would be December eleventh.

Q Now did something occur that day between you and Mr. Young concerning this agreement, was there some talk between you? A Yes, we

40

John N. McGarvey, direct.

had a talk as to why my name was not mentioned in that agreement, inasmuch as he was my agent.

Mr. Richards: I object and ask that be stricken out.

The Court: Yes, let that be stricken.

10 Mr. Cole: Strike it, inasmuch as that is probably your conclusion.

Q Tell us what occurred between you on that date.

(Question withdrawn.)

Q Did you discover on that date that your name was not in the agreement? A Yes, sir.

20 Q Then did you talk with Mr. Young about it? A Yes, sir.

Q What was the conversation? A As to why my name was not in the agreement as principal.

30 Q What did he say? A Why he said that he had misrepresented himself as a capitalist because he had another big deal on out there, some sleeve valve, or something, in which he was going to make a wonderful profit out of it, and he didn't want to appear to them as a mere agent. That was the explanation Mr. Young gave me as to why my name was not in that agreement.

Q Is that all that happened that day? A That is all as far as that question is concerned.

Q Any question raised that day about his assigning this agreement to you? A No, not that day.

40 Q Later? A The question of the assignment of the agreement—we are speaking now of December eleventh—yes, that day, that was before I

John N. McGarvey, direct.

went to Mays Landing, yes, that same day Mr. Conger asked Mr. Young to assign that agreement to me before it would be recorded.

Q Let's have all that happened. A Mr. Young stepped aside and he says, "We will adjust that in another agreement wherein you will get this twenty-five thousand dollars." 10

Q Did he say that to you or Mr. Conger? A He said that to me.

Q What was the next thing that happened after December eleventh between you and Mr. Young? A We went to Mays Landing.

Q That has been explained, and I brought you back, what after that? A We came back from Mays Landing to Atlantic City and I think that Mr. Young went to Philadelphia alone because I got in conversation with a gentleman regarding this tract, and when I reached Philadelphia that night I reported the conversation to Mr. Young. 20

Q About this property? A About this property.

Q What was that? A That was to the effect that there was a scheme or plot on hand to nullify this agreement that had been signed.

Q Have you told us the language or just the conclusion of what you said to Mr. Young? A I tried to do that, but I seem to get in wrong with the procedure. 30

Q Now, Mr. McGarvey, please don't. You heard something in Atlantic City. A I will tell it all if I am permitted.

Q Did you make a report to Mr. Young? A I did.

Q Was that before or after the recordation of the agreement at Mays Landing? A That was before the recording of the agreement at Mays Landing. 40

John N. McGarvey, direct.

Q How long before? A The night before.

Q Was that the reason that this agreement was recorded? A Yes, sir.

Q When did you next meet Mr. Young? A Well, now you are talking of the night of December eleventh when I had a conversation with Mr. Young?

10 Q You have told us about that, and told us about the agreement being recorded, and about what happened when you discovered the fact that your name was not on the agreement. We have all that. Now then, did you after that time see Mr. Young and talk to him about this agreement or this land? A After the agreement was recorded on December twelfth?

Q Yes. A Yes, I saw him in Philadelphia.

20 Q About when? A Oh, every day, two or three times a day, Judge, at that time.

Q Now, did there come a time when you felt—you needn't give us any reason—that Mr. Young had denied you had any right or intended to in this agreement on this land?

Mr. Richards: I object to the question, if your Honor please. It undertakes to get an impression and not a fact. The Judge's question is did there come a time when he felt?

The Court: I think as a preliminary question I will admit that. It has no binding effect.

Mr. Richards: It seems to me he can tell what was said and done, but he can't testify as to an impression that he had.

The Court: Oh, yes, it is not binding in any way upon any one, simply to fix a period. I will admit it.

40

John N. McGarvey, direct.

Q Did there? A Yes, sir, there was a time.

Q Now in consequence of that feeling, did you do anything? A Yes.

Q What did you do? A I—that was on, let me see, Tuesday was the eleventh, we were in Atlantic City, and Wednesday was the twelfth, and that is the date of its record, the agreement, Thursday in Philadelphia, an incident having happened in Mays Landing that caused me to investigate some things in Philadelphia, I don't know whether that is — 10

Q Don't do that. A No, I won't tell it, and upon further investigation in Philadelphia, I was convinced of Mr. Young's intention.

Q What did you do, having been convinced? A I went to the Girard Trust Company to examine the thousand-dollar draft.

Q Then what after that? A Then I went to Mr. MacCain's office in Philadelphia. 20

Q Who is he? A He was supposed to be counsel for Mr. Young.

Q You say supposed, why do you say that? A Sometimes he is and sometimes he is not.

Q How do you know he was ever Mr. Young's attorney? A He told me so.

Q Mr. Young or Mr. MacCain? A Mr. MacCain. 30

Q All right, did you have some talk with him? A I did.

Q About this agreement? A Yes, sir.

Q Now don't take that for a moment. What was your next step? A My next step was to come to Atlantic City. I had a talk with Mr. MacCain in his office on Friday, which I think would be the fifteenth—it would be the fourteenth, because Saturday was the fifteenth, Sunday was the sixteenth, December seventeenth 40

John N. McGarvey, direct.

was the annual meeting in Atlantic City. I had a talk with Mr. MacCain in his office on Friday the fourteenth and I then came to Atlantic City on Monday, December the seventeenth, and served a formal notice on the Chelsea Title and Guaranty Company of my equitable ownership in that agreement.

10

Mr. Cole: Let me have that paper that was served on you, Mr. Kelly.

(Paper produced by Mr. Kelly.)

Q I show you what purports to be a notice to the Chelsea Title and Trust Company, bearing the signature of John N. McGarvey. Is that your signature? A That is my signature.

Q Will you look at that and say whether that is the paper that you served on the Title Company, Chelsea Title and Guaranty Company? A That is the paper.

20

Mr. Cole: I am going to offer it in evidence.

Mr. Richards: I object.

The Court: What is the objection.

30

Mr. Richards: The objection, if your Honor please, is that a paper served upon the Chelsea Title Company cannot bind us, it is a mere self serving declaration and could have no evidential effect, and therefore I object. It purports, to be, if your Honor please, a notice to the Chelsea Title and Guaranty Company of a claim that the complainant has upon the agreement, or upon the land upon which the agreement now in evidence is a bar, and I say that he can't introduce in evidence a paper that is

40

John N. McGarvey, direct.

merely a declaration on his part that he has such an interest, addressed to a party who is not a party to this suit.

The Court: The Chelsea Title and Guaranty Company were apparently agents of both parties to this agreement. The notice, of course, is not evidential of the fact contained in it, simply evidential to the extent that that particular notice was served upon the Title Company. 10

Mr. Cole: That is the only purpose of the offer.

The Court: I will admit it, and limit it, of course, to that purpose only.

Mr. Richards: If your Honor please, the agreement is that a deed to such property shall be executed and delivered to the said Chelsea Title and Guaranty Company of Atlantic City, New Jersey, on or before December eighteenth, 1923, to be held in escrow and when the full purchase price of said property is paid to said title company as hereinbefore provided, said deed may be delivered to said party of the second part upon the disbursement of said purchase price hereinafter agreed upon as hereinafter provided. 20 30

The Court: And then there is an additional clause below that, that the sum of \$2500 is also held in escrow under certain conditions to be returned.

Mr. Richards: Yes, now, if your Honor please, they were acting entirely for the vendor in this thing. How can this paper bind the vendee?

The Court: Whatever it said it could not bind the vendee at all, and does not. It may 40

John N. McGarvey, direct.

be that eventually that this paper will have no bearing, but in the orderly trial of the case it seems to me there can be no objection to it being offered in evidence as proof only that such a paper was served upon the title company.

10 Mr. Cole: To prove the fact of service, that is all.

The Court: Limited entirely to that.

Mr. Richards: If for that purpose alone, then I have no objection.

The Court: It is absolutely limited, of course, to that purpose both by counsel and the Court.

(Paper admitted in evidence and marked Exhibit C19.)

20 Q Did you see Mr. Young or have any talk or correspondence with him concerning this agreement of the land after you served that notice? A No, sir.

Q Did you deliver that notice personally? A I did.

Q Did you after that date make a tender of any money? A Yes, sir.

30 Q To the Chelsea Title and Guaranty Company?

Mr. Richards: I object to that, if your Honor please.

The Court: How can that be admissible, Judge Cole, at this time?

40 Mr. Cole: I want to show that we performed under the terms of this agreement, they were supposed—we were supposed to perform on February the seventh. Now if

John N. McGarvey, direct.

we are right in our contention this was our contract, we were obliged to perform, and want to show that we tendered ourselevs to perform the agreement.

Mr. Richards: If your Honor please, there is nothing before the Court about any agreement yet at all.

10

The Court: The extent of the testimony so far is that this man has paid all the money up to the present time that has been expended, apparently.

Mr. Cole: There is here an agreement between the International Speedway and Mr. Young or his nominee, and we have showed that all the money that has been paid we paid, and whatever may be the ultimate outcome of the suit is no matter, but we certainly have a right to prove that we made the tender on our theory that we were the owners who were bound to perform.

20

Mr. Richards: If your Honor please, there is nothing in this case at this point, it is utterly devoid of any evidential value that would bind Mr. Young under the pleadings that he had tendered money to the Chelsea Title Company, if your Honor please.

30

The Court: But the Court can't so closely designate the order of the proceedings in a trial. I will permit it, of course, subject to it being properly connected. Only the question of the order of trial, and I will permit it.

Q Did you make a tender of any money to the Chelsea Title and Guaranty Company? A Yes, sir.

40

John N. McGarvey, direct.

Q When? A On—well there is a paper that gives the exact date, it was on or before February seventh.

Q How much money did you tender? A I think it was \$25,500.

10 Q Was it in real money? A It was real money, not stage.

Q Who were there when it was tendered? A Mr. Kelly, the secretary of the Chelsea Title and Guaranty Company, Mr. Conger, and the cashier of that bank who brought the money in.

Q Now tell us what. A That bank on the corner, I don't know its title.

20 Q Tell us what took place at that time, what did you do and what was said? A I reduced my tender to a formal written demand to the Chelsea Title and Guaranty Company through its proper officers, notified —

Mr. Richards: I object.

The Court: Sustain the objection.

Q Don't tell us through the proper officers tell us who the man was that you were talking to. A Chelsea Title and Guaranty Company —

30 Q Proceed. A —told me —

Mr. Richards: I object.

A What shall I say?

Q Give his name. A Mr. Kelly and Mr. Conger were both there, Mr. Kelly told me —

Q Linus Kelly? A Linus Kelly told me —

40 Mr. Richards: I object to what Mr. Kelly told him out of the presence of the defendant.

John N. McGarvey, direct.

The Court: How is that admissible, Judge Cole?

Mr. Cole: May it please your Honor, we are showing here Mr. Young with whom the agreement was made and International Speedway, who we say are obliged to give us the deed, on the theory that we are the principal, we are trying to show, on the theory we were the principal, that we did all that the contract required of us to do, the Chelsea Title and Trust Company, according to the terms of the agreement, was the agent for both parties. Now we want to show what we did there, and what we were told by the title company who was to insure this title. 10

Mr. Richards: If your Honor please — 20

Mr. Cole: Certainly they must be bound by what the Title Company said. They were the ones who were to insure and give us the title.

Mr. Richards: We are certainly not bound by the declarations of this agent, to begin with, and secondly there is nothing —

The Court: I will sustain the objection to what was told and I will admit what was done under the same ruling I have heretofore made. 30

Q Did the Title Company accept your money?

A They accepted and returned it.

Q Have you —

Mr. Richards: If your Honor please, that is not clear to me and I ask that be stricken out because it contains a conclusion. They accepted it and returned it. If your Honor 40

John N. McGarvey, cross.

please, I, of course, could not object beforehand, but it seems to me the question is not responsive or the answer is not responsive.

10 The Court: The question was did they accept it and he said they accepted it and he further makes the voluntary statement that they returned it. Let that be stricken out.

Mr. Cole: Strike that out.

Q They accepted it?

Cross examination by Mr. Richards.

Q Ever purchased other properties here in Atlantic City, Mr. McGarvey?

20 Mr. Cole: I object, not cross examination and irrelevant.

The Court: I will permit it.

A That is personally?

Q Yes. A No.

Q Did you ever record any other deed in Atlantic City or in Mays Landing? A No.

30 Q How did you happen to know that a deed required a notary's certificate? A Why I am in the business for over twenty years and I know that.

Q Whereabouts? A Philadelphia.

Q How did you know it were required in New Jersey? A My—by hearing of transactions, if you say New Jersey, yes, I have had transactions in New Jersey but not in Atlantic City.

40 Q And you knew that a notary's certificate was necessary to be appended to a deed before it could be recorded? A Yes, sir.

John N. McGarvey, cross.

Q Why did you so particularly ask Mr. Conger if there was a notary's certificate attached to this deed? A Because it was understood that the agreement coming from Cleveland would be recorded.

Q Now you knew it was going to be recorded?
A Yes.

10

Q You knew the agreement was to be in Atlantic City? A Yes, sir.

Q Now when you called up on the telephone that morning and talked with Mr. Conger what you really wanted to know whether the agreement had arrived, wasn't that correct? A Right.

Q Then why did you ask him whether or not there was a notary's certificate attached to it? A Because Mr. Young had told me what the envelope contained, the original agreement, the draft and the notary's certificate.

20

Q Mr. Young told you that there was a notary's certificate, is that correct? A Told me that the letter that left Cleveland —

Q That that letter contained a notary's certificate? A A clerk's certificate, not a notary's certificate, a clerk of the court, testifying to the right of that notary to accept the affidavit, not a notary's certificate.

Q And you were so anxious about this certificate that you particularly mentioned it to Mr. Conger, is that correct? A Only when he said he didn't have it.

30

Q Oh, then your interest was directed to this notary's certificate when Mr. Conger told you that there was no certificate attached, is that correct? A No. I called Mr. Conger on the telephone and asked him if he had received the original agreement and the draft from Cleveland and he said yes, and then I said to him, "Have

40

John N. McGarvey, cross.

you got the clerk of the court's certificate there, too?" and he said, "No." I was anxious for that because I knew that the agreement could not be recorded otherwise.

10 Q But what moved you to ask about the certificate? A Just what I said, the desire to have the agreement recorded, which was part of the original proposition.

Q And you were so familiar with the recording of these deeds that you particularly and anxiously inquired about whether or not the clerk of the court's certificate was attached, is that correct, you want us to understand that? A I want you to understand that I inquired whether that was there.

20 Q Now, is the fact of the matter, Mr. McGarvey, that it was Conger who called your attention to the fact that the agreement lacked the clerk's certificate or the notary's certificate? A Well, I wouldn't like to say that that was so.

Q Yes. Now didn't he tell you over the telephone that the certificate was not there? A He may have told me that.

30 Q So that your impression that you gave us when you were being examined by Judge Cole, that you asked him about the certificate first is not correct now, isn't that true? A Well, no, I don't—I am not prepared to so answer that question that way.

Q It is at least doubtful, isn't it, Mr. McGarvey? A I don't know whether it was I who spoke first to Mr. Conger about the clerk's certificate, or whether it was he that spoke to me, but I do remember, as I testified, that I asked Mr. Conger if he had the clerk's certificate.

40 Q After Mr. Conger told you that he didn't have it, isn't that right? A I am not certain about that.

John N. McGarvey, cross.

Q Mr. Young told you that he had a duplicate with him? A Yes, sir.

Q He showed you the duplicate, didn't he? A Yes.

Q And that had the certificate duly attached? A Right.

Q And then you came to Atlantic City? A 10
The next day.

Q Did you stop at Mays Landing on the way down? A That day?

Q That day. A No.

Q Did you stop at Mays Landing on the way down on the day that you recorded the agreement? A Yes, sir.

Q On the way down? A On the way down.

Q What time did you arrive at Mays Landing? A Well, I think we came on the nine 20
o'clock electric from Camden, I don't know what time we arrived.

Q Well, it was in the forenoon? A Yes.

Q Now you inquired, you say, for a Mr. Johnson? A Yes, sir.

Q Do you remember what his first name was? A No, I do not.

Q Did you see him? A Yes, sir.

Q What kind of looking man was he? A 30
He was a young man.

Q Yes, that is a pretty vague description. A Well, he was a young man, clean shaven, and I think his hair was inclined to be dark.

Q Tall or short? A He is taller than I, taller than Mr. Young.

Q What was his official connection with the clerk's office? A As I understood it he was there to take the abstracts for the newspapers of the City of Philadelphia—what official connection he had with that office I don't know. 40

John N. McGarvey, cross.

Q He was representing the newspapers? A As I was told.

Q Who told you? A Why, I think it was the young lady in the Chelsea Title and Guaranty Company.

Q Nobody in Mays Landing told you that?

10 A No.

Q You heard Mr. Young talk to Mr. Johnson? A No.

Q Why were you so anxious to have the news of this purchase suppressed? A Well, I think that it is sometimes wise to keep your affairs away from publicity when you can.

Q During the afternoon before you recorded these agreements you had some discussion with Mr. Young relative to the fact that your name was not mentioned in this agreement, I understood you to say, is that correct? A Yes, sir.

Q When you went to Mays Landing you gave Mr. Young twenty-five dollars to pay to Mr. Johnson? A Yes, sir.

Q Who paid for the revenue stamps? A I presume Mr. Young.

Q Not what you presume? A Well, I don't know. I didn't. I gave him twenty-five dollars.

30 Q Were the revenue stamps attached to the deed? A I don't know.

Mr. Cole: Was no deed, an agreement.

A The agreement?

Q The agreement. A I don't know that.

Q You didn't see? A No.

Q You were present when Mr. Young turned the paper over to the young lady in the office?

40 A Yes, I was standing right back of Mr. Young.

John N. McGarvey, cross.

Q Do you remember the young lady's name?

A No, I do not.

Q You recollect what her position was there?

A No, I don't know that.

Q She seemed to be acting in authority? A She did.

Q You heard her say to Mr. Young that there had been something said about the recording of this paper? A Yes, sir. 10

Q And it was after she said that that the paper was recorded? A Yes, sir.

Q Did you tell her that that had been fixed up? A No, sir, I had no conversation with her.

Q Mr. Young tell her that? A Mr. Young had all the conversation.

Q And you heard it? A I heard it.

Q Now, after you left the clerk's office what did you do at Mays Landing, after that? A Why we walked up and down for awhile along that body of water. 20

Q Did you loiter around the court house for a while? A Yes, we loitered around the court house for awhile.

Q Sit out on the benches there in front of the court house? A Yes, we were waiting for a train.

Q Talk to anybody there? A I met a gentleman, a detective, I think, of Atlantic City. 30

Q Remember his name? A No, I don't remember his name.

Q What did you talk to him about? A I wasn't talking anything, Mr. Young was doing the talking, I was merely introduced to him.

Q Did you enter into any conversation? A Regarding the deal?

Q Yes. A No.

Q You never said anything about this agreement? A No, not to him. 40

John N. McGarvey, cross.

Q Did you tell this detective while you were sitting there in front of the court house, on the day that you had recorded the agreement, that Mr. Young had a good proposition? A No, sir.

Q Did you tell this detective that Mr. Young had bought the Speedway track? A I did not.

10 Q Did you have any conversation of that description at all with this detective? A I had no conversation with the detective, I sat there and listened to a conversation that Mr. Young and he had.

Q Did you speak to him at any time? A After I was introduced to him.

Q What did you say? A The same as any gentleman would speak to another.

Q Did your conversation in any wise relate
20 to the purchase of the Speedway tract? A No.

Q Your interest in it, Mr. Young's interest in it? A No, I don't recall.

Q Recording of the deed? A No.

Q Did you tell this detective that you had just recorded a deed? A No.

Q Or agreement? A Not that I recall, if you want to tell me what—want me to tell you what conversation took place between those two I will do it.

30 Q I will ask you the questions and you answer them. A All right, I will answer your questions.

Q At any time was Mr. Young absent while you were talking to the detective? A Oh, I think he was. I think he went up the street somewhere, he and I sat there.

Q You still continued talking to this detective? A In a casual way, yes.

Q You say you don't remember his name, do
40 you remember his appearance? A Yes.

John N. McGarvey, cross.

Q Would you know him if you saw him again?

A Yes, I would know him.

Q Is he here? A Yes, he is in the court room.

Q Will you point him out? A Gentleman sitting right there. (Pointing to Emanuel Eckstein.)

10

Q Witness is pointing to Detective Eckstein of the Atlantic City Detective Bureau. That is all the questions I have to ask.

Cross examination by Mr. Vale.

Q Mr. Cole, will the records show who counsel represents?

Mr. Vale: I represent the Speedway.

20

Q Mr. McGarvey, you knew nothing about this property until it was brought to your attention by Mr. Young? A No, sir.

Q And it was pursuant to Mr. Young's request that you put up this money, that you became interested in the property after examination as to its value? A It was after the examination of its value that I put up the money to buy the property for me, not for Mr. Young.

30

Q This property, whom did you consult as to the value? A Various people in Atlantic City.

Q Name one. A Name one? Well, I consulted Linus Kelly of the Chelsea Title and Guaranty Company. I consulted William Conger of the Chelsea Title and Guaranty Company. I consulted a man named Roberts who has a sign out there for sale on some ground along the Absecon Boulevard near Venice Park. I consulted Herman Mulock as to his ideas of values,

40

John N. McGarvey, cross.

and maybe a few more. Those were the ones that I recall.

Q When the agreement came back and you saw it at the trust company, it was in the name of Charles W. Young? A Or his nominee.

10 Q Or his nominee? Subsequently you say that you made a tender— A Yes, sir,—

Q To the trust company? A Yes, sir.

Q —of the sum of \$25,000? A \$25,000, whatever was the balance due under that agreement, whatever the agreement called for less the deposit money I made a tender.

Q Did you ever at any time communicate a demand to the Speedway Association that they convey this property to you? A I didn't have to under that agreement.

20 Q I am asking you if you did.

The Court: Let that be stricken.

A No, I did not.

30 Q Did you ever as a matter of fact mention to the Speedway that you had tendered this money to the trust company and that the trust company had accepted the purchase price and consequently you demanded of them that they execute and deliver a deed to you? A Not unless the Chelsea Title did after my tender, I personally—

Q I am asking you whether you did. A No.

40 Q As a matter of fact when you filed your bill of complaint in this suit you never stated that any tender had by you been made at any time of any balance of the purchase price, did you? A I couldn't state that, because the time for the tender had not arrived when I filed suit.

John N. McGarvey, cross.

Q In other words when this bill of complaint was by you filed no tender by you had been made? A Not any tender.

Q No amendment was made to the pleadings averring a tender? A No.

Q When was the first time that any person suggested to you the making of a tender? A 10
No one suggested that to me. My own experience told me that.

Q So, that without consultation with any person, without advice from any person, you went to the bank and got the \$25,500 and made the tender to the trust company, is that true? A
No, I did it under the advice and consent and counsel of my attorney, Judge Cole.

Q Now, as a matter of fact you never communicated the fact of tender to the Speedway or to any representative of the Speedway in Cleveland or elsewhere? A Not unless my attorney did. 20

Q I am asking what you know? A No, I couldn't do it after I had an attorney.

Q I think that you have testified that when you asked Mr. Young to transfer or assign his interest in this agreement to you that he replied that will be taken care of when we repay you the \$25,000? A No. 30

Q Isn't that true? A No, that is not true. I didn't testify that way.

Q What is the reference that you have made to the \$25,000 to be repaid to you? A I have reference to this, that when Mr. Young came to me originally and asked me to satisfy myself as to the value of this ground, and could I be interested in purchasing this ground that he before settlement would give me twenty-five thousand dollars profit, see? 40

John N. McGarvey, cross.

The Court: Just one minute, Mr. Vale, I would like to have what this witness testified at that time, I made a note of it at that time.

(Former testimony repeated as follows:
 10 "A —yes, that same day Mr. Conger asked Mr. Young to assign that agreement to me before it would be recorded. Q Let's have all that happened. A And Mr. Young stepped aside and he says, 'We will adjust that in another agreement wherein you will get this \$25,000.'")

Q Isn't it a fact that after you had recorded this—isn't it a fact that after the recording of this co-called lis pendens by you wherein you attempted to give notice of your equitable interest in this land, that you called in the office of Mr. MacCain in Philadelphia and demanded that he, Young, give you the twenty-five thousand dollars that you have adverted to in your direct examination? A No.

20

Q Do you mean to testify— A I mean to testify—

Q I will ask the question. A Go ahead.

Q Do you mean to testify that at no time
 30 you never demanded of Mr. MacCain, as counsel for Mr. Young, that he return to you or give to you the \$25,000 which you claimed to be due you as the profit that was coming to you on that deal? A Not in that manner.

Q Will you tell the Chancellor, please, in what manner you did demand the \$25,000 be returned to you from Mr. Young? A Yes, sir. I told Mr. MacCain in his office of certain things that had transpired between Mr. Young and myself which forced me to arrive at the
 40 conclusion—

John N. McGarvey, cross.

Q Wait.

Mr. Richards: Your Honor please, I am not representing the same party, and I don't want to be bound by a declaration in the case that would bind Young.

Mr. Vale: And furthermore I assume, your Honor, when any declaration comes out that your Honor will take care in the sifting of evidence on what is material. 10

The Court: It will be heard on the part of the Speedway, of course, over the objection of the counsel for Young.

A The witness is not trying to do anything—

The Court: Just answer the questions. 20

A I am trying to do that.

The Court: Don't explain to me then.

A I went to Mr. MacCain's office and I told him, by reason of certain things that had happened between Mr. Young and myself, I could have no further connection with Mr. Young, and that I ought to have the assignment of that agreement to me as security for my money that was put up and Mr. MacCain says to me, "What about the proposition whereby you were to let Mr. Young have this property in return for \$25,000?" I says, "I will stand on that proposition," and I stand there today. 30

Q And when you said, "I stand on that proposition" you simply meant that you stood, as you originally stood, when you went into it, namely that you were to get back \$25,000 from Mr. Young for what you did for him? A No, pro- 40

John N. McGarvey, cross.

vided he was able to do so before I was compelled to settle.

Q In other words, according to your view, there was a distinct understanding between you whereby on a certain condition you were to receive twenty-five thousand dollars for what you did for Mr. Young? A Before I was compelled
10 to settle, yes. I admit that.

Q Now, when you went to Mr. MacCain, I think you said that you went there for the purpose of demanding that the contract for the sale of the land in the name of Mr. Young should be assigned to you as collateral security and for your proper protection; that is true, isn't it? A Yes, I went to Mr. MacCain's office telling him this occurrence, which I am not permitted to bring in. After Mr. MacCain had heard that;
20 he said, "I don't blame you." Well, I said, "I should have some security for this money," and I asked him to see that Mr. Young would assign that agreement, not to me, I said, "I am perfectly willing to assign it to you, Mr. MacCain, to Mr. Smith, to anybody, but I demand that I am protected in this matter," see?

Q I think you have testified that as a result of what occurred, you forthwith filed this paper of record. Tell the Chancellor whether at any
30 time you, by writing or otherwise, communicated to Mr. Young the intention of your purpose to file that paper or make that claim of title? A No.

Q Never. So, that without any notice whatever to Mr. Young of your purpose to file his pendens or this claim for equitable title you filed without formally requesting Young to do anything? A Oh, no. I had requested Mr. Young
40 through his counsel, Mr. MacCain. Mr. MacCain

John N. McGarvey, cross.

accepted my proposition. Mr. Young was in Mr. MacCain's office on a Saturday morning and I called Mr. MacCain up and Mr. Young answered the phone and said, "Mr. McGarvey, I accept your proposition." Now thereafter he had—

Q So, that, according to your testimony now, you want the Chancellor to believe that your offer of twenty-five thousand dollars or your demand for twenty-five thousand dollars was by Mr. Young accepted both by word of counsel and by word of Young himself? A Not my offer, Mr. Young's proposition to me was that he would give me twenty-five thousand dollars. I had no offer to make Mr. Young. Mr. Young was making a proposition to me of twenty-five thousand dollars to be given to me before the time of settlement on this property. That was the original proposition, when he first came into it, in Mr. MacCain's office that day, I said to him, "I will stand on that proposition." Mr. MacCain says, "Well, inasmuch as you want us to reduce to writing," I said, "There is no writing necessary," I said, "It is merely an assignment of that agreement which is recorded in Mr. Young's name, there is no necessity for it, assign that agreement to you as his counsel, I am perfectly willing to trust you, Mr. MacCain."

Q So, that there is no question in your mind that this proposition of twenty-five thousand dollars voluntarily made by Mr. Young to you was made not as a result of any quarrel between you, but, on the contrary, was made when he originally came to you? A Absolutely, I admit that.

Q Yes, there is no question about that? A No, I never attempted to deny it.

John N. McGarvey, re-direct.

Q I call your attention to the following recital as stated in a paper signed by you and dated and sworn to and subscribed on the seventeenth day of December, 1923, and ask you to explain that recital in the light of your last—in the knowledge of your last answer: “And
10 whereas the reasons for putting the words ‘or his nominee’ in the said agreement of sale was because the undersigned, John N. McGarvey, was the real principal in this transaction, and at the time did not want to be disclosed, he having advanced and furnished all of the funds having been furnished to date for said purchase under the said agreement of sale.” A I admit that, and the reason for my not being disclosed was to protect Mr. Young, at his request, because he
20 had this great big deal on in Cleveland of this sleeve business. That was admitted by Mr. Young in Mr. MacCain’s presence and in his office. That is why I put that paragraph in there.

Re-direct examination by Mr. Cole.

Q Tell us now what you did say to Mr. MacCain in other words, tell us all the conversation that happened? A I went into Mr. MacCain’s
30 office and I stated to Mr. MacCain—may I say who was present?

Q That you said to him. A May I say who was present at this conversation?

Q Yes. A All right, I just don’t want to get in bad with the Court, because of my ignorance of the procedure.

Q Go ahead. A I went to Mr. MacCain’s
40 office on a Friday—

John N. McGarvey, re-direct.

Mr. Richards: If your Honor please, before he answers that question, as I gather now Judge Cole's question was to detail all the conversation that he had with Mr. MacCain. Now I object to that.

Mr. Vale: That is not rebuttal.

The Court: Not binding upon you, on cross examination he was asked by counsel for the Speedway if he said certain things, part of that conversation now he is entitled to give all the conversation. 10

Mr. Richards: Can't bind me.

The Court: Doesn't bind you.

A I went to Mr. MacCain's office on a Friday, December fourteenth, I think, with J. Willison Smith, President of the West End Trust Company. I said to Mr. MacCain, "I am going to ask you some questions, Mr. MacCain, which I won't object if you refuse to answer. You as an attorney ought to be able to take care of yourself." He said, "All right, if you ask me any question I don't feel like answering, I won't answer." I said, "Mr. MacCain, do you represent Mr. Young?" He said, "Yes." I said, "How long have you represented Mr. Young?" He said, "About three years." I said, "Do know whether Mr. Young has got any money or not?" He says, "No, he is broke." I said, "You got a copy of that agreement between the Speedway and Mr. Young or his nominee?" He said, "Yes." I says, "You know that I am the equitable owner of that agreement and that I put all the money into this transaction, Mr. Young being broke and won't have to put any money in?" 20 30 40

John N. McGarvey, re-direct.

Mr. Richards: I object.

The Court: Not binding upon you.

A I am only answering questions.

Q Proceed, Mr. McGarvey, until the Court stops you. A Sure. He said, "Yes." Now
10 I said, "Mr. Young has been endeavoring two or three days to get me to agree to a change, substitution or an amendment of that agreement, and I have refused. As a lawyer, and as Mr. Young's attorney, having read that agreement, do you consider it invulnerable or criminal?" I said, "That is my point of view, it is either an invulnerable agreement or a criminal one." He said, "I agree with you, the agreement is invulnerable, and if not invulnerable it must be
20 criminal." I said to Mr. MacCain the same day, "Now," I said, "I don't want anything more to do with Mr. Young." Having recited things that took place at Mays Landing and having recited the fact that he used the thousand-dollar check in Philadelphia three days before he had a right to use it in Cleveland, and in place of that I said, "I want nothing at all to do with this man." He said, "I don't blame you." Therefore I
30 said, "What I shall do is I will accept and stand ready to carry out the original proposition of Mr. Young to give me twenty-five thousand dollars before settlement, but, in the meantime, I am entitled to the assignment of that agreement." He said, "Of course you are." I said, "I must have that." "The menace of death is between both of us, to say nothing of the sole security of my money," and I says, "To show you the confidence and good faith I have, I am willing that you take the assignment of that
40 agreement you are his attorney, you take the

John N. McGarvey, re-direct.

assignment of that agreement." "I don't want it." I said, "He is a great friend of J. Willison Smith, swears by him, have it assigned to J. Willison Smith, anybody, so it is out of the hands of Mr. Young." All that conversation took place in Mr. MacCain's office prior to my filing that complaint.

Q You said that Mr. Young used the thousand-dollar check before he had a right to. How do you know that? A I know from the evidence of the check, and my letter, that thousand-dollar check was sent to him in Cleveland at his request over the telephone to give to Mr. Berlekamp, who was in financial distress, the means of aiding the closing of this deal. My letter which is offered in evidence distinctly says he had no right to use that until after the agreement was signed, sealed and delivered. The evidence of the cancelled check shows he used it in Philadelphia, December the fifth, three days prior to its right to be used in Cleveland.

Q Can you tell by looking at that check when he got the money? A Yes, he got it at the West Philadelphia Bank. The cashier told me so, too.

Mr. Richards: I object.

The Court: Let that be stricken.

Mr. Richards: If your Honor please, so far as I am concerned I think it ought to be all stricken.

Q That is all.

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Linus A. Kelly, direct.

LINUS A. KELLY, sworn for the complainant.

Direct examination by Mr. Cole.

Q What is your position with the Chelsea Title and Guaranty Company? A Secretary.

10 Q I show you Exhibit C18 for identification and ask you whether that paper ever came into your possession? A It did.

Q Did you hand that paper to Mr. Cole this morning? A I did.

Q State the circumstances under which this paper came to you. A That agreement of sale, together with the \$2,500 draft was enclosed in a letter from Mr. Vanderveer, an attorney of Cleveland, Ohio, whom, I believe, represented the International Speedway.

20

Mr. Vale: I object.

Mr. Cole: Strike that out.

The Court: Strike it out.

Q I call your attention to Exhibit C17 and ask you whether that is the draft that accompanied the agreement? A Yes, that is the draft.

Q Will you produce the letter from Mr. Vanderveer?

30

(Letter produced.)

Q Is the letter you show me of December eighth the one which came with the draft and the agreement? A It is.

(Letter offered and admitted in evidence and marked Exhibit C20.)

Mr. Cole: I now offer the agreement in evidence which was marked C18 for identification.

40

Linus A. Kelly, direct.

The Court: Is there any objection to the agreement? If not, let it be admitted by consent at this time.

(Agreement admitted in evidence and marked Exhibit C18.)

Mr. Richards: Yes, I renew my objection to that agreement on the ground—no, I don't 10
either, I have no objection to it.

Q Did you have any knowledge of anything concerning the sale of this land referred to in the agreement before the receipt of the agreement? A No, no personal knowledge.

Q After the receipt of the agreement, did you meet Mr. Young in connection with the matter? A Several times.

Q Will you state, please, the dates, as near 20
as you can recall, that you met Mr. Young after the receipt of the agreement and who were present, if you recall, and what took place, chronologically, if you can? A The first time after the receipt of the agreement, I think it was about December eleventh, the day on which Mr. Young and Mr. McGarvey came to Atlantic City, at that time I believe Mr. Conger was present, and I don't have any recollection of anyone else being present. 30
The question was asked me as to the recording of this agreement, under the terms of the agreement, the title company being made an agent, and I had had experience on an Ohio proposition before, and I was a little bit afraid of the meaning of the word escrow as used in Ohio, and I didn't want a misunderstanding, so I told Mr. Conger to get in touch with Mr. Vanderveer, who sent that paper to us, to be more specific in his instructions, so as to allow us to deposit the draft 40

Linus A. Kelly, direct.

and record the agreement. I believe that is all the conversation that I recollect at the present time on that particular day. I don't know that I can—I believe there was another conversation between that date and December the seventeenth, but it was more or less general.

10 Q You don't recall what it was? A No, I have no specific recollection of the conversation at that particular time, and on December seven-
teenth, Mr. Young was in in the morning, I think, if that is—no, if I am not mistaken that is the day Mr. Young phoned me, I don't know where he was phoning from, and asked me if I knew of any papers to be served on him on that day, and I said I knew of nothing. I didn't know what he was referring to. He came into the office subsequently and said there was to be
20 a meeting in the Chalfonte Hotel, I believe, of the stockholders of the International Speedway. He went out to attend that meeting. Somewhere in the neighborhood of three o'clock I think Mr. Young phoned me and asked me if I could come to the Chelsea Hotel to accept the deed from the International Speedway according to the terms of the agreement of sale. I told him I was busy, but he asked me, as I say if I
30 would go down there as he didn't want to come up to the office because he had an impression that Mr. Conger was inimical to his interests, so I said, all right I would go down, so I went down and I talked to Mr. Young for possibly fifteen or twenty minutes.

Q Anybody present? A No, just Mr. Young and myself at that particular time.

40 Q Proceed. A In the lobby of the hotel before I went into a meeting in one of the smaller dining rooms of the hotel.

Linus A. Kelly, direct.

Q Tell us the conversation that you had with Mr. Young. A Mr. Young's conversation at that time was more or less rehash of the whole proposition as I recollect it. He said that they had had a meeting, they shifted the meeting, I believe, from the Hotel Chalfonte to the Hotel Chelsea, and he knew and I knew at that time that there was a disagreement between Mr. McGarvey and Mr. Young, and there was no specific bit of conversation that I recollect. So I went into the dining room, the smaller dining room of the hotel, and a deed was delivered to me. 10

Q Who were there? A Present, Mr. Vanderveer.

Q The same Mr. Vanderveer from whom you received the letter? A I believe so. Mr. MacCain, Mr. Young. 20

Q Mr. MacCain who is here in the room? A Right here. Mr. Young, Mr. Berlekamp, I think at that time Mr. Fry, and a gentleman who was a member of the, either board of directors or a large stockholder of the corporation, whose name I have forgotten, I believe he is in the steel industry in Pittsburgh, somewhere or in Pennsylvania.

Q Right here, had you before that date met any of the persons other than Mr. Young who were in the dining room? A No. 30

Q How did you learn their names? A I was introduced to them by Mr. Young.

Q What did he say in the introduction, if anything? A He introduced me as the secretary of the Chelsea Title and Guaranty Company who would accept the deed they had prepared there to deliver to the company according to the terms of that agreement. 40

Linus A. Kelly, direct.

Q Did he tell you what relation any of these other persons bore to the transaction? A Yes, sir.

10 Q What did he say? A He told me that Berlekamp, I think Mr. Young told me that Berlekamp, I think I had already known it, was the president of the International Speedway, and Mr. Fry was the secretary, I think that is the correct name, further that this other gentleman, whose name I cannot recollect, was one of the either director or a large stockholder of the corporation in the steel business, as I recollect it, somewhere in Pennsylvania, and told me Mr. MacCain was his attorney, and Mr. Vanderveer was there representing the International Speedway, according to Mr. Young.

20 Q Did they all hear what he was telling you? A They were all present. Well, I don't know that they all heard Mr. Young tell me who they were individually, I think part of that was done out front, but they were all present at the time I went into the room.

Q You say a deed was delivered to you? A A deed was delivered.

Q Who delivered it? A Mr. Vanderveer.

30 Q What did he say to you? A He delivered a deed to me from the International Speedway Association purporting to be in accordance with the terms of that agreement to a grantee whose identity he requested I would not disclose and he and Mr. MacCain sealed it in an envelope and asked me to keep it until the time of final settlement in that condition.

Q Have you that deed? A I have.

Q Will you produce it?

40 (Sealed envelope produced.)

Linus A. Kelly, direct.

Mr. Cole: I want to offer this in evidence.

Mr. Richards: No objection.

The Court: It will be admitted at this time by consent.

(Sealed envelope admitted in evidence and marked Exhibit C21 and opened by Mr. Cole.)

10

Mr. Cole: I ask that the deed be separately marked.

(Envelope opened and a card and deed produced.)

Mr. Cole: I ask both the card and deed be marked separately.

(Deed offered and admitted in evidence and marked C22, dated December 17th, from the Speedway Association to Brighton Gardens, and card offered and admitted in evidence and marked Exhibit C23, of J. H. Vanderveer.)

20

Mr. Cole: Deed dated December 17th, from Speedway Association to Brighton Gardens, acknowledged on the same date by Herbert S. Fry, as Secretary, before Edgar R. Somers, a notary public, purporting to be made in the State of New Jersey, County of Atlantic, unrecorded. The deed describes the property as follows: "All those certain tracts or parcels of land and premises, situate in the Township of Egg Harbor, County of Atlantic and State of New Jersey, bounded and described as follows, to wit:

30

BEGINNING at a stake standing at the Southeast side of Forked Creek above the Fork and in the 6th line of the survey of Peter Boice and runs thence (1) South-

40

Linus A. Kelly, direct.

10 wardly, thirty-seven degrees West, five chains; thence (2) southwardly, seventy-eight degrees west, twelve and one-half chains; thence (3) Northwardly, ten chains; thence (4) Northwardly, seventy-eight degrees East, thirteen chains; thence (5) Northwardly, fifteen chains and seventy links; thence (6) northwardly seventy-five degrees West, nine chains and seventy links; thence (7) Northwardly, ten and one-half chains; thence (8) Southwardly, seventy-five degrees East ten chains and thirty links; thence (9) southwardly thirty-two chains and sixty links; thence (10) Northwardly, seventy-eight degrees East two chains to the place of beginning.

20 CONTAINING twenty-three acres, more or less, with the usual allowance for roads."

30 Then there is a recital; "BEING the same lands and premises granted and conveyed unto the International Speedway Association by Deed from George B. Gerau, et ux, et al, dated the 28th day of August, 1922, and recorded November 1, 1922, in Deed Book 696, pages 9 and 11, in the Atlantic County Clerk's Office at Mays Landing, N. J."

Deed was executed by the International Speedway Association, by C. H. Berlekamp, President, attested by Herbert S. Fry, Secretary, and bears the seal International Speedway Association, Inc., Delaware, 1922.

The Court: Under the agreement there are two tracts and you have only read one of twenty-three acres while the other says 378 acres.

Linus A. Kelly, direct.

Mr. Cole: That is in the deed. Maybe I better read it into the record, I read about the 23 acres.

“BEGINNING at the lower mouth of Newfound Thoroughfare where it empties into the Beach Thoroughfare and is the beginning corner of a survey of two hundred and ninety-two acres (of marsh and oyster beds) that was made July 7, 1810, to Daniel Adams and others in company and is recorded in the Surveyor General’s Office at Burlington in Lib. C. C. folio 272 and runs from thence (1) Northwardly, thirty-six and one-half degrees West, fifteen and one-half chains; thence (2) Northwardly, sixty degrees and thirty minutes east sixty-eight chains and fifty links; thence (3) northwardly, twenty-five degrees and thirty minutes east, twenty-two chains; thence (4) northwardly, eighty degrees and and thirty minutes West twenty-four chains and fifty links; thence (5) southwardly, sixty-four degrees and thirty minutes West, seventy-seven chains and fifty links; thence (6) southwardly, thirty degrees and thirty-nine minutes West, thirty-six chains; thence (7) Southwardly, fifty-nine degrees and thirty minutes East ten chains; thence (8) Southwardly, thirty degrees and thirty minutes West twelve chains; thence (9) Southwardly, eighty-six degrees and thirty minutes East, forty-five chains and fifty links; thence (10) Northwardly twenty degrees and thirty minutes East thirteen chains to the place of beginning.

CONTAINING 378½ acres and the usual allowances for highways.”

Linus A. Kelly, direct.

Mr. Richards: There is an error in a description in that deed and the original deed.

The Court: Apparently there is one course there.

10 Q Has the deed from which I have just read and which was offered in evidence been in the possession of the Title Company ever since the day you deposited it? A It has.

Q Have you met Mr. Young in connection with this matter since December seventeenth? A Yes.

Q When was that? A I can't give exact dates, but shortly thereafter, I think on one or possibly two occasions Mr. Young, I should say around the eighteenth, maybe the nineteenth, 20 Mr. Young was here in Atlantic City.

Q Did he refer to this transaction? A Yes.

Q State what he said. A His reference to this transaction was not as regards any relationship or any rights between Mr. McGarvey at that time and himself, but more as relation of the condition in our office in which he had taken umbrage at some things Mr. Conger had done which are not of interest.

30 Q Something between him and somebody in your office? A Yes, but that was his conversation at that time.

Q I don't care for that. I want to know if you had any conversation with him touching this transaction after the delivery of the deed of December seventeenth?

Mr. Richards: What does Judge Cole mean by this transaction?

40 Mr. Cole: I mean the matter of the agreement of the sale of this International

Linus A. Kelly, direct.

Speedway to Mr. Young. Of course he can answer that yes or no first, I don't know. I want to get the fact about it.

A I don't recollect any special conversation, Judge.

Q All right. Now, did Mr. McGarvey at any time after December seventeenth make a tender of any money to the title company? A He did. 10

Q Who were present? A Mr. Harry Rhoads who was the assistant cashier of the Chelsea National Bank, Mr. McGarvey, Mr. Conger and myself, all of the time, and Mr. Maurice Cole part of the time, Mr. Albert C. Abbott part of the time.

Mr. Vale: May it please the Court, I wish to interpose an objection here to any tender being made to this company on behalf of the Speedway Company here. 20

The Court: Note the objection.

Q What did Mr. McGarvey say to you touching the tender and what did he tender?

Mr. Richards: I object on the ground what was said by Mr. McGarvey to Mr. Kelly cannot bind the defendant. 30

The Court: Will not bind the defendant Young, at least.

A Am I at liberty to go on?

The Court: Yes.

A Mr. McGarvey tendered the sum of twenty-five thousand five hundred dollars in cash to the 40

Linus A. Kelly, direct.

10 company and demanded from the company a deed from the International Speedway Association to John N. McGarvey which I advised him I did not have and could not give him, that no deed other than the one originally given to me on December seventeenth had been given to me by the International Speedway. He then demanded that we set a time, as I recollect, for settlement, it appearing that our searches at the time, namely February seventh, were not entirely completed.

Q I was about to ask you, were you on February seventh, or was the Atlantic Title and Guaranty on February seventh, the date named in the agreement prepared to insure that title?

A No, sir.

20 Q Did you communicate that fact to Mr. McGarvey? A At the time he made the tender, yes, I said to Mr.—yes, Mr. McGarvey had written prior, I think he wrote prior to May seventh advising us that he would be on hand on May seventh to make such a tender.

Q On May seventh? A February seventh, excuse me.

30 Q Did you have any correspondence with either Young or the International Speedway, again, or Mr. Vanderveer, after December seventeenth, the time the deed was delivered?

A To them or from them?

Q Either way. A On, I think February seventh or the eighth, we forwarded to Mr. Vanderveer, from whom we got the deed from the International Speedway Association, a copy of a memorandum of tender made by Mr. McGarvey.

40 Q Have you got that? A I have a carbon of the letter I addressed to him and copy of that memorandum.

Linus A. Kelly, direct.

Mr. Cole: We call for the letter to Mr. Vanderveer.

Mr. Vale: I have no such letter.

A It is dated February the ninth.

(Copy produced.)

10

Q Was this letter mailed to Mr. Vanderveer?

A I believe so.

Mr. Vale: I ask that that be stricken out, may it please the Court.

The Court: Permit that to remain to that extent.

Q This refers to an enclosure, was there an enclosure, first of all? A There was.

20

Q This appears to be addressed to J. H. Vanderveer, 802 Olmer Building; from whom did you get that address? A Letter head of Mr. Vanderveer's stationery in his prior correspondence to us.

Q Did you dictate this letter? A I did. I think I did, the initials are at the bottom.

Q Might look at it and see. A I did.

Q Did you personally mail the letter? A I did not.

30

Q What is the usual course for mailing letters in the office of the title company? A After they are signed and sealed and addressed, they are put in the mail.

Q Who does that work? A We have a clerk who mails, takes care of both registry and ordinary mail, and it is his duty to see that they are mailed.

Q How was it mailed, by registered, or in the ordinary course? A The ordinary course.

40

Linus A. Kelly, direct.

Q And your envelopes, what kind of envelopes are they, I mean are they plain or do they bear any card? A Our envelopes bear the company's name and address.

Q Assuming that this was sent, was it ever returned? A It has not been returned.

10 Q Did you get any reply, any acknowledgment? A No, sir.

Mr. Cole: I ask that be marked for identification.

(Letter marked C24 for identification.)

Q Have you a copy of what you say was enclosed? A I have the original of which what was enclosed was a carbon.

20 (Copy marked C25 for identification.)

Mr. Richards: Not simply being captious about it, I want to state now —

Mr. Cole: You needn't apologize.

Mr. Vale: He is not apologizing.

Mr. Cole: I thought maybe he was.

30 Q Did the Brighton Gardens Company named as grantee in this deed Exhibit C22, ever tender itself to perform according to the terms of the instrument? A It did not.

Q Have you ever heard from it? A I have not.

Q Has anybody, individually or corporation, other than McGarvey tendered to perform that agreement? A No, sir.

Q Did you have any letters from either the International Speedway or Vanderveer after February ninth? A None.

40

Linus A. Kelly, direct.

Q Any from Mr. Young or Mr. MacCain his lawyer? A No.

Q Did Mr. Young ever make any statement to you as to the source of the money that went to the purchase of the agreement? A It was my understanding gained from Mr. Young's statement that the money put up to bind this agreement, that is the \$2500, was the money of Mr. McGarvey. 10

Q Did Mr. Young ever claim to you that he had put any money into this contract? A No, sir.

Q Was this original agreement ever in Mr. McGarvey's possession, do you know, personally? A I don't know personally.

Q Do you know personally whether your company directed the county clerk not to record that agreement? A I don't know personally. 20

Mr. Vale: Before any cross examination takes place, may I ask your Honor that all references in the witness' testimony about the tender, questions and answers, be stricken out of this record.

The Court: Upon what ground?

Mr. Vale: As being immaterial and irrelevant in this case, or not in accord with the averments contained in the bill. 30

The Court: The clause in the agreement is that, concerning the payment of \$25,000 in cash to be paid to the said Title Company for party of the first part at the time of settlement, and the said sum, together with said first down payment, shall be disbursed in accordance with the terms. Your objection is that it is not in accordance with the bill? 40

Linus A. Kelly, cross.

Mr. Vale: No averment contained in the bill or any prayer made therein.

The Court: I will hear you on that, Judge Cole.

10 Mr. Cole: May it please your Honor, I suppose our bill makes Mr. Young and the Speedway parties. It was made by the Speedway Company as owner with Mr. Young.

The Court: Your prayer that the Speedway be required to execute and deliver to the complainant may cover that.

Mr. Cole: Sure, we won't get anywhere unless we get a deed.

The Court: I will overrule the motion to strike.

20 Q There is one question I forgot to ask you; did you ever after February seventh notify Mr. McGarvey that your company was prepared to insure the title? A No.

Q Is your company yet prepared to insure it? A No.

Q I mean as a good and marketable title? A I don't know.

30 *Cross examination by Mr. Richards.*

Q Mr. Kelly, at the time that Mr. McGarvey tendered you the \$25,500 did you tell him that your company was not prepared to insure the title? A At that time, yes.

Q Did you tell him that there were evident defects in the title? A No, I don't think I put it that way. I said possible defects in the title.

40 Q Such defects that you as a title company were not prepared to say that the title tendered

Linus A. Kelly, cross.

by the Speedway Company was a good title? A There was no title tendered by the Speedway Company, sir, if I understand you.

Q You had in your hands the agreements between the Speedway Company and Young? A Yes.

Q Wherein they agreed to vest in Young or his nominee a fee simple title to the herein described property under a now existing agreement by deed of conveyance delivered to him, her, it or them, at or before said date, said party of the first may by proceedings for specific performance had and by or before said date instituted, and within a reasonable time after the termination hereof concluded (to permit of a reasonable time for the prosecution and termination of such suit for specific performance begun as aforesaid) or otherwise, cause to be conveyed to the said party of the second part, his, her, its or their successors, heirs and assigns, by deed of special warranty, a fee simple title to the within described property,"—now on the date that McGarvey tendered you \$25,500, were you prepared to say that the International Speedway Company could deliver a fee simple title to the within described property, comfortable to a deed of special warranty? A No, sir.

Q You told Mr. McGarvey that? A Yes.

Q When did you first hear of the International Speedway property in relation to a possible purchase of it, and a connection to which your company would be interested? A My first recollection of it is one day Mr. Young and Mr. Conger were in the library in our office and I was brought in and introduced to Mr. Young and Mr. Conger advised me that Mr. Young was looking over the International Speedway property.

Linus A. Kelly, cross.

Q About when was that, Mr. Kelly, if you recall? A Well, I can't be accurate, but, judging back, it would be about, I should say, between the second half of the month of November.

Q Do you recall whether or not about the thirty-first of October that Mr. Berlekamp asked you to make a search of the title of the International Speedway? A You mean he asked the company?

Q Asked the company. A He did.

Mr. Cole: Wait a moment. I object to it on the ground it is not cross examination and it can't bind us.

Mr. Richards: If your Honor please, I am merely trying to refresh the witness' memory just when he first —

The Court: It is not cross examination and of course cannot bind.

Mr. Cole: We didn't agree until the latter part of November.

The Court: I sustain the objection.

Q Do you know whether or not you talked to Mr. Young about the insurance of this title or a search of this title around the thirty-first of October, 1923?

Mr. Cole: Objected to for the same reason, it is not cross-examination of the witness, what Mr. Young had with them before they entered into the proceeding.

The Court: I will permit the question.

A I have no recollection of any such conversation with Mr. Young in October.

Linus A. Kelly, cross.

Q Would your books show whether or not you had an application for a search of that property about that time? A They would.

Q Have you got your books here? A No, but I have the application.

Q What is the date of it? A I think October thirty-first, October thirty-first, 1923.

10

Q Is that the application upon which you subsequently founded your searches? A Yes, sir.

Q Who directed you to make that search?

Mr. Cole: I object to it, all this examination is not cross examination, it is irrelevant against us, and can't bind us.

The Court: I will permit it because of the terms in the agreement that if this company are unable to insure certain other acts may follow. I will permit it.

20

A This application was made by C. J. Berlekamp and I. N. Griscom, October thirty-first, 1923, to insure an owner in blank, grantor from the International Speedway Association, described as being the same premises in this case, and the application is taken and is in the handwriting of Mr. Conger.

30

Q Do you know whether Mr. Young was present at the time? A I have no knowledge of the making of that application other than its existence.

(Application marked D1 for identification.)

Q What did you do with the \$25,500 that you say Mr. McGarvey handed to you? A We returned it to Mr. McGarvey.

40

Linus A. Kelly, cross.

Q When? A At—well, within a few minutes after it was delivered to us, when I advised him that we were not in position to make any settlement.

By Mr. Cole.

10 Q Did he say anything to you at the time? The fact as to your insuring the title? A Yes.

Mr. Vale: I object to that, may it please the Court. The effort is made here, may it please the Court, to bind both Young and the Speedway by reason of statements made by the complainant to a supposed agent of both, the agency is only inferentially established, and I submit has not been established that
20 would submit at least declarations to be evidence, particularly when they are self-serving declarations.

The Court: "It is further understood and agreed that the said title company is hereby appointed the agent of all parties hereto to whom tender shall be made, at its offices in Atlantic City, tender to such title company to be considered as tender to the parties in interest." I admit the question of tender.
30 Further than that I will overrule the offer.

Mr. Cole: All I want to do by this question is to contradict the manifest inference sought to be raised by the fact that the money was returned. If the fact is that Mr. McGarvey said, "This money is yours whenever you are ready to do the things provided in the agreement" it would certainly destroy the inference which now rests on the

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Linus A. Kelly, re-direct.

record that we had retired voluntarily, and perhaps claimed no further interest.

The Court: Sustain the objection.

(Recess taken until 1.45 o'clock P. M.)

10

AFTERNOON SESSION.

(Trial of the cause resumed at 1:45 P. M.)

LINUS A. KELLY, resumed.

Re-direct examination by Mr. Cole.

Q Did you make any statement to the one who delivered to you the deed December seventeenth at the time it was delivered? A I did. 20

Q What did you say?

Mr. Richards: I object.

The Court: I will permit it. Doesn't bind your client.

A I advised Mr. Vanderveer, who delivered the deed to me, that as a notice had been served upon the company to the effect that Mr. McGarvey claimed to be the principal and the nominee in the agreement between the International Speedway and Charles Young, his nominee— 30

Q What if any reply did he make? A My recollection of Mr. Vanderveer's reply at that time, that that was a matter between Mr. Young and Mr. McGarvey, that they knew only Mr. Young in the transaction.

Q Had Mr. McGarvey at that time served a notice? A Yes. 40

Linus A. Kelly, re-direct.

Q Exhibit C19 the notice you had in mind and referred to when you talked with him? A Yes, that is the copy of it that was served upon the company.

10 Q Now, I show you a letter dated December twenty-ninth, 1923, signed "J. H. Vanderveer" and ask you whether that was received by your company? A It was.

Q About what time? A I presume the thirtieth or thirty-first.

Q Of the month of December? A December.

Q I notice there are some lead pencil and the word "Important" that you put on there, I suppose? A The lead penciling and underscoring were not on the letter when received.

20 (Letter offered and admitted in evidence and marked Exhibit C26.)

Q Have you ever since that date had any authority or direction from either Mr. Vanderveer or the Association or anybody purporting to represent or claiming to represent him releasing either the agreement or the draft? A I have not.

Q Does your company still hold that money?

30 A We do.

Q I show you a letter of Cole and Cole, January twenty-ninth, 1924, to the company and ask you whether that was received in the mail? A That was.

Mr. Cole: I will offer that.

(Letter offered and admitted in evidence and marked Exhibit C27.)

40 Mr. Cole: I want to offer in evidence a copy of a letter from Cole and Cole to International Speedway Association in care of

William H. Conger, direct.

Mr. Vanderveer dated January twenty-ninth, together with the return registry receipt.

Mr. Vale: May it please the Court, I want to object not to any irregularity or formality of proof, but, on the contrary, it is immaterial and irrelevant at the present stage because no agency has been established as between Vanderveer and the International Speedway Association. 10

Mr. Cole: He is the one that sent the deed.

The Court: Yes, but that doesn't necessarily authorize you, that one act.

(Letter and registry receipt marked C28 and 29 for identification respectively.)

Mr. Cole: Your Honor understood this letter is addressed to the International Speedway Association in care of Mr. Vanderveer? 20

The Court: Yes.

WILLIAM H. CONGER, sworn for the complainant.

Direct examination by Mr. Cole. 30

Q What is your connection with the Chelsea Title and Guaranty Company? A I have no title, Judge.

Q You are an employee? A Yes.

Q How long have you been employed there?

A From the first of March of last year until the first of March of this year.

Q Did you have anything to do with the connection, with this agreement between the Inter- 40

William H. Conger, direct.

national Speedway and Young? A Yes, I had all to do with it.

Q When was the matter or the agreement first brought to your attention? A The matter of the agreement?

10 Q Yes. A I drew that agreement just a few days before it was executed; I should say it was about Wednesday or Thursday of the week in which it was executed.

Q To whom did you deliver it? A I delivered it to Mr. Young.

Q Did you know about its receipt from somewhere in the West? A I received it.

Q How did it reach you? A Pardon me?

Q How did it reach you? A By mail.

20 Q What came with it? A The check of the West End Trust Company endorsed over to us to hold in escrow.

Q When you say the check you mean the \$2,500 draft? A \$2,500 which you have offered in evidence; yes, sir.

Mr. Richards: I object to the last phrase as being not responsive.

The Court: Yes, it will be stricken all except the check for \$2,500.

30 Q Now, what was the first thing that happened between you and Mr. Young after the receipt of this agreement and the check or draft, whatever it may be called?

Mr. Richards: I object.

Q Or writing for \$2,500?

40 Mr. Richards: I think we are entitled to find out what relevancy this can have. At the present time I can't see it.

William H. Conger, direct.

The Court: It must be in reference to matters connected with this case, of course. I will permit the question.

Q I might ask you, did you ever have any other transactions with Mr. Young other than that connected with this agreement? A None whatsoever. 10

Q Your testimony will be addressed, therefore, to this agreement? A Absolutely.

Q Now proceed to tell us. A You want what happened after?

Q What happened, so far as Mr. Young is concerned; of course if Mr. McGarvey was present that can go in. A You don't want what went before it?

Q No, after the memorandum, tell us what happened after the agreement? A After I received it I received and opened all the mail distributed it and this came in, of course I was looking for it, and that afternoon I received a telephone message from Philadelphia asking me whether we had received it and I said yes. 20

Q From whom? A From Mr. Vanderveer from Cleveland representing the International Speedway Association.

The Court: That doesn't answer the question. Let that be stricken. The question was from whom did you receive the telephone message. 30

A From Mr. Vanderveer—telephone message? From Mr. McGarvey.

Q Now, do you know where Mr. McGarvey was at the time? A He said he was in Mr.—

Mr. Richards: If your Honor please— 40

William H. Conger, direct.

Q Never mind, if you don't know. A I don't know; no, I couldn't know unless I were there physically.

Q What did he say to you?

Mr. Richards: I object.

10 The Court: Sustain the objection.

Q Now, Mr. Conger, repeating my question with relation to what you had to do with Mr. Young—you shifted off to Mr. McGarvey—can you tell us what the relation was with Mr. Young?

Mr. Richards: I object to what his relation was with Mr. Young.

The Court: Sustain the objection.

20 Q Did you ever meet Mr. Young in connection with this agreement? A Oh, yes.

Q Where did you meet him? A Chelsea Title and Guaranty Company.

Q When was it? A In the latter part of November, the exact date I don't know. I wouldn't attempt to fix it.

Q I am talking about the agreement. A I met him the next day after I received the agreement from the West.

30 Q Where did you meet him? A He came to see me at the Chelsea Title Company.

Q Tell us what happened between you.

Mr. Richards: If your Honor please, I think that is objectionable, it is too vague, nothing to show it relates to this case. I am perfectly willing for Judge Cole to develop his case, but I want him to do it on other questions.

40 (Question withdrawn.)

William H. Conger, direct.

Q Did you have any talk with Mr. Young about this agreement? A Oh, yes.

Q What was it? A I had the agreement there and the question came up about its form and recording.

Q About what? A About its form and recording. There had been a certificate that had not been attached to it but was loose, and I didn't know that it was on my desk, when I opened the mail, I imagine it slipped out, and went to the side, among other things on the right side of my desk, so when the question came up about recording it and Mr. Young pointed to me that I had this certificate on my desk, which I thought belonged to some other paper, and not this, but he knew the color of it, and so on, so that we attached the certificate to the—I attached the certificate to the agreement, and then I, in our conversation about Mr. McGarvey's ownership of the agreement, and his being the real principal in the transaction.

Mr. Richards: I object.

The Court: Sustain the objection.

Mr. Vale: Ask it be stricken out.

The Court: Let it be stricken out.

Mr. Cole: What is the objection to it? 30

Mr. Richards: Your Honor please—

The Court: Stricken.

Mr. Cole: Am I not entitled to the ground of the objection?

The Court: Not after the Court has ruled upon it, and I have ruled on it as inadmissible.

A I then proposed to assign the agreement to Mr. McGarvey, after Mr. Young—

40

William H. Conger, direct.

Mr. Richards: If your Honor please there is no question pending to which this could be a responsive answer and I ask that it be stricken out.

The Court: Sustain the objection.

10 Q Did you have any talk with Mr. Young after the receipt of the agreement with the draft or check? A Oh, yes.

Q When was it? A It was the following day after I received the agreement from the West.

Q Where was it? A At the Chelsea Title Company.

Q Who was present? A Mr. McGarvey and Mr. Young and myself.

20 Q Now won't you please tell us as nearly as you can recall the substance of the conversation that was had among you three concerning this agreement. Now please don't state your conclusion, give the language, as nearly as you can substantially.

30 Mr. Richards: If your Honor please, it seems to me that this question is irrelevant at this time unless there is to be some effort to connect this testimony in a way that would bind either of the defendants. Now up to date it has not been done and I submit there is nothing new at this time that, judging from the former line of questions, that it would admit of such testimony; in other words there is nothing here at the present time of a controversial nature as I see it, up to this point, so far as this case stands now, and nothing that would make relevant a
40 conversation between the three parties un-

William H. Conger, direct.

less it is connected. It seems to me it is not entitled to presentment.

The Court: I will permit it to go in at this time, of course it must be connected.

(Question repeated.)

A The conversation with reference to the recording of the agreement and the assigning of it. I— 10

Mr. Vale: Move to strike out.

The Court: It will be stricken out. He doesn't state the conversation at all, he states his conclusion of the effect, exactly what counsel has advised him not to do. The question is what was the conversation.

A I said to Mr. McGarvey and Mr. Young that I would prepare the assignment to Mr. McGarvey to protect his interest. 20

Mr. Richards: I object to that.

The Court: Did you tell him that, is that what you said?

A Yes, sir.

The Court: All right, permitted. 30

A And Mr. Young then called Mr. McGarvey aside and had some conversation which I didn't hear. They came back to my desk and they relieved me from at that time assigning the agreement, stating, Mr. Young stating—

Mr. Richards: I object and ask that that part be stricken out that relieved, except what he said. 40

William H. Conger, direct.

The Court: Let it be stricken. That is not responsive to the question.

A You mean what I said?

Q What Mr. Young said when you came back? A Said, "Let that go until tomorrow because I have arranged with Mr. McGarvey an option to purchase this agreement for a certain profit," which I think was \$25,000, if Mr. Young could settle the matter himself before the day of settlement.

Mr. Vale: I ask that that "I think" be stricken out, may it please the Court, as not responsive.

The Court: No, I will let it remain for whatever probative force it may have.

Q Proceed. A And at that time both Mr. Young and Mr. McGarvey got into the conversation and asked me to prepare some sort of a rough draft to be passed upon as an agreement of option which was to be prepared in Philadelphia, the next day, which I did, covering that profit to Mr. McGarvey, Mr. Young all the time recognizing Mr. McGarvey as the owner.

Mr. Richards: I object.

The Court: Let that be stricken.

Q Mr. Conger, how old are you? A Forty—forty-five.

Q Can't you tell us the talk that took place, without stating the conclusions? A Yes, I can.

Q Do it, please, that is what we want. A As I said they were in my office and the question came up about the agreement, and I had it there to be recorded, and I suggested the assignment.

William H. Conger, direct.

Mr. Young and Mr. McGarvey went outside at Mr. Young's suggestion, and he came back, and I was informed I was not to assign it then, that that was a matter to be taken up the next day, and I prepare—

Mr. Richards: Now—

10

Q Did you prepare something? A I did.

Q What did you do with it? A As I recall it I handed it to Mr. McGarvey and Mr. Young, it was merely a rough—

Q Did you keep a copy of it? A I can't find a copy of it, I looked for it but it was kind of a memoranda, it was not an agreement, just the data to make, to be made the basis of an agreement of option to purchase this agreement by Mr. Young.

20

Q All right, now go ahead, what more happened? A Well, that is all happened that afternoon, as I recall it, they went away.

Q Was the agreement sent for record? A It was, I am informed.

Q Do you know— A Yes, I saw the, I had never seen the agreement that went for record, but I have seen the abstract of it at the title company which comes from the record.

30

Mr. Richards: I object.

Mr. Cole: Strike that out.

The Court: It will be stricken out.

Q Do you know what became of that agreement, which you received from Cleveland after you got it? A I kept it with the company's papers.

40

William H. Conger, direct.

Q Was it ever delivered to Mr. McGarvey?

A It was the following day, as I recollect it, but only for a little while.

Q I don't care anything about how long, was it delivered to him? A Yes.

Q Who were present when it was delivered?

10 A Mr. Young, Mr. McGarvey and myself.

Q What took place at that time? A I handed the agreement to Mr. McGarvey. He wanted to go to Mays Landing to record it, and I gave it to him and he went away, he was to come back to the office and we were to go to lunch together, in the meantime I read either the letter or the—

Q Wait a moment before you come to that. Did anybody go out with Mr. McGarvey? A

20 As I recall it Mr. Young and he went out together.

Q How did you come to deliver that agreement to Mr. McGarvey? A How I came to deliver it to him?

Q Yes.

Mr. Richards: I object to how he came to do it, if your Honor please.

30 The Court: Facts leading to it, I take it, I will permit the facts leading to it.

Mr. Richards: We will get another conclusion.

The Court: If we do we will strike it out.

Mr. Cole: Mr. Young may have told him to do it.

The Court: I have admitted it.

A It was by their common consent, yes.

40 Q Was Mr. Young there when you handed it to him? A Yes, sir.

William H. Conger, direct.

Q Did Mr. Young know for what purpose you handed it to Mr. McGarvey? A Yes.

Q What was it? A It was to record it.

Q Were they to return it to you—I mean the agreement? A Yes.

Q Who returned it to you? A Mr. McGarvey. 10

Q Who was with him, if anybody, when he returned it? A He was by himself then, as I recall.

Q Did you—just answer this yes or no—did he say to you why he was returning it? A He returned it to me because I requested it.

The Court: Let that be stricken.

Q Did he tell you, answer yes or no, why he was returning it to you? A Did he tell me why he was returning it? I just want to get your question, Judge. I don't believe the question can be answered yes or no. 20

(Question repeated.)

A Because I requested it.

(Question repeated.) 30

A Well, for our safekeeping.

The Court: Did he tell you, yes or no?

A Yes.

Q That is the answer, yes. Had you requested him to return it to you? A Yes.

Q And why did you request him to return it to you, after you had delivered it to him in the presence of Mr. Young? A Because the ques- 40

William H. Conger, direct.

tion arose in my mind as to the meaning of the instructions from Cleveland whether or not we were to hold it without recording, whether the escrow meant holding it without recording or not, and not wishing to do anything they didn't instruct us to do I felt I had better hold it for
 10 further instructions from Cleveland.

Q Did you tell Mr. McGarvey that? A Yes.

Q Did you either before that or after that notify county clerk's office not to record that deed or agreement, rather? A I did, yes.

Q Now did you meet Mr. Young and have any talk with him or he with you about this agreement after you had delivered it to Mr. McGarvey?

The Court: Do you mean before its re-
 20 turn or at any time after?

Mr. Cole: I mean— It is not important, if he had any talk after he can say so.

A No. Mr. Young—

The Court: That answers the question.

Q You answer, yes or no. A No.

Q Did you ever have any talk with Mr.
 30 Young at all about this agreement after the date you handed it to Mr. McGarvey to be recorded?

A No.

Q Have you ever met him since? A No.

Q Now you have stated that you had suggested the drawing of an assignment of this agreement to Mr. McGarvey?

The Court: Just one moment, Judge, that
 40 is not the testimony, the testimony of assignment to Mr. Young is this testimony.

William H. Conger, direct.

Mr. Cole: Assignment to Mr. Young.

Q Did you mean to say that? A No, I didn't mean that.

Mr. Richards: I object to correcting his own witness.

10

A Assigned to Mr. McGarvey.

Mr. Richards: There is an objection pending.

The Court: I will permit it.

Q Which was it, Mr. Conger? A Assignment from Mr. Young to Mr. McGarvey.

Q You read the agreement? A I prepared it.

20

Q Did you know it was to Mr. Young was the vendee named in it? A I did.

Q At whose request did you draw the agreement? A Mr. Young's.

Q Please tell us as best you can the exact words you know that passed touching the assignment of that agreement and who said it?

The Court: You want the exact language of the conversation touching this assignment of the agreement.

30

A I told Mr. Young that he should assign the agreement to Mr. McGarvey to protect his interest.

Q Had you had any information from anybody that Mr. McGarvey had an interest? A Yes.

Q From whom did you get the information?

A Mr. Young and Mr. McGarvey.

40

William H. Conger, cross.

Q What did they tell you? What did Mr. Young tell you? A Mr. Young told me that Mr. McGarvey was the principal and he was to put up all the money.

Q Now do you know about the subsequent tender of money? A Yes, sir.

10 Q Who made it? A Mr. McGarvey.

Q About when was it made? A As I recall the date that the agreement expired, that was February the seventh, I think.

Q What did he tender? A He tendered cash, legal tender.

Q How much? A In the neighborhood of \$25,500 and some odd dollars as I recall.

Q Did you ever meet Mr. Vanderveer in connection with the matter? A No, sir.

Q Or Mr. MacCain? A No, sir.

20 Q Meet anybody other than Mr. McGarvey and Mr. Young? A No, sir.

Cross examination by Mr. Richards.

Q When was it that Mr. Young told you that Mr. McGarvey was the principal? A He told it to me prior to the drawing of the agreement, of course the exact date I don't know, it was about the twenty-second or twenty-third of November when our conversation started.

30 Q Wait a minute, you have answered. That is all.

Charles W. Young (for Complainant), direct.

CHARLES W. YOUNG, sworn for the complainant.

Direct examination by Mr. Cole.

Q Are you the C. W. Young named in the agreement offered in evidence in this case? A I am. 10

Q Also the C. W. Young named in the quitclaim deed to the International Speedway? A I am.

Q Did you receive any consideration for the quitclaiming? A No.

Q Had you any promise of consideration? A No.

Q Do you now claim any interest in the land described in the agreement or in the agreement? A I deny Mr. McGarvey has any interest. 20

(Question repeated.)

A Yes.

Q By virtue of what? A By virtue of deed now of record in the name of Clarence E. Soffort.

Q Who is he? A A retired man.

Q Where does he live? A Living in Cleveland. 30

Q Were you present at the Chelsea Hotel on December seventeenth last? A I was.

Q How did you come there? A For luncheon.

Q Did you meet Mr. MacCain? A No, sir, not there, took him with me, and with the others that had been down here for the annual meeting of the Speedway Corporation.

Q Were you a stockholder? A I was not.

Q How did you come to be down to attend that meeting? A An interest in seeing that every- 40

Charles W. Young (for Complainant), direct.

thing that was done to pass a perfect title or good title from the Speedway to me.

Q Well, you already had an agreement dated December eighth with the Speedway, did you?

A Yes. Deed? Beg pardon.

10 (Question repeated.)

A Yes, agreement.

Q The one that was lodged with the title company? A That one that was lodged at Mays Landing.

Q The one that you had recorded? A Yes, sir.

Q Was that a copy of the one that was deposited with the guarantee title? A It was not.

20 Q Different was it then? A It was different, it was not a copy of it.

Q You mean not an exact copy? A I don't know, I mean it was an original and the other was the copy.

Q Did you ever surrender that agreement to the International Speedway? A Put it of record.

30 Q Why? A Because I wanted to, as I do in every purchase or real estate, I put it of record, which gives me additional security.

Q As against the International Speedway? A Against anybody including the owners.

Q Who were the owners of this land? A International Speedway.

Q Have you ever surrendered your rights that you claim under that agreement to the International Speedway?

40 Mr. Richards: I object. Your Honor please, I don't believe that Judge Cole has the right to cross examine this witness, he

Charles W. Young (for Complainant), direct.

can't go on a fishing expedition with him. That is the matter of record that the title to this land, where the title is, is a conclusion. The record can be produced here and we are entitled to the record and the counsel cannot make their case by even conclusion out of the mouth of the defendant that will bind either the defendant or the Speedway Company. 10

The Court: What relevancy can this present question have, Judge Cole?

Mr. Cole: Your Honor please, he is the defendant, the one that they say was our agent, of course our argument will be that there is now a collusion between this defendant and the International Speedway to defeat our rights. Now we certainly have a right to call this man and examine him. 20

The Court: Certainly, no question about that.

Mr. Cole: Of course if the question is objectionable from a legal standpoint, that is another matter.

Mr. Richards: It certainly is objectionable because a pure conclusion.

Mr. Cole: I don't want any conclusion. 30

The Court: Sustain the objection.

Q Have you ever signed any paper or had any agreement with the International Speedway Company concerning your interest in the agreement of December eighth, 1923?

Mr. Richards: I object to that on the ground that we are entitled to the paper, to begin with, no call was made for it, and thirdly because it is not within the compass 40

Charles W. Young (for Complainant), direct.

10 of the case as presented by the pleadings. The charge here is, in the pleadings, that this man is the agent of the complainant, for the purpose of taking title to this property, and no agreement of this description was in the pleadings, and no copies of it, and no charge to meet it and for the further ground, I think the more important, we are entitled to the paper.

The Court: If he says there is no paper, of course that answers it. If there is a paper before the contents can be shown then there must be a demand. I will permit his question.

(Question repeated.)

20 The Court: There are two questions there. I will sustain the objection.

Q Have you ever signed any writing with the International Speedway Company concerning your interest in the agreement of December eighth, 1923?

Mr. Richards: I want to renew my objection.

The Court: You may have your objection. I will overrule the objection.

30 (Question repeated.)

A The quitclaim, if that is it—

Q Quitclaim deed? A Yes.

Q Any other paper? A No.

Q Have you had any agreement by word of mouth with that company concerning your interest in that agreement?

40 Mr. Richards: I object to that on the ground it is not within the scope of the pleadings.

Charles W. Young (for Complainant), direct.

The Court: Sustain the objection.

Q Did you know on December seventeenth when there was a meeting at the Chelsea Hotel, that a paper had been delivered by Mr. Vanderveer to Mr. Kelly? A It had not been delivered until after that meeting.

10

Q Whenever it was did you know it had been delivered? A I was present when it was delivered and put under seal in the presence of all the gentlemen there including Mr. Kelly and myself.

Q Did you see the deed? A I did.

Q Did you know who was the vendee in it? A Named the vendee.

Q What? A Named it.

Q Who did? A I.

Q Are the words "Brighton Gardens of Atlantic City" in your handwriting? A Nothing like my handwriting. Compare it with others.

20

Q Did you say a moment ago that that was put in by your direction? A Absolutely.

Q Who is the Brighton Gardens Company? A A corporation to which for the payment by them of the money would have received title when the Chelsea Title and Trust Company were ready to give their policy.

30

Q Did you have any negotiations with the Brighton Garden Company? A I was instrumental in having them raise money to pay for this property when the Chelsea was ready to accept it under the agreement.

Q Who negotiated with you for the Brighton Gardens Company? A Some gentlemen who are directors of that company.

Q Who? A Well, there is a Mr. Valker, Mr. Bridgeman, there was another name I can't think of.

40

Charles W. Young (for Complainant), direct.

Q Was this deed made as a result of your negotiating with these gentlemen representing the Brighton Gardens Company?

10 Mr. Richards: If your Honor please, it seems to me this is all far afield, quite immaterial and I object to it.

The Court: Sustain the objection.

Q Was it before or after the delivery of this deed that the International Speedway Company made a deed to this Mr. Soffort that you spoke of? A Mr. Soffort's deed, to Mr. Soffort was much later, as will show by the records, when it was, but much later than the date when this deed was given to Mr. Kelly.

20 Q Has the Brighton Gardens Company given up its rights under this deed?

Mr. Richards: I object.

The Court: Sustain the objection.

Q Do you know why the Brighton Gardens Company did not take title under this deed?

Mr. Richards: I object as irrelevant.

30 The Court: I will permit the answer to this question.

A There was no opportunity for them taking, as title was not ready, and don't I know when title will be ready.

Q Well, does Mr. Soffort, named in the deed, represent you? A Mr. Soffort took and paid—

Q Answer my question. A Yes.

Q Is he holding that deed for you? A Yes.

40 Q Are you alone the one interested in the deed? A Other than the Brighton Gardens.

Charles W. Young, cross.

Q Was there a mortgage given back— A
There was.

Q —from Mr. Soffort to International Speedway? A There was.

Q For how much? A \$28,000.

Q Is there any agreement in writing outstanding between Soffort and the International Speedway? A No. 10

Q Have you any other agreement with the International Speedway than this agreement of December eighth in writing?

Mr. Richards: I object. It is immaterial and not within the scope of the pleadings.

The Court: I think that same question I overruled some time ago, question was any agreement by word of mouth. 20

Q Has the mortgage of \$28,000 from Soffort to the International Speedway been cancelled of record? A It has not.

Q Are you speaking now of your knowledge, or are you giving us simply your opinion? A Knowledge.

Cross examination by Mr. Richards.

Q What was the consideration of the deed from the International Speedway Company to Soffort? A The mortgage? 30

Q No, the deed, what was the consideration for that?

The Court: His answer is the mortgage.

Q The mortgage? A The mortgage.

Q Was that a purchase money mortgage? A I don't know the technical term, whether it is the 40

Charles W. Young, re-direct.

purchase money or a mortgage, or the difference between, it evidently was, it paid for the property, if you call that a purchase money mortgage, I don't know.

Q Then the International Speedway Company delivered a deed to Soffort? A They did.

10 Q And got back a \$28,000 mortgage in return? A They did.

Q Did that mortgage bear interest? A I think so.

Q Do you remember the rate of interest? A Six per cent.

Q Has there been any demand for the payment of that interest to your knowledge? A No, it wouldn't be due as yet, not due, if it was six months, which I assume it would be.

20 Q Do you know whether or not as a matter of fact there has been a threatened foreclosure of that mortgage? A Yes.

Q For what reason? A I can't tell.

Q Do you know whether or not the principal has been demanded at maturity? A Some-time after maturity.

Re-direct examination by Mr. Cole.

30 Q How long was the mortgage drawn for? A My recollection is two months, the records will show.

Q Who demanded payment? A The Speedway Association.

Q Well, did some individual do that, the corporation you know can't do it, it has to be an individual.

40 Mr. Richards: I object to the counsel arguing.

Charles W. Young, re-direct.

Mr. Cole: The objection is a good one, withdraw the suggestion.

Q What individual demanded payment of it?

A I don't know.

Q By whom did they make the demand, on whom did they make the demand? A I don't know. 10

Q Then how do you know it was made? A Well, I got it, it was made.

Q Somebody told you? A Well, I am not sure—

Q Just a moment, somebody told you? A I saw a letter, I don't know whether it was addressed to me, I am not sure.

Q When did you see the letter? A Saw the letter in Mr. McCain's office. 20

Q Your attorney? A Not in this matter.

Q How did you happen to be in Mr. McCain's office? A I haven't any office, and I frequently go in there with Mr.—there are other people that I do business with, that draws papers for me, Ennets and Schmidheizer, it is an office of many offices.

Q Then the source of your information concerning the demand for the payment of that mortgage was learned in Mr. MacCain's office? 30

A I learned it either from him or by seeing the letter; I am not sure.

Mr. Cole: I ask to strike that answer.

The Court: Stricken.

(Question repeated.)

A Yes.

Charles W. Young, (recalled), direct.

Mr. Richards. Your Honor please, I wish to make a motion to dismiss the bill.

The Court: Have to close your case, Senator, to do it.

10 Mr. Cole: May it please, your Honor, may I recall Mr. Young a moment. There are a couple of questions I overlooked.

CHARLES W. YOUNG, recalled.

Direct examination by Mr. Cole.

Q Did you retain counsel to file an answer for you in this suit, local counsel? A I did.

18 Q Whom did you retain? A Mr. Bourgeois.

20 Q Of Bourgeois and Coulomb? A Yes.

Q Did you retain counsel to file an answer for the International Speedway?

Mr. Richards: I object, if your Honor please, irrelevant.

The Court: What relevancy can that have?

30 Mr. Cole: I don't know. I have always thought, may it please your Honor, that if we could show that this International Speedway and Mr. Young are acting in concert, here, to defeat our rights, if we had any under this agreement, would be a pertinent inquiry. Suppose it should develop that this whole thing is Mr. Young, or suppose it should develop that the International Speedway is seeking to assist Mr. Young in some way, I don't know, it may be the answer would be against us, but I think we would
40 have a right to develop the fact.

Emanuel J. Eckstein, direct.

Mr. Richards: Supposing, if your Honor please, that what he says is true, what relevancy can that have in his case? He is seeking in this proceeding to declare that Young was his agent to deal with these people. Now, it would not make any difference whether or not the International was undertaking to assist Mr. Young or Mr.— 10
whatever this man's name was in Cleveland or anybody else. That doesn't constitute a fraud upon Mr. McGarvey, whatever their relations. The situation is that under this bill the International and Mr. Young are named defendants. They have a right to come in hereby counsel and defend it, and it is not a relevant inquiry on the part of the complainant to find out who employed counsel or how they are paid, whether they 20
get paid or anything else.

The Court: Sustain the objection.

COMPLAINANT RESTS.

DEFENDANTS' TESTIMONY.

EMANUEL J. ECKSTEIN, sworn for the de- 30
fendants.

Direct examination by Mr. Richards.

Q Mr. Eckstein, what is your business? A An officer of the Atlantic City Detective Department.

Q Were you in Mays Landing about December twelfth, 1923? A Yes, sir.

Q What were you doing there? A Over 40
there on a murder case.

Emanuel J. Eckstein, direct.

Q At that time did you meet Mr. McGarvey and Mr. Young? A I did, sir.

Q Who introduced Mr. McGarvey? A Mr. Young.

Q Did you have any conversation with him? A We had a conversation, yes, sir.

10 Q Where did you have it? A On the little white bench in front of the court house.

Q Now, during that conversation did Mr. McGarvey say to you that Mr. Young had a good proposition in the purchase of the speedway tract? A Yes, sir.

Q Will you detail the exact words that Mr. McGarvey used? A I don't know whether I can detail the exact words, but I can give it to you in substance.

20 Mr. Cole: Just a moment. He can only deny what Mr. McGarvey said.

The Court: Why?

Mr. Richards: I want to be sure I have got the exact words I asked Mr. McGarvey.

Mr. Cole: I withdraw it.

(Question repeated.)

30 A I don't know whether I can detail the words, but I can repeat it in substance. We talked about the tract, I understood Mr. Young had purchased and Mr. McGarvey said—

Mr. Cole: I move to strike out what he understood.

The Court: Let it be stricken.

A Mr. McGarvey said he thought Mr. Young had a good proposition in the speedway tract.

40 Q Did Mr. McGarvey tell you that Mr. Young had purchased this speedway tract? A No.

Emanuel J. Eckstein, cross.

Q Say anything about the purchase of the speedway tract? A Not Mr. McGarvey.

Q Did Mr. Young in Mr. McGarvey's presence say that he had purchased the speedway tract? A Yes, sir.

Q What did Mr. McGarvey say when Mr. Young said he had purchased the speedway tract? A Nothing. 10

Q Did they tell you what they were doing in Mays Landing? A Yes.

Q What? A Recording a deed.

Q A deed? A Yes.

Q What did it relate to? A The tract of meadowland known as the speedway, what was to be the speedway.

Q Now was Mr. Young present at the time that Mr. McGarvey told you that Mr. Young had a good proposition in this purchase? A Yes. 20

Cross examination by Mr. Cole.

Q How long had you known Mr. McGarvey at that time? A I had only met him that few minutes.

Q How long had you known Mr. Young? A I met Mr. Young around the middle of November.

Q That is all. 30

By Mr. Richards.

Q You knew neither of these men intimately? A No, sir.

Q You were not on friendly terms with either one? A No, sir.

Mr. Cole: I ask that question be stricken out as quite leading.

The Court: Yes, it will be stricken. 40

Charles W. Young (for Defendants), direct.

CHARLES W. YOUNG, recalled for the defendants.

Direct examination by Mr. Richards.

10 Q Mr. Young, what is your business? A
Buying and selling real estate.

Q Where do you live? A At 129 Bentley
Road Cynwyd.

Q That is Pennsylvania? A Suburb of
Philadelphia.

Q When was your attention first brought to
the possible purchase of the speedway tract
that is in controversy in this suit? A Middle
of October.

Q Who brought it to your attention? A
Garret P. Snyder.

20 Q As a result of that what did you do
toward negotiating for the purchase of the
speedway tract?

Mr. Cole: I want to object to all this as
being irrelevant until he met Mr. McGarvey,
I don't see what his previous action has to
do with this case.

30 Mr. Richards: If your Honor please, the
allegation is that we were the agent of the
complainant and goes to show knowledge.

The Court: I will permit it.

(Question repeated.)

A Examined it in the company of Mr. Snyder
and the president of the association on the fol-
lowing Sunday to having been called to my at-
tention.

40 Q Did you negotiate with the officers of the
company concerning the purchase? A First

Charles W. Young (for Defendants), direct.

with the president then went to Cleveland and met the other officers and negotiated with them, all being residents of the Middle West.

Q How long did you continue those negotiations before you met Mr. McGarvey? A About a month, probably a little longer.

Q When did you meet Mr. McGarvey in relation to the purchase of the speedway tract? You can't refer to any memorandum. A I am going to put it in evidence, or you will have to look at it, or the Judge may. 10

Q Put it back in your pocket and give your best recollection. A Fifteenth day of November.

Q What year? A 1923.

Q Did you know Mr. McGarvey before that date? A No. 20

Q Will you tell us why you went to him? A At that time I knew I could purchase the speedway tract and approximately the figure. I went first submitting it to Daniel Simpkins and then went to Mr. Smith, J. Willison Smith, president of the West End Trust Company, on that day, it may have been the day previous, but I believe it was that day. He was very busy—

Q Never mind about that. A Well—

Q As the result of anything that happened between you and Smith, did you then go to Mr. McGarvey? A He did, he referred to Mr. McGarvey, and to use his name, that he had sent me. 30

Q And did you go to Mr. McGarvey? A I did.

Q What conversation did you have with Mr. McGarvey relative to the purchase of the speedway tract at that time? A I told him that I could purchase it at forty-five thousand dollars possibly less. 40

Charles W. Young (for Defendants), direct.

Q What did you want him to do? A Wanted him to loan me money.

Q How much? A Up to five thousand dollars.

Q For what purpose? A For deposit and expenses that was incurred in concluding the contract.

10 Q Did Mr. McGarvey agree to loan you the five thousand dollars?

Mr. Cole: I object.

A Not then.

The Court: Sustain the objection.

Q Did you get the five thousand dollars from Mr. McGarvey that day? A No.

Q What did you offer to Mr. McGarvey in exchange for his five thousand dollars? A Nothing that day.

Q Did you have a subsequent conversation with Mr. McGarvey over the speedway proposition? A We came to Atlantic City the following day and had other subsequently to it, I think.

Q What was done the following day between Mr. McGarvey and yourself relating to the speedway proposition? A Naturally wanted to see it and made an appointment to meet him at the Reading Station the following morning.

Q What did you do? A Met him there and took him out in an automobile to the tract.

Q You and he examined the tract together? A I had already examined it and was describing its approximate boundaries as near as I could, had a blue print and so forth, of course in those big tracts you can't tell except ap-

40

Charles W. Young (for Defendants), direct.

proximately, but I gave him enough of the boundaries and so forth so he could recognize the property.

Q Did you have any further conversation with him that day? A Yes, he left me to make his own investigation as to the values and their ownerships, if possible, contiguous to it, or on the meadows. 10

Q Meet him later during the day? A He agreed to meet me and did at the Chalfonte for dinner.

Q Did he loan you that five thousand dollars that day? A No.

Q When did you meet him again? A The following Monday, as near as I can recollect was Thursday or Friday, sixteenth day of November, that he was here, and I remained in Atlantic City until Saturday night, that I know because I saw Mr. Willison Smith there until Saturday night, and left Saturday night and spent Sunday at home and went to his office on Monday. 20

Q By the way, who was present at that dinner at the Chalfonte this Thursday or Friday night? A Mr. McGarvey and I started dinner.

Q Just tell us who was present quickly as you can, we want to get on. A We two were only present at the beginning of the dinner and as we progressed and very shortly after starting, someone said, "Boys, may I sit down with you?" and it was Mr. J. Willison Smith. 30

Q Now on the following Monday, which you say was the nineteenth of November, did you meet Mr. McGarvey relating to the speedway proposition? A Yes.

Q Did you have at that time a conversation about the loan of the five thousand dollars or any other sum? A Yes. 40

Charles W. Young (for Defendants), direct.

Q Will you tell the Vice-Chancellor what that conversation was? A That he would loan me that much money or up to it, such as I call on wanting immediately, twenty-five hundred, or as soon as I started to Cleveland, a few days later that, first, if I should sell it to Mr. Simpkins, to whom it had been offered at thirty thousand dollars advance, I would divide with him that advance. If Mr. Simpkins did not purchase, Mr. McGarvey was to sell the property, if he could, as my agent, and then the advanced price, providing he should do it before the sixth day of February, the contract expiring on the seventeenth of February—

Q Proceed. A That that was accepted, and how much later, the document is here to prove, and had given to me the due bill, I thought it was Girard Trust, but maybe West End, I haven't seen it since I had it, and I went to Cleveland.

Q What was to be done with the advance in price over what the property was costing you, if Mr. McGarvey succeeding in selling it between the time of that negotiation and the sixth of February, and provided Simpkins did not purchase it? A The time—will you repeat that?

Q What was to be done with the money? A The excess over that?

Q Yes. A I was to give him one-half of it.

Q All right, go ahead. A What do you mean?

Q After that, what was to be done in case Mr. McGarvey—Mr. Simpkins failed to purchase and Mr. McGarvey failed to get a purchase before the date of the sixth of February?

Mr. Cole: May it please your Honor, I object to this, I think we are entitled to have the conversation.

Charles W. Young (for Defendants), direct.

The Court: Yes, sustain the objection.

Q What was the conversation relating to the contingency that no one should purchase the property before the sixth of February?

Mr. Cole: I object to that. I think we are entitled to have the conversation. 10

The Court: Yes.

Q Give us the conversation. A That was the first condition that was submitted by me, and then if that failed and Mr. McGarvey should sell it for me up until the sixth of February, or up until the day preceding, I would rather mention, up until the day preceding the expiration of an agreement which was yet to be signed, which later did have the date of December seventh, expiring on February seventh, was sixty or two months, I don't know, but they are the approximate dates. That would give him the last day or the day preceding the last to return him his money. 20

Mr. Cole: Mr. Young are you telling us the conversation?

A Yes, sir, I am. 30

By Mr. Cole.

Q With Mr. McGarvey? A Yes, sir.

Q Talk between you? A Yes, sir.

Q All right. A That should he not sell it on the day preceding the expiration of the agreement to be made, that was confident of being made, but yet had to be consummated, I was to repay him—this is my agreement with 40

Charles W. Young (for Defendants), direct.

Mr. McGarvey, I was to repay him the money loaned me.

By Mr. Richards.

10 Q Now, after—was that all the conversation that day? A The conversation may have been more than one day, but that was the result of it before I went to Cleveland, and before I got the check.

Q We don't want that, we want to know whether that was all the conversation you had on Monday, the nineteenth of November. A It was all the conversation I had on, whether it was that day or the succeeding day.

20 Q How much of the conversation did you have on that day, Mr. Young? A All of the conversation, and probably repeated on a subsequent date, I think. I don't know that that was the final end of the conversation, but I know that was the final agreement.

Q Did you have any conversation after that ninth, before you went to Cleveland? A I don't know.

Q If you did, did that relate to this agreement? A Absolutely had no other business with him.

30 Q When did you go to Cleveland? A I don't know, except from letters here which confirm that I was in Cleveland and wrote letters at a certain date, the latter part.

Q Did you go between the nineteenth and the eighth of—between the nineteenth of November and eighth of December, how many times did you go to Cleveland? A Twice.

40 Q When did you go that first time, as near as you can recollect? A Around the twenty-fifth.

Charles W. Young (for Defendants), direct.

Q What did you do in Cleveland? A Completed negotiations.

Q With whom? A With the officers of the Speedway. It was determined that they would have to be authorized by a resolution or by an agreement.

Mr. Cole: Is this important? I object to all this. 10

A Well—he knows.

Q Just wait a moment.

Mr. Richards: I don't think it is important.

Q Did you negotiate in Cleveland for the purchase? A Yes.

Q And you came back from Cleveland? A 20
Yes.

Q Have any further talk with Mr. McGarvey?

A I don't know.

Q You mean you don't recollect?

Mr. Cole: I object.

A I said—

The Court: Sustain the objection. He says, "I don't know." 30

Q Did you go to Cleveland again? A I did.

Q Did you have further negotiations in Cleveland at that time? A Not any further negotiations, but got from them the agreement, the negotiations were on the preceding, were concluded, and they had to get authority from the stockholders which is the reason of my leaving Cleveland, waiting there and going out. 40

Charles W. Young (for Defendants), direct.

10 Q Now, the agreement, a copy of which is attached to this bill of complaint, a copy of which I think is also in evidence, was the agreement you got signed? A The copy is not in evidence, the copy of that copy is in evidence, and that is, as I believe, purported to be a copy of the one on file at Mays Landing. There has been a distinction between these two agreements, which is the original and which is not.

Q Did you bring the original back with you? A I did.

Q What was done with the copy? A It was sent from Cleveland to the Chelsea Title.

Q Was that copy signed and executed? A It was.

Q The same as the original? A Yes.

20 Q It was, in fact, a duplicate? A Well—

Q Never mind. When you came back, did you see Mr. McGarvey? A I did.

Q What did you and he do relating to this matter, after you saw him? A General congratulation from him, called up, he called up, as testified here by him, Mr. Conger, called up the title company on the phone.

Q Did you claim—what did you do after that? A Came to Atlantic City.

30 Q Where did you go? A To the title company.

40 Q Have any conversation there between Mr. McGarvey, anybody and yourself? A Immediately that I entered, I met Mr. Conger, he said, "Gentlemen, here," he took him back into, I believe to be Mr. Kelly's office, immediately back of Mr. Conger's desk, they were not gone over three moments, he came out there, and I don't know what took place, of course, there, and the question came up about putting this of record.

Charles W. Young (for Defendants), direct.

Q What was said about putting the agreement of record when Mr. McGarvey was present?

A That they did not or could not put it of record, he didn't have the notary's certificate. While they were out, I picked up that which he denied having the night before, which had not been referred to yet that morning, I picked it up on the left-hand side of his desk, next to the wall, didn't immediately say anything, but that was his reason why it could not go of record.

10

Q Now— A May I go on and say what happened?

Q No. Now, what happened? Did you and Mr. McGarvey leave the title company after that? A I want to say that—

Q Answer the questions, please, and we will get along faster. A Yes, we left the title company.

20

Q Did you meet Mr. McGarvey the following day? A Yes.

Q Where? A Camden.

Q What did you do? A Went down on the electric train to Mays Landing, later to Atlantic City.

Q Did you and Mr. McGarvey proceed to Mays Landing? A Yes, went on the train together and got off there.

30

Q What did you do when you got there? A Looked up Mr. Johnson, and was not immediately found, but later on, and I put the agreement of record, the original agreement of record, mine.

Q Did you pay Mr. Johnson twenty-five dollars? A No.

Q Did you borrow twenty-five dollars from Mr. McGarvey? A No.

Q Did you, after the agreement was of record, did you meet anybody in Mays Landing?

40

Charles W. Young (for Defendants), direct.

A I met him before it was of record, Mr. Eckstein, when I was seeking Mr. Johnson, almost immediately upon getting to the court house.

Q Have any conversation between Mr. McGarvey, Mr. Eckstein and yourself? A I did.

10 Q Anything said about the purchase of the Speedway property? A There was.

Q What was said? A That it was purchased at, by me, at a low price, that I had a good profit in it, much else that was not relevant.

Q Who said that? A McGarvey.

Q Did you tell Eckstein that you purchased it? A I don't recall whether I told him or he told him, I put my agreement of record later, when I had put it of record I have shown here, and I said I said I had put my agreement of purchase of record.

20 Q Now, after you put the agreement of record, what did you do next? A I left both of them and went to a bank, what I would call the main street, and met quite an elderly gentleman there, an officer, don't know his name, and inquired for a party who I had been told in Cleveland, had considerable money in the—stockholder.

30 Q A stockholder in the Speedway Company? A I was looking for him.

Q What did you and Mr. McGarvey do when you got through with your business in Mays Landing? A When the train left, we were on it for Atlantic City.

40 Q What did you do when you got in Atlantic City? A Went to luncheon, the first thing, then came back from luncheon and went to see Mr. Conger, I, waiting at the corner of Tennessee and Atlantic, in the embrasure of an empty

Charles W. Young (for Defendants), direct.

store, at that time, for his return. He came over to me, in the meantime Mr. Snyder had joined me there, knowing I was going to be there, he had been at luncheon with us, he said, "Mr. Conger wants to see you." I declined to see Mr. Conger, and I did not, and never did see Mr. Conger to speak to him from that day or the preceding day on. We then went to the Chalfonte Hotel in the lobby, where I am accustomed to sit when I am in Atlantic City, and chatted. 10

Q Anything said about the affair, about the Speedway proposition? A There was nothing else to talk about, maybe time of day, but at each of these times the Speedway was talked of, and I don't recall anything else; there may have been irrelevant things, and it was two or three or four hours confining the luncheon, after we got in Atlantic, luncheon, and then the meeting over here, and then the Chalfonte was certainly— 20

Q When did you see Mr. McGarvey again after that day? A The day of the thirteenth of December, the afternoon.

Q By the way, have you fixed the day when you put this agreement of record? A Twelfth.

Q Following day you saw him again? A Yes. 30

Q Where? A At his own office.

Q Have any conversation about the Speedway matter with him? A No, had a conversation with him about Mr. Conger and certain charges I made.

Q What did you and Mr. McGarvey do? A I had him come to the Land Title Office, 834, to prove my contention of what Mr. Conger had done. 40

Charles W. Young (for Defendants), direct.

Q Who was at the Land Title Office? A Mr. Fry, Mr. Berlekamp, Mr. Vanderveer, Mr. MacCain and myself.

Q MacCain was your counsel? A He had been my counsel for years, in many things, but in different—

10 Q About what time of the day was it? A Six o'clock.

Q At that time, was there any discussion about the Speedway project? A There was not.

Q What—when the meeting was over, what occurred? A We all went out and I walked as far as, well, some street west of Broad, and I left Mr. McGarvey, after while, and went home.

Q At that time, was there any trouble between Mr. McGarvey and yourself? A There
20 was not.

Q When did you see Mr. McGarvey again? A Never have talked to him since that time.

Q Have you seen him since that time? A On the street once or twice, in passing, I think twice. I don't know whether he saw me on either time.

Q You didn't have any conversation with him of any kind after that? A None.

Q This was on the night of the thirteenth? A It was.

30 Q What day of the week was that, do you recall? A Thursday.

Q Were you in Mr. MacCain's office on the following Saturday morning? A I was.

Q Did you communicate with Mr. McGarvey that morning? A I did not. May I qualify that?

Q You can tell us what you did. A Mr. MacCain had not come in, I was informed by his office that he was out purchasing with his wife,
40 it was probably ten o'clock in the morning, and

Charles W. Young (for Defendants), direct.

I had the habit in anyone's office of picking up the phone, and Mr. McGarvey was on the telephone calling Mr. MacCain, and I did have a conversation with Mr. McGarvey, a very short one, at the latter part of which Mr. MacCain came in, just about as it was over.

Q What did you say to McGarvey and what did he say to you? A That the proposition which he had made the night before to Mr. MacCain was accepted, and he said nothing, practically hung up immediately. 10

Q Did you say that to him? A I said that to him.

Q And he made no reply to it? A No, I thought maybe it dropped, but—beg pardon, after making the answer, there was no answer over the phone at all, quiet, dead. 20

Q Did you understand what the proposition was that you referred to?

Mr. Cole: I object.

The Court: Sustain the objection.

Q Mr. Young, did Mr. McGarvey at any time between the dates you first met him and your last conversation with him over the telephone, or at any other time, ever claim that he was the owner of this agreement? A He never did. 30

Q Did he ever claim to be the equitable owner of the land mentioned in the agreement? A Not prior to his filing of some paper in Mays Landing was the first, and it was an entire surprise.

Q Did he ever claim that you were acting as his agent for the purchase of the Speedway tract? A He never did.

Q Were you, in fact, acting as his agent in negotiating with the Speedway Company in the 40

Charles W. Young (for Defendants), cross.

purchase of the Speedway tract? A I never was.

Q Did you have any understanding or agreement with him, relative to the purchase of the Speedway tract, except the one you have detailed here? A Nothing other than I have detailed here, the last being that short few words over the telephone.

Q That is all. Cross examine.

Cross examination by Mr. Cole.

Q Did you ever go to the title company and undertake to perform the agreement which you had with the Speedway of December eighth? A I went there repeatedly and saw Mr. Wygand, constantly trying to hurry up, what is the condition, hurry up, get it through.

Q What was the last date that you were at the title company, urging them to close this up? A I don't know.

Q Did you ever have the money, twenty-five thousand, five hundred, to pay? A I made arrangement when title was ready to have much more than that.

Q Did you go there on February seventh and make the tender? A I did not. The title was not ready. I had been there.

Q I didn't ask you that, sir. A Well, I am telling you.

Q Have you ever had, in your own name, \$25,500 to pay the amount mentioned in that agreement?

Mr. Richards: I object to that. In the first place, it is not cross examination, and, secondly, it is immaterial whether he ever

Charles W. Young (for Defendants), cross.

had, in his own name, twenty-five thousand dollars or not.

The Court: I will permit it.

(Question repeated.)

A Oh, I have had a hundred thousand dollars.

Q In your own name? A Yes. 10

Q Since when? When did you have a hundred thousand dollars in your own name that you could use to buy this property? A You asked me whether I ever had that much money, and I answered your question.

Q I mean, having in mind, Mr. Young— A I didn't use it.

Q All right. Have you had, in your own name, twenty-five thousand five hundred dollars to buy this property at any time from December until February seventh? A I haven't, because there was no necessity. 20

Q That is all. Have you had it? A No.

The Court: He says, "I haven't." Let the rest be stricken.

Q Are you now claiming to have an interest in this agreement of December eighth? A No.

Q Have you been released from it by the Speedway Company? A Don't know later, but the— 30

Mr. Vale: He is asking a conclusion there, may it please the Court.

Mr. Cole: He is under cross examination.

Mr. Vale: What if he is?

The Court: I will sustain the objection.

Q Why did you deem it necessary if you had the agreement that was yours of December 40

Charles W. Young (for Defendants), cross.

eighth, and not Mr. McGarvey's, as he claims, to quitclaim under that and then make a new deed with the International to put this property through Mr. Soffort? A Because of the action of Mr. McGarvey on the fourteenth of December in Mr. MacCain's office.

10 Q What was that? Were you there? A I was not.

Q You say Mr. McGarvey had until February sixth, or the day before, in which to do certain things under his agreement? A I beg pardon?

(Question repeated.)

A Yes.

Q Why didn't you wait until February sixth to give him an opportunity to do that before you surrendered your interest under this agreement?

20 A Because of his reported doings to me, and the proposition to me in Mr. MacCain's office of December fourteenth, and also the filing of a certain paper in Mays Landing.

Q In other words, you saw fit, for reasons satisfactory to yourself, to repudiate the agreement you had with Mr. McGarvey; is that correct? A No, I never repudiated it.

30 Q Did you tell your counsel, whom you first employed, to file this answer, what your arrangement was with Mr. McGarvey?

Mr. Richards: I object.

The Court: Sustain the objection.

Mr. Cole: I want to show the answer is quite contrary to what he is now setting up; at least he doesn't make the complaint in the answer.

40 The Court: He is not compelled to disclose what he told his counsel. Sustain the objection.

Charles W. Young (for Defendants), cross.

Q When you went to Mays Landing to record this agreement, were you afraid the International Speedway might repudiate the agreement? A I always take it as a protection universally.

Q I am asking— A Afraid of nothing, I do it anyhow.

Q Will you answer the question? A I was not. 10

Q Did you have that agreement recorded to protect yourself against any possible future act on the part of the International Speedway? A Yes.

Q What was the date that you say you concluded that you would not any longer recognize Mr. McGarvey? A I never said in my testimony that I ever refused to recognize him.

Q Do you recognize he has any interest now? A No. 20

Q Where did his interest end, according to your opinion? A When he started these proceedings.

Q When was that? A You started them.

Q Well, don't you know? A No.

Q How can you determine when it was if you don't know? A Well, I know that at that time, when I got the information for it, that I was protecting myself. 30

Q When were you advised about the proceedings? You mean now the proceedings in equity, these present proceedings? A And the one at Mays Landing, and the agreement, or the visit of Mr. McGarvey to Mr. MacCain, all of this came in consecutive order.

Q When do you fix that time? A Called Mr. McGarvey on the fourteenth and fifteenth.

Q When did you arrange to have this property sold to the Brighton Gardens Company? A After the time that I learned several things. 40

Charles W. Young (for Defendants), cross.

Q You fix December fourteenth as the time you saw Mr. MacCain; is that right? A No, I don't say that. I said I talked to Mr. McGarvey on the phone; I have already testified on the fifteenth.

10 Q And you did report all that he said there?
A Fourteenth.

Q Who did you see after that and negotiate with for the sale of the property to the Brighton Gardens Company? A Still wasn't consulted; arrangements had been made.

20 Q I didn't ask you that. I asked you with whom you were negotiating for the sale of the property to the Brighton Gardens Company, after you thought you had trouble with Mr. McGarvey? A I never told them of any trouble with Mr. McGarvey, any one of the Brighton Gardens.

Q But you negotiated with somebody for the purchase of it, didn't you? A When the title was ready I didn't have to talk to them any more; the title has never been ready.

Q Did you negotiate for the sale of this property to the Brighton Gardens Company before you got Mr. McGarvey's money? A No.

30 Q When did you, after you got his money?
A I don't know the date.

Q With whom did you negotiate? A I have already told you Mr. Valker was one.

Q Mr. Valker? A Mr. Valker.

Q Where does he live? A Spruce street, east, I don't remember the number, but in an apartment, Spruce street, between Nineteenth and Twentieth, maybe between Eighteenth and Nineteenth.

40 Q What is his first name? A William.

Charles W. Young (for Defendants), cross.

Q What is his business? A He had been with the, he had been with the Durant, selling Durant securities, he was a security salesman, I would call him.

Q Did you ever get any money from him?
A No.

Q From the company? A No. 10

Q Did you have any agreement in writing with the company? A No.

Q Did you have any agreement that was not in writing with them? A In everything else had with him the company was going to get the property; it didn't interfere with the right that I speak of that Mr. McGarvey was to have, it was all protection.

Q You mean you were then going to buy it subject to Mr. McGarvey's rights? A No. 20

Q What was it? A I said after the expiration of his rights, we were getting prepared, it was incorporated, and getting prepared for it, which was done, but not a binding agreement, but was in preparation for raising money, if Mr. McGarvey did not sell the property for me prior to the sixth day of February. You can't get an incorporation in a day.

Q What did you personally know about the incorporation? A A great deal. 30

Q Of the Brighton Gardens? A Of every incorporation for thirty years.

Q I didn't ask you that? A Brighton Gardens, yes.

Q Tell us what you personally know about the incorporation of that company. A I saw that it was incorporated.

Q Under what law? A Under the law of New Jersey, always have. 40

Charles W. Young (for Defendants), cross.

Q Where did it meet and organize? A I would have to have the papers here, record, what was done by the corporation.

Q I am asking you, do you know, Mr. Young?

A No.

Q Who are the incorporators? A I mentioned them to you.

Q How do you know that? A I don't know how I know anything; I know it, and it is a matter of record, and I will prove I know it.

Q Did you ever see the record? A Yes.

Q Where did you see the record? A I was present at its incorporation.

Q Who was present? A Mr. Merozze and Mr. MacCain.

Q The lawyer? A Yes, and myself.

20 Q And where are they? A Anywhere I visited, offices in the Land Title, and the Corporation Guaranty Trust, or whatever its name, there are two of them there, but the one Mr. Merozze an officer of.

Q For what purpose was the company incorporated? A To take title when Mr. McGarvey failed to sell this property for me.

Q Were you anticipating that he had failed? A I didn't know.

30 Q Now, he did fail, did he? A I don't know.

Q You repudiated it, didn't you? A I never repudiated anything.

Q You admit now, that you had no interest in that agreement? A That wasn't in the agreement.

Q Then why was not this title made to the Brighton Gardens Company? A Because that would have controverted my agreement that I had with Mr. McGarvey which was to sell this
40 property if he could.

Charles W. Young (for Defendants), cross.

Q Why did you turn around and have it sold to Mr. Soffort out in Ohio? A Because of these proceedings and what Mr. McGarvey done on the fourteenth and fifteenth day of December.

Q Then you testified whenever Mr. McGarvey was out of this transaction— A I would like it read to me.

10

Q Wait a moment. Then you testified whenever Mr. McGarvey was out of this transaction that the Brighton Gardens Company had a right to take this property over? A Same as I had myself on the last day.

Q Won't you please answer that yes or no, that that was the understanding? A That they would take it over.

Q Why haven't they? A There was no title, and nobody will take it over without title.

20

Q Mr. Soffort, took it over, hasn't he? A He had the privilege.

Q And he gave a bond and mortgage for twenty-eight thousand dollars? A Yes, sir.

Q What did he know about this title? A Nothing.

Q Did he ask you anything about it? A He knew, yes, it couldn't be done for some time, and he took his chances.

Q Who told him that? A I did, and probably others out there.

30

Q Where did you see him to tell him that? A In the Cleveland Hotel.

Q You went West and had the International Speedway Company make this agreement over after you had quitclaimed, didn't you? A Yes.

Q Who did you meet in connection with the transaction? A All the ones in that proceeding, all the ones in that department.

Q Mr. Vanderveer? A Yes.

40

Charles W. Young (for Defendants), cross.

Q What did you tell him in order to get this deed to Soffort? A Told him what McGarvey had done on the fourteenth and fifteenth, told them all that happened there that day, and they knew what had happened on the thirteenth, they had met Mr. McGarvey that day.

10 Q Was anything said about the \$2,500 on deposit with the Chelsea Guaranty Company by Mr. McGarvey? A No, sir.

Q Did they know it was there? A Sure, they sent it there.

Q You knew it was there? A Absolutely.

Q Have you ever tendered Mr. McGarvey the money that he has put in this enterprise? A I wouldn't have the right.

Q I didn't ask you that, sir. Have you done it? A No.

20 Q Do you know who wrote in that deed the name of Brighton Gardens Company? A No, sir, I do not. I know it was at my direction.

Q Who did you tell to put it in there? A I don't know.

Q Where did you tell them? A I think it was at the Chelsea Hotel.

30 Q Who prepared that deed? A Will I see the deed? It may help me. I want to get who it was—I think it was in the office of the Guaranty Trust Company now, that put this thing in here, if I can find the notary before whom—oughtn't that to be here somewhere?

The Court: Right on the other side.

A The deed—this Brighton Gardens deed was acknowledged by Mr. Sypherd, at least, I went to Mr. Sypherd, I had to be identified by Mr. Daniel D. White, in the Guaranty Trust Building, and
40 it was somebody in there—now it is coming back

Charles W. Young (for Defendants), cross.

to me—that put in these things at my direction, I had the officers there and they executed this deed, and I recall that Mr. White sent over word that he knew me for many years, and it was all right for Mr. Sypherd to either party, and I think you will find that this Edgar R. Somers is connected with the Guaranty Trust. 10

Q Now, my question was, which you have not answered, who prepared the deed? A I want to see if I could get some identification. Some stenographer copied from another, here in Atlantic City, and I don't know who, that is the best recollection, it was some stenographer that prepared a deed from other copies, is the best that I can recall. There is a copy of one there that was put in their hand, and I don't know who it was.

Q Were these officers in Atlantic City on that date? A Yes, sir, down to the Guaranty Trust, and met Mr. Sypherd. 20

Q Brought the seals with them? A They did. They had been there for various things, anyhow, they had the seal.

Q This states a consideration of a hundred dollars. How did that amount come to be inserted? A Well, the stamps were not provided by them on any of the papers, and it was provided by me, whereas they should have provided all the stamps on the various papers that had them. 30

Q Well, you haven't answered my question. A I am trying to.

(Question repeated.)

A Because they owed me a hundred dollars.

Q Is that all you were going to pay for the land? A No, we often put in nominal one dol- 40

Charles W. Young (for Defendants), cross.

lar, but more recently have to have more than that; some courts have decided that isn't any consideration.

Q Who owed you the hundred dollars? A The vendors.

Q International Speedway? A Yes.

10 Q And because they owed you a hundred dollars, that was the amount that was inserted? A Not necessarily. When that was put of record—

Q What was the consideration the Brighton Gardens was to pay for this property? A The amount that was named in the agreement that was on file in Mays Landing.

Q \$28,000? A Yes.

Q The same agreement you are talking about now that they had with you, or your nominee?

20 A Sure, this was not title.

Q What did they owe you a hundred dollars for? A I told you, for disbursements.

Q For the International Speedway? A Yes, they had needed the money; I put up the money for stamps on everything, and I think you will find stamps amounted to more than that alone.

Q How did you come to be present at the incorporation of the Brighton Gardens Company?

A They were my nominees.

30 Q When did they come to be your nominees?

A Because I put them in there, which I had the right to do.

Q I say when, when did they come to be your nominees? A They would never be my nominee if they didn't pay for the property after the sixth day of February.

Q Was Mr. Soffort your nominee, too? A Not then.

40 Q Was he later? A I don't know. That is a legal question.

Christian S. MacCain, direct.

Q Does the Brighton Gardens Company now have any right to buy this property?

Mr. Richards: If your Honor please, I presume it is a legal conclusion, and I object to it on that ground.

The Court: Yes, it would seem to me that it is a legal question, a question of law. Sustain the objection. 10

Mr. Cole: I think that is all.

CHRISTIAN S. MACCAIN, sworn for the defendant.

Direct examination by Mr. Richards.

Q Mr. MacCain, what is your business? A I am a lawyer. 20

Q Where do you practice? A Philadelphia.

Q Member of the Pennsylvania Bar? A Yes, sir.

Q Do you know Mr. Young? A I do.

Q Do you know Mr. McGarvey? A I do.

Q When did you first know Mr. McGarvey and Mr. Young with his relations with the International Speedway purchase? A I knew Mr. Young was dealing with Mr. McGarvey in some way, some time around the first week in December of last year, I first met McGarvey for the first time in my office on the night of Thursday, December thirteenth. 30

Q At that time, was there any conversation relating to the Speedway deal? A On the evening of the thirteenth, the conversation referred entirely to certain actions, certain charges Mr. Young had made against Mr. Conger in connec- 40

Christian S. MacCain, direct.

tion with the Speedway deal, but there was no discussion between Mr. Young and Mr. McGarvey as to their relations to each other that night in my office.

10 Q At that time, did Mr. Young charge bad faith on the part of Mr. Conger in relation to this matter? A Mr. Young was charging bad faith against Mr. Conger in relation to his handling of the trust company in this matter.

Q When did you next meet Mr. McGarvey? A I met Mr. McGarvey next on Friday afternoon as the consequence of a telephone call. Mr. J. Willison Smith and Mr. McGarvey came to my office and Mr. Smith introduced Mr. McGarvey and then left, and Mr. McGarvey remained with me for something like over two hours that afternoon.

20 Q During that time, did you have a conversation with Mr. McGarvey relative to the Speedway deal? A Yes, Mr. McGarvey—

Q And if so, will you state what it was? A Mr. McGarvey did most of the talking and went over a considerable amount of stuff that I have a very hazy recollection of because it related solely to extraneous questions. He finally got down to a specific statement that on the night before he and Mr. Young had had a conversation, after leaving my office, and as a result of that he had lost confidence in Mr. Young, and he came to me with the idea that perhaps some arrangement could be made to fix the matter up. As a result of that afternoon's conversation, he left with me the proposition which he has narrated here, that he would take his money and twenty-five thousand dollars and step out.

30 Q Did he, at that time, make any claim to you to be the owner of this agreement of purchase? A He did not.

40

Christian S. MacCain, direct.

Q I am referring now to the agreement between the Speedway Association and Charles W. Young? A He did not, sir.

Q Did he, at that time, say that Mr. Young was acting as his agent in the matter? A No.

Q That he was the real principal behind this proposition? A No, he did not put forth that claim. 10

Q What did he say to you was the business relation between Mr. Young and himself? A He stated to me that Mr. Young had come to him to get financial assistance in purchasing this property from the Speedway Association; that Mr. Young and he had agreed that if Mr. Young could purchase this property for a certain price, Mr. McGarvey would advance deposit money for some little things along that might be needed and that the property, if purchased, should be offered for resale; that Mr. Young had explained to him that it had already been offered to Mr. Simpkins for a specific price, my recollection is seventy-five thousand dollars, the price at which Mr. Simpkins was offered the property, and that Mr. McGarvey had agreed with Mr. Young that if they bought the property, Mr. Simpkins should have the purchase at that price, if Mr. Simpkins did not, then the sale price should be put at \$100,000, and that upon such sale that the profits of that sale were to be divided equally between Mr. Young and Mr. Smith. 20 30

Q Now, did you have any further conversation with McGarvey? A The next afternoon, Saturday afternoon.

Q What was that? A Saturday noontime, about another telephone conversation—another telephone call and Mr. McGarvey came to see 40

Christian S. MacCain, direct.

me again around two o'clock or half-past two, and stayed with me, I imagine, nearly two hours, Saturday afternoon.

10 Q What did he say at that time relative to this matter? A At that time he reiterated much of the talk of the afternoon before, he changed his ground somewhat, and insisted at this time that he should have an assignment of this agree-
ment of sale as security to him for the payment to him of the twenty-five thousand dollars plus deposit money, plus down money, which had been advanced by him.

20 Q How did he happen to fix upon twenty-five thousand dollars? Did he tell you that? A Directly, no. Indirectly he said that Mr. Young had mentioned that figure to him in his first interview, and he would go back to that item of twenty-five thousand dollars plus the amount.

Q You mean that Mr.—

Mr. Cole: I object.

(Question withdrawn.)

30 Q What else was said before he concluded his interview, Mr. MacCain? A Unless you can direct my attention to some specific thing I can recall of.

Q Did he make any direct threats that if Mr. Young did not satisfy his demands that he would do certain things? A Mr. McGarvey said that it was his intention to get possession of that property, and that unless Mr. Young immediately did what he desired he would find he was in for a considerable trouble.

40 Q Now, then, what did he desire Mr. Young to do? A At the time Mr. McGarvey left me his desire had boiled down to a mere assignment

Christian S. MacCain, direct.

of that agreement to him as security for this amount of money.

Q Was there any alternative proposition to that? A There was some sort of an alternative proposition made which contemplated that if Mr. Young did not immediately do that, that then the agreement should be assigned to him and Mr. Young step out entirely. 10

Q That was his demand? A That was the demand.

Q Did he reiterate his demand of the day before for the payment of the twenty-five thousand dollars? A Yes, and coupled with the rest of the demand, not as a separate demand.

Q Now after he had made the demand for the twenty-five thousand dollars on Friday, what, if anything, did you do? A On Friday after Mr. McGarvey had left, Mr. Young unexpectedly came to my office around half-past five in the afternoon, and I then reported to him what had occurred between Mr. McGarvey and myself. 20

Q What did Young— A Mr. Young tried to get Mr. McGarvey and also some others on the telephone that night from my office. He had no success there. On Saturday morning I was delayed getting into the office, and when I came in Mr. Young was talking on the telephone and I heard enough of the conversation to indicate to me that it was the Speedway— 30

Mr. Cole: I object.

The Court: Sustain the objection.

Q What did you hear Mr. Young say over the telephone? A I heard Mr. Young say, "I accept your proposition" and someone else said "Yes, twenty-five thousand dollars." Mr. Young 40

Christian S. MacCain, cross.

went on repeating those things, apparently without getting an answer, and hung up the 'phone. I couldn't hear anything on the telephone except what Young said.

Q See McGarvey after that? A Yes, that was Saturday morning.

10 Q You saw McGarvey Saturday afternoon?
A Yes.

Q Did you at that time communicate with Mr. McGarvey that Mr. Young was willing to pay the twenty-five thousand dollars? A I indicated to Mr. McGarvey what Mr. Young had said to me the night before, and that morning, all excepting his offer of paying the twenty-five thousand dollars, and the money which he had advanced.

20 Q That was after Mr. McGarvey had—did Mr. Young on Friday afternoon make any threats about what he would do unless he was paid the twenty-five thousand dollars? A After he left me with the alternative proposition of Friday, on Saturday when he became very insistent and made specific demands.

Cross examination by Mr. Cole.

30 Q What was the date that Mr. Smith accompanied Mr. McGarvey to your office? A That was on Friday, the fourteenth of December.

Q Was Mr. Smith present during all the conversation? A No, he remained but a few minutes and left.

Q Was there any conversation while Mr. Smith was there? A None except the necessary introducing, conversation.

40 Q No other conversation while he was there?
A No other conversation concerning it.

Christian S. MacCain, cross.

Q Had any conversation passed concerning this arrangement, this agreement between Young and the Speedway or concerning Young while Mr. Smith was present? A None in my office on Friday afternoon, December fourteenth.

Q Wasn't any other time that is when Mr. Smith was there? A Only time Mr. Smith was there, and there was no conversation. 10

Q Is that the first time you had met Mr. McGarvey in connection with this matter? A No, I had met Mr. McGarvey in my office late in the afternoon of the day before.

Q Was he there alone? A The day before Mr. Young, Mr. Vanderveer, Mr. Holloway, Mr. Fry, Mr. McGarvey and myself were in my office.

Q Had the meeting been pre-arranged? A The meeting of the afternoon before had been arranged for the gentlemen who were interested in the Speedway Association, Mr. Young brought Mr. McGarvey into that meeting for the purpose of satisfying him as to his charges against Mr. Conger. 20

Q As to what? A As to Mr. Young's charges against Mr. Conger; certain transactions had taken place between Mr. Conger and the people in Cleveland, and Mr. Vanderveer and Mr. Berlekamp, who was also present, were there for the purpose of—Mr. Conger—Mr. McGarvey was brought in for the purpose of having these men tell him what they had communication they had had with Mr. Conger in Atlantic City concerning this deal. 30

Q What men had had communication with Mr. Conger? A Mr. Berlekamp and Mr. Vanderveer had particularly received communications from Atlantic City purporting to come from Mr. Conger. 40

Christian S. MacCain, cross.

Q Now tell us all that was said about Mr. Conger at that meeting and who said it? A Mr. Conger—

Q Before you do that, Mr. MacCain, let me ask you, had these gentlemen that you name, other than Mr. McGarvey, been to your office before on that day? A They had been to my office, if my recollection serves me, around noon-time, had been there awhile and then went away and came back late in the afternoon.

Q Was Mr. McGarvey there at that time? A No.

Q What were they doing there at that time? A They had come on in connection with the sale of this property to Young.

Q That was December when? A That was on December thirteenth.

Q What took place at that time? A As I say at that interview there was threshed out what—

Q Tell us what was said, Mr. MacCain, you are a lawyer, you ought to be able to do that. A It is such an extensive conversation.

Q I don't care how very extensive. A It was criss-crossed, a half a dozen men talking at once, it is pretty hard to pick it up.

Q Do the best you can, please— A Mr.—

Q Just a moment, please. Do the best you can but tell us all the conversation that took place before Mr. McGarvey arrived, and who was it did the talking. Please don't state your conclusion. A Before Mr. McGarvey arrived Mr. Vanderveer and I were discussing certain phases of the action of the Speedway Association so as to provide the proper authority to its officers to execute the agreements of sale and the deed when that deed should be made.

Christian S. MacCain, cross.

Q The agreement had already been executed at that time, hadn't it? A No, the deed from the Speedway Association to the Brighton Gardens was made on the seventeenth of December, the following Monday.

Q I am talking about the agreement between the Speedway and Mr. Young, that had been made, hadn't it? A The agreement between the Speedway and Mr. Young, yes. 10

Q Certainly there was no talk about arranging for the agreement of sale at that time, was there? A There was talk of the agreement, not about its execution.

Q What was said about the agreement? A That Mr. Young would have to provide certain facilities for getting the members and the officers and board of directors of the Speedway into Atlantic City. They had come on here. There had been a mistake in posting the notices for the annual meeting and they were on here, to get that straightened out and provide for the new meeting which was to take place on the seventeenth for which notice had been sent, and certain waivers were to be provided for that meeting on the seventeenth, and Mr. Vanderveer and I were discussing those questions. The other gentlemen were here at that time for the purpose of holding the meeting which could not be held, and they were simply waiting to go back to Cleveland, which they did that night, and Mr. Young brought Mr. McGarvey over into my office to see these men at that time as they were there. 20 30

Q Have you told us all the conversation that took place at the earlier meeting? A Yes.

Q Tell us what took place all the conversation, and who did the talking at the later meeting. A Well, at the later meeting, Mr. Young 40

Christian S. MacCain, cross.

brought Mr. McGarvey in and said to him, "These are the men with whom certain conversations were had by telephone, from Atlantic to Cleveland." Mr. Vanderveer then said to Mr. McGarvey that a telephone message had come to his office for Mr. Berlekamp and it had come from the Chelsea Trust Company. Mr. Berlekamp explained that he had received a telephone message from Atlantic City from a man named Griscom. That information which had come from Mr. Griscom to him over the telephone was information which only was in the possession of Mr. Conger in Atlantic City, and these men stated to Mr. McGarvey what they had, what information they had received and where they had gotten it from. Mr. McGarvey after that conversation said he didn't believe that there was anything to be complained of anyway that should change his attitude toward the matter, and as a result of that he and Mr. Young finally left.

Q Now was that all the conversation that took place at that time? A That was the conversation, as I can recall it, there was considerable more talk than that but that is all I can recall.

Q I say that is all you can recall? A That is all I can recall as the result of that conversation.

Q You next met when? A Next afternoon.

Q When Mr. Smith came? A Mr. Smith came in then.

Q Was that pre-arranged? A Mr. Smith called me on the telephone Friday morning and arranged for half-past two in the afternoon, yes.

Q At that time had you heard of any dispute between Mr. Young and Mr. McGarvey concerning this agreement? A Not until Mr. Me-

Christian S. MacCain, cross.

Garvey told me Friday afternoon what I have already related to you.

Q That is the date Mr. Smith came? A That is the date Mr. Smith came.

Q Had Mr. Young told you of any trouble at that time? A No, I hadn't seen Mr. Young since the night before.

10

Q That is the answer; in other words when Mr. McGarvey came there on Friday you had not heard a word from either Mr. Young or Mr. Smith that there was any trouble between them touching that agreement? A None whatever.

Q Then the only other conversation which you had when Mr. Smith was present, when Mr. Smith came in and I think he remained a little while? A Yes, and he left, and on Saturday Mr. McGarvey came back again.

20

Q How did it come about that Mr. McGarvey began to talk to you about this agreement, if you know, if there hadn't been any conversation between these two men before? A Mr. McGarvey opened his conversation by telling me that the night before when he and Mr. Young left my office that conversation which they had had resulted in him losing confidence in Mr. Young, and he came to me as Mr. Young's counsel to see if he could adjust that matter.

30

Q Did he tell you what it was that had caused the loss of confidence? A He did not tell me in such words that I can repeat. He told me a very long conversation, and I cannot tell you what the details of it was.

Q You mean you don't remember anything of the conversation as to what brought about the loss of confidence? A No, I do not.

Q But he did tell you he lost confidence in him? A Told me he lost confidence in Mr. Young.

40

Christian S. MacCain, cross.

Q Then after he told you that he had lost confidence then he proposed some question of settlement? A At the end of this conversation of two hours.

Q I say he proposed the settlement? A He made some proposition of settlement, yes.

10 Q What was his proposition of settlement? A He would take twenty-five thousand dollars and the money which he had advanced in the matter, which amounted, as he said, to \$4,125, possibly less, and step out, or the alternative was that Mr. Young was to step out and he was to take the property.

Q Now did he tell you at that conversation that the \$25,000 he was askind was the \$25,000 of profit that Mr. Young had mentioned he should have in the initial proceeding? A No, he did not mention it as a profit.

20

Q Did he tell you that that was the understanding in the beginning that he was to have \$25,000? A No, he told me—

Q Smith made you the flat proposition—

Mr. Richards: Wait a moment, let him answer the question.

30 A He told me at his first interview that Mr. Young had offered him \$25,000 for the loan of five thousand dollars, and he was reporting that proposition and would now take his \$25,000 plus the amount he had put in.

Q Have you been in court all day? A Yes.

Q Did you hear Mr. McGarvey's testimony about his conversation with you? A Yes, sir.

Q Was what he said true? A I don't think that, as I recall it, there is very much difference between what he said and I have testified to here.

40

Christian S. MacCain, cross.

Q All right, that is all.

(Recess taken until June 20, 1924, at ten o'clock A. M.)

Atlantic City, N. J., June 20, 1924. 10

(Trial of the cause resumed at 10 A. M.)

CHRISTIAN S. MACCAIN, recalled.

Cross examination resumed by Mr. Cole.

Q Do you know Daniel W. Simpkins? A
Yes, sir.

Q An attorney-at-law of Pennsylvania? A 20
Yes, sir.

Q Is he in any way associated with you? A
I have an office in his suite. There is no other
connection between us.

Q I noticed his name is on this envelope
which contained the Brighton Gardens deed and
you were present when it was delivered? A I
was present when that deed was delivered, yes,
sir.

Q Had you heard that at one time Mr. Simp- 30
kins was a prospective purchaser for this prop-
erty? A I had.

Q Is he still? A That I don't know, sir. I
haven't heard anything from him about it since.

Q When was he a prospective purchaser? A
I should say that was approximately somewhere
between the first and fifteenth of December of
last year.

Q During the period that you were having
these conversations with Mr. McGarvey? A It 40

Charles W. Young, recalled, direct—cross.

was before Mr. McGarvey came to the office that I knew Mr. Simpkins had been consulted by Mr. Young about it.

Q Had you ever heard he had retired from being a prospective purchaser? A I never heard that he has dropped the idea, no, sir.

10

CHARLES W. YOUNG, recalled.

Direct examination by Mr. Richards.

Q Mr. Young, did you ever tell Mr. Conger that you were acting as an agent for Mr. McGarvey? A No.

Q At any time? A Beg pardon?

20 Q That you were acting as an agent for Mr. McGarvey? A No.

Q At any time? A Beg pardon?

Q At any time? A No.

Q Or words to that effect? A Nothing like it.

Q Did you ever authorize him to prepare an assignment of your agreement? A No.

Cross examination by Mr. Cole.

30

Q Did you tell Mr. Conger that when he prepared that deed he should make it to you or your nominee, John N. McGarvey? A No. It is ridiculous.

Q Did you tell him to put in "Or your nominee?" A Always have agreements made that way.

40 Q I didn't ask you that, sir. Did you tell Mr. Conger to put in your deed "Or your nominee?" A Yes.

Charles W. Young, recalled, cross.

Q You had a nominee in mind at the time? A Always a straw man as a nominee.

Q Mr. Young, will you answer my question?

A I did.

Q What nominee had you in mind at that time? A Any that I chose to make.

Q No one specifically? A Not at that time. 10

Q When, before that, did you ever have an agreement in writing for the purchase of real estate where you had it in your name or "Your nominee?" A Every one that I ever make.

Q Not every one, I want to know. A. I don't know.

Q Can you tell us where we can find a single contract that you have made for the purchase of real estate where the agreement ran to you or "your nominee?" A I don't know. I want to say I haven't been active in six years. 20

Q Never mind a speech, Mr. Young. A All right.

Q No question. A Want to withdraw the—

The Court: There is no question.

A Have I a right, your Honor, to make a remark to help Judge Cole?

The Court: No. 30

A Thank you.

Garrett P. Snyder, direct.

GARRETT P. SNYDER, sworn for the defendants.

Direct examination by Mr. Richards.

10 Q What is your business, Mr. Snyder? A Shoe machinery.

Q Where do you live? A Outside of Mt. Holly.

Q Do you own any property here in Atlantic City? A I have sold my properties.

Q Did you own any in 1923? A Yes, sir.

Q What did you own? A I owned a two-family house at the corner of Ventnor and Baltimore avenue.

Q Did you know a gentleman by the name of Berlekamp? A Yes, sir.

20 Q Who was he, so far as you knew? A He was a tenant of mine on the first floor of my apartment.

Q Ever have any talk with him about the International Speedway Tract? A Yes.

Q When was that? A Oh, on various occasions during his tenancy in my place, probably nine months, better part of nine months.

Q Did he talk to you about selling it?

30 Mr. Cole: I object.

The Court: What relevancy has this?

Mr. Richards: I am simply leading up to the fact that this is the man who brought the proposition to Young's attention, and when he brought it to his attention prior to the—in corroboration of Young's testimony.

40 The Court: I will permit you to show when his attention was brought to this property, sustain the objection to the present question.

Garrett P. Snyder, direct.

Q As a result of these conversations did you bring this property to Young's attention? A I did.

Mr. Cole: Objected to because the question in this case solely is whether we are the nominee of Mr. Young, under that agreement. 10

The Court: I will permit this line of questioning.

Q When did you do that? A The week of October fourteenth, prior to October fourteenth.

Q What year? A 1923.

Q Did you have a conversation between Mr. Young, yourself and anybody else subsequent to that, a few days subsequent to that? A No, sir. 20

Q Subsequent to the week of the fourteenth did you ever have a conversation with anybody relating to the Speedway tract? A No one other than Mr. Young and Mr. Berlekamp.

Q Do you recall about the twelfth of December, 1923, meeting Mr. Young and Mr. McGarvey? A Yes, sir.

Q Will you tell us about that? A I met Mr. McGarvey and Mr. Young at the corner of Tennessee and Atlantic avenues in the neighborhood of quarter of one, midday. Mr. Young introduced me to Mr. McGarvey and said that he had just returned from Mays Landing where he had recorded his agreement, and then Mr. McGarvey suggested that we go have some lunch, and we went from there to the Extra Dry and sat down and had our luncheon together. 30

Q What, if anything, did Mr. Young say to Mr. McGarvey when he introduced you to him? 40

Garrett P. Snyder, direct.

A That I was the man that had brought the tract to him, Mr. Young.

Q Did you have any further conversation at the Extra Dry concerning the Speedway purchase? A Yes, we discussed various phases of developing the tract.

10 Q What was said, if anything, by Mr. McGarvey or Mr. Young about the development? A Mr. Young was explaining some of the plans that he had in mind of developing the tract along the lines of cutting it up into parcels and selling it off, and mentioned the names that he was going to get to take the place under, and went into sort of a general detailed idea of his plans on the tract. Mr. McGarvey says that his idea of it would be to make a quick sale of it.

20 Q Did Mr. McGarvey say anything about being the owner of the property?

Mr. Cole: I object.

The Court: Sustain the objection.

Q Did Mr. McGarvey at any time tell you what his interest was in the property? A No, sir.

30 No cross examination.

DEFENDANTS REST.

40

Linus A. Kelly, direct.

COMPLAINANT'S REBUTTAL.

LINUS A. KELLY, recalled.

Direct examination by Mr. Cole.

Q Did Mr. Young make any statement to you concerning this Brighton Gardens at the time of the delivery of the deed down to the Chelsea Hotel? A Yes, sir. 10

Q Will you state what he said to you? A When the deed was handed to me by Mr. Vanderveer and the grantee's name in it was Brighton Gardens Company, or Brighton Gardens, anyway, I at that time asked whether that was or was not a corporation and Mr. Young stated that it was, it would be a corporation, that he was forming, but, as yet, had not been incorporated but would be before the time for the delivery of that deed, at the time of settlement. 20

Q Did he say anything more to you as to the name of the corporation or how it came about? A Mr. Young asked me what I thought of the name "Brighton Gardens" and I told him it sounded all right to me. He says, "Well, the Brighton in Atlantic City stands for class." He said, "I used to stop there." 30

Q Is that all he said? A That is all I can think of now.

Q Did he say anything about whose corporation it was? A At that time he said it was a corporation he was forming, but had not yet been incorporated.

Q That he was? A That he was forming but had not yet been incorporated.

Q I hadn't heard that. 40

J. Willison Smith, direct.

The Court: That is what he said before.
No cross examination.

10 J. WILLISON SMITH, sworn for the complainant.

Direct examination by Mr. Cole.

Q Mr. Smith, what is your business? A President of the West End Trust Company, Philadelphia.

Q How long have you occupied that position?

A Nearly three years.

Q Your home is where? A Philadelphia, 511 South 48th street.

20 Q Did you know Mr. Charles W. Young? A I did.

Q How long have you known him, approximately? A I should say about ten years, I first came in, how I would connect it up, whatever time the Hale and Kilburn Building at 6th and Filbert street went through the Land Title and Trust Company.

Q Do you know Mr. McGarvey? A Yes.

30 Q How long have you known him? A About twenty to twenty-five years.

Q Did Mr. Young call to see you concerning some meadow land or real estate in Atlantic City? A He did.

Q About when was that? A About the middle of November, 1923.

Q Did you refer him to Mr. McGarvey? A I never did.

Q Do you know Mr. MacCain? A I do.

40 Q Who was on the stand yesterday. A I do.

J. Willison Smith, direct.

Q Were you in his office with Mr. McGarvey concerning this Young-McGarvey matter? A I was.

Q When, do you fix the time? A On the Friday before the third Saturday of December.

Q About how long were you there? A I suppose fifteen minutes. 10

Q Did you overhear what took place at the time you were there? A I did.

Q Did you yourself engage in the conversation in any way? A Pardon me?

Q Will you tell us, please, what took place there? A At the particular conversation?

Q Yes, at the conversation. A I took Mr. McGarvey in and told him, told Mr. MacCain that Mr. McGarvey had something to say regarding the Charles W. Young agreement for land at Atlantic City, and told him that Mr. McGarvey was dissatisfied with the arrangements, and that he wanted an assignment of the agreement made in the name of Charles W. Young and that the situation was such that Mr. McGarvey was so dissatisfied he wanted some understanding. Then Mr.—at that Mr. McGarvey had some questions to ask Mr. MacCain. I said, “Of course, if you represent Mr. Young, you can answer them or not,” and then Mr. MacCain listened to what Mr. McGarvey had to say, which was along this line— 20 30

Mr. Richards: I object.

A —which was that Mr. Smith asked Mr. MacCain if he represented Mr. Young. Mr. MacCain said that he did. Mr. McGarvey asked him about how long and I don't recall just what the length of time was that Mr. MacCain said that 40

J. Willison Smith, direct.

10 he did represent him. Following that Mr. McGarvey asked whether that would be an assignment of that contract, that he insisted upon having an assignment of the contract, that all of his money had been put into it, and he felt that he was entitled to it. Mr. MacCain replied that he didn't know about that feature of it, that Mr. Young would be the one to make the assignment. Mr. McGarvey then said that the contract was either invulnerable or criminal and Mr. MacCain didn't say whether it was or not, to the best of my recollection, but listened on that feature of it. Following that, I said that I would have to leave shortly as it was necessary for me to take a train out of the city and I would leave Mr. McGarvey and Mr. MacCain together, but that I felt personally, in view of
20 what I knew of the situation, that Mr.—

Mr. Richards: I object. It seems to me declarations of this witness about what he knew was the situation could not be evidential to bind Mr. Young.

The Court: Is there anything rebuttal upon this part?

30 Mr. Richards: Nothing rebuttal about it, at all.

Mr. Cole: Mr. MacCain is supposed to have told us all that took place. He said that Mr. Smith was only there a few minutes and did not engage in the conversation at all. This is to show that is not so.

40 Mr. Richards: Now, if your Honor please, they want to catch or contradict Mr. MacCain, they should have done that by asking MacCain direct questions and then founding their denial upon that. Now, they didn't

J. Willison Smith, direct.

do that. Now without directing MacCain's attention to specific conversation, or specific quotation, they cannot now use it.

The Court: I will sustain the objection as to this part. I have admitted the rest.

By the Court.

10

Q You had further conversation at that time with them, Mr. Smith? A Just about a few statements other than what I was about to say, which was to the effect that Mr. MacCain stated to Mr. McGarvey that he had said to his wife the night before—

Mr. Richards: I object to what he said to his wife.

20

The Court: I will sustain the objection. He had further conversation.

A That is all of that conversation.

By Mr. Cole.

Q Mr. Smith, do you remember—do you recall any other statement made by Mr. McGarvey at this time other than what you had testified? 30

Mr. Richards: I object to that, if your Honor please. He can't now in rebuttal proceed to get Mr. McGarvey's declarations, he must do that by laying the foundation to contradict MacCain, if that is his object.

The Court: Mr. MacCain was asked if he said anything further and he denied it, therefore it is unnecessary or impossible to 40

J. Willison Smith, direct.

ask any specific question. He says there was nothing further and I will permit it.

(Question repeated.)

A No, I don't recall anything definitely.

10 Q Did you hear them— A A number of things were said that I don't recall definitely.

Q Did you hear Mr. McGarvey say anything to Mr. MacCain—

Mr. Richards: Your Honor please—

The Court: Don't answer until the question is finished and ruled upon. Proceed, Judge.

20 Q Did you hear Mr. McGarvey make any statement to Mr. MacCain concerning his, McGarvey's interest in that agreement?

Mr. Richards: I object.

The Court: Sustain the objection.

Q Did you hear Mr. McGarvey say to Mr. MacCain "Do you know that I am equitable owner of that agreement?"

Mr. Richards: I object.

30 The Court: Upon what basis can you ask that question, Judge Cole? Objection is made it is not rebuttal and I would like to hear you upon that ground it is rebuttal.

Mr. Richards: On the further ground it is a highly improper question in view of what the witness has just said.

Q That is all.

40 The Court: Question apparently withdrawn?

J. Willison Smith, direct.

Mr. Cole: Your Honor say "Apparently withdrawn?"

The Court: Apparently so.

Mr. Cole: Oh, no.

The Court: I asked you upon what you based your question and you made no reply and I assumed the question was withdrawn. 10

Mr. Cole: No.

(Former statement by the Court repeated.)

Mr. Cole: It is based upon the ground that Mr. MacCain is allowed to go on the stand and testify to a conversation between him and Mr. McGarvey. He testified that Mr. Smith was there, that he remained only a moment or two and retired. The plain inference from his testimony is that he, Smith, could not have heard all that took place, and then he relates what took place, and I propose to show and have shown that Mr. Smith is here, that he was there a longer time, than he, MacCain, said he was, that he simply did engage in conversation, and that he, Smith, did hear more than Mr. MacCain says he heard, and that he heard things which Mr. MacCain said did not take place at all. 20 30

The Court: Did Mr. MacCain testify that this statement was or was not made?

Mr. Cole: He doesn't say it either was or was not made, but having related all the conversation it seems to me I have a right to show, if it be true, that Mr. McGarvey did make a statement in his presence.

The Court: The statement is overruled, the witness has testified he recalls nothing 40

J. Willison Smith, direct.

further than he told, and if for no other reason the present question would be leading, in view of the fact the witness says he does not remember any further conversation.

No cross examination.

10

COMPLAINANT RESTS.

TESTIMONY CLOSED.

20

30

40

Complainant's Exhibits.

Exhibit C2.

6-19-24L

IN CHANCERY OF NEW JERSEY.

Between

John N. McGarvey,
Complainant

and

Charles W. Young, and In-
ternational Speedway As-
sociation, a corporation &c.
Defendants.

10

On Bill &c.

Lis Pendens.

Take Notice, that a suit entitled as above set forth has been commenced and is pending in the Court of Chancery of the State of New Jersey.

20

That the general object of the said suit is to have it decreed that the defendant Charles W. Young has no interest in the lands and premises by virtue of an agreement of December 8, 1923, between him and International Speedway Association and that said Association be required to grant and convey the said premises to complainant as the equitable owner of all rights in said agreement and the land therein described,

30

That the lands and real estate to be affected by said suit are described as follows, to wit: All that or those lots, tracts or parcels of land and premises hereinafter particularly described, situate, lying and being in the City, Borough or Town of Atlantic City (formerly Egg Harbor Township) in the County of Atlantic and State of New Jersey, bounded and described as follows, to wit:

40

Complainant's Exhibits.

BEGINNING at the lower mouth of Newfound Thoroughfare where it empties into the Beach Thoroughfare and is the beginning corner of a survey of 292 acres of marsh and oyster beds) that was made July seventh 1810, to Daniel Adams and others in company and is recorded in the Surveyor General's office at Burlington in Lib. C. C. folio 272 and runs from thence (1) north $36\frac{1}{2}$ degrees west $15\frac{1}{2}$ chains; thence (2) north 60 degrees and 30 minutes east 68 chains and 50 links; thence (3) north 25 degrees and 30 minutes east 22 chains; thence (4) north 80 degrees and 30 minutes west 24 chains and 50 links thence (5) south 64 degrees and 30 minutes west 77 chains and 50 links thence (6) south 30 degrees and 39 minutes west 36 chains; thence (7) south 50 degrees and 30 minutes east 10 chains thence (8) south 30 degrees and 30 minutes west 12 chains; thence (9) south 86 degrees and 30 minutes east 45 chains and 50 links; thence (10) North 20 degrees and 30 minutes east 13 chains to the place of beginning. containing $389\frac{1}{2}$ acres and the usual allowance for highways.

No. 2. Beginning at a stake standing at the southeast side of Forked Creek above the Fork and in the 6th line of the survey of Peter Boice and runs thence (1) South 37 degrees West 5 chains; thence (2) South 78 degrees West $12\frac{1}{2}$ chains; thence (3) North 10 chains thence (4) north 78 degrees east 13 chains; thence (5) North 15 chains and 70 links; thence (6) North 75 degrees West 9 chains and 70 links thence (7) North $10\frac{1}{2}$ chains; thence (8) South 75 degrees east 10 chains and 30 links; thence (9) south 32 chains and 60 links; thence (10) north 78 degrees east 2 chains to the place of beginning.

Complainant's Exhibits.

Containing 23 acres more or less with the *usual* allowance for roads.

Dated December 26, 1923.

Cole & Cole
Solicitors of Complainant.

Received and recorded & filed Dec. 27, 1923 at 10
8 A. M.

William A. Blair, Clerk.

Chancery Notices No. 3 page 342.

STATE OF NEW JERSEY

County of Atlantic

I, WILLIAM A. BLAIR, Clerk of the County 20
of Atlantic, and also Clerk of the Common
Pleas Court holden therein, said court being a
record of record, having a common seal, do here-
by Certify, That the foregoing is a true copy of a
certain Lis Pendens—John N. McGarvey complt.
vs. Charles W. Young et al. Defts. as the same
is recorded and filed in my said office.

In Testimony Whereof, I have here-
unto set my hand and affixed my 30
(Seal) Official Seal at May's Landing, N. J.,
this 17th day of June A. D. 1924.

Wm. A. Blair,
Clerk

By

Deputy Clerk

Complainant's Exhibits.

(Endorsed)

CERTIFIED COPY

of

LIS PENDENS

10 John N. McGarvey, Complt.

vs.

Charles W. Young & International
Speedway Assn. Deft.**Exhibit C3.**

6-19-24L

20 QUIT CLAIM DEED—Charles W. Young et ux
to International Speedway Association.THIS INDENTURE, made the ninth day of
January in the year of our Lord one thousand
nine hundred and twenty-four.30 BETWEEN Charles W. Young and Irene M.
Young his wife of the City of Philadelphia in the
County of Philadelphia and State of Pennsyl-
vania of the first part, and International Speed-
way Association, a corporation of the State of
Delaware.40 WITNESSETH that the said party of the first
part in consideration of the sum of One dollar
(\$1.00) to them duly paid before the delivery
hereof, have remised, released and forever quit-
claimed and by these presents do remise, release
and forever quit claim to the said party of the
second part, and to its successors and assigns,
All those lots, tracts or parcels of land and
premises hereinafter particularly described,

Complainant's Exhibits.

situate lying and being in the city of Atlantic City, in the County of Atlantic and State of New Jersey, as follows:

BEGINNING at the lower mouth of Newfound Thoroughfare where it empties into the Beach Thoroughfare and is the beginning corner of a survey of 292 acres (of mash and oyster beds) that was made July 7, 1810 to Daniel Adams and others in company, and is recorded in the Surveyor General's office at Burlington in Lib. C. C. folio 272 and runs from thence (1) North $36\frac{1}{2}$ degrees west $15\frac{1}{2}$ chains; thence (2) north 60 degrees and 30 minutes east 68 chains and 50 links; thence (3) north 25 degrees and 30 minutes east 22 chains; thence (4) north 80 degrees and 30 minutes West, 24 chains and 50 links; thence (5) south 64 degrees and 30 minutes west 77 chains and 50 links; thence (6) south 30 degrees, and 39 minutes west 36 chains; thence (7) south 59 degrees and 30 minutes east 10 chains; thence (8) south 30 degrees and 30 minutes west 12 chains; thence (9) south 86 degrees and 30 minutes east 45 chains and 50 links; thence (10) North 20 degrees and 30 minutes east 13 chains to the place of beginning.

Containing $378\frac{1}{2}$ acres and the usual allowance for highways.

No. 2. Beginning at a stake standing at the southeast side of Forked Creek above the Fork and in the 6th line of the survey of Peter Boice and runs thence (1) south 37 degrees West 5 chains thence (2) south 78 degrees West $12\frac{1}{2}$ chains; thence (3) North 10 chains; thence (4) North 78 degrees east 13 chains; thence (5) North 15 chains and 70 links; thence (6) North 75 degrees West 9 chains and 70 links; thence (7) North $10\frac{1}{2}$ chains; thence (8) South 75 de-

Complainant's Exhibits.

grees east 10 chains and 30 links; thence (9) South 32 chains and 60 links; thence (10) North 78 degrees East 2 chains to the place of beginning. Containing 23 acres more or less with the usual allowance for roads. with the appurtenances, and all the estate, right, title, and interest of the said party of the first part therein.

10 TO HAVE AND TO HOLD the above mentioned and described premises with the appurtenances unto the said party of the second part its successors and assigns forever.

IN WITNESS WHEREOF, the said party of the first part have hereunto set hand and seal the day and year first above written.

Signed, sealed and delivered in the presence of)

20 Clarence L. Walker)

Words "in the County of" on page 1, line 8 ruled out before execution.)

Words "and State of" and "of the second part" page 1, line 9 ruled out before execution.)

30 Word "heirs" page 1, line 15, ruled out before execution.)

Word "heirs" page 3, line 4, ruled out before execution.)

Jno Ennis, Jr.)

Chas. W. Young (seal)

Irene M. Young (seal)

Complainant's Exhibits.

State of Penn. County of Phila. ss.

BE IT REMEMBERED, that on this tenth day of January, in the year of our Lord one thousand nine hundred and twenty four, before me a Foreign Commissioner of deeds for New Jersey in Pennsylvania personally appeared Charles W. Young and Irene M. Young his wife, who I am satisfied is the grantor in the within deed or conveyance named and I having first made known to them the contents thereof, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed. All of which is hereby certified. 10

Jno. Ennis Jr. (seal)
A Foreign Commissioner of
deeds for New Jersey in Penn- 20
sylvania.

Received and recorded January 12, 1924 at 8
A. M.

William A. Blair, Clerk.

Deed book No. 731 page 435.

30

40

Complainant's Exhibits.

STATE OF NEW JERSEY

County of Atlantic

I, WILLIAM A. BLAIR, Clerk of the County
of Atlantic, and also Clerk of the Common Pleas
Court holden therein, said court being a court of
10 record, having a common seal, do hereby Certify,
That the foregoing is a true copy of a certain
deed—Charles W. Young et ux to International
Speedway Association as the same is recorded
in my said office.

In Testimony Whereof, I have here-
unto set my hand and affixed my
(Seal) Official Seal at May's Landing, N. J.,
this 17th day of June A. D. 1924.

20 Wm. A. Blair
Clerk

By

Deputy Clerk

(Endorsed)

30 CERTIFIED COPY
of
QUIT CLAIM DEED
Charles W. Young, et ux.,
to
International Speedway Assn.

40

*Complainant's Exhibits.***Exhibit C4.**

6-19-24L

OLD COLONY CLUB Incorporated

An International Organization for Business Men

Cable Address: OLCOLCLU

Telephone

Main 5001

10

Codes } W.U. 5-Letter

Used } Bentley

THIS LETTER WRITTEN FROM

Old Colony Club, Hotel Cleveland

Cleveland, Ohio.

Dear Mr. Mc Garvey,

Just finished talking to another admirer of
J. W. S. who served under him in Fleet Corp.

"where is he not known" Mr. Rew.

20

Our matter will be closed when I have agree-
ment signed, sealed and delivered. Mr. Hollo-
way, Manager of Apollo Steel Company, near
Pittsburgh, cannot attend meeting until One
o'clock Saturday. This is disappointing but
cannot be helped. He is a director of the Speed-
way Corp.

The parting with this property is a bitterly
disappointing dose, if there was any other way
out they would not go thru. Some of the larger
stockholders, who have signed agreement to sell
and also given proxies for confirmation at annual
meeting, have also put up or offered to put up
money to save property but they are not in
sufficient amount of money, so unless they can
raise \$35,000 by Saturday, the Directors say
they will put thru sale to me. There is only
our third of it in sight.

30

I have used all the diplomacy I am capable of
and except it to come thru.

40

Complainant's Exhibits.

10 Since writing preceding page, phoned Mr. J. H. Van Derveer, the attorney, he believes Berlikamp is bewildered, thru so many divergent views of the stockholders, who want to keep the property and develop it but who have little or no money, they are all small towns people, who were expecting profits of 10 to 1 and die hard.

He feels sure the contract will be signed Saturday or in Atlantic Monday Dec. 17th.

It just chimed 8 and I am going to retire, tired out.

Very truly,
Chas. W. Young.

Exhibit C5.

20

6-19-24L

HOTEL CLEVELAND,
Cleveland, O.

The day of thanks to Him for all Our Blessings.

Dear Mr. McGarvey,

30 It looks as if agreement will be signed and executed Saturday although it may go over to next week on account of holiday, which is being extended over the balance of the week.

Things have run about as I expected, his safety depends entirely on the consummation of this deal.

Was with prosecutor in Ackron Wednesday, they will save him, if he plays fair with me. His attorneys have made it plain to him, that it is his only hope.

40

Sincerely yours,
Chas. W. Young.

*Complainant's Exhibits.***Exhibit C6.**

6-19-24L

(Envelope postmarked: Cleveland, Ohio, Nov 30,
1923, 8.30 A. M.)

Mr. John W. Mc Garvey,
1013 Lincoln Bl'd'g. 10
Phila. Pa.

In corner:

HOTEL CLEVELAND,
Cleveland, O.

Exhibit C7.

6-19-24L

20

Mortgages Negotiated Insurance Placed
Appraisements Made Building Estimates Given

JOHN N. McGARVEY

Builder

Real Estate Operator
1013 Lincoln Building

Bell Phone
Walnut 1943

Philadelphia, Pa.,
November 28, 1923.

30

Mr. Chas. W. Young,
c/o Hotel Cleveland,
Cleveland, Ohio.

My dear Mr. Young:—

I am enclosing herewith a check for One Thou-
sand Dollars (\$1,000.00) drawn to your order.

It is clearly understood that this check is to
be used for the purpose that you and I discussed; 40

Complainant's Exhibits.

only after the agreement is signed, sealed and delivered by the proper officers so that there can be no possibility of losing this Thousand Dollars in case there is no deal.

I will rely upon your good judgment to handle this deal in the same way that I would handle it myself.

10

Wishing you every success, I remain

Yours very truly,

John N. McGarvey

JNM/MG

ENC.

Exhibit C8.

20

6-19-24L

Same as Exhibit I in Bill of Complaint.
Printed in full on page 11.

Exhibit C9.

6-19-24L

30

(Envelope postmarked: Cleveland, Ohio, Nov. 29, 1923, 8.30 P M.)

Mr. John W. Mc Garvey,
1003 Lincoln Building,
Phila. Pa.

In corner:

HOTEL CLEVELAND
Cleveland, O.

40

*Complainant's Exhibits.***Exhibit C10.**

6-19-24L

WESTERN UNION TELEGRAM
 RECEIVED AT WESTERN UNION BLDG.,
 230 SO. 11th ST., Philadelphia, Penn. Always
 Open

10

B454 9 DUPLICATE

3 DEC 21 PM 5 59

CL CLEVELAND OHIO DEC 7 549P
 JOHN W MCGARVEY
 4814 TRINITY PLACE PHILADELPHIA
 PENN
 SKIES CLEARING EXPECT TO SEND
 FAVORABLE TOMORROW AFTERNOON
 LATE

20

CHAS Y YOUNG

Exhibit C11.

6-19-24L

COPY 1923 DEC 8 P M 6 08
 CLEVELAND OHIO
 JOHN W MCGARVEY
 4814 TRINITY PLACE PHILADELPHIA
 PENNA

30

VENI VIDI VICI EVERYTHING SIGNED
 AND DELIVERED ARRIVED NINE
 MONDAY

CHAS W YOUNG
 TEL. NO. WOO 0399

40

*Complainant's Exhibits.***Exhibit C12.**

6-19-24L

(Envelope postmarked: Philadelphia, Pa., Dec 18,
1923, 9.30 P M.)

10 Mr. John H. Mc Garvey
1013 Lincoln Building
Phila. Pa.

Exhibit C13.

6-19-24L

20 Postcard addressed:
Mr. John H. Mc Garvey,
1013 Lincoln Building,
Phila. Pa.

Dear Mr? Mc. Garvey,

Who did YOU SAY you were going to use
those MORTGAGES with as COLLATERAL?

WHY did you not follow your story of the
LITTLE BOY who kept quiet, UNTIL HE
STUCK HIS LITTLE FINGERS TO HIS
LITTLE NOSE

30 THE SURPRISES WILL BECOME IN-
CREASINGLY interesting.

Sincerely yours,

Enclosed in envelope.

*Complainant's Exhibits.***Exhibit C15.**

6-19-24L

OCEAN CITY TITLE AND TRUST
COMPANY

55-360

10 Ocean City, N. J. Dec. 10th 1923 No. 393
 Pay to the Order of Chas W. Young \$625 00/100
 Six hundred and twenty five DOLLARS
 John N. McGarvey.

In margin

JOHN N. MCGARVEY

Builder

1013 Lincoln Building, Phila., Pa.
 (Perforated: PAID 12-12-23 55-360

Chas. W. Young

20 Pay to the Order of
 Any Bank, Banker or Trust Co.
 Prior Endorsements Guaranteed.
 DEC 11

WEST PHILADELPHIA BANK

3-129

C. E. Mayo, Cashier.

Pay to the Order of

Any BANK or TRUST CO.

Prior Endorsements Guaranteed

30 DEC 11 1923

FRANKLIN NATIONAL BANK

2-44 Philadelphia 2-44

J. Wm. Hardt, Cashier

40

*Complainant's Exhibits.***Exhibit C16.**

6-19-24L

Mortgages Negotiated Insurance Placed
 Appraisements Made Building Estimates Given

JOHN N. MCGARVEY

Builder

Real Estate Operator

1013 Lincoln Building

10

Bell Phone
 Walnut 1943

Philadelphia Dec 10th 1923

Received from John N. McGarvey the sum of
 Eleven hundred and twenty-five (\$1125) on ac-
 count of the expenses of the purchase of The
 International Speedway Assn. property in At-
 lantic City N. J. the same to be paid by me in
 the event of no sale being consummated

20

Chas. W. Young

30

40

*Complainant's Exhibits.***Exhibit C17.**

6-19-24L

WEST END TRUST COMPANY
 App. No. 1794 Chelsea Title & Guaranty Co.
 No. 9023 Philadelphia Dec 3-1923
 10 THE NEW YORK TRUST COMPANY 1-114
 New York
 Pay to the order of WALTER C. DAVIS
 F. G. Treston, Teller.
 West End Trust Co. \$2500and00cts /100 Dollars
 \$2200.00 Samuel Hayes
 Asst. Treasurer.

In margin:
 BROAD STREET and SOUTH PENN SQUARE
 (Perforated: PAID 12-15-23.)

20 Endorsed on back
 Pay to the Order of
 International Speedway Ass'n, Inc.
 Walter C. Davis
 Teller
 Herbert S Fry Treas.
 Payable to Chelsea Title and Guaranty
 Company
 Atlantic City N. J.
 30 The International Speedway
 Association
 By Herbert S Fry
 Treas.

Pay to the order of
 ANY BANK, BANKER OR TRUST CO.
 All Prior Endorsements Guaranteed
 3-4 DEC 14 23 3-4
 FEDERAL RESERVE BANK
 of Philadelphia, Pa.
 40 WM. A. DYER, Cashier.

Complainant's Exhibits.

RECEIVED PAYMENT
 Through the New York Clearing House
 Prior Endorsements Guaranteed
 X DEC 15 1923
 Federal Reserve Bank of Philadelphia
 Pay to the Order of
 Federal Reserve Bank, Philadelphia 10
 Prior Endorsements Guaranteed
 55-144 DEC 13 1923 55-144
 Chelsea Nat. Bank, Atlantic City
 3-4 Pay to the Order of 3-4
 Any Bank, Banker or Trust Co.
 Prior Endorsements Guaranteed
 Federal Reserve Bank of Philadelphia
 For Deposit in the
 CHELSEA NATIONAL BANK
 To the Credit of
 Chelsea Title and Guaranty Co. 20
 RECEIVED PAYMENT
 Previous Endorsements Guaranteed
 FEDERAL RESERVE BANK
 DEC 14 1923
 COLLECTED THROUGH
 Philadelphia Clearing House

Exhibit C18. 30

6-19-24L

Same as Exhibit II in Bill of Complaint.
 Printed in full on pages 11 to 19.

40

*Complainant's Exhibits.***Exhibit C19.**

6-19-24L

Appl. #1794.

TO CHELSEA TITLE & GUARANTY COM-
PANY:

10

AGREEMENTRE: International Speedway Association to
Charles W. Young, or his Nominee, John N.
McGarvey.

20

WHEREAS, International Speedway Association on the eighth day of December, 1923 entered into a certain Agreement of Sale or Conveyance for four hundred and one and one-half (401½) acres, more or less of meadow land situate on both sides of the Absecon-Atlantic City Boulevard, Egg Harbor Township, Atlantic County, New Jersey, bounded and described as follows, to wit: BEGINNING at the lower mouth of Newfound Thoroughfare where it empties into the Beach Thoroughfare and is the beginning corner of a survey of 292 acres (of marsh and oyster beds) that was made July 7, 1810 to Daniel Adams and others in company and is recorded in the Surveyor General's Office at Burlington in Lib. C. C. folio 272 and runs from

30

(1) North 36½ degrees West 15½ chains, thence

(2) North 60 degrees and 30 minutes East 68 chains and 50 links, thence

(3) North 25 degrees and 30 minutes East 22 chains, thence

(4) North 80 degrees and 30 minutes West 24 chains and 50 links, thence

(5) South 64 degrees and 30 minutes West 77 chains and 50 links, thence

40

Complainant's Exhibits.

- (6) South 30 degrees and 39 minutes West 36 chains, thence
- (7) South 59 degrees and 30 minutes East 10 chains, thence
- (8) South 30 degrees and 30 minutes West 12 chains, thence
- (9) South 86 degrees and 30 minutes East 45 chains and 50 links, thence 10
- (10) North 20 degrees and 30 minutes East 13 chains to the place of beginning. CONTAINING 378½ acres and the usual allowances for highways.

NO. 2—BEGINNING at a stake standing at the southeast side of Forked Creek above the Fork and in the 6th line of the survey of Peter Boice and runs thence

- (1) South 37 degrees West 5 chains, thence
- (2) South 78 degrees West 12½ chains, thence 20
- (3) North 10 chains, thence
- (4) North 78 degrees East 13 chains, thence
- (5) North 15 chains and 70 links, thence
- (6) North 75 degrees West 9 chains and 70 links, thence
- (7) North 10½ chains, thence
- (8) South 75 degrees East 10 chains and 30 links, thence
- (9) South 32 chains and 60 links, thence 30
- (10) North 78 degrees East 2 chains to the place of beginning. CONTAINING 23 acres, more or less, with the usual allowance for roads; title to which your Company has been asked to insure under the above numbered Application.

AND WHEREAS, the Vendee named in said Agreement of Sale is CHARLES W. YOUNG of the City and County of Philadelphia and State of Pennsylvania, or his Nominee.

Complainant's Exhibits.

AND WHEREAS, the reason for putting the words "or his Nominee" in the said Agreement of Sale was because the undersigned, John N. McGarvey was the real principal in said transaction and at the time did not want to be disclosed, he having advanced and furnished all of the funds that have been furnished to date for said purchase under said Agreement of Sale.

10

AND WHEREAS, no funds of any other person or persons, including the said Charles W. Young named therein, have been put into the transaction above mentioned.

20

NOW THEREFORE, I, John N. McGarvey of #1013 Lincoln Building, Broad and South Penn Square, Philadelphia, Pa., do hereby give you formal notice that you are not to recognize either an equitable ownership in said Agreement or a legal ownership in a deed that might be presented to you making Charles W. Young the Grantee therein instead of the undersigned John N. McGarvey; and that I do hereby stand ready and willing at all times to bring such suit and to take such course or courses as shall be necessary in law or equity in the State of New Jersey or elsewhere that you shall require to perfect my equitable title to said property and convert it to the legal title in fee simple for the same.

30

IN WITNESS WHEREOF, I have hereunto set my hand and seal this Seventeenth day of December, A. D., nineteen hundred and twenty-three.

John N. McGarvey (LS)

Sworn and subscribed to
before me this 17th
day of December, 1923.
W. H. Conger, Jr.,
Notary Public for New Jersey.

40

*Complainant's Exhibits.***Exhibit C20.**

6-19-24L

App. No. 1794 Chelsea Title & Guaranty Co.

Hills & Van Derveer

Attorneys at Law

802-805 Ulmer Bldg.

Cleveland, Ohio

A. T. Hills

J. H. Van Derveer

10

December 8, 1923.

Chelsea Title & Guaranty Co.,

Atlantic City, N. J.

Gentlemen:

Enclosed please find contract between the International Speedway Association and Charles W. Young for sale of property therein described, together with draft for \$2500.00, being the down payment mentioned therein. Said contract and check are hereby placed in your hands in escrow. Kindly take care of the matter in accordance with the terms of the contract.

20

Yours truly,

J. H. Van Derveer.

30

40

*Complainant's Exhibits.***Exhibit C21.**

6-19-24L

Deed

International Speedway Assn,

App

Dated 12-17-23.

10

(In Pencil.)

Mr. Vanderveer

Mr. Maccam

Exhibit C22.

6-19-24L

20

ERROR PROOF NEW JERSEY DEED BOTH
 BY AND TO INDIVIDUALS AND COR-
 PORATIONS OR TO TRUSTEES, BUT NOT
 BY TRUSTEES. TO BE FILLED IN,
 UNDER LIKE NUMERALS BELOW, AS
 FOLLOWS, TO WIT:

- (1) Names of Sellers with husbands and wives
and their addresses.
- (2) Names of Purchasers and their addresses.
- 30 (3) Complete and correct description of the
property sold. Follow this with names of
parties, date and record book and page of
last deed and additional recital, if any,
such as wills, heirs, deaths, etc.
- (4) Enter amounts of mortgages assumed but
not created by purchaser, restrictions, trust
conditions, if any, to be created, etc.
- (5) To make deed general warranty deed strike
out words "by, from, through or under
40 him, her, them, it or any of them" in the

Complainant's Exhibits.

warranty and note the change over witness' signature before execution.

(Last) Do not strike out any surplus terms throughout used—his, her, their, its, heirs, successors, etc., such general phraseology used to cover all conditions and avoid errors in filling blanks.

10

THIS INDENTURE, made the Seventeenth day of December in the year of our Lord one thousand nine hundred and twenty three

(1) BETWEEN INTERNATIONAL SPEEDWAY ASSOCIATION, a corporation created by and existing under and by virtue of the laws of the State of Delaware, hereinafter called the party of the (2) first part, and Brighton Gardens of Atlantic City hereinafter called the party of the second part:

20

WITNESSETH, that the said party of the first part, for and in consideration of the sum of One hundred dollars lawful money of the United States of America, well and truly paid by the said party of the second part to the said party of the first part, at and before the ensembling and delivering of these presents, the receipt whereof is hereby acknowledged, has or have granted, bargained, sold, aliened, enfeoffed, released, ponveyed, assigned, transferred, ratified, aproved and confirmed, and by these presents does or do grant, bargain, sell, alien, enfeoff, release, convey, assign, transfer, ratify, approve and confirm unto the said party of the second part, his, her, their, its, heirs, successors and assigns (3) ALL those certain tracts or parcels of land and premises, situate in the Township of Egg Harbor, County of Atlantic and State of New Jersey, bounded and described as follows, to wit:

30

40

Complainant's Exhibits.

BEGINNING at a stake standing at the Southeast side of Forked Creek above the Fork and in the 6th line of the survey of Peter Boice and runs from thence (1) Southwardly, thirty-seven degrees West, five chains; thence (2) Southwardly, seventy-eight degrees West, twelve and one-half chains; thence (3) Northwardly, ten chains; 10 thence (4) Northwardly, seventy-eight degrees East, thirteen chains; thence (5) Northwardly, fifteen chains and seventy links; thence (6) Northwardly seventy-five degrees West, nine chains and seventy links; thence (7) Northwardly, ten and one-half chains; thence (8) Southwardly, seventy-five degrees East ten chains and thirty links; thence (9) Southwardly thirty-two chains and sixty links; thence (10) Northwardly, seventy-eight degrees East two 20 chains to the place of beginning.

CONTAINING twenty-three acres, more or less, with the usual allowance for roads.

BEGINNING at the lower mouth of Newfound Thoroughfare where it empties into the Beach Thoroughfare and is the beginning corner of a survey of two hundred and ninety-two acres (of marsh and oyster beds) that was made July 7, 1810 to Daniel Adams and others in company and 30 is recorded in the Surveyor General's Office at Burlington in Lib. C. C. folio 272 and runs from thence (1) Northwardly, thirty-six and one-half degrees West, fifteen and one-half chains; thence (2) Northwardly, sixty degrees and thirty minutes East sixty-eight chains and fifty links; thence (3) Northwardly, twenty-five degrees and thirty minutes East, twenty-two chains; thence (4) Northwardly, eighty degrees and thirty minutes West twenty-four chains and fifty links; 40 thence (5) Southwardly, sixty-four degrees and

Complainant's Exhibits.

thirty minutes West, seventy-seven chains and fifty links; thence (6) Southwardly, thirty degrees and thirty-nine minutes West, thirty-six chains; thence (7) Southwardly, fifty-nine degrees and thirty minutes East ten chains; thence (8) Southwardly; thirty degrees and thirty minutes West twelve chains; thence (9) Southwardly, eighty-six degrees and thirty minutes East, forty-five chains and fifty links; thence (10) Northwardly twenty degrees and thirty minutes East thirteen chains to the place of beginning.

10

CONTAINING 378½ acres and the usual allowances for highways.

BEING the same lands and premises granted and conveyed unto the International Speedway Association by Deed from George B. Gerau, et ux, et al, dated the 28th day of August, 1922, and recorded November 1st, 1922, in Deed Book 696, pages 9 and 11, in the Atlantic County Clerk's Office, at May's Landing, N. J.

20

TOGETHER with all and singular the lands, buildings, improvements, waters, water courses, water rights (riparian and pier rights granted or to be granted if the within conveyed property is tangent to, touches upon or embraces water front or fronts to which they would or may attach or be entitled), mineral rights and deposits, woods, streets, alleys, passages, ways, rights, liberties, privileges, hereditaments, incidents, appendants and appurtenances in the line of title and to the same belonging, granted, or in any wise appertaining with the full right to and use of the same that may have been granted heretofore to these or the prior owners hereof or to which they were, may or will be in any way entitled, and the reversion and reversions,

30

40

Complainant's Exhibits.

remainder and remainders, rents, issues, benefits and the profits thereof, and of every part and parcel thereof:

10 AND ALSO, all the estate, rights, title, interest, property, privileges, possession, claim and demand whatsoever, both in law and equity, of the said party of the first part, of, in and to the said premises, with the appurtenances, appendants incidents and hereditaments now vested in the party of the first part or that may hereafter be vested in the party of the first part in fulfillment and in perfection of estoppel of the title hereto both as to the quantity and quality of the same intended and purported to be granted and conveyed by this deed, if there is ascertained to be in any manner any deficiency of title either as to the quantity or quality thereof or both.

20 TO HAVE AND TO HOLD the said premises, with all and singular the buildings, appurtenances, appendants, incidents and hereditaments thereunto belonging as aforesaid unto the said party of the second part, his, her, their, its, heirs, successors and assigns, to the only proper use, benefit and behoof of the said party of the second part, his, her, their, its, heirs, successors and assigns.

30 (4)
AND the said party of the first part for himself, herself, themselves, itself, his, her, their, its, heirs, executors, administrators, successors, DO or DOTH by these presents covenant, grant and agree to and with the said party of the second part, his, her, their, its heirs, successors and assigns, that the said party of the first part, his, her, their, its heirs, successors, all and singular the hereditaments, appurtenances, appendants,
40 incidents and premises herein above described

Complainant's Exhibits.

and granted, or mentioned and intended to be so, unto the said party of the second part, his, her, their, its, heirs, successors and assigns, against the said party of the first party, his, her, their, its heirs, successors and against all and every other person or persons whomsoever lawfully claiming or to claim the same, or any part thereof, (5) by, from, through, or under **him, her,** them, it or any of them, SHALL and WILL, subject to the above mentioned encumbrances, conditions, exceptions and reservations, if any, WARRANT and forever DEFEND. 10

IN WITNESS WHEREOF the individual parties of the first part to these presents has or have hereunto set his, her or their hands and seals, and the corporate parties hereto have caused its or their common or corporate seal or seals to be affixed and set hereto duly attested by their proper and authorized officers thereof affixing their signatures hereto, in attestation of their due execution and delivery, the day and year first above written. 20

The International Speedway Association
(Seal)

by C. H. Berlekamp President (Seal)

Attest

Herbert S. Fry Secretary (Seal) 30

Signed, sealed and delivered
in the presence of

Page 1, line 3, the
word "International"
written over erasure before
signing.

(Twenty-eight dollars in documentary stamps)

(I.S.A. C.H.B. 12-7-23 written on each stamp) 40

*Complainant's Exhibits.*INSTRUCTIONS
FOR ACKNOWLEDGMENTS

Acknowledgments may be taken without the necessity of having Court certificate attached before the following:

- 10 A Notary Public, Master in Chancery, Attorney-at-Law for the State of New Jersey or before any Judge of any New Jersey Court of Record, Chancellor or Vice-Chancellor of the Court of Chancery, without seal, or before an American Diplomatic Representative abroad, Notary Public of Foreign Countries, a Commissioner of Deeds for New Jersey, commissioned to act in another State for New Jersey, with his seal; but if taken before a Notary Public or
- 20 other State or County officials of any State other than New Jersey, no seal necessary but Certificate of Court of Record in such State certifying to the authenticity of such official's right to take acknowledgments must be attached to the Deed.

STATE OF NEW JERSEY }
COUNTY OF ATLANTIC }^{ss.}

- 30 BE IT REMEMBERED, that on this seventeenth day of December in the year of our Lord one thousand nine hundred and twenty three (1923) before me, the undersigned subscriber a notary public of New Jersey personally appeared the undersigned deponent who being duly sworn, on his oath made due proof, to my satisfaction, that C. H. Berlekamp is President, and deponent is Secretary (Cashier) of the International Speedway Association, the corporation grantor in the within Deed named; that deponent well
- 40 knows the common seal of said corporation; that

Complainant's Exhibits.

the seal affixed to said Deed is the common seal of said corporation, and was so affixed thereto, and said Deed was signed and delivered by said President in the presence of deponent, as the voluntary act and deed of said corporation, pursuant to resolution of the Directors thereof, and that deponent thereupon signed his name thereto as a witness thereof. 10

Herbert S. Fry

Sworn and subscribed to before me the day and year aforesaid. All of which I do hereby certify.

Edgar R. Somers

Notary Public of N. J.

My commission expires Sept. 10, 1928

(Seal)

20

Exhibit C23.

6-19-24L

J. H. Van Derveer

Hills & Van Derveer

Attorneys at Law

802-805 Ulmer Building

Cleveland, Ohio

30

40

Complainant's Exhibits.

Exhibit C24.

6-19-24L

February 9, 1924.

Appl. 1794.

10 J. H. Van Derveer, Esq.,
802 Olmer Building,
Cleveland, Ohio.

Dear Sir:—

Enclosed herewith please find a memorandum of tender which John N. McGarvey made at the Office of this Company on February 7, 1924, which is self explanatory.

Yours very truly,

CHELSEA TITLE & GUARANTY CO.

20

By

Secretary.

LAK/EC
Encl.

30

40

*Complainant's Exhibits.***Exhibit C25.**

6-19-24L

February 7th, 1924 at

11:45 A. M.

Application #1794.

Chelsea Title & Guaranty Company,
1313 Atlantic Avenue,
Atlantic City, N. J.

10

Mr. Harry F. Rhoades, Assistant Cashier of the Chelsea National Bank, presented for account of John N. McGarvey, Twenty-five thousand five hundred (\$25,500.00) Dollars, (the said John N. McGarvey accompanying him), said sum being tendered to the Chelsea Title & Guaranty Company by John N. McGarvey as provided under the terms of an Agreement of Sale made between The International Speedway Association and Charles W. Young, or his Nominee, dated December 8, 1924.

20

Mr. McGarvey demanded a deed from The International Speedway Association to himself, as Nominee and real principal purchaser under the above mentioned Agreement of Sale and as per a declaration made by the said John N. McGarvey and recorded in the Clerk's Office of Atlantic County at Mays Landing, New Jersey on December 18, 1923.

30

Mr. Kelly, on behalf of the Company, advised Mr. McGarvey that he did not have in his possession a deed to the order of John N. McGarvey and that the Company was not yet in a position to insure deed to the property described in said Agreement of Sale, as being free and clear of all encumbrances, according to the terms of the

40

Complainant's Exhibits.

Agreement, and also due to the condition of title, it's examination is still unfinished.

Mr. McGarvey thereupon produced a copy of the Agreement which provides as follows:

10 "It is hereby understood and agreed that said Title Company (referring to The Chelsea Title & Guaranty Company), is hereby appointed the Agent of all parties hereto, to whom tender shall be made at it's Offices in Atlantic City. Tender to said Title Company to be construed as tender to the parties in interest.

"This Agreement shall be extended to such time as delay may be caused by the Title Company in it's examination of title to said property."

20 Pursuant to said above quoted terms of the Agreement, a duplicate copy of which is on file with the said Title Company, Mr. Kelly, on behalf of said Company, stated the he was unable to consummate the said Agreement and make settlement thereunder, which settlement would have to be postponed to some future time when the title examination would be complete and title could be conveyed under the terms and conditions mentioned in said Agreement.

30 Thereupon Mr. McGarvey demanded the return of said Twenty-five thousand five hundred (\$25,500.00) Dollars to be held by him and to be again tendered at such time as the Title Company, the Agent of said parties to said Agreement, will notify him that they are ready to make settlement in this transaction and accept the said balance of Twenty-five thousand five

40

Complainant's Exhibits.

hundred (\$25,500.00) Dollars due. Present—
Harry F. Rhoades, Assistant Cashier of

Chelsea National Bank,
John N. McGarvey,
William H. Conger, Jr.,
Linus A. Kelly.

HAK
2-7-24

10

Exhibit C26.

6-19-24L

App. No. 1794 Chelsea Title & Guaranty Co.
Hills & Van Derveer

Attorneys at Law
802-805 Ulmer Bldg.
Cleveland, Ohio

20

A. T. Hills

J. H. Van Derveer

(In red crayon the word "Important.")

December 29, 1923.

The Chelsea Title & Guarantee Co.,
Atlantic City, N. J.

Gentlemen:

On or about the 8th day of December, 1923, the
International Speedway Association, through me,
mailed you an agreement between said Associa-
tion and one Charles W. Young, together with a
draft for \$2500.00, you being directed to hold
the same in escrow.

30

On or about the 12th day of December, 1923, I
wrote Mr. Young a letter saying the agreement
and the draft might be withdrawn from the es-
crow.

I write you now to advise that you should
permit neither the agreement nor the draft to be

40

Complainant's Exhibits.

withdrawn by reason of any authority I gave
Mr. Young in said letter to him.

Yours respectfully,

JHV:K

J. H. Van Derveer

Exhibit C27.

10

6-19-24L

Date Received
Date Answered
Filed by

Law Offices
COLE AND COLE
Guarantee Trust Building
Atlantic City, N. J.

20 C. L. Cole
C. L. Cole, Jr.
Maurice Y. Cole

Jan. 29, 1924.

Chelsea Title & Guaranty Co.,
1315 Atlantic Ave.,
City.

Gentlemen:

30 As you may know, we represent Mr. John N.
McGarvey in the matter of his claim of right to
receive a title from International Speedway As-
sociation pursuant to written agreement of De-
cember 8, 1923, between said Association and
Charles W. Young, or his nominee. We under-
stand that since then the title has been conveyed
to another. The agreement provides for settle-
ment on February 7, 1924 unless the time is ex-
tended by your Company in your examination
of title. Assuming that you will be prepared to
40 insure the title on or before said date, we are
advising you as attorneys for Mr. McGarvey

Complainant's Exhibits.

that he will be prepared to perform his part of the contract as provided, assuming that the International Speedway Association will be prepared to perform on its part.

Kindly acknowledge receipt in writing and advise what your position is now respecting the title, and what you will be prepared and able to do on or before said date. 10

Very truly yours,
Cole & Cole

Exhibit C23F.

6-19-24L.

Jan. 29, 1924.

International Speedway Association, 20
c/o J. H. VanDerveer, Atty.,
802 Ulmer Bldg.,
Cleveland, O.

Gentlemen:

We are enclosing a copy of letter we are sending to Chelsea Title & Guaranty Company which concerns your written agreement of December 8, 1923 with Charles W. Young or his nominee. As you know, Mr. McGarvey is the nominee who was in mind at the time the agreement was made. We represent Mr. McGarvey and have been advised that since then you have conveyed the title to another. This was in violation of your agreement and we assume that on or before February 7, 1924 you will be prepared to perform your contract with Mr. McGarvey according to its terms. Mr. McGarvey will be prepared to perform on his part. 30

Very truly yours,
Cole & Cole 40

*Complainant's Exhibits.***Exhibit C29S.**

6-19-24L.

RETURN RECEIPT.

Received from the Postmaster the Registered
or Insured Article, the original number of which
10 appears on the face of this Card.

International Speedway Assoc.
(Signature or name of addressee.)
c/o J. H. VanDerveer, per JK.
(Signature of addressee's agent.)

Date of delivery, Jan. 31, 1924

Form 3811

Post Office Department

Official Business

Registered Article

20 No. 38237

Insured Parcel

No.

Penalty for private use
to avoid payment of
Postage, \$300.

Postmark of delivering
office

Register or insure
valuable mail

30

and date of delivery

Cleveland, Ohio, Jan 11-PM 192

Return to Cole & Cole 16277

(Name of Sender)

Street and Number,

or Post Office Box, Guarantee Trust Bldg.,

Post Office at

State Atlantic City, N. J.

c5-6116

40

New Jersey Court of Errors and Appeals

<p><i>Between</i></p> <p>JOHN N. MCGARVEY, <i>Complainant-Appellant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>CHARLES W. YOUNG, <i>et als.,</i> <i>Defendants-Respondents.</i></p>	}	<p><i>On Bill.</i></p> <p><i>On Appeal</i> <i>from</i> <i>Chancery</i> <i>from Order</i> <i>Dismissing</i> <i>Bill Advised</i> <i>by INGERSOLL,</i> <i>V.-C.</i></p>
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BRIEF FOR APPELLANT.

(Italics, etc., except where otherwise noted, ours.)

The Point Involved.

The only point involved is whether the Vice-Chancellor was correct in dismissing the bill upon motion of respondents, after answers and replications thereto, without final hearing, upon the ground of *res adjudicata*.

(Notice to dismiss, p. 53; conclusions, p. 54; order dismissing, p. 63.)

That the bill sets up a cause of action cognizable in equity is not denied or questioned by notice, reservation in the answers or otherwise, and the matter as to how far relief could be granted upon the present bill, was not argued below and is not argued here.

Statement of the Case.

The bill was filed September 5, 1925. In substance it set up that: Young, one of the defendants, approached complainant and informed

him that he (Young) had information with respect to a parcel of ground, belonging to the Speedway Association, which was a desirable piece of property to acquire, and suggested, inasmuch as he (Young), could not supply the funds wherewith to purchase and, inasmuch as complainant was experienced in the buying and selling of real estate, which experience would be valuable, that complainant become interested with Young in the purchase of the property as a joint enterprise; complainant investigated the property and agreed to advance the money necessary to secure a contract; Young agreed to go to Cleveland to negotiate; Young went to Cleveland on behalf of the joint enterprise; complainant advanced the moneys necessary for the down payment; a contract was negotiated; the identical draft sent by complainant to Young was used for purposes of the down payment; the expenses of Young were paid by complainant; Young secured a contract from the Speedway Company by which that company agreed to convey the property to Young "or his nominee"; Young explained that *his* name was put in as purchaser "because he represented himself, in dealing with the seller as a capitalist, and he did not want it to appear to them that he was in fact not acting for himself"; the purpose of Young and complainant was a resale of the property; complainant ascertaining that Young, about the 15th day of December, 1923, had denied any interest of complainant in the property, served notice on the Chelsea Title and Guaranty Company, with which the agreement provided the deed should be placed in escrow, to the effect that he *was* interested; negotiations took place between the parties and finally it was agreed that if the property was sold prior to the time when complainant would be obliged to put up the

balance of the contract price, complainant having agreed to advance the balance of the purchase price, the interest of complainant in the joint enterprise should be fixed at the sum of \$25,000 in addition to the money which complainant had invested therein and there should be paid to the complainant the sum of \$25,000 plus the moneys which he had invested, in liquidation of his rights in the joint enterprise.

The bill then proceeds, paragraph 4, to allege that: immediately upon this agreement being consummated, Young formed a plan of defrauding complainant, and, in pursuance of that plan, on the 29th day of December, 1923, caused the Speedway Association to make a deed of the premises to one Safford, and, on the same day, caused Safford to make a deed to Young; in further pursuance of the fraudulent plan, and undoubtedly to conceal what was being attempted, Young, on January 9, 1924, gave a quit-claim deed to the Speedway Association, and, on the 5th day of January, 1924, the Speedway Association gave another deed to Safford; the deed from Safford to Young was held off record, not being recorded until May 18, 1925, which, significantly, is the date this Court decided the appeal in the prior case; the Speedway Association accepted as "full consideration" for the property a mortgage of \$28,000 made by Safford to the Speedway Association notwithstanding the fact that the contract provided for payment in cash of the balance of the contract price, which moneys complainant was to advance; every dollar that was put into the property was money of complainant; Young advanced no moneys; at Young's procurement the Speedway Association took the property back as security for the balance of the contract price,

thus relieving Young of paying the balance of the contract price; Safford was but a dummy for Young.

The bill then alleges that on the day fixed for passing title complainant tendered the balance of the contract price, but the Chelsea Title and Guaranty Company could not deliver the deed in pursuance of the contract, a deed having already been made by the association to Safford, and another by Safford to Young.

The bill then alleges that by deed dated May 16, 1925, Young conveyed the property to Grossman and Westney, two of the defendants, and that Westney and Grossman paid no consideration for the property and that they hold in trust and that they had full and complete knowledge of the rights of complainant.

The prayers of the bill are (p. 9) that Grossman and Westney be decreed to hold the property as trustee for complainant under a resulting trust, or, in the alternative, for Young and the complainant as "joint adventurers," and that the rights and interests of Young and complainant may be fixed and determined, or, in the alternative, to secure to complainant the repayment to him "of the amount of money invested by complainant in said lands and premises and the sum of \$25,000 with interest as the value of complainant's interest in said joint adventure," and for other relief.

Prior to answers filed two motions were made to dismiss. The notice in one stated no ground (p. 21). It was argued and denied. The notice in the other specified two grounds, A and B, in effect, *res adjudicata* and estoppel. This motion was argued and denied. Defendants then answered to the merits (answer of Grossman and

Westney, p. 35, paragraphs 3, etc.; answer of Young, p. 39, paragraph 1, etc.). The defendants likewise, in lieu of plea, alleged certain proceedings in a prior cause as *res adjudicata*. (Answer of Grossman and Westney, p. 23, paragraph 1; answer of Young, p. 44, paragraph 14, etc.)

Complainant then filed replications (pp. 46, 49). The case was then referred to the Vice-Chancellor for trial and a day fixed. Prior to the day fixed for trial a motion was made "for a final decree adjudging that the bill of complaint filed by you in the above entitled cause, is *res adjudicata*, you having joined issue on an answer in lieu of a plea, setting up the defense of *res adjudicata*" (Notice, p. 53). This motion was argued and decided (Conclusions, p. 54). Whereupon, the order dismissing the bill was made (p. 63) from which this appeal was taken (Notice of appeal, p. 64; petition of appeal, p. 65).

The prior proceedings held to be *res adjudicata*.

On December 27, 1923, complainant filed a bill against Young. That bill alleged that: On December 8, 1923, the Speedway Association made an agreement with Young to sell certain lands in Atlantic City; the sum of \$2,500 earnest money named in said agreement was paid by complainant to said Young and said Young "was his (complainant's) agent in procuring said agreement"; Young paid no part of said consideration; had no financial interest in the agreement and negotiated said agreement "as agent and for the benefit *solely* of complainant"; Young repudiated his agency and denied "that com-

plainant has any interest in the agreement, and has refused to assign said agreement to complainant *as the nominee* referred to in said agreement"; the action of Young was a fraud upon complainant and an attempt to deprive complainant of his rights in the agreement, which was procured while said Young was acting *solely* as agent for complainant. The bill prayed that it be decreed that "in procuring the agreement referred to in the bill the defendant, Young, was acting as agent for complainant, that he holds said agreement in trust for complainant; that he has no interest legal or equitable in the same or the lands and premises described, that he be commanded to assign, transfer and set over said agreement to complainant and that the International Speedway Association be required to execute and deliver a deed to complainant for the lands and premises described in the agreement upon complainant's complying with the terms and conditions thereof" and for other relief (p. 23).

It will be observed that this bill rested solely upon *specific* agency. It expressly excluded any idea of joint interest; it did not rest upon resulting trust; it specifically prayed that the Court decree that Young was acting as agent for complainant; that he held the agreement in trust for complainant and that he had no interest legal or equitable in the lands.

Answers were filed by Young and the Speedway Association, also a defendant, which, in effect, amounted to a general denial, the answer of Young also setting up the statute of frauds (pp. 26, 28).

The case was heard by Vice-Chancellor Ingersoll. Testimony was taken. He delivered con-

clusions, which are not pleaded in the present case, but which are referred to by him in his present conclusions (p. 55) and which, therefore, are separately printed and handed to this Court for its information. In those conclusions the Vice-Chancellor said, after referring to the testimony and the respective claims made by complainant and Young, complainant insisting that Young acted *solely* as his agent, Young having no interest in the property, and Young insisting "that the contract was properly made in his name, and that the agreement was—if the property was sold within a certain time, he and McGarvey were partners and the money was to be divided—and in case it was not sold within that time, McGarvey was to have returned to him the money advanced and have no further interest in the agreement,"

"The Court is not impressed with either of these claims. It is not probable that Young would devote a great deal of time making several trips to Atlantic City and Cleveland, and assume personally the payment of part at least of expenses without any arrangement for remuneration or profit to him. Neither is it probable that the complainant would advance considerable sums of money, and agree that he was to have no profit unless a resale was made before time of settlement, and that he was only to have his money returned less a certain deduction of the expenses."

"Neither the testimony produced by the complainant that Young was his agent, but that on the happening of a certain contingency, he would accept \$25,000 in full consideration for his interest in the contract, and that produced by the defendant that the agreement was for the joint benefit of the parties, only if the property was resold within a certain time and if not sold (as it was not) McGarvey was only to have his money returned, is convincing."

And the Vice-Chancellor then added, and to this he refers in his present conclusions (p. 55):

“Should the complainant accept a decree for the repayment of the money advanced by him in the enterprise, such decree will be advised, otherwise the bill must be dismissed.”

The Vice-Chancellor did *not* determine that *this* was the relief to which complainant was entitled nor *could* he so determine upon the pleadings as filed. Such a determination would have been wholly beyond the issue. The complainant was not obliged to “accept” such a decree which would have barred him from appealing.

Thereupon, a decree was made which did nothing more than order “that complainant’s bill be, and the same is dismissed, with costs to the defendant.”

An appeal was taken to this Court and argued. The opinion was filed May 18, 1925, written by Trenchard, *J.*, and in that opinion the prayer of the bill was specifically recited (p. 31). This Court said, after reciting the prayer:

“To warrant the relief asked for in the complaint the evidence must be of such weight and sufficiency as will reasonably justify the court in finding (among other things) the existence of *the agency charged in the bill.*”

“Apparently the Vice-Chancellor thought that such proof was not adduced, and we think that was right. No documentary evidence was presented in support of complainant’s contention that the defendant, Young, acted solely as his agent in the transaction * * *.”

“*It is unnecessary for present purposes to determine precisely what were the contractual relations between the parties. It is sufficient to say that we find that complain-*

ant's claim of agency was not made out. We think that a careful consideration of complainant's own testimony indicates *that Young was not acting solely as his agent.*"

And, finally p. 34:

"Since the bill was properly dismissed for want of proof of the agency essential to relief, therein alleged, it will be unnecessary to consider other objections leveled against the relief asked for in the bill."

The decree of the Court of Chancery dismissing the bill was thereupon affirmed.

The issue in the prior case was sharply defined and both the Court of Chancery and this Court specifically confined the determination to the one issue presented.

When we look at the testimony taken in the prior case, which is referred to in the answer of defendants pleading *res adjudicata* (p. 34), we can readily perceive why it was that the Court, in express terms, confined itself to deciding the one issue tendered and why this Court, in its opinion, stated "It is unnecessary for present purposes to determine precisely what were the contractual relations between the parties."

The proofs disclosed, without contradiction, that every dollar that was used in obtaining the contract of purchase from the Speedway Association was advanced by complainant and that he paid the expenses of Young, when Young went to Cleveland to obtain the contract.

Young had not known complainant before he spoke to him about this property (Testimony of Young, p. 169). Young then says (p. 170) that, although not knowing complainant—

"Q What did you want him to do? A Wanted him to loan me money.

Q How much? A Up to five thousand dollars.

Q For what purpose? A For deposit and expenses that was incurred in concluding the contract.

Q Did Mr. McGarvey agree to loan you the five thousand dollars?

Mr. Cole: I object.

A Not then.

The Court: Sustain the objection.

Q Did you get the five thousand dollars from Mr. McGarvey that day? A No.

Q What did you offer to Mr. McGarvey in exchange for his five thousand dollars?

A Nothing that day."

Complainant, although a stranger to Young, and although offered no interest in the transaction, nevertheless, as Young says—"left me to make his own investigation as to the values and their ownerships, if possible, contiguous to it, or on the meadows" (p. 171).

Young then says (p. 172) that complainant finally agreed to loan him up to \$5,000 upon condition that if Young resold the property to a Mr. Simpkins, to whom it had been offered at \$30,000 advance, he, Young, would divide the advance with complainant and, if Simpkins did not purchase, complainant was to sell the property, if he could, as the agent of Young, and then the advance price, providing he should sell it before February 6th, would be divided equally (p. 172), but, if complainant did not sell before February 6th, Young was to repay him the money loaned (p. 174). Young then tells how he went to Cleveland, negotiated the contract which ran to him *or his nominee*, how he came back, met complainant, and how both complainant and Young went to Mays Landing to record the contract (p. 177). Young then speaks of various communications with complainant with

respect to the property (pp. 178, 179), Young's visit to the Trust Company and conversations with officers of that company, and then says that, on or about December 13th, he accepted a proposition which complainant had made to McCain the night before. When we turn to the testimony of McCain we find that that proposition which Young says he accepted, was that the complainant "would take his money, \$25,000 and step out" (pp. 194, 196). McCain tells (p. 197) how he heard a conversation between Young and McGarvey, which conversation Young says was the one in which he accepted the proposition of complainant to in effect, liquidate his interest in the transaction at \$25,000 plus the amount of money which he had advanced.

Under the terms of the contract the title was to close on February 7, 1924 (p. 16), and the deed, properly executed, was to be delivered to the Chelsea Title and Guaranty Company on or before December 18, 1923, to be held in escrow, to be delivered when the purchase price of the property was paid in full. The purchase price was \$28,000 to be paid "\$2,500 on the signing of the agreement (which moneys complainant paid (p. 15)) and the balance \$25,500 in cash" (p. 15). On December 17th or 18th there was delivered to the Chelsea Title and Guaranty Company, at a meeting at which Young was present, a deed from the Speedway Association to Brighton Gardens, in pursuance of the terms of the agreement (pp. 123, 124, 125).

The following testimony of Young is important (p. 182):

"Q Did you ever go to the title company and undertake to perform the agreement which you had with the Speedway of December 8th? A I went there repeatedly and saw Mr. Wygand, constantly trying to

hurry up, what is the condition, hurry up, get it through.

Q What was the last date that you were at the title company, urging them to close this up? A I don't know.

Q Did you ever have the money, \$25,500, to pay? A I made arrangement when title was ready to have much more than that.

Q Did you go there on February 7th and made the tender? A I did not, the title was not ready, I had been there."

Notwithstanding the fact that Young says he was constantly after the title company to hurry up so that title could be closed, it appeared that, on the 29th of December, 1923, more than a month before the time fixed for closing, the Speedway Association, at the request of Young, had made a deed to one Safford, and that, on the 9th day of January, 1924, Young and his wife had made a quit-claim deed to the Speedway Association, and that, on the 5th of January, 1924, the Speedway Association had made another deed to Safford. All these deeds were recorded about the days of their dates, or shortly thereafter.

So that, while Young was attempting to get the Title Company to close under the agreement, the Speedway Company had already conveyed, at the request of Young, and the deed, which was held in escrow by the Trust Company, had been made useless, and, instead of paying cash, as required by the contract, the Speedway Company had taken back a mortgage for the full purchase price. Asked as to why he did this Young says (p. 184), that it was "because of the action of Mr. McGarvey on the 14th of December, in Mr. McCain's office." And (p. 184):

"Q In other words, you saw fit for reasons satisfactory to yourself, to repudiate the agreement you had with Mr. McGarvey; is that correct? A No, I never repudiated it."

He recognizes the interest of complainant on page 188:

“Q For what purpose was the company incorporated? A To take title when Mr. McGarvey failed to sell this property for me.

Q Were you anticipating that he had failed? A I didn't know.

Q Now, he did fail, did he? A I don't know.

Q You repudiated it, didn't you? A I never repudiated anything.

Q You admit now, that you had no interest on that agreement? A That wasn't in the agreement.

Q Then why was not this title made to the Brighton Gardens Company? A Because that would have controverted my agreement that I had with Mr. McGarvey which was to sell this property if he could.”

Page 187:

“Q Did you have any agreement that was not in writing with them? A In everything else had with him the company was going to get the property; it didn't interfere with the right that I speak of that Mr. McGarvey was to have, it was all protection.”

He then says (p. 185):

“Q What was the date that you say you concluded that you would not any longer recognize Mr. McGarvey? A I never said in my testimony that I ever refused to recognize him.

Q Do you recognize he has any interest now? A No.

Q Where did his interest end, according to your opinion? A *When he started these proceedings.*

Q When was that? A You started them.”

Young concealed his interest in the property at the hearing before the Vice-Chancellor, which

took place on January 19, 1925. He was asked (p. 183):

“Q Are you now claiming to have an interest in this agreement of December 8th?
A No.”

Again on (p. 188):

“Q You admit now, that you had no interest in that agreement? A That wasn't in the agreement.”

On page 192 he is asked:

“Q Was Mr. Safford your nominee, too?
A Not then.

Q Was he later? A I don't know. That is a legal question.”

And then further questioning along that line was stopped on objections of counsel for defendants.

On (p. 183):

“Q Are you now claiming to have an interest in this agreement of December 8th?
A No.

Q Have you been released from it by the Speedway Company? A Don't know later, but the—”

He was interrupted by counsel for defendants, and the objection sustained upon the ground that it was calling for a legal conclusion.

The reason for these interruptions and objections is clear when we find that, coincident with the making of the deed of December 29, 1923, by the Speedway Association to Safford, *Safford made a deed to Young, which deed was kept off record until the eighteenth day of May, 1925, or until after this court had determined the cause.* And it was Young who actually held title, and who, on the 16th day of May, 1925, conveyed to Westney.

The whole purpose of Young was to conceal his interest in the property. When Young was called for complainant (p. 155), he deliberately evaded. He was asked "Did you receive any consideration for the quit-claiming? A No. Q Had you any promise of consideration? A No. Q Do you now claim any interest in the land described in the agreement or in the agreement? A I deny Mr. McGarvey has any interest. Question repeated. A Yes. Q By virtue of what? A By virtue of deed now of record in the name of Clarence E. Safford."

On page 156, the question was asked:

"Q Have you ever surrendered your rights that you claim under that agreement to the International Speedway?"

On page 157:

"Q Have you ever signed any paper or had any agreement with the International Speedway Company concerning your interest in the agreement of December 8, 1923?"

These questions were objected to and answers not permitted.

An examination of the witness' testimony (pp. 155 to 163) shows that he is attempting throughout to conceal. He says that his interest in the agreement is by virtue of a deed of record in the name of Safford. At the time he *knew* that his interest was by virtue of a deed from Safford to himself, executed at the same time that the Speedway conveyed to Safford, which latter deed was kept off record.

Complainant, McGarvey, in his testimony that the purchase was made for his benefit, is supported by the testimony of Kelly, secretary of the Chelsea Title and Guaranty Company (pp. 120, 121, 133); Conger, an employee of the Chelsea Title and Guaranty Company (pp. 142,

145, 147); Conger saying (p. 148), that at a conference which they had—

“both Mr. Young and Mr. McGarvey * * * asked me to prepare some sort of a rough draft to be passed upon as an agreement of option which was to be prepared in Philadelphia, the next day, which I did, covering that profit to Mr. McGarvey, Mr. Young all the time recognizing Mr. McGarvey as the owner.”

This answer was stricken out.

And page 154—

“Q What did they tell you? What did Mr. Young tell you? A Mr. Young told me that Mr. McGarvey was the principal and he was to put up all the money.”

Also by the testimony of Snyder (pp. 209, 210).

We have referred to this testimony in detail, not for the purpose of re-arguing the matter which was decided in the previous case, but to show that there was proof that there *might be* contractual relations between the parties other than the specific relation alleged in the then pending bill, and to indicate that it was not by inadvertence that this court, in its opinion affirming the decree below, confined the determination to the precise question which was submitted upon the pleadings. It was this testimony, coming from the defendant himself, which, we submit, led this court to say: “*It is unnecessary for present purposes to determine precisely what were the contractual relations between the parties.*”

The use of this language by this court indicates, it seems to us, that this court must have assumed that, at *some* time for *some* purpose it *might* be necessary to determine what the precise contractual relations between the parties were.

This court, in deciding the case, in more than one place indicated that it was deciding but one thing, *i. e.*, (p. 33) “* * * that complainant’s claim of agency was not made out. We think that a careful consideration of complainant’s own testimony indicates that Young was not acting *solely* as his agent,” and again (p. 32), to warrant the relief asked for in the complaint, the evidence “must convince the court of the existence of *the agency charged in the bill*,” and then, “No documentary evidence was presented in support of complainant’s contention that the defendant Young acted *solely* as his agent in the transaction,” and finally (p. 34), “Since the bill was properly dismissed for *want of proof of the agency essential to relief*, therein alleged, it will,” etc.

The present bill does not involve the issue decided in the prior suit.

The present bill does not allege and does not rest upon proof of any sole agency. It alleges a joint adventure. It sets up that all of the money paid in consideration was paid by complainant and as a result thereof a resulting trust arose and that subsequently Young repudiated the interest of complainant and that negotiations were had between the parties which resulted in an agreement that there should be paid to complainant, for his interest in the joint enterprise, \$25,000. It alleges *fraud* on the part of Young and sets up that Young, in order to defeat the rights of complainant, quit-claimed to the Speedway Company and then had the Speedway Company make a deed to a dummy, Safford, and then had Safford make a deed to Young, long before the time fixed for the performance of the agreement, which last deed was concealed

during the entire course of the proceedings in the other suit.

The prayer of the bill is not that Young be determined to have no interest in the property because complainant has the entire interest. On the contrary, the prayer is that the enterprise be determined a joint adventure and that the rights and interests of both Young and complainant may be fixed, and then, in the alternative, that a decree may be made securing to complainant the repayment to him of the amount of money invested by him and the sum of \$25,000 with interest, as the value of complainant's interest in said joint adventure.

It was urged in argument below that this bill could not be sustained unless complainant commits perjury or unless he concede that he committed perjury in the other suit. This does not follow. Complainant may not be called as a witness in this suit. Because the court did not agree with his version of the transaction in the previous suit is no indication that he committed perjury. He was supported in his testimony by other witnesses. Indeed, this court in its opinion said that a careful consideration of *complainant's own testimony indicated that Young was not acting solely as his agent*. So that, whatever the pleadings may have alleged in the previous case, this court seems to have thought that complainant's testimony in that case, considered as a whole, was not to the effect that complainant was *solely* interested. What complainant is now doing is to acquiesce in the determination of the court below, and of this court, in the previous case, that, at least as matter of law, Young was not acting solely as his agent, and is to ask the court now to determine "precisely what were the contractual rela-

tions between the parties" (p. 33). He is, as he has a right to do, relying upon Young's own version of the transaction and upon what the court below said in the previous case, "Neither the testimony produced by the complainant that Young was his agent, but that on the happening of a certain contingency, he would accept \$25,000 in full consideration for his interest in the contract, and that produced by the defendant that the agreement was for the joint benefit of the parties, only if the property was resold within a certain time and if not sold (as it was not) McGarvey was only to have his money returned, is convincing."

In any aspect of this case complainant would be entitled to a decree imposing an equitable lien upon the lands for the amount of moneys which he advanced in the purchase, and the fact that, in the conclusions of the Vice-Chancellor in the previous case, the Vice-Chancellor stated that "Should the complainant accept a decree for the repayment of the money advanced by him in the enterprise, such decree will be advised" cannot bar him from that relief, for, had he accepted the offer of the Vice-Chancellor, such a decree would have been beyond the issue, he would have barred himself from having this court pass upon the issue which *was* tendered in that suit and would likewise have deprived himself of the opportunity of having the court determine "precisely what were the contractual relations between the parties."

If there is anything in the present bill not barred by *res adjudicata* the decree must be reversed for the plea of *res adjudicata* was to the whole bill and the decree of dismissal is of the whole bill.

The fact, if it be a fact, that the pleadings could have been amended in the previous suit to include the present relief asked for does not affect the situation.

It was suggested below, upon argument, that the pleadings might have been amended in the prior suit so as to cover that which is now sought to be accomplished in the present suit. If the pleadings had been amended, an entirely different cause of action would have been presented. They were not amended, and, therefore, the issue now presented was not present. It is immaterial whether they could have been amended or not. The question is "was the issue presented and did the court determine it?" This court in affirming expressly, as we have said before, confined itself to the determination of the precise issue presented by the then pending bill.

The relief now asked could not have been granted in the prior suit under the prayer for general relief.

As the Chancellor said in *Black v. Keiley*, 23 N. J. E. 358, at page 361—

"There can be no decree for relief under the general prayer, unless warranted by facts set forth in the bill."

And this case was cited by the present Chancellor in *Wood v. Cox*, 92 N. J. E. 307, at page 310.

Relief warranted upon the facts stated by the bill may be granted under the prayer for general relief.

In re Public Service R'way Co., 95 N. J. E. 31.

But this does not warrant the court, under the prayer of general relief, in granting relief to

which the complainant may be entitled upon a different state of facts than alleged in the bill.

And this court said in *Newark v. Erie R. R. Co.*, 76 N. J. E. 317:

“* * * and it may be incidentally remarked that here we have no special prayer for an injunction of the character of that granted by the decree, the familiar rule must govern that the relief afforded by the decree must conform to the case made out by the pleadings as well as the proofs, and that granted under the general prayer must be *secundum allegata et probata*.” * * *

“In order to entitle the plaintiff to a decree under the general prayer different from that specifically prayed, the allegations relied upon must not only be such as to afford a ground for the relief sought, but they must have been introduced into the bill for the purpose of showing a claim to relief, and not for the mere purpose of corroborating the plaintiff's right to the specific relief prayed; otherwise the court would take the defendant by surprise, which is contrary to its principles.”

THE LAW.

Vice-Chancellor Backes in *Nagle v. Conard*, 96 N. J. Eq., p. 61, said:

“The rule of *res judicata* was invented to promote peace, *not to deny justice*. The principle is authoritatively settled that a decree or judgment on a matter outside of the issues raised by the pleadings is a nullity and is nowhere entitled to the least respect as a judicial sentence. *Jones v. Davenport*, 45 N. J. Eq. 77. In a second suit between the same parties for the same cause of action all triable matters *within the issues* are *res judicata*. In a second suit between the same parties for a different cause of action only those matters within the issues actually litigated and determined

as *res judicata*. 15 R. C. L. Judgments, sections 429, 450, 452. Whether this motion be regarded as within the first or second propositions—I think it comes within the second—the result is the same. *The issues here tendered were not presented.*”

And Vice-Chancellor Backes in that case refused to consider *res judicata* a decree made in a litigation between the same parties and which, by its broad language, covered the matter sought to be litigated upon the then pending motion and held that, although the broad language of the decree seemed to settle the question, what was said in the decree was not within the issues.

Vice-Chancellor Garrison in *Sbarbero v. Miller*, 72 N. J. Eq. 248, at p. 255, said:

“ ‘A judgment estops the parties only as to the grounds covered by it and the facts necessary to uphold it.’ Herm. Estop. 105, sec. 105. ‘Even parties and privies are bound only so far as regards the subject-matter then involved, and are at liberty to raise the same questions in another distinct controversy affecting a distinct cause of action.’ Herm. Estop. 124, sec. 118. ‘And they will not be concluded unless the judgment *necessarily involved the matter which it is sought to be held as conclusively settled by the litigation.*’ Herm. Estop. 291, sec. 252, *et seq.*”

“The fundamental principle of *res judicata* is that the subject-matter must have been settled in the previous litigation between the same parties.”

And this court said, in *Walsh's Estate*, 80 N. J. Eq. 569:

“ ‘Where the second action is upon a different claim or demand, but between the same parties, the judgment in the prior action operates as an estoppel *only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered.*’ ”

And defining what there must be present in order to make the judgment conclusive this court said:

“All that is necessary is that *the right to relief in the one suit shall rest upon the same point or question*, which, in essence and substance, was litigated and determined in the first suit, and in such a case the parties and those in privity with them are concluded, ‘not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.’ ”

34 C. J. Title Judgments, section 1325, p. 915, states the rule:

“The true test of the conclusiveness of a former judgment in respect to particular matters is *identity of issues*. If a particular point or question is in issue in the second action, and the judgment will depend upon the determination of the particular point or question, a former judgment between the same parties will be final and conclusive in the second if that *same point or question was in issue and adjudicated in the first suit*; otherwise not. Or, as the rule is otherwise stated in some of the decisions discussing this matter, in a second action between the same parties on a demand different from that in the first action, the judgment in the first action is an estoppel only as to the points controverted, on the determination of which the finding or verdict was rendered. And in order that this rule should be applied, it must clearly and positively appear, either from the record itself or by the aid of competent extrinsic evidence, *that the precise point or question in issue in the second suit was involved and decided in the first.*”

In *Clark Thread Co. v. The William Clark Company*, 55 N. J. Eq. 658, Vice-Chancellor Reed said:

“The effect of an estoppel by judgment may present two aspects—one where a second suit between the same parties is brought for the same cause of action; the second where a second suit between the same parties is brought not for the same cause of action, but for a cause of action so related to the cause in the preceding suit, that some matter, the *establishment of which is essential to the recovery by the complainant in the last suit was in issue and determined in the preceding suit.*

“In respect to the first phase in which the question of estoppel presents itself, it is entirely settled that after one judicial determination by a court of competent jurisdiction, a second suit for the same matter, between the same parties or their privies, cannot be relitigated in the same or any other court. Nor does it matter that, in the final suit, evidence existed which was withheld or undiscovered, or that the law was misconceived by the court, or left uncited by counsel, or that no defense was made and judgment went by default, or that only one of several defenses was interposed by the defendant; in spite of any of these defects in the prosecution or defense of the action, the judgment stands as an absolute bar against a second litigation of the same cause of action.

When, however, a second suit is brought not for the same demand, but for a cause which was a part of the same matter, but was not included in the first action, the estoppel is not so sweeping. In such instance only those issues which are common to both suits, and which had to be or were actually decided in the first suit, are regarded as *res adjudicata* in the second. This distinction between the two kinds of estoppel is lucidly stated by Mr. Justice Field in *Cromwell v. Sac County*, 94 U. S. 351.

In that case there had been an action upon certain county bonds, in which action the county succeeded. In a subsequent action by substantially the same parties, upon other coupons on the same bonds, the previous judgment was set up as an estoppel. Mr. Justice Field, after speaking of the absolute estoppel as to every ground which might have been presented in the preceding case, when a second action is brought for the same cause, goes on to say: 'When a second action is upon a different claim, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding of the verdict was rendered. In all cases, therefore, when it is sought to apply the estoppel of a judgment in one case to matters arising *in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined on the original action; not what might have been litigated or determined.*

In accordance with this view, it had been held in *Steam Packet Company v. Sickles*, 65 U. S. 333, that where the record of the first suit does not show that the point involved was actually decided, parol evidence is admissible to show the state of affairs that existed at the trial, with a view to ascertain what was decided.

The point so decided, namely, that in the second class of estoppels, it must appear that the point set up by way of estoppel was, or must have been determined in the original suit, was reaffirmed in the case of *Wilson v. Deen*, 121 U. S. 525; was recognized in *Dooley v. Potter*, 140 Mass. 49; *Daggett v. Daggett*, 143 Mass. 516; *Kilander v. Hoover*, 111 Ind. 10; *People v. Hall*, 104 N. Y. 170; *Bigley v. Jones*, 114 Pa. St. 510; *Russell v. Place*, 94 U. S. 606."

The general rule regarding estoppel and *res adjudicata* is concisely stated in *Mershon v. Williams*, 63 L. 398, as follows:

“A matter is not to be regarded *res adjudicata* unless there is identity of the thing sued for, of the cause of action, of the persons and parties, and of the quality of the persons for and against whom the claim is made and the judgment in the former suit be so directly in point as to control the issue in the pending action.”

Vice-Chancellor Howell, in *Schlistra v. Van Den Hewel*, 82 N. J. E. 161, said:

“Where the effect of a judgment upon a motion is to absolutely settle rights of parties, and a review can be had, there is no doubt that the judgment would be *res adjudicata*. Such was the opinion of Vice-Chancellor Pitney in the case of *West New York Silk Mill Co. v. Laubsch*, 52 N. J. E. (8 Dick.) 65. There a motion was heard by the Hudson county circuit court to set off one judgment against another. It was refused, with costs, and one of the parties subsequently filed a bill in chancery for the same purpose. The objection of *res adjudicata* was raised; the vice-chancellor held that the former judgment of the circuit court was binding, and that portion of the relief which was prayed in the bill was denied; that it will be observed that *in that case the original motion dealt with the rights of the parties finally*, and that there was a right of review. The doctrine of the *Salz* case is upheld by the supreme court of Colorado in *Rockwell v. District Court*, 17 Colo. 118. In *Scherff v. Missouri Pacific Railway Co.*, 81 Tex. 471, 26 Am. St. Rep. 828, it was held that a judgment within the authority of *res adjudicata* must be a definite judgment of condemnation or dismissal upon the merits of the case. This would seem to be dispositive of the point upon reason and authority; but it will be likewise observed that the parties to the common law

litigation are slightly different from the parties in this suit, *and that the issues here are much broader and more various than those presented by the supreme court record.* There the *sole* issue was whether quo warranto proceedings should be instituted to test the title of the defendants to the offices of elders and deacons or members of the consistory of the Northwilde church. Conceding that they are, the bill in this case raises the further question as to whether the defendants and a fraction of the congregation, upon the facts presented, have a right to secede from the Christian reformed church and join the reformed church in America, and take the church property and temporalities with them. A mere statement of these differences is a demonstration that the doctrine of *res judicata* cannot apply to this case. The argument, however, has the support of authority."

The Vice-Chancellor, after citing with approval a part of the opinion of Mr. Justice Field in *Cromwell v. County of Sac*, 84 U. S. 351, which case was cited by Vice-Chancellor Reed, continued his opinion as follows—

"The doctrine of this case was approved by this court in *Paterson v. Baker*, 51 N. J. E. (6 Dick.) 49, and in *Clark Thread Co. v. William Clark*, 55 N. J. E. 658. See *Hoffmeier v. Trost*, 83 N. J. L. 358.

It is, therefore, quite apparent on either of the grounds above stated that the rule which was entered in the supreme court dismissing the rule to show cause cannot be held to be such an adjudication upon the merits of the controversy as will preclude the examination into the matter in the present proceeding."

This principle is stated in *Ferry-Hallock v. Progressive Paper Co.*, 76 N. J. E. 1, as follows:

"Where an issue was not precisely raised nor expressly decided by the court, the decision was not conclusive of the issue."

and in the case of *Hoppaugh v. McGrath*, 53 N. J. L. 89, as follows:

“On the introduction of the record of the judgment in the former suit, the estoppel will extend no further than the issues that were capable of being litigated in that suit.”

In *Mayor and Alderman of the City of Paterson v. Elizabeth D. Baker*, 51 N. J. E. 49, Vice-Chancellor Van Fleet said:

“But where the second action is upon a different claim or demand but between the same parties, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered * * * the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined, for it is only upon such matters as were actually litigated and determined that the judgment is conclusive.”

And see also—

Wooster v. Cooper, 59 N. J. E. 204;

Schneider v. Schmidt, 84 N. J. E. 18.

The fact that this Court expressly declined to define the contractual relations between the parties and based its determination of affirmance upon a single point, i. e., lack of proof that Young was acting solely as agent for complainant prevents any application of the rule of res adjudicata extending beyond that single point.

There are numerous authorities gathered in volume 6, American and English Annotated Cases, 104, as follows:

“In *Lewis v. Ocean Nav. etc. Co.*, 125 N. Y. 348, 26 N. E. 301, Peckham, *J.*, said: ‘Where a judgment may have proceeded upon either or any of two or more different and distinct

facts, the party desiring to avail himself of the judgment as conclusive evidence upon some particular fact must show affirmatively that it went upon that fact, or else the question is open for a new contention.' See to the same effect *Robinson v. New York, etc. R. Co.*, 64 Hun. (N. Y.) 41, 18 N. Y. Supp. 728; *Contant v. Feaks*, 2 Edw. (N. Y.) 330. And see *Colwell v. Bleakley*, 1 Abb. App. Dec. (N. Y.) 400. And in *Russell v. Place*, 94 U. S. 608, the court said 'It is undoubtedly settled law that a judgment of a court of competent jurisdiction, upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record, or be shown by extrinsic evidence, that the precise question was raised and determined in the former suit. If there be any uncertainty on this head in the record—as, for example, if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated, and upon which the judgment was rendered—the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined.' See to the same effect *Washington, etc. Steam-Packet Co. v. Sickles*, 24 How. (U. S.) 333, 5 Wall. (U. S.) 580; *Thompson v. N. T. Bushnell Co.*, 80 Fed. Rep. 332; *Belleville etc. R. Co. v. Leathe*, 84 Fed. Rep. 103, 53 U. S. App. 718, 28 C. C. A. 279. And see *Teal v. Terrell*, 48 Tex. 491.

Where a suit in equity is brought for the purpose of having set aside as fraudulent a conveyance of real property and a bill of sale of personal property, and the decree fails to pass upon the question of the fraudulency of the bill of sale, the question is not *res judicata*. *Hollister v. Lefevre*, 35 Conn. 456.

An item of an account in a claim for services, which was in issue in a former suit but was overlooked by the Court in its judgment is still open. *Bell v. U. S.*, 28 Ct. Cl. 65, Compare *Keokuk v. Alexander*, 21 Iowa 377.

A question as to the width of a highway acquired by prescription is not rendered *res judicata* by the fact that it was in issue in a former suit if the judgment left the question undecided. *Davis v. Clinton*, 58 Iowa 389.

Where, in a suit against the maker of a promissory note, the defendant interposes two defenses, one of which is to the effect that the note was originally valid the note was subsequently discharged by agreement between the parties, and a judgment is rendered for the defendant wherein it does not appear on what ground the decision is made, the question whether the note was originally void is not *res judicata*. *Littlefield v. Huntress*, 106 Mass. 121."

And in 34 Corpus Juris, title "Judgments," p. 919, sec. 1325, it is stated, with respect to the rule of *res adjudicata*—

"And in order that this rule should be applied, it must clearly and positively appear, either from the record itself or by the aid of competent extrinsic evidence, that the precise point or question in issue in the second suit was involved and decided in the first."

In *Ferry-Hallock Company v. The Progressive Paper Box Company, et al.*, 76 N. J. E. 1, Emery, V.-C., said:

"The opinion of Judge Lacombe in the *Ferry-Waring Company* suit does not expressly decide the issue now raised, as to the distinction between 'stays' and 'rings' under the *Ferry* patents, nor was that issue precisely raised. It is not therefore conclusive in the question, and its bearing on this question is therefore to be considered

only in connection with the evidence given at the hearing upon this subject.”

In *Hoppaugh v. McGrath*, 53 N. J. L. 81, at p. 89, the Supreme Court said—

“On the introduction of the record of the judgment in the former suit, the estoppel will extend no further than the issues that were capable of being litigated in that suit.”

As we have already pointed out the issues presented in the pending cause could not have been determined in the prior cause although there was a prayer for general relief.

CONCLUSION.

The Vice-Chancellor in his conclusions refers to many cases, among others to the opinion of Vice-Chancellor Backes in *Sarson v. Maccia*, 80 N. J. E. 433 (p. 60).

There is no doubt but that what Vice-Chancellor Backes said in that case correctly states the law. It is, of course, no answer to a plea of *res judicata* “that the pleadings in the first suit should have counted upon the precise false representations set up as the cause of action in the second” and it is undoubtedly correct that— “It is enough if the matter was triable in the first suit, and that it was actually litigated and adjudicated,” but that language can have no application to the case at bar where the matters now sought to be litigated were *not* triable in the first suit, because not within the pleadings, and where those matters were *not* actually litigated or adjudicated and where, on the contrary, this court expressly stated that it was determining the case upon the narrow issue of agency raised in that suit and expressly said that it was unnecessary for “present purposes”

[Faint handwritten notes on the right margin, including phrases like "the case at bar", "matters now sought to be litigated", "not triable", "actually litigated and adjudicated", "determining the case upon the narrow issue of agency", "present purposes"]

to determine precisely what were the contractual relations between the parties.

The subject matter of the suit is not the same.

Again (on p. 61), the Vice-Chancellor says that "The second bill is based upon exactly the same subject-matter as was the first bill." We submit that the Vice-Chancellor erred. In the sense that both bills involve transactions arising out of the same property and between the same parties, the subject matter is, of course, the same. But the subject matter of the first suit was the relationship created between complainant and defendant Young, by virtue of an alleged agreement under the terms of which the defendant was to act solely as agent for complainant. *That alleged relationship and the rights of complainant growing out of that relationship was the subject matter of the first suit.* The subject matter of the present suit is the relationship existing between complainant and defendant Young by virtue of an agreement for a joint enterprise, and by virtue of the law of resulting trust, and by virtue of a claimed express contract under the terms of which complainant was to be paid \$25,000 out of the proceeds of this property, and the right of complainant to an equitable lien upon the property, at least to the extent of the moneys advanced by him. The subject matter therefore, was not, in any respects, the same.

Applying the principle which the Vice-Chancellor has applied in the case at bar it would seem that if a suit were brought in the Circuit Court for \$5,000 loaned to the defendant and the defense was that the moneys alleged to be loaned had not, in fact, been loaned, but had been advanced to the defendant for the purpose of

which could not
have been brought
into play in the
preceding suit
because the deed
from Safford to
Young was not
recorded until this
Court had decided
the prior suit for
it was not until
that deed was
recorded that it
appeared that
Young got not
only the contract,
but also the
property with moneys
solely of M. G. Harvey.

purchasing goods, and judgment was rendered against the plaintiff upon *that* issue, the plaintiff would be precluded from bringing a suit against the defendant alleging the advance of the money for the purpose of purchasing goods and the failure of the defendant to purchase goods as required by the contract. Such a suit *could* be brought and the judgment in the first suit would not be *res adjudicata* notwithstanding that the pleadings *might* have been amended in the first suit to include this cause of action.

And yet the subject matter, in the sense used by the Vice-Chancellor in the present suit, is the same, *i. e.*, the right of the plaintiff to recover \$5,000 against the defendant. The question, we submit, is not what *might* have been done *if* the pleadings had been amended but what was, in fact, the issue *upon the pleadings as filed* unless it appears that something beyond the pleadings as filed was litigated. Nor does the fact that there was a prayer for general relief in the former suit aid the respondents for the general relief asked for was relief which would be predicated upon a finding of fact in favor of the complainant upon the issue tendered by the bill, *i. e.*, that Young was acting solely as agent for complainant. Under the bill, if that fact had been found in favor of the complainant relief not specifically prayed for in the bill could have been granted, but relief, under this prayer, could not be granted upon the finding of an issue in favor of the complainant not tendered by the bill. Here, again, a further answer is that, notwithstanding the fact that there was a prayer for other relief in the bill, the court, both original and appellate, confined its determination to the one issue presented by the bill. We have already covered this.

All the facts arising out of the transaction between complainant and defendant Young were not determined in the prior suit.

The Vice-Chancellor further says: "All the questions of fact arising, in connection with the transaction between complainant and defendant, have been litigated and determined in the former suit * * * ." The Vice-Chancellor in his own conclusions in the prior suit did *not* determine what the rights of the parties actually were nor did he determine any question of fact, except one, *i. e.*, that Young did not act solely as agent for complainant. He expressly said that he did not believe the story of either party. He did not attempt to determine what the actual contractual relations were and if he had so determined, it would have been beyond the issues and a judgment beyond the issues cannot be *res adjudicata* in any event.

Aside from this it can hardly be said that all the questions of fact arising in the transaction between complainant and defendant have been litigated and determined when this court expressly declined to pass upon the question of what the actual contractual relations between the parties were for the reason that it was not necessary to do so for "present purposes."

We have made no argument as to whether an equitable cause of action is set forth in the present bill nor have we argued whether the statute of frauds applies (fraud on the part of defendant is expressly charged in the bill) for the reason that those matters were not argued below and were not within the issue determined below and are not within the issues here, the decree below and the motion upon which it was based being based solely upon the ground of *res adjudicata*.

We respectfully submit that the decree should be reversed so that the case can proceed to hearing so that evidence may be produced to substantiate the charges made in the bill.

Respectfully submitted,

CASSMAN & GOTTLIEB,
Solicitors for Appellant.

HARRY CASSMAN,
MERRITT LANE,
Of Counsel Appellant.

The first part of the book is devoted to a general
 description of the country and its resources.
 It is followed by a detailed account of the
 various tribes and their customs.
 The author then describes the
 different kinds of animals and plants
 which are found in the country.
 The last part of the book is
 devoted to a description of the
 different kinds of minerals
 which are found in the country.

Conclusions.

CONCLUSIONS.

IN CHANCERY OF NEW JERSEY.

<hr/> <i>Between</i>	}	<i>On Bill, &c.</i>	
JOHN N. MCGARVEY, <i>Complainant,</i>		<i>On Final Hearing.</i>	10
<i>and</i>		<i>Conclusions.</i>	
CHARLES W. YOUNG, <i>et al.,</i> <i>Defendants.</i>		(Not for Print.)	

Filed January 16, 1925.

On Bill for Relief and Specific Performance.

Messrs. Cole & Cole, for complainant.

Mr. Emerson L. Richards, for defendant
Young.

Mr. Ruby R. Vale, for defendant International
Speedway Association.

Ingersoll, V.-C.:

Evidence produced by the complainant, a real estate operator and builder of Philadelphia, is that on or about the 22nd of November, 1923, the defendant Young called upon him and stated that a piece of ground in Atlantic City (the premises in question) could be purchased at a reasonable figure, and inquired if he (complainant) could be interested in it.

After examination of the premises by the complainant, the defendant Young made two or more visits to Cleveland, Ohio, to interview the owners and secured an agreement of sale of the premises, made to and in the name of the defendant.

The complainant furnished the money paid to secure this agreement.

Conclusions.

10 There appears to have been some conversation between the parties, concerning the propriety of having this agreement recorded in the name of Young, and Conger, a clerk in the title company's office, suggested it should be assigned to McGarvey—and according to his (McGarvey's) statement, "Mr. Young stepped aside and he said, 'We will adjust that in another agreement, wherein you will get the twenty-five thousand dollars,' " and it was recorded in the clerk's office of Atlantic County, the complainant and defendant going together to Mays Landing for that purpose.

20 In the cross examination of the complainant by the counsel of the Speedway Company, also defendants, the complainant said: "I went to Mr. McCain's office and I told him, by reason of certain things that had happened between Mr. Young and myself, I could have no further connection with Mr. Young, and that I ought to have the assignment of that agreement to me as security for my money that was put up and Mr. McCain says to me, 'What about the proposition whereby you were to let Mr. Young have this property in return for \$25,000?' I says, 'I will stand on that proposition,' and I stand there today." He qualifies in the next answer "provided he was able to do so before I was compelled to settle."

30

The claim of the complainant is, that the defendant Young acted solely as his agent in the entire transaction, and that the contract was improperly made in the name of the defendant Young, and should be reformed. He admits, however, as above stated, that if sale was made before time of settlement, he was to receive as his share of the profits the sum of \$25,000.

40

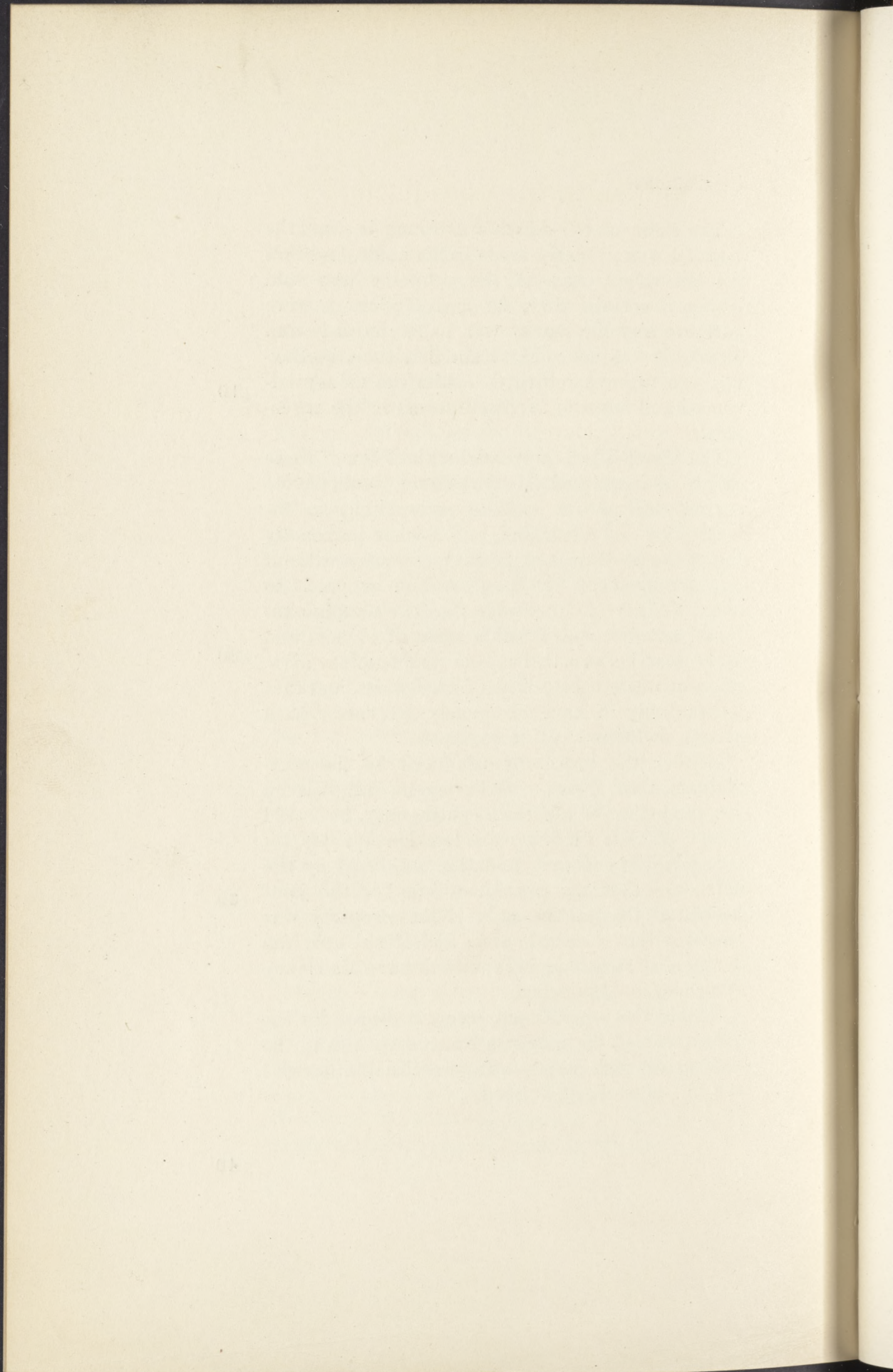
Conclusions.

The claim of the defendant Young is, that the contract was properly made in his name, and that the agreement was—if the property was sold within a certain time, he and McGarvey were partners and the money was to be divided—and in case it was not sold within that time, McGarvey was to have returned to him the money advanced and have no further interest in the agreement. 10

The Court is not impressed with either of these claims. It is not probable that Young would devote a great deal of time making several trips to Atlantic City and Cleveland, and assume personally the payment of part at least of expenses without any arrangement for remuneration or profit to him. Neither is it probable that the complainant would advance considerable sums of money, and agree that he was to have no profit unless a resale was made before time of settlement, and that he was only to have his money returned less a certain deduction of the expenses. 20

Neither the testimony produced by the complainant that Young was his agent, but that on the happening of a certain contingency, he would accept \$25,000 in full consideration for his interest in the contract, and that produced by the defendant that the agreement was for the joint benefit of the parties, only if the property was resold within a certain time and if not sold (as it was not) McGarvey was only to have his money returned, is convincing. 30

Should the complainant accept a decree for the repayment of the money advanced by him in the enterprise, such decree will be advised, otherwise the bill must be dismissed.



NEW JERSEY COURT OF ERRORS
AND APPEALS.

Between
JOHN N. MCGARVEY,
Complainant-Appellant,
v.
CHARLES W. YOUNG, MAX GROSSMAN and SHIRLEY
GROSSMAN, his wife, ALFRED W. WESTNEY
and LAURA WESTNEY, his wife,
Defendants-Respondents.

ON BILL, &c.

ON APPEAL FROM CHANCERY.

BRIEF FOR RESPONDENTS.

STATEMENT OF FACTS.

The conclusions of Vice-Chancellor Ingersoll, as set forth on pages 54, 55, 56 and 57 of the State of Case succinctly state the facts, set forth the pleadings and suggest the issues which are involved in this case; and, with italics ours, read as follows:

“On December 27, 1923, John N. McGarvey filed a bill in this Court against Charles W. Young, and the International Speedway Association, a corporation, in which he alleged that the International Speedway Association had entered into an agreement with the defendant, Young, by which it agreed to sell certain lands therein described to said Young. This agreement is attached to the bill of complaint as Exhibit “A.” *That Young was complainant’s agent in procuring said agreement, and that Young had acted only as agent and for the benefit solely of complainant; that Young had fraudulently repudiated the contract with complainant.*

The prayer of the bill, in addition to those praying for answer and subpoena was:

‘That it be decreed that in procuring the agreement referred to in the bill the defendant *Young was acting as agent for complainant, that he holds said agreement in trust for complainant, that he has no interest legal or equitable in the same or the lands and premises described, that he be commanded to assign, transfer and set over said agreement to complainant and that the International Speedway Association be required to execute and deliver a deed to complainant for the lands and premises described in the agreement upon complainant’s complying with the terms and conditions thereof, and that complainant may have such other and general relief as may be agreeable to equity.*’

Answer and replication were filed; hearing was had, opinion was filed, in which this Court

held, '*Should the complainant accept a decree for the repayment of the money advanced by him in the enterprise such decree will be advised, otherwise the bill must be dismissed.*'

In accordance therewith a final decree dismissing the bill was advised on October 4, 1924.

An appeal was taken with the result that the decree was affirmed. May 18, 1925, 3 Ad. Rep. No. 21, page 932, 129 Atl. 199.

On September 4, 1925, the complainant (by other counsel than those who represented him in the former suit) *filed a bill in much greater detail alleged the facts set forth in the former bill. The same agreement is attached to the bill of complaint and marked Exhibit II.*

In said bill it is averred that title of the International Speedway Association has been conveyed to one Safford and by Safford to Young. The International Speedway Association is therefore not made a party defendant.

The bill also alleged that Young and his wife conveyed said premises to Max Grossman and Alfred W. Westney, and that they hold said property in trust for Young. Grossman and Westney, and their wives have therefore been made party defendants.

The prayers of the bill, in addition to those for answer and subpoena are:

'2. That it may be determined that the said Max Grossman and Shirley, his wife, and Alfred W. Westney and Laura, his wife, hold said property as trustees for complainant under a resulting trust or in the alternative for the said Charles W. Young and the complainant as joint adventurers and that the rights and interests of the said Charles W. Young and the

complainant may be fixed and determined or in the alternative to secure to complainant the repayment to complainant of the amount of money invested by complainant in said lands and premises and the sum of \$25,000.00 with interest as the value of complainant's interest in said joint adventure.

3. That complainant may have such other and further relief as may be proper.'

In the former bill, the complainant in clause 6, said, 'The action of said Young is a fraud upon complainant and an attempt to deprive complainant of his rights in the agreement which was procured while said Young was acting solely as agent for complainant.'

The defendant moved to dismiss the bill because: a. That a previous proceeding estops the complainant from proceeding in this cause. b. That the decree in the former action was *res adjudicata* as to the present action. c. That the complainant's case is within the statute of frauds.

After hearing arguments the motion was denied and the defendants were given time to file answer.

The reason impelling me to deny this motion was that there was nothing before me to prove the facts alleged in the motion; the motion of course being upon the facts stated in the bill.

The defendants then filed an answer by way of plea, in which they set forth the pleadings in the previous case, the appeal and the opinion of the Court of Errors and Appeals and alleging *res adjudicata*, with prayer for dismissal.

Replication is filed admitting the pleadings in the previous case, but denying *res adjudicata*, and alleging new parties. A reply is filed presenting not only the pleadings in, but the testimony in the previous hearing.

Motion is now made to dismiss the bill."

The dismissal of the bill was advised by the Vice-Chancellor and final decree entered, and it is from this decree that this appeal was taken.

ARGUMENT.

The Vice-Chancellor sets forth the issues involved in the following statement of the reasons on which defendants based their motion to dismiss the bill:

"a. That a previous proceeding estops the complainant from proceeding in this cause. b. That the decree in the former action was *res adjudicata* as to the present action. c. That the complainant's case is within the statute of frauds."

Before considering the reasons in support of respondent's position that the bill does not aver facts to warrant relief in equity, a short summary of the law as to the propriety of the remedy here invoked, should be given.

It is suggested that whatever of doubt may exist in the State of New Jersey as to the right of a court of law or equity to take judicial notice of the facts disclosed by the record of a prior case, on an issue of *res adjudicata* or estoppel, where no answer is filed by the defendant, and the issue is attempted to be raised by motion to dismiss or general de-

murrer; there can be no question that where an answer has been filed which discloses and affirmatively places in the record a copy of the record in the prior case, that the issue is properly raised and may be determined on motion to dismiss, or on issue joined by bill and answer.

The law would seem to be well settled as stated in Kocher and Trier's Book on "New Jersey Chancery Practice and Precedents," on pages 166 and 167:

"In other words, a person who has a defense to a bill of complaint which, under the former practice, would have been raised by plea, has two options. He may answer the bill fully in the usual manner, including therein his answer in lieu of plea, and in such case he takes his chances as to whether the Court will or will not permit the issue, in the nature of a plea, raised by him, to be heard before the final hearing. On the other hand, he may file his answer in lieu of plea, in which case he need only answer the bill so far as may be necessary to support the subject matter of his plea. In this case he will, not having answered the bill, obtain a hearing on the subject-matter of his plea before final hearing upon the bill, but he takes his chances whether, in case his answer in lieu of plea should be found insufficient or untrue, the Court will exercise its discretion to permit him to answer over, or will dispose of the whole matter upon his answer in lieu of plea."

And further in Section 305, page 170, it is stated that:

"The defense of *res adjudicata* should be made by an answer in lieu of plea, where the

existence of the former adjudication does not appear on the face of the bill. A pleading of this character must show that the point at issue on the present bill was at issue on the former bill, and that the right to relief is the same in the second suit as in the first."

See also:

Schneider v. Schmidt, 84 N. J. Eq. 18;
Kocher's Chancery Practice, 258;
Kocher's Chancery Practice, 261;
Douma v. Powers, 92 N. J. Eq. 25;
Watters v. Bayonne, 89 N. J. Eq. 384;
Moore v. Moore, 74 N. J. Eq. 733;
Chancery Rule 114;
P. L. 1915, p. 195, Rule 52;
Chancery Rule 68.

Rule 68 of the Court of Chancery, page 18, provides as follows:

"Every defense heretofore presentable by plea, shall be made in the answer, and may, in the discretion of the Court, be heard and disposed of before the hearing of the principal case. The evidence necessary to determine the questions raised by such defense shall be taken as the Court shall direct. If a defense be stated, which heretofore would have been the proper subject of a plea, the answer need not answer the allegations of the bill of complaint further than is necessary to support such defense. In such case, should the answer be found insufficient or untrue, the Court may, in its discretion and on terms, permit the defendant to answer the bill fully, or may make such other order or decree as may be just."

The argument for the dismissal of the bill of complaint may be considered under three propositions:

1. The matters set forth in the pending bill have all been adjudicated by the decree entered in the prior proceeding, *i. e.*, former decree or *res adjudicata*.

2. The matters averred in the instant bill are based on the same subject-matter and are flagrantly inconsistent with or contradictory to, the facts as averred and proved in the former proceedings, *i. e.*, estoppel.

3. The subject-matter of the bill relates to an alleged interest in land, but does not aver any writing as evidencing such interest, or the agency on which based, as is required by the Statute of Frauds and Perjuries.

These several propositions and the subsidiary reasons of each will be considered in the order of their statement:

I.

THE MATTERS SET FORTH IN THE PENDING BILL HAVE ALL BEEN ADJUDICATED BY THE DECREE ENTERED IN THE PRIOR PROCEEDING, *i. e.*, FORMER DECREE OR *RES ADJUDICATA*.

This proposition makes necessary an analysis of the subject-matter of complainant's bill in this proceeding and of the facts averred and proved in the former proceeding.

Before pointing out the similarity of the averments in the former and in the present proceeding, reference should be made to the fact that the parties complainant and defendant are the same in both proceedings, with the exception that in the instant case, the defendants Grossman and Westney are added.

It is clear that the addition of these two defendants does not in the least change, either the fact or legal conclusion that the parties defendant are the same, and this because of the following averment contained in the instant bill:

“9. On or about the 16th day of May, 1925, the said Charles W. Young and Irene Young, his wife, conveyed said lands and premises to Max Grossman and Alfred W. Westney, which said deed was recorded on the 18th day of May, 1925, in Book 771 of Deeds, page 258. Complainant says that neither the said Max Grossman nor Alfred W. Westney paid any consideration for said conveyance and that they and each of them hold title to said property in trust for the said Charles W. Young and that they and each of them had full and complete knowledge of the rights of complainant.”

The principle is well settled that where the party sought to be bound in a second suit is the successor in interest, title or office or privity to the party bound by the first judgment, the former suit will be a bar to subsequent action; and if the point in issue—the gravamen of plaintiff's case or the substance of the defense, is identically the same and was litigated and decided in the one action, the judgment will be binding on any subsequent parties who are in privity with the original plaintiff or defen-

dant. If the parties to the two suits are really and substantially in interest the same, although they may nominally be different, or although nominal parties may be added in the second suit, the former judgment is a bar.

The doctrine of *res adjudicata* or *estoppel*, as applicable to successors in interest or privities, is tersely expressed by the present Chancellor Walker in the recent case of

Cashin v. Alamac Hotel (1925), 131 Atlantic 117,

(not yet reported in New Jersey Chancery Reports) on page 121 as follows:

“In *City of Paterson v. Baker*, 51 N. J. Eq. 49, 26 A. 324, Vice-Chancellor Van Fleet, quoting from *Cromwell v. Sac County*, 94 U. S. 351, 24 L. Ed. 195, said (51 N. J. Eq. at page 53, 26 A. 325), that parties and those in privity with them are concluded, ‘not only as to every matter * * * offered and received to sustain or defeat the * * * demand, but as to any other admissible matter which might have been for that purpose.’”

Section 430, page 953, 15 R. C. L. states that:

“The judgment of the Court, so long as it remains unreversed, should be conclusive upon the parties, and those in privity with them in law or estate.”

Likewise, where a former judgment on the same cause of action is pleaded in bar, it is no objection to its operation as an estoppel that additional parties are joined in the second action, provided the judgment was rendered on the merits and the party

against whom the estoppel is set up was actually a party to the former litigation.

Kelsey v. Dilks, 74 N. J. Eq. 270 aff. 77 N. J. Eq. 209;

Southern Cotton Co. v. Shelton, 220 Fed. 247, 136 C. C. A. 509, quot. *Cyc.*

It is, therefore, evident that the rights of Grossman and Westney are the same as the rights of Young in the former proceeding and that the rights of the three defendants in the instant proceeding are the same rights that Young had in the first proceeding.

A mere comparison of the first bill filed by the present complainant against Charles W. Young, et al., with the instant bill, demonstrates to a certainty that no new or additional averments or facts have been averred in the latter bill, which entitle him again to seek a judicial determination, either in law or in equity of the actual relationship between him and defendant, or of complainant's interest in the land in question.

The new bill avers that Young and McGarvey, by agreement, *were to be joint adventurers in the purchase of the land*; that Young took the agreement of sale in own name; that due to disagreement because of Young's representing himself as sole owner, negotiations took place between them, wherein it was agreed that if the property were sold prior to time when complainant was obliged to put up the balance of the purchase price, the interest in the joint enterprise should be fixed at the sum of \$25,000, in addition to the money which he had invested therein, which the complainant was to receive in liquidation of his rights in the joint enterprise (paragraph 6 of complaint). It further avers that Young im-

mediately formed a plan to defeat complainant's rights and thereupon caused deed for land to be made by International Speedway Association to one, Safford (a straw man), who in turn conveyed by deed to Young, which in effect was a conveyance from Young as (Safford, strawman) to Young, himself (paragraph 7).

It further avers that Young and wife conveyed property to Grossman and Westney, who paid no consideration, and that they merely held title in trust for Young, that they had full knowledge of complainant's rights (paragraph 9) and that the only money invested was advanced by McGarvey (complainant) (paragraph 10).

The bill then prays:

"1. That Grossman and Westney be decreed to hold property as trustees for complainant under a resulting trust, or that

2. Young and McGarvey are joint adventurers and that their rights and interest be determined, or that

3. To secure complainant McGarvey the repayment to complainant the amount of money invested by him and the sum of \$25,000 as value of complainant's interest in said joint adventure."

The original bill averred that Young was the agent for McGarvey to purchase land; and prayed that Young (defendant) should be decreed as such, that he hold agreement in trust, *had no interest, legal or equitable in the agreement or the land*, and that he be ordered to assign the agreement, and that the vendor be decreed to give deed to complainant and "*such other and general relief as may be agreeable to equity.*"

It is to be noted that the original bill and the new bill are in equity identical; in that the subject-matter, parties and issues of the actions are the same:

1. *Both seek to charge the land with an interest in complainant; original bill with entire interest, new bill with a part interest.*

2. *The parties to the suit are the same.* While it is true that two new names are added as party defendants, the new bill alleges that the new parties are assignees of original defendant without consideration and that they are merely trustees for Young; in other words, their interest is Young's interest.

3. *The issues to be decided are the same, i. e., the quantum of interest of complainant, if any, in the land.*

The Appellate Court stated the subject-matter of complainant's bill in the prior action, as follows (129 Atl. 199, 200):

“On complainant's request that defendant Young in procuring the agreement referred to in the bill, *was acting as agent for complainant and that he held said agreement in trust for complainant and that he has no interest, legal or equitable in the agreement or the land* and that he be ordered to assign, transfer and set over the said agreement, and that the International Speedway Association be required to execute and deliver a deed to complainant for the land.”

In affirmance of the Vice-Chancellor, the Appellate Court held that the evidence was not sufficient

to justify the Court in finding the existence of the agency charged in the bill (129 Atl. 199, at page 200).

The Appellate Court further found (129 Atl. 199 at page 200):

“As we think the greater weight of the evidence is that it was procured as a loan.”

The Court of last resort of this State has concluded then that the defendant was not complainant's agent as by him alleged and that the money advanced by complainant was a loan.

This Court has finally, therefore, determined that complainant had no interest in the land and that the relation existing between complainant and defendant was merely that of debtor and creditor, the money being a loan.

It is, therefore, evident that under all the pleadings and judgment, that the former action precludes and bars complainant from maintaining the new action.

This fundamental principle is tersely stated in 15 R. C. L., Section 429, page 950 as follows:

*“This doctrine is that an existing final judgment or decree rendered upon the merits, and without fraud or collusion, by a Court of competent jurisdiction, upon a matter within its jurisdiction, is conclusive of the rights of the parties or their privies, in all other actions or suits in the same or any other judicial tribunal of concurrent jurisdiction.” * * **

It is also stated in Section 430, page 953:

*“The foundation principle upon which the doctrine of *res judicata* rests is that parties ought not to be permitted to litigate the same*

issue more than once; that, when a right or fact has been judicially tried and determined by a Court of competent jurisdiction, or an opportunity for such trial has been given, the judgment of the Court, so long as it remains unreversed, should be conclusive upon the parties, and those in privity with them in law or estate."

The single question then presented, in the instant case, whether Young and McGarvey were joint adventurers, each owning an undivided one-half interest in the property, was decided by the learned Vice-Chancellor and affirmed by this Court in the first and prior action.

The averments of the prior bill and the evidence adduced by him at the hearing, necessarily set forth McGarvey's version of what was the actual relationship existing between him and Young.

In its final analysis, there is no difference between the prior and the instant bill. Both bills aver the same essential acts which McGarvey and Young each performed in their dealings with each other in the purchase of the land. The bills differ only in the *conclusions* which the complainant places upon their respective acts as in the prior and instant proceeding respectively, he seeks to establish a different legal relation between him and Young.

In the prior bill, complainant averred the conclusion of Young's sole agency and of the complainant's consequent sole and exclusive interest in the land. In the instant bill, complainant avers the conclusion of a joint venture and his consequent partial interest in the ownership of the land.

It is evident then that the bills are identical in subject-matter, *e. g.* (1) as to the essential *facts* of

the transaction; (2) as to the conclusion of *agency*; and (3) as to the alleged *interest* of the complainant; and that the bills differ only in the *conclusions* as to the legal relations of the parties and the *quantum of interest* in the land, *e. g.*, (1) Whether Young was agent for McGarvey in McGarvey's *sole venture* or for both Young and McGarvey in their *joint venture*; and (2) Whether McGarvey's quantum of interest in the land was *sole and exclusive* of Young or *joint* with him.

The *relief* prayed for in both bills is also identical, when expressed in general terms; *for the complainant in both bills, sought to charge the land with his interest.* The prayers differ only in the *quantum* of that interest, and the quantum of the interest differs, as the facts are found on the same essential acts averred in both bills relative to the relations existing between the parties and the consequent legal conclusions flowing therefrom.

It is, therefore, evident that since the essential facts of the transaction as averred in both bills are the same, the relief asked under the instant bill could have been granted in the prior proceeding, if the evidence adduced at the hearing had been sufficient to warrant it.

It should require the citation of no authorities to support the proposition that relief in equity is always full and complete and will be granted in the form warranted by the pleadings and proved at the hearing, whether specifically prayed for or not.

In other words, adequate remedy in the form warranted by the pleadings and evidence will always be granted under a prayer for general relief; and conversely, relief, of course, will not be granted un-

der a general prayer unless the facts on which relief is granted are essentially set forth in the bill and proved at the hearing.

See in this connection

Public Svc. Rwy. 95 N. J. Equity 231.

The test in the granting of relief both as to form and degree, is the averment of essential facts in the bill, and not the inferences or conclusions which the complainant seeks to draw therefrom or the specific prayers for relief by him made; in short, it is whether or not the essential facts stated in the bill warrant the particular form of relief which the evidence introduced in support of the averments, justifies.

Included in complainant's prior bill was a prayer:

"That complainant may have such other and general relief as may be agreeable to equity."

Complainant's prior bill also prayed specifically, in effect, that he be decreed the sole owner of the land.

It is but fair to assume that at the hearing, McGarvey presented all the evidence at his command, to sustain the averments of his bill as to his version of his actual interest in the land, which as a conclusion, he then claimed was exclusive.

Can it be seriously doubted that a court of equity, under a bill averring an actual interest in land, concluded by complainant to be sole and exclusive, either under the specific prayer of sole ownership or the prayer for general relief, would fail or neglect to give the relief as to the *quantum of interest* which the proofs adduced at the hearing warranted? Particularly, can it be doubted that the learned Vice-Chancellor under the original bill would not have granted the relief prayed for in the instant bill,

viz: a decree that McGarvey and Young were joint owners, if there had been evidence in support of such decree? To conclude otherwise, is to ignore the fundamental principles of equitable relief.

Further, it is to be noted that there can be no suggestion of additional or different acts or facts averred in the second bill, for complainant at the prior hearing, was necessarily familiar with every fact of his relations with Young.

In support of the above statement that there was no evidence adduced by McGarvey from which the Vice-Chancellor could have granted a decree of joint ownership between Young and McGarvey and in confirmation of the statement that a court of equity will not hesitate to grant such relief as is consonant of the bill and proper, under competent evidence, *the attention of this Court is directed to the action of the Vice-Chancellor in the prior case which granted optionally a different relief than that specifically prayed for in the prior bill.* The Vice-Chancellor concludes his opinion with the following suggestion of optional relief:

“Should the complainant accept a decree for the repayment of the money advanced by him in the enterprise, such decree will be advised, otherwise the bill must be dismissed.”

Your Honorable Court, in the opinion of Mr. Justice Trenchard, affirms the finding of fact and conclusion of law that the relation of debtor and creditor existed between the parties. The learned Justice says:

“The fact that Young procured from complainant the \$2500.00 which he used as cash payment on the contract is far from conclusive upon the question of agency, since, as we think, the greater weight of the evidence is that it was procured as a loan.”

The fact that this Court stated that it was unnecessary to determine "precisely what were the actual contractual relations between the parties," in no wise weakens the force of its definitive finding of the fact of a *loan* in contradistinction to the fact of *agency*, its necessary conclusion of fact and law that McGarvey had no interest in the land, and its optional decree "for the repayment of the money advanced by him" (defendant).

After carefully considering the evidence, the Vice-Chancellor found and this Court has affirmed, that the right of McGarvey was limited to a sum of \$2500.00 which had been advanced by him to Young under certain restrictions and conditions, the exact nature of which was not necessary to be decided.

Since the question of McGarvey's interest in the land in question was brought before this Court by the first bill, the issue was necessarily determined therein and definitively determined against McGarvey's having any interest in the land, and his sole and only equity finally found to be limited to a loan of \$2500; it is submitted that the issues raised by the instant bill being the same and having been previously presented to, and decided by this Court, the doctrine of *res adjudicata* applies, and there are no grounds upon which the instant bill can be sustained.

The attention of this Court is called to the recent case of

Sarson v. Maccia (1919) 90 N. J. Eq. 433.

In that case, plaintiff sought to restrain defendant from prosecuting an action at law in deceit on the ground of *res adjudicata*, in that defendant had brought a previous suit in the same court for a rescission of the contract and a restoration of the

property. The averments of the two actions differ, in that in the first action, defendant alleged that "a certain mortgage was good and that the maker was financially able to pay it;" and in the second action, averred that "complainant, with intent to defraud, falsely represented the mortgage to be a gilt-edge security for \$1500.00."

In granting the decree, Vice-Chancellor Backes, in his opinion on page 433, said:

"While the bill did not specifically set up the cause of action now alleged in the suit at law, viz., that the complainant, with intent to cheat and defraud defendant, falsely represented the second mortgage to be a gilt-edge security for \$1500.00, it is clear that it was one of the issues tried and was treated by the Vice-Chancellor as raised by the pleadings and that the decree of dismissal turned upon its decision." * * *

And further on page 433:

"Nor in order to raise the estoppel, is it necessary that the pleadings in the first suit should have counted upon the precise false representations set up as the cause of action in the second. It is enough if the matter was triable in the first suit, and that it was actually litigated and adjudicated."

And again, on page 437:

"These cases hold the judgment to be an estoppel though the suits involve different claims. *A fortiori* is a judgment a bar to a second suit involving the same cause of action, only seeking different relief. See in re: Walsh's Estate, 80 N. J. Eq. 368."

This proposition should not close without emphasizing the consideration that the doctrine of estoppel or of *res adjudicata* is not a mere rule of practice or of technical procedure; but, on the contrary, is an inflexible rule of justice to be rigidly enforced for the security of substantive rights growing out of or attached to a litigated subject-matter.

The present Honorable Chancellor Walker in *Cashin v. Alamac Hotel*, *supra*, at page 121, sets forth this fundamental principal in the following language:

“The doctrine of *City of Paterson v. Baker* was approved by the Court of Errors and Appeals in *re Walsh's Estate*, 80 N. J. Eq. 565, 569, 570, 74 A. 563. And further (51 N. J. Eq. at page 59, 26 A. 327):

‘The doctrine under consideration is not a mere rule of procedure, limited in its operation, and only to be enforced in cases where a defeated suitor attempts to litigate anew a question once heard and decided against him, but a rule of justice unlimited in its operation, which must be enforced whenever its enforcement is necessary for the protection and security of rights and for the preservation and of the repose of society.’

See also, *McMichael v. Horay*, 90 N. J. Law, 142, 100 A. 205; *Goekel v. Erie R. R. Co.* (Err. & App.) 126 A. 447; *Margolies v. Goldberg* (Err. & App.) 127 A. 271.”

II.

THE MATTERS AVERRED IN THE INSTANT BILL ARE BASED ON THE SAME SUBJECT-MATTER AND ARE FLAGRANTLY INCONSISTENT WITH, OR CONTRADICTORY TO, THE FACTS AS AVERRED AND PROVED IN THE FORMER PROCEEDINGS, *i. e.*, estoppel.

The doctrine of estoppel is based on two subsidiary reasons, which will be amplified in the order stated:

(1) Because the same facts, or the facts flowing from the same subject-matter are stated or conclusions drawn which may be either inconsistent with or contradictory to, the facts as originally stated; and

(2) Because there was a failure to present an alleged defense, available claim or right.

(1)

Because the same facts, or the facts flowing from the same subject-matter are stated or conclusions drawn which may be either inconsistent with, or contradictory to, the facts as originally stated.

This rule of equity is founded on the consideration that the termination of litigation should not be indefinitely postponed, as well as the principle, both in law and in equity, that claims or defenses which are necessarily contradictory or inconsistent, can not be entertained in the same action.

The following cases demonstrate that the courts, in varying language, but in uniform conclusion, refuse to permit a party to raise a claim or defense which was necessarily inconsistent with, or contradictory to a claim or defense raised by him at a prior determination of the action.

In addition to the strong inclination of the courts to terminate litigation, they refuse to permit a litigant to secure an unfair advantage by raising in a second issue, a question which he would not have dared to raise in his original action.

In other words, a litigant may not try his cause under two inconsistent and contradictory theories which could not have been presented in the original action, by the simple expedient of presenting them "seriatim" through the medium of additional and subsequent suits.

In the present case, McGarvey could not have averred in his original bill (a) *that he was the sole owner of the property and Young had no interest; and (b) that McGarvey and Young were joint owners, each owning one-half interest.* These direct averments are necessarily inconsistent and contradictory and evidence adduced to support either of them would necessarily prove the other to be false and untrue.

Of course, McGarvey could have set forth, and if he desired alternative relief for a part or a whole interest in the land, it was his duty as matter of law and equity (as hereinafter shown in pages 26 to 31 of this brief) to aver in his original bill, the facts and acts relating to the purchase of the land and have averred that Young was his agent and that he was the sole owner of the property; and that it was the position of Young that he was acting as agent for both in a joint venture, each having an undi-

vided one-half interest in the land; and prayed for a decree conformable to the fact as found by the Court.

It is submitted that McGarvey should not be permitted to obtain two trials of his single cause of action, by the subterfuge of raising a claim in a later action, which if raised in his original bill, would have disclosed such apparent inconsistent and contradictory averments that the Court to whom such a bill was presented, would necessarily reject it because of the obvious insincerity of one of the averments.

An examination of the authorities in New Jersey demonstrates that courts of equity will not permit inconsistent or contradictory averments to be raised through the medium of two actions at different times, in an effort to escape the impossible situation resulting from the joinder of such averments in a single action.

Walsh's Estate (1909) 80 N. J. Eq. 565, is a leading case, both in New Jersey and throughout the United States. A testatrix by her will, appointed her two daughters executrices; the daughter A denied that there was any estate and said that she held, as owner, certain property of her mother which had been given to her for a valuable consideration. Two of the legatees filed a bill in Chancery against the executrices and after hearing, it was decreed that the property be held as part of the estate of the testatrix. In her account, A claimed that she had never received certain of the property which had been the subject of the former action. The legatees claimed that the subject-matter of the estate was decided in the Chancery suit and that it was *res adjudicata*. The Court of Errors and

Appeals adopted the opinion of his Honor, Judge Joline of the Prerogative Court, who said, after stating the general rule of New Jersey as to *res adjudicata*, pages 570-1:

“The defendant adopted a certain proceeding, the legal effect whereof was an admission that she had in possession as owner certain things, including these two items excepted to, and the Court rendered a decision, the legal effect whereof was that she did not own said mortgage and said money, of which she admitted that she had possession, and that she would turn them over to the estate of the testatrix. If they had not been in her possession, would she have adopted a procedure which would have admitted possession? *After having alleged in the Chancery suit that she had them in possession and having submitted the ownership thereof to the decision of that court, she should not be allowed to play fast and loose with the courts and with the administration of justice and be permitted to deny that which she admitted in the previous suit. Otherwise, we would strike the basic principles of the doctrine of res adjudicata; would justify trifling with legal procedure and with the stability of legal decisions. Lord Rosedale once said that it was more important that an end should be put to litigation than that justice should be done in every case.*”

In *Patterson v. Baker* (1893) 51 N. J. Eq. 49, Vice-Chancellor Van Fleet, in an opinion, held:

“The doctrine that a judgment concludes the parties forever in respect to subject-matter, not a mere rule of procedure to be enforced only in cases where a defeated suitor attempts to

litigate anew a question once decided against him, but a rule of justice which must be enforced whenever its enforcement is necessary for the protection and security of rights."

See also *Gardner v. Raisbeck*, 28 N. J. Eq. 71.

In the case of *West N. Y. Imp. Co. v. West N. Y.* (1918) 88 N. J. Eq. 571, his Honor, Judge Morgan said:

"A Chancellor's decree adjudicating the rights of parties is a final adjudication of all matters in issue and determined."

See also *McCarter v. Ketchem* (1907) 74 N. J. L. 829.

(2)

Because there was a failure to present an alleged defense, available claim, or right.

The authorities in New Jersey and other jurisdictions are in accord that where a party has one or more available claims, or one or more possible defenses, and fails for any reason, to set forth one or more of these possible claims or defenses and the cause is tried without the suggestion of such claim or defense, that he will not be permitted to set forth in a later suit any claim or defense which might have been properly alleged in the original proceeding.

The rule is often stated in general terms that a judgment is conclusive not only upon the question actually contested and determined, but upon all matters which might have been litigated and decided in that suit; and this is undoubtedly true of all matters properly belonging to the subject of the con-

troversy and within the scope of the issue so that each party must make the most of his case or defense, bringing forward all his facts, grounds, reasons or evidence in support of it on pain of being barred from showing such omitted matters in a subsequent suit, and it is also true that where the second suit is upon the same cause of action, all matters which might have been litigated are conclusively settled by the judgment.

McEligot v. Nutley (1918) 92 N. J. L. 120;

Denver City Water Works v. Amer. W. W.
(1913) 81 N. J. E. 139;

In re: *Walsh* (1909), 80 N. J. E. 565.

The effect of a judgment cannot be avoided by a difference in the pleadings when those in the first case could and should have been as full as those in the second, though in fact they were not.

This principle is stated in picturesque and apt language by a Southern Judge as follows:

“No party plaintiff or defendant is permitted to stand his case before the Court on some of its legs and if it falls, set it up again on the rest in a subsequent proceeding and thus evade the bar of the former judgment. It is the body of the case and not certain of its limbs, only that the final judgment takes hold upon. He must discharge all his weapons and not reserve a part of them for use in a future encounter. He must realize that one defeat will not only terminate the campaign but end the war.”

Perry v. McLennon (1879) 62 Ga. 598;

Hill v. Cox (1921) 151 Ga. 599.

It is submitted that the following New Jersey cases demonstrate the accuracy of the principal as above stated.

In *Denver City Water Works v. Amer. Water Works* (1913) 81 N. J. Eq. 139, there was an application to direct a receiver to discontinue a suit; the first reason being that there was a prior adjudication. It was so ordered; Vice-Chancellor Howell, saying in his opinion, page 147:

“The rule undoubtedly is, that it is the duty of one who brings a suit to include in it every cause of action available to him, which is consistent with the general purpose of his bill, and the same rule, must from the nature of theory, apply to defenses. It is the duty, therefore, of every defendant to set up and prove every defense which he may have to the claim, and if either complainant or defendant shall omit to allege or prove any available claim or defense, such claim and such defense are lost to him forever.”

In *MeEligot v. Nutley* (1918) 92 N. J. L. 120,

a contractor brought an action against the town of Nutley for balance due on sewer contract. A judgment based on a holding that a certificate of acceptance had not been issued by the proper town officials, as alleged, was *res adjudicata*, in a subsequent case on same cause of action, wherein plaintiff alleged that such certificate was fraudulently withheld, such facts being within plaintiff's knowledge and provable by him.

In an opinion by his Honor, Judge Kalish, on page 123, it was held:

“A plaintiff is required to present all the facts existing at time of the commencement of his action and which relate to the subject-matter of such actions and essential to his right of re-

covery, or be forever barred from doing so after the issue is presented and final judgment given on merits.

The legal rule is well settled that a judgment in a former case between the same parties, relating to the same subject-matter, settles all points which come before the Court and under pleadings and also every ground which might have been presented.

Cromwell v. Soc. 94 U. S. 351;

Roney v. Westlake, 216 Pa. 374;

Dickinson v. D. F. & W. 90 N. J. L. 158.”

In *McMichael v. Horay* (1917) 90 N. J. Law
142, S. C. 100 Atl. 206,

A recovered a judgment against B. In a subsequent action brought by B for damages for an alleged conspiracy and procuring false testimony in the same suit in which the recovery was had, the matters therein alleged having been available as a defense in the prior action; it was held that there was no basis for a new suit as the same was *res adjudicata*. Chancellor Walker in upholding the prior decree quoted the opinion of Vice-Chancellor Van Fleet in the *City of Paterson v. Baker* (1893), 51 N. J. E. 49.

In quoting from *Cromwell v. Sac County*, 94 U. S. 351, Vice-Chancellor Van Fleet, held, on page 53:

“That parties and those in privity with them are concluded, not only as to every matter offered and received to sustain or defeat the demand, but as to any other admissible matter which might have been offered for that purpose; for example, a judgment rendered on a promissory note is conclusive as to its validity and amount due upon it, although it be subsequently

alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, etc.”

Again, the same Chancellor, in the same case, quoting from *Beloit v. Morgan*, 7 Wall 619, said on page 56:

“The judgment of a Court having jurisdiction of the parties and the subject-matter of the suit is conclusive, not only as to the rest of that case, but as to all further litigation between the same parties, touching the same subject-matter, though the res itself, may be different.”

See also the language of the Honorable Chancellor Walker in the late case of *Cashin v. Alamac Hotel*, *supra*, at page 121, wherein he again refers to the above excerpts from the foregoing cases in almost the same language.

The late Federal case of

Horse Creek Coal Land Co. v. Aldeeson
(1920), 266 Fed. 477,

states the principle in almost the exact language of the Courts of New Jersey; Pritchard, J., saying on page 483:

“It is well settled that a judgment is conclusive upon the question actually contested and determined, and also upon all matters which might have been litigated and contested in the suit. *Phelan v. Gardiner*, 42 Cal. 306; *Rogers v. Higgins*, 57 Ill. 244; *C. & O. Canal Co. v. Gettings*, 36 Md. 276.”

This late decision of the Federal Court, but follows the earlier expression of the Supreme Court of

the United States in *Dowell v. Applegate* (1893), 152 U. S. 327, wherein Mr. Justice Harlan, on page 344, in approving the case of *Stockton v. Ford*, 18 How. 418, 420, announced the rule as follows:

“But this question was properly involved in the former case, and might have been there raised and determined. The neglect of the plaintiff to avail himself of it, even if it were tenable, furnishes no reason for another litigation. *The right of the respective parties to the judicial mortgage was the main question in the former suit. That issue, of course, involved the whole or any partial interest in the mortgage. We are satisfied, therefore, that the former suit constitutes a complete bar to the present.*”

Several cases are cited by counsel for appellant, but all announce the rule as stated by the learned Vice-Chancellor in the instant case. A cursory examination of appellant's cases will disclose that in every instance where the doctrine of *res adjudicata* or estoppel was denied, the facts of the second case were different from those of the prior case, and necessarily, presented issues not raised in the prior case. The conclusion in some of the cases was that the issue of the prior case was not broad enough to include the issue of the subsequent case, or that a different and new issue was presented on different facts.

In *Nagle v. Conard*, 96 N. J. Eq. 61, complainant, a daughter of decedent, filed a bill to contest the father's will in respect to two matters: First, whether she came within the word “children;” and second, whether decedent died intestate. A grandchild of the decedent filed a cross bill, charging decedent died intestate and prayed for partition

of lands. The complainant, as assignee, filed another bill to foreclose on a mortgage mentioned in the will. All the cases were heard together. The Chancellor found that the complainant was included in the word "children;" that the decedent died intestate; that the grandchild inherited and was entitled to partition; that there were outstanding estates in trustees, and there could be no partition until the trusts were executed and they would terminate when the youngest child reached the age of twenty-one years.

The bill in the second suit alleged the youngest child had reached the age of twenty-one and moved for partition. The trustees and some of decedent's children resisted on the ground that it was not "partable" because the trusteeship was not at an end, to which the reply was made *res adjudicata*.

The Court held that the reply was good as to a part, but not as to other paragraphs in the will, viz: that portion of the will which created a trust to pay out the income to the widow in monthly allowances and as to the trust to accumulate the income and pay to the widow and child when the youngest reaches the age of twenty-one.

The Court, in determining that *res adjudicata* did not apply, held:

"The Court was concerned only with trusts running to children of deceased and decided only when trust relations as between trustees and children terminated. The trust relations between trustees and the widow and between trustees and holders of mortgage were things apart from adjudication and could not have been adjudicated because precluded by the will."

In *Sbarbero v. Miller* (1907), 72 N. J. Eq. 248,

there had been a prior adjudication, by *ex parte* hearing, of the lunacy of an assignor of a lease. A bill in equity was subsequently brought wherein the issue was raised of the mental competency of the assignor and the knowledge of the assignee of such incompetency. It was urged that the fact of lunacy had been established by the record in the *ex parte* proceedings. The Court held that the fact of lunacy was not *res adjudicata* by the prior *ex parte* proceedings and that it was proper to inquire into the fact of lunacy.

In *Schulstra v. Van Den Henvel* (1913), 82 N. J. Eq. 155,

the first suit was a *quo warranto* proceeding to determine the right of certain members of a church to hold office. The second suit was to determine the right of certain members and officers of the church to withdraw as members of the church organization; and the Court held that the issues were entirely different.

Clark Thread Co. v. Wm. Clark Co., 55 N. J. Eq. 658.

In the first suit, the Clark Thread Company brought an action against the sales manager of another corporation to restrain the infringement of certain patents and to obtain an accounting from the sales manager as an *individual*. The second suit was brought against the corporation which employed the sales manager and prayed for a restraining order for infringement and for an accounting by the *corporation as such*.

The Court differentiated between the action for an accounting against the corporation and the action for the accounting against the individual, and held that the principle of estoppel or *res adjudicata* did not apply.

Every other case from which excerpts have been taken by appellant, have been cited in this paper book and are in truth illustrative of the application of the principle of *res adjudicata* or estoppel to facts similar to the instant case.

It is, therefore, submitted that if a party who fails or omits to allege one of several available claims or one of several available defenses, which might properly have been alleged in the original suit, be precluded from setting forth such claim or defense in a later suit; *a fortiori*, should a complainant be precluded from setting forth in a later suit an averment which he had not only failed or omitted to set forth in the original suit, but a fact or conclusion which would have been impossible for him to allege in his original suit without exposing the apparent absurdity and falsity of two inconsistent and contradictory averments.

III.

THE SUBJECT-MATTER OF THE BILL RELATES TO AN ALLEGED INTEREST IN LAND, BUT DOES NOT AVER ANY WRITING AS EVIDENCING SUCH INTEREST, OR THE AGENCY ON WHICH BASED, AS IS REQUIRED BY THE STATUTE OF FRAUDS AND PERJURIES.

As pointed out in the preceding pages of this argument, this Honorable Court has found the negative fact that Young was not the agent of McGarvey in accepting the sum of \$2500.00 and in buying the land. It has also found and concluded as matter of fact and law, the affirmative fact that the sum of \$2500.00 was loaned by McGarvey to Young.

The conclusion then is inevitable that the money which was paid by Young on account of the purchase price was his own money and not that of McGarvey.

It is this distinguishing fact which brings the instant case within the rule of law announced by Vice-Chancellor Pitney in *Schultz v. Waldans* (1900) 60 N. J. E. 71 (infra) and later announced and applied in the latest utterance in the Court of Chancery by Vice-Chancellor Leaming in *Partridge v. Cummings* (1926) 131 Atl. 683 (infra), and also by the same Vice-Chancellor in the earlier case of *Ostheimer v. Single* (1907) 73 N. J. E. 539.

The law is well settled that when A and B agree to purchase land, title to be taken in the name of A, who pays the consideration price, with money borrowed from B, with an oral agreement to hold the land in trust for B or both of them, that such oral agreement cannot be enforced as it is directly within the Statute of Frauds.

Vol. 25 R. C. L., page 547, states the rule as follows:

“An agreement by one person to purchase land for the benefit of another and to reconvey to him on repayment of the price or hold for his benefit is regarded, as a general rule, where the principal has no present interest in the land to be purchased, as in effect a contract for the sale of the land by the party by whom the purchase is to be made to the other party, and for such reason within the statute, insofar as the right of the latter to claim the benefit of a purchase made by the other party in his own name is concerned.”

Vol. 39 Cyc, pages 49, 50 and 179 and 180 states the same rule.

The leading case of
Schultz v. Waldans (1900) 60 N. J. Equity
71,

shows that the law is settled in New Jersey in accord with the general rule. In that case, complainant alleged that he entered into an oral agreement with defendant, by which defendant should take and hold title to certain property and sell the property for the best price he could obtain; for the mutual profit of complainant and defendant, and that defendant promised to allow the complainant for one-half the profits. It was alleged that complainant supplied some money, but the Court found that no money was contributed by complainant. The bill prayed a division of profits and a declaration that defendant held an undivided one-half in trust for complainant.

Vice-Chancellor Pitney concluded that the Statute of Frauds was a bar to relief, saying on pages 73 and 74:

“The question still remains whether if two persons, not heretofore engaged in business jointly as partners or otherwise, and having no joint or partnership funds, shall agree that they will go into a simple joint venture of the purchase of real estate upon a parol agreement, that the profits, if any, should be equally divided between them, and the title be taken in the name of one; the other, without having contributed anything toward the purchase price, can claim a benefit from the purchase.

It is not necessary to cite authorities for the position that if A employs B to purchase a certain piece of real estate for him and furnishes him with the money to pay for it, and B negotiates for and purchases the premises, taking title in his own name, and *pays for it with his own money*, A, in the absence of any writing signed by B, by reason of the Statute of Frauds, can have no remedy against him.

But it is alleged, and there is some appearance of authority for the position, that if such a contract, resting wholly in parol, were made for a joint enterprise in the nature of a partnership, the result would be otherwise. I am unable to adopt that view and I think it is not sustained by any weight of authority."

The learned Vice-Chancellor then carefully reviewed the authorities and concluded that the two principles brought the case within the Statute of Frauds and "The Statute of Frauds prevents A from successfully claiming an interest in the land," and affirmed decree dismissing bill.

In *Partridge v. Cummings* (1926) 131 Atl. 683, Vice-Chancellor Leaming, states the law and differentiating fact as to resulting trusts within and without the Statute of Frauds, as follows: (Page 684)

"Mr. Justice Story, in *Smith v. Burnham*, 3 Sumn. 435, Fed. Cas. No. 13019, not only repudiates as unsound a distinction between a contract for the sale of land and one for the sale of an interest in the profits to be acquired by its purchase and sale, but also expresses the view, which seems unanswerable, that the trust provisions of the Statute of Frauds are applicable to all such cases, because title is held by one for the benefit of another under agreements, not manifest in writing; excepting, of course, resulting and constructive trusts. No resulting trust can be here suggested, since no money of complainant's was used in the acquisition by Cummings Bros. of the Avalon Company contract. That view also appears to have been entertained by Vice-Chancellor Pitney in Schultz

v. Waldans, 60 N. J. Eq. 71, 47 A. 187. Alike by the terms and spirit of the parol agreement here involved, the equitable title of the Cummings Bros. under the Avalon Company contract was to be held by them for complainant as to an equal one-third interest therein; this constitutes complainant's present claim an attempt to establish an express trust in land by an agreement not manifest by writing."

The Vice-Chancellor in that case also points out that:

"A trust as to an equitable title in land in no way differs in this respect from a trust as to a consummated legal title."

In *Ostheimer v. Single* (1907) 73 N. J. E. 539, in the opinion of Vice-Chancellor Leaming, on page 542, the Court said:

"When a person purchased land with his own money and takes title in his own name, a trust cannot be raised in favor of another by reason of existence of a parol agreement, upon the part of the purchaser that he would make the purchase for the benefit of another and permit the other thereafter to make payment. One who sets up a resulting trust in himself, the conveyance being to another, must show that the land was bought *with his money* and not merely that the purchase was made for his benefit or on his account."

See also the earlier case of
Wallace v. Brann (1855) 10 N. J. E. 308.

If the money deposited was a loan to Young by McGarvey, it is, of course, Young's money and the fact that McGarvey furnished it, is immaterial.

Titson v. Foote (1886) 40 Miss. 788.

It is true that two New Jersey cases *Harrop v. Cole* (1913) 85 N. J. E. 32, and *Rogers v. Genung* (1909) 76 N. J. E. 308 seem to decide that if the relation between the parties is that of confidential and faithful agent, that the Statute of Frauds will not prevent the setting up of the oral agreement. These cases are clearly distinguishable from the case at bar, in that in the present case, there was no confidential relation as the parties were total strangers to each other and dealt as business acquaintances and for the further reason that the theory on which these cases were decided, has no application to a case in which both parties act as principal.

It is submitted that (a) as the exact issue raised by complainant's present bill, viz: the question as to his ownership of the property under discussion, was expressly decided in complainant's original bill, that this issue it now *res adjudicata*;

(b) Even though the material averment in complainant's present bill had not been expressly decided in the original bill, complainant having failed and omitted to set forth all his available claims at that time, is now precluded and estopped from setting forth such claims in a later, and the present bill;

(c) The subject matter of the bill of complaint relates to, and concerns an alleged interest in land; and there being no writing to evidence the agreement between the parties, the Statute of Frauds is a bar to the consideration of the instant bill by this Honorable Court.

Finally, it is submitted that the conclusions of the learned Vice-Chancellor and the decree by him advised and entered, should be affirmed and the appeal dismissed.

All of which is respectfully submitted.

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