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Bill of Complaint.

Filed May 16, 1928.

In Chancery of New Jersey.

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

10

Your complainant, Robert C. Nelson, of Whippany, in the Township of Hanover, County of Morris and State of New Jersey, respectfully shows:

1. That Edwin S. Wilson being seized in fee simple of the following described lands and premises, to wit:

All that lot or parcel of land in the Township of Hanover, County of Morris and State of New Jersey, butted and bounded as follows:

20

BEGINNING in the middle of the road between the store house of the said Edwin Wilson and the store house of N. P. Thomas where the middle of the road that passes the old Bleything Paper Mill intersects the Whippany road; thence (1) along the middle of the Whippany road South 65 degrees 15 minutes West 2.26 to a stake; thence (2) North 29 degrees West 2.25 to a stake; thence (3) North 65 degrees 15 minutes East 2.26 to the middle of the 30 road leading to the paper mill aforesaid; thence (4) South 29 degrees East 2.25 to the beginning. Containing half an acre of land. Being the same premises conveyed by Willard W. Cutler, one of the Special Masters in Chancery of New Jersey to said Edwin S. Wilson by deed dated August 2, 1911 and recorded in the Morris County Clerk's Office on August 11, 1911 in Deed-Book A-21 page 396; died 40 resident of Hanover Township, Morris County on

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July 5, 1912, testate of a last will and testament which was duly admitted to probate by the Surrogate of the County of Morris on July 29, 1912, and of which a true copy is attached hereto as Schedule A, and leaving him surviving his wife, Clara L. Wilson, his son, William Q. Wilson, and Mary Wilson the wife of said William Q. Wilson, and
10 Edith Delmonico and William Wilson, children of the said William Q. Wilson, parties defendants herein.

2. Said Edwin S. Wilson, in and by his last will and testament, appointed as executor and trustee thereof American Trust Company of Morristown, New Jersey, with power to sell and convey the real estate of the said Edwin S. Wilson; and American
20 Trust Company in due time qualified as executor of said Edwin S. Wilson and took upon itself the duties of executor and trustee under the will of the said Edwin S. Wilson and since that time has acted and is now still acting in those capacities.

3. Under date of May 12, 1920 American Trust Company as trustee under the will of Edwin S. Wilson entered into an agreement with complainant and one William C. Silva whereby it leased part
30 of the premises described herein to complainant and said William C. Silva for the period of 10 years from May 15, 1920, and granted to complainant and said William C. Silva an option of purchasing the premises described herein in the following words:

“It is also agreed by and between the parties hereto that the said party of the second part shall have the right and privilege of purchasing
40 said premises and the premises immediately in

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the rear thereof with the house thereon belonging to the Estate of the said Edwin S. Wilson for the sum of Seven Thousand Dollars (\$7000.)”

A copy of said agreement of lease and option is attached hereto as Schedule B.

4. For many years prior to the entry of complainant and William C. Silva into the agreement of May 12, 1920, shown by Schedule B, no rental was procured from the premises leased by complainant and William C. Silva by the agreement of May 12, 1920 (and which consisted of the greater and most valuable part of said premises described in said option of May 12, 1920 and was improved by a store with an apartment above) which exceeded one-third of the rental which complainant and William C. Silva agreed to pay under that agreement of lease. The agreement of May 12, 1920 was entered into by complainant and William C. Silva and the high or increased rental was agreed to be paid by them; because of the right and option which was held out to complainant and William C. Silva by American Trust Company as trustees of Edwin S. Wilson, deceased, in the negotiations for said lease, as an inducement for the execution of said agreement by complainant and William C. Silva, and the payment of said rent thereunder.

5. By agreement of September 1, 1921 complainant and the said William C. Silva dissolved the partnership which had formerly existed between them and the said William C. Silva assigned to complainant all the right, title and interest of the said William C. Silva in and to the agreement of lease made May 12, 1920, set forth in Schedule

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B hereto annexed, and in and to all the rights and privileges of the said William C. Silva thereunder, "and in particular to the right and privilege or option of purchasing the premises covered and described in said agreement of lease upon the terms and in the manner provided and granted in said agreement of lease." And American Trust
10 Company as trustee under the last will and testament of Edwin S. Wilson by instrument of September 1, 1921 did acknowledge the granting to complainant and William C. Silva of the option of purchase by agreement of May 12, 1920, set forth in Schedule B. hereto annexed, and did consent to the assignment by William C. Silva to complainant of the above mentioned lease of May 12, 1920, and the above mentioned right or option of
20 purchasing and of all the right title and interest of the said William C. Silva therein. A copy of said assignment by William C. Silva to Robert C. Nelson of September 1, 1921 is attached hereto as Schedule C and a copy of the consent of American Trust Company, Trustee of Edwin S. Wilson is attached hereto as Schedule D.

6. Since the execution of said agreement of May 12, 1920 set forth in Schedule A, hereto annexed,
30 and in particular from the entry of complainant into said premises demised thereby in accordance with the terms thereof, complainant, both as a member of the firm of Nelson & Silva, and individually, since the dissolution of said partnership and the assignment to complainant of said lease and option, has continually and faithfully performed all covenants and agreements of lease made by complainant and William C. Silva in the
40 agreement of May 12, 1920; and has continually

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and promptly paid the agreed rental in accordance with the terms of said lease and option of May 12, 1920 and has expended considerable money by way of repair and improvement of said premises not required by said lease; with the belief that upon the exercise of the option contained in the agreement of May 12, 1920 the said premises would be acquired by complainant in accordance with the 10 terms of said agreement. Complainant received from defendant American Trust Company as trustee under the will of Edwin S. Wilson repeated assurances that when complainant exercised his right under the option contained in the agreement of May 12, 1920 said premises would be conveyed to complainant and William C. Silva and later to complainant, as the sole holder of the option, in accordance with the terms of said agreement of May 12, 20 1920; and, depending thereon, complainant has continually and faithfully performed the agreements made by him in the lease and option of May 12, 1920.

7. Under date of April 4, 1928 within the term of said lease of May 12, 1920 and within the time prescribed for the exercise of said option, complainant, who was then the sole holder of said option and of the rights under the agreement of 30 May 12, 1920, by his attorney Martin R. O'Keefe, notified American Trust Company, who was then and is now trustee of said Edwin S. Wilson, that complainant accepted the option to purchase the premises described in this bill of complainant in accordance with the terms of said option and agreement of May 12, 1920; and that complainant was ready and willing to accept the proper deed of American Trust Company as executor and trus- 40

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tee of Edwin S. Wilson. A copy of said letter of April 4, 1928 is attached hereto as Schedule E.

8. American Trust Company, trustee of Edwin S. Wilson deceased, in response to said letter of April 4, 1928, by letter of their attorneys, Messrs. King & Vogt, of Morristown, New Jersey, dated
10 April 13, 1928 advised Martin R. O'Keefe, attorney for complainant, that it refused to execute and deliver to complainant the deed for the premises described herein in accordance with the terms of the agreement of May 12, 1920. A copy of said letter of April 13, 1928 is attached hereto as Schedule F.

9. Because of the notice by the attorneys for American Trust Company, Messrs. King & Vogt,
20 by their letter of April 13, 1928, set forth in Schedule F hereto attached, that American Trust Company, trustee of Edwin S. Wilson, deceased, refused to perform the contract and to execute and deliver to complainant its deed for the said premises in accordance with the terms of the agreement of May 12, 1920, no formal tender of the consideration for said conveyance was made by complainant to American Trust Company, Trustee
30 of the Estate of Edwin S. Wilson as aforesaid but by notice of May 3, 1928, complainant by his attorney Martin R. O'Keefe, notified American Trust Company Trustee under the last will and testament of Edwin S. Wilson that complainant accepted the option to purchase the premises described herein granted by the agreement of May 12, 1920 and was ready, able and willing to pay the purchase price specified for the conveyance of said prop-
40 erty, to wit, Seven Thousand Dollars (\$7000) in

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cash and tendered himself as ready, willing and able to do so, and requested American Trust Company as trustee of Edwin S. Wilson to prepare its proper deed conveying the premises described herein to complainant in accordance with the terms of the option contained in the agreement of May 12, 1920 and notify complainant or his attorney Martin R. O'Keefe when the same was ready 10 for delivery. Said notice was served on American Trust Company on May 4" 1928. A copy thereof is attached hereto as Schedule G.

10. Defendant American Trust Company as trustee under the last will and testament of Edwin S. Wilson has failed and refused to perform the contract of May 12, 1920 and executed between it and the complainant which has been 20 duly accepted by complainant and notice of acceptance and complainant's ability, readiness and willingness to perform said contract has been given to said American Trust Company Trustee as aforesaid.

11. Clara L. Wilson, widow of Edwin S. Wilson died April 1st 1928, resident of Whippany, Hanover Township, Morris County, New Jersey. William Q. Wilson, son of Edwin S. Wilson and 30 Mary Wilson wife of said William Q. Wilson still live. Edith Wilson, daughter of William Q. Wilson still lives and according to the information of complainant is the wife of one Louis C. Delmonico, Florham Park, New Jersey. William Wilson, son of William Q. Wilson, still lives and is married and the name of his wife is Madeline O. Wilson. Said Edith Delmonico, Louis C. Delmonico, William Wilson and Madeline O. Wilson are all of 40

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10 full age. No other lineal descendants of Edwin S. Wilson survived him. The Morristown Memorial Hospital and All Souls Hospital, contingent beneficiaries of the trust created by the will of said Edwin S. Wilson, according to the information of complainant still exist; and each is a corporation of the State of New Jersey having its principal office at Morristown, Morris County aforesaid.

12. Complainant since his acceptance of said option, has always been ready and willing and able and now tenders himself ready, willing and able to perform his part of said agreement and is desirous of obtaining a conveyance of the premises described in the agreement of May 12, 1920 or so much thereof as can be obtained by him, with an abatement by
20 way of compensation by reason of the failure of title as to any portion of the premises or of any defect in the title thereto.

Complainant is without adequate remedy in the Courts of law and therefore prays;

1. That American Trust Company as trustee of Edwin S. Wilson, deceased, and William Q. Wilson and Mary Wilson his wife, Edith Delmonico and
30 Louis C. Delmonico, her husband, William Wilson and Madeline O. Wilson, his wife, The Morristown Memorial Hospital and All Souls Hospital, corporations of the State of New Jersey, who are defendants in this suit, may answer this bill of complainant and each statement therein made, without oath, answer under oath being hereby waived.

2. That said American Trust Company as trustee
40 of said Edwin S. Wilson may be decreed specifically

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to perform the said agreement herein above set forth, the complainant tendering himself as being ready, willing and able and hereby offering specifically to perform the said agreement on his part.

3. That if specific performance of said agreement by American Trust Company trustee of Edwin S. Wilson, deceased, be denied, complainant may be 10 granted as against American Trust Company such just and proper damages as will compensate him for the loss which he has sustained by reason of American Trust Company inducing him to enter into the aforesaid agreement and by reason of expenditures by way of improvement upon said premises which he has made depending upon compliance with and performance of said agreement by the American Trust Company in its capacity as trustee 20 of the said Edwin S. Wilson, deceased.

4. That a writ of subpoena may be issued commanding said defendants to answer this bill of complaint, without oath, answer under oath being waived, and to abide by such decree as this Court may make in the premises.

MARTIN R. O'KEEFE
Solicitor for and of Counsel 30
with Complainant.

Schedule "A" annexed to Bill of Complaint.

Schedule "A"

**(Last Will and Testament of Edwin S.
Wilson.)**

I, EDWIN S. WILSON of the Township of Hanover,
10 in the County of Morris and State of New Jersey,
being of sound and disposing mind memory and
understanding do make publish and declare this to
be my last will and testament.

FIRST: I do direct that all my just debts and
funeral expenses be paid as soon as can be conve-
niently done after my decease.

SECOND: I do give and bequeath all my property
20 both real and personal to the trustee hereinafter
named to hold and care for the same making all
necessary repairs and paying taxes and for other
objects needed to keep said property and the sev-
eral particles thereof in good condition as I would
do if living and to pay the net income therefrom to
my wife Clara L. Wilson so long as she may live;
and at her death and thereafter during the joint
lives of my son William Q. Wilson and his wife
Mary Wilson I do direct that out of said income
30 the sum of Two hundred Dollars per year be paid
to my son William Q. Wilson for the purpose of
being expended in travelling on vacations to be
taken by him without being accompanied by his
wife Mary Wilson or any relatives or members of
his family, the manner in which said sum has been
expended in any year to be certified by a written
statement made by my son before any subsequent
40 payment shall be made him and no subsequent
payment shall be made in case such statement

Schedule "A" annexed to Bill of Complaint.

does not show said sum was expended for the purposes herein directed.

In case said statement shall not be furnished or shall show that the said sum was not expended as herein directed the said sum for the next and each subsequent year till statement as herein directed is furnished shall be divided between and paid to the Presbyterian, the Methodist Episcopal and the Catholic Churches of Whippany, New Jersey. So long as his present wife Mary Wilson shall live the balance of the income is to accumulate during the lifetime of my said son, but in case he is sick and unable to work or is in any way incapacitated from supporting himself the trustee may if deemed necessary advance such sums from said accumulated income as may be necessary for his individual support and maintenance. The support and maintenance both of his wife and the remainder of his family are not however to be included therein. In case my son's wife, Mary Wilson, shall die before he does then on her death I desire my son to have all the balance of my property and I do give and devise it to him in that event. In case she shall survive him I do direct said trustee to accumulate the income of and from all my property for the lives of Edith and William the children of my said son and during the life of the survivor of them if their mother Mary Wilson shall live so long. On her death in the life-time of said children or the survivor of them my trustee may in case said children or either of them have shown themselves, in the judgment of said trustee to be economical and industrious and not disposed to live extravagantly and squander property they might have nor the same without judgment, turn over and pay the balance to such children equally or to the one of

Schedule "A" annexed to Bill of Complaint.

them that has shown himself or herself to be possessed of the above characteristics to be free from the above traits. If such children or neither of them shall in the opinion of such trustee be of such habits as to meet the above standard at the death of their mother and shall not have acquired such habits in their life-time or in case both children
10 shall have died in the life-time of their mother then in any of the above events I do give devise and bequeath the same as follows; to the Morristown Memorial Hospital the undivided one half thereof, and to All Souls Hospital of Morristown, N. J. the undivided one half thereof.

LASTLY: I do constitute and appoint as executor of this my will and as trustee hereunder without
20 bonds the American Trust Company of Morristown, New Jersey with power to sell and convey any real estate I may die seized or possessed of; such sale and conveyance, if made during the life-time of my wife, to be made only on her written consent. And I do direct said trustee to care for said property as if it were the owner thereof, keep the buildings insured against loss by fire, pay taxes and make repairs and rebuild on the request of my wife any buildings destroyed by fire
30 and that for the purposes expressed in this my will said trustee my use not only the income from my estate but also the principal thereof, both real and personal; that the said estate shall be kept so invested as to produce the largest income consistent with the safety of the principal thereof and that the net income and the balance of the principal shall be paid and divided by said trustee or held
40 by it as herein directed.

Schedule "B" annexed to Bill of Complaint.

IN WITNESS WHEREOF I have hereunto set my hand and seal this Twenty-fourth day of November A. D. Nineteen hundred and Eleven.

EDWIN S WILSON (SEAL)

Signed, sealed, published and declared by the testator Edwin S. Wilson as and for his last will and testament this Twenty-fourth day of November A. D. Nineteen hundred and Eleven in the presence of us who were both present at the same time at his request as witnesses and who immediately thereafter at his request and in his presence and in the presence of each other, have hereunto subscribed our names as witnesses.

ANNIE E. MURPHY Morristown, N. J.
CHARLTON A. REED Morristown, N. J.

20

Schedule "B"

(Copy of Lease and Agreement.)

THIS INDENTURE, made the twelfth day of May A. D. nineteen hundred and twenty, between AMERICAN TRUST COMPANY as Trustee under the Will of Edwin S. Wilson, deceased, party of the first part, and ROBERT C. NELSON and WILLIAM C. SILVA, parties of the second part;

WITNESSETH, That the said party of the first part has let and by these presents does grant, demise and lease unto the said party of the second part and the said party of the second part have hired and taken and by these presents do hire and take from the party of the first part, ALL that certain

Schedule "B" annexed to Bill of Complaint.

building and property, situate, lying and being in the Township of Hanover, County of Morris and State of New Jersey, in the Village of Whippany, at the corner on the northerly side of the public road leading from Whippany to Morristown, where the road leading from the Caledonian Mill to the first named road joins the same and on the westerly side of said last named road, bounded on the West
10 by the property of St. Mary's Church, in Whippany, and on the North by other properties of the party of the first part, and on the East by said road to the Caledonian Mill, for the term of ten years from the fifteenth day of May, 1920, at the annual rent of Three Hundred and Sixty Dollars, payable monthly at the rate of thirty dollars per month in advance. It is also agreed by and between the parties hereto that the said party of
20 the second part shall have the right and privilege of purchasing said premises and the premises immediately in the rear thereof with the house thereon belonging to the Estate of the said Edwin S. Wilson for the sum of Seven Thousand Dollars (\$7000.) That in case the parties of the second part desire to purchase said premises the sum of five thousand dollars may remain on said premises secured by a purchase money mortgage payable one year from the date thereof with interest
30 at 5% per annum payable semi-annually. This mortgage to have the usual fire insurance and tax exemption clauses.

And it is agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first to re-enter the said premises and to remove all persons therefrom and the said premises to have again, to repossess and
40 enjoy.

Schedule "B" annexed to Bill of Complaint.

The said party of the second part hereby covenants to pay to the said party of the first part the said rent as herein specified.

The party of the second part is to pay for the use of water and also for electric current on the premises.

It is also understood and agreed that the party of the first part reserves the right to sell said premises to any other party than the party of the second part at any time during this lease but that in case of such sale the party of the second part shall have the opportunity to purchase said premises before the sale thereof is made to any other party and that in such case the party of the second part may purchase the same on the terms of the above option or on the same terms as the party of the first part is willing to sell said premises for to any other person or persons. In case of a sale of said premises by the party of the first part to any other than the lessee, the lease hereby granted shall be terminated at any time on giving six months notice of such sale and of conveyance thereunder to be made.

The party of the second part further covenants that they will permit the party of the first part or its agent at all times during regular business hours to show the premises to persons wishing to purchase the same and subsequent to three months prior to the termination of the lease or of the renewal thereof to show the same to contemplating tenants.

It is hereby further agreed that the parties of the second part shall not sublet said premises or any part thereof nor let anyone else in possession of said premises without the consent in writing of the party of the first part first had and obtained.

It is hereby further agreed that the party of the first part may enter said premises at any time

Schedule "B" annexed to Bill of Complaint.

during business hours to examine the same or to make repairs but this right is not to be construed as a covenant on the part of the party of the first part to make repairs.

It is further agreed that the party of the second part will quit the premises hereby demised in as good state and condition as reasonable use and wear
 10 thereof will permit, damages by the elements excepted.

The said party of the first part doth covenant that the said party of the second part, on paying the said rent and performing the covenants aforesaid, shall and may peaceably and quietly have, hold and enjoy the said demised premises for the term aforesaid.

IN WITNESS WHEREOF, the party of the first part
 20 has caused these presents to be signed by its proper officers thereunder legally constituted and the parties of the second part have set their hands and seals the day and year first above written.

AMERICAN TRUST COMPANY,
 CHARLES R. WHITEHEAD,
 Vice President.

Attest:

30 CHARLES B. LITSEY,
 Sec'y.

Signed, sealed and delivered
 in the presence of
 As to Robert C. Nelson
 MARTIN R. O'KEEFE.

ROBERT C. NELSON [L.S.]

As to William C. Silva
 SAMUEL THEMPEAR

40

WILLIAM C. SILVA [L.S.]

Schedule "C" annexed to Bill of Complaint.

Schedule "C"

(Copy of Assignment.)

THIS AGREEMENT made this First day of September, A. D. Nineteen Hundred and Twenty-One, between ROBERT C. NELSON, of the Township of Hanover, in the County of Morris and State of New Jersey, party of the first part, and WILLIAM C. SILVA, of the Township of Hanover aforesaid, party of the second part, WITNESSETH That

Whereas a partnership is existing or has existed between the parties hereto under the firm-name of Nelson & Silva; and in said partnership the said parties have, in the Village of Whippany in the Township of Hanover aforesaid, conducted a general store, an oil and gasoline station, and have conducted a general merchandise business and the business of selling oil and gasoline and of repairing automobiles;

Now, by mutual consent of the parties hereto, the said partnership heretofore existing is wholly dissolved, and, for certain good and valuable considerations and the sum of One Dollar advanced, delivered and paid by the said Robert C. Nelson to the said William C. Silva, the receipt whereof is hereby acknowledged, and the mutual covenants herein contained, it is hereby agreed between the parties hereto as follows:

(1) That the said William C. Silva has granted, bargained sold and conveyed and does hereby grant, bargain, sell and convey to the said Robert C. Nelson, and to his executors, administrators and assigns, all the right, title and interest of the said

Schedule "C" annexed to Bill of Complaint.

William C. Silva in and to the said partnership and in and to all the stock in trade (both in possession and in transit), and the fixtures, horses, conveyances, cash in hand, cash in bank, bills receivable, accounts receivable, good-will, capital, profits, and all other rights, credits and assets belonging to the said partnership;

(2) That the said William C. Silva does hereby
10 assign transfer and set over unto the said Robert C. Nelson, his heirs, executors, administrators and assigns, all the right title and interest of the said William C. Silva in and to the agreement of lease made May 12, 1920 between American Trust Company, as Trustee under the Will of of Edwin S. Wilson, deceased, party of the first part, and the said Robert C. Nelson and William C. Silva, parties
20 of the second part, granting and leasing the store and building and property situate in the Village of Whippany aforesaid at the corner on the northerly side of the public road leading from Whippany to Morristown where the road leading from the Caledonian Mill to the first-named road joins the same and on the westerly side of said last-named road; and in all rights and privileges to which the said Robert C. Nelson and William C. Silva are entitled thereunder, and in particular to the right and privi-
30 lege or option of purchasing the premises covered and described in said agreement of lease upon the terms and in the manner provided and granted in said agreement of lease, and the right to the possession of the premises described therein in accordance with the terms of the said agreement or lease;

(3) And the said William C. Silva does hereby covenant and agree to permit the said Robert C. Nelson to hereafter conduct the business above men-
40 tioned as the sole owner and proprietor thereof;

Schedule "C" annexed to Bill of Complaint.

(4) And the said William C. Silva does hereby covenant and agree with the said Robert C. Nelson that he the said William C. Silva, will not engage in or conduct any business in the territory within a radius of five miles of the premises above described for a term of three years from the date hereof if during said term the said Robert C. Nelson be engaged in business at the premises above 10 described.

(5) And the said William C. Silva does hereby covenant and agree to and with the said Robert C. Nelson that he, the said William C. Silva, will not hereafter hold himself out or represent himself to be the agent or representative of the said Robert C. Nelson in any manner whatsoever.

(6) And the said Robert C. Nelson does hereby ²⁰ covenant and agree to and with the said William C. Silva that he, the said Robert C. Nelson, does hereby assume and make himself responsible and liable for all debts and obligations of the said partnership now existing, and that he does hereby release and discharge the said William C. Silva, his executors, administrators, assigns, from any liability for said debts or obligations.

IN WITNESS WHEREOF, the said parties have here- ³⁰
unto set their hands and seals, in duplicate, this
First day of September, A. D. Nineteen Hundred
and Twenty-one.

ROBERT C. NELSON [L. S.]

WILLIAM C. SILVA [L. S.]

Signed, Sealed and Delivered
in the Presence of
MARTIN R. O'KEEFE.

Schedule "D" annexed to Bill of Complaint.

Schedule "D"**(Consent of American Trust Company.)**

WHEREAS, under date of May 12, A. D. 1920,
American Trust Company, as Trustee under the
10 Will of Edwin S. Wilson, deceased, did make, execute and deliver to Robert C. Nelson and William
C. Silva, an agreement of lease granting, demising
and leasing to the said Robert C. Nelson and William
C. Silva, all that certain building and property,
situate, lying and being in the Township of
Hanover in the County of Morris and State of New
Jersey, in the Village of Whippany at the corner
on the northerly side of the public road leading
20 from Whippany to Morristown where the road leading
from the Caledonian Mill to the first-named
road joins the same and on the westerly side of
said last-named road, for the term of ten years from
the fifteenth day of September, 1920; and by virtue
of said lease the said Robert C. Nelson and William
C. Silva have been in possession of said premises
as tenants thereof; and the said American Trust
Company, as trustee as aforesaid, in and by said
lease did grant unto the said Robert C. Nelson and
30 William C. Silva the right and privilege of purchasing
said premises and the premises immediately
in the rear thereof with the house thereon belonging
to the Estate of the said Edwin S. Wilson, for the
sum of seven thousand dollars;

And whereas the said William C. Silva has assigned,
transferred and set over to the said Robert
C. Nelson, all the right, title and interest which he,
40 the said William C. Silva, has or might have in the

Schedule "D" annexed to Bill of Complaint.

premises above described and in the lease above mentioned and in the option to purchase said premises granted therein;

Now, the American Trust Company, as Trustee under the Will of Edwin S. Wilson, deceased, does hereby consent and agree to the said assignment by the said William C. Silva to the said Robert C. Nelson of the above-mentioned lease and of the above-mentioned right or option to purchase, and of all the right, title and interest of the said William C. Silva therein. 10

IN WITNESS WHEREOF, the said American Trust Company has caused these presents to be signed by its President and its corporate seal to be hereto attached this First day of September, A. D. Nineteen Hundred and Twenty-One.

AMERICAN TRUST COMPANY 20
 Trustee under the Will of Edwin
 S. Wilson, deceased,
 By CHARLES R. WHITEHEAD
 Vice-Pres.

Attest:

CHARLES B. LITSEY
 Secretary

30

40

Schedule "E" annexed to Bill of Complaint.

Schedule "E"

**(Letter of Martin R. O'Keefe to
American Trust Co.)**

APRIL 4, 1928.

AMERICAN TRUST COMPANY

10 MORRISTOWN, N. J.

CHARLES B. LITSEY, Esq.,
Secretary.

DEAR MR. LITSEY :

Under date of May 12, 1920 the American Trust
Company as Trustee under the will of Edwin S.
Wilson, deceased, entered into an agreement with
Robert C. Nelson and William C. Silva, leasing to
20 Messrs. Nelson and Silva the Wilson store property
at Whippany, on the northwest corner of the junc-
tion of the main public road leading from Whippany
to Morristown and the road leading to the Cale-
donian Mill, for the term of ten years, and giving
to them "the right and privilege of purchasing said
premises and the premises immediately in the rear
thereof with the house thereon, belonging to the
Estate of the said Edwin S. Wilson for the sum of
\$7000.00".

30 The partnership of Nelson and Silva was later
dissolved and the rights of Mr. Silva in the lease
and the option to purchase the Wilson property
were assigned and transferred by him to Mr.
Nelson; and you by your instrument of September
1, 1921, consented and agreed to the said assign-
ment.

As attorney for Mr. Nelson, I am advising you
that he is ready to exercise the right to purchase
the Wilson properties granted him and is ready to
40 accept your proper deed as executor and Trustee

Schedule "F" annexed to Bill of Complaint.

of Edwin S. Wilson for the premises and will tender to you the consideration stipulated for in the option, to wit, \$2000 in cash and is purchase money mortgage upon the said premises for \$5000., payable in one year from date, with interest at 5% per annum.

Will you please make arrangements to have a proper deed prepared and submitted to me for approval and advise me when you will be ready to perform the contract? 10

For your convenience and at your request, I am enclosing you herewith copies of the original lease and option of May 12, 1920 between the American Trust Company and Nelson and Silva; the assignment of September 1, 1921 by Silva to Nelson; and the consent by American Trust Company to the above noted assignment also dated September 1, 1921.

Very truly yours, 20

MARTIN R. O'KEEFE

O'K:MC.

Schedule "F"

**(Copy of Letter from King & Vogt to
Martin R. O'Keefe.)**

KING & VOGT, 30
MORRISTOWN, N. J.

APRIL 13, 1928

MARTIN R. O'KEEFE, Esq.,
10 Washington St.,
Morristown, N. J.

DEAR SIR:—

The American Trust Company, trustee of the Estate of Edwin S. Wilson, deceased, has referred 40

Schedule "G" annexed to Bill of Complaint.

to me your letter of April 4th regarding the Nelson and Silva lease, for reply.

The American Trust Company as trustee of the Wilson estate feels that it cannot legally make the conveyance which you requested in your letter and accordingly has advised me to communicate with you that it refuses to execute and deliver the deed
10 requested.

Very truly yours,

KING & VOGT

by HAROLD A. PRICE.

HAP/DR

Schedule "G"

20

(Formal Demand.)

TO AMERICAN TRUST COMPANY

TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF EDWIN S. WILSON, LATE OF THE TOWNSHIP OF HANOVER IN THE COUNTY OF MORRIS AND STATE OF NEW JERSEY, DECEASED:

YOU ARE HEREBY NOTIFIED That I, Robert C. Nelson, of the Township of Hanover in the County of Morris and State of New Jersey, do hereby accept and take advantage of the right and privilege of purchasing the premises situate in the Township of Hanover aforesaid, specified in the Lease made between you, as party of the first part, and William C. Silva and myself, as parties of the second part, dated May 12, 1920, (the rights of said William C. Silva in said lease and said option having
30 been assigned and conveyed and transferred
40

Schedule "G" annexed to Bill of Complaint.

by him to me and you by instrument dated September 1, 1921 having consented in writing to said assignment and agreed thereto), for the sum of Seven Thousand Dollars (\$7000.)

And you are notified that I am ready, able and willing to pay you the purchase price specified for said property in the option, to wit, \$7000., in cash; and that I hereby tender myself as ready and will- 10
ing and able to do so; but, because I have been advised by Mess. King & Vogt, your attorneys, that you refuse to execute and deliver to me your deed for the premises in question in compliance with the wish, I am not making physical tender; but if you express yourself as willing and ready to perform, I will present the cash to you at your banking-house or other place that you may designate and within a reasonable time.

And you are requested to prepare your proper 20
deed conveying said premises to me, in accordance with the terms of the option mentioned in the instrument of lease dated May 12, 1920; and you are requested to notify me or my attorney, Martin R. O'Keefe, 10 Washington Street, Morristown, N. J. when the said deed is ready for delivery.

Dated at Morristown, N. J., May 3" 1928

ROBERT C. NELSON

30

BY MARTIN R. O'KEEFE

ATTORNEY

Service of the within Notice and Demand is hereby acknowledged this May 4" 1928

AMERICAN TRUST COMPANY,

Trustee of Edwin S. Wilson, Estate.

By KING & VOGT, Attorneys.

40

**Answer of Defendant, American Trust
Company, as Trustee of Edwin S.
Wilson, deceased.**

Filed May 26, 1928.

IN CHANCERY OF NEW JERSEY

10 THE AMERICAN TRUST COMPANY, as Trustee of
Edwin S. Wilson, deceased, said Trust Company
being a corporation of the State of New Jersey with
its banking house in the Town of Morristown, Mor-
ris County, New Jersey, answering the bill of com-
plaint herein, says:

(1) It admits Paragraph One.

20 (2) It admits that American Trust Company
was appointed executor and trustee of the Will of
Edwin S. Wilson. The power and authority to sell
the real estate of said deceased were specifically
given the American Trust Company, as executor,
with the limitation or condition that the sale or
conveyance, if made during the lifetime of the wife
of said Edwin S. Wilson, was "to be made only on
her written consent."

30 (3) It admits that on May 12th, 1920, a paper
writing was executed between the American Trust
Company, as Trustee under said Last Will and Tes-
tament of Edwin S. Wilson, and complainant, and
one, William C. Silva. As to the contents of said
paper writing, it leaves the complainant to his
proof and begs leave to refer to said paper writing
for information with reference thereto.

40 (4) It denies Paragraph Four.

Answer of Defendant, American Trust Company, as
Trustee of Edwin S. Wilson, deceased.

(5) It denies such portion of Paragraph Five as relates to the provisions with reference to the dissolution of the partnership therein referred to. As to the paper writing signed by the American Trust Company, trustee as aforesaid, referred to in said Paragraph Five, it begs leave to refer to said paper writing for a statement of its terms. 10

(6) It denies Paragraph Six.

(7) It denies Paragraph Seven, except that it admits that complainant, by his attorney, Martin O'Keefe, attempted to exercise the alleged option. It admits the writing of the letter of April 4, 1928, by the said Martin O'Keefe. Said letter or a copy thereof, is set forth under Schedule E. 20

(8) It admits Paragraph Eight.

(9) It denies Paragraph Nine, except that it admits the service of the notice set forth under Schedule G.

(10) It denies Paragraph Ten, except that it admits that it has refused to execute the deed therein referred to. 30

(11) It admits Paragraph Eleven.

(12) It denies Paragraph Twelve.

GENERAL DEFENSE.

As a general defense to the bill herein, the said answering defendant says:

40

Answer of Defendant, American Trust Company, as
Trustee of Edwin S. Wilson, deceased.

(1) The right of the executor under the Will of Edwin S. Wilson, to make sale of decedent's real estate, if exercised during the lifetime of the widow of deceased, could only be made with her written consent; that the said widow of testator was living at date and time of said lease and did not in writing
10 consent to the alleged option to sell and convey said land; but, on the contrary, protested in writing against said sale.

(2) That no action was instituted by complainant during the lifetime of the widow of the deceased to force compliance with said option. The said widow died April 1st, 1928. On April 4th, 1928, attempt was made by the complainant to exercise
20 alleged option. This defendant contends that death of the said widow could not give said option legal life.

(3) The said last Will and Testament of the said Edwin S. Wilson gave power of sale to the executor, subject to the following condition; "such sale and conveyance, if made during the lifetime of my wife, to be made only on her written consent." The sale,
30 under the alleged lease, was not consented to by the widow in writing, and was, therefore, unenforceable.

(4) There was no legal consideration for the alleged option.

KING & VOGT
Solicitors of Defendant, American Trust Company, Trustee Under the Last Will and Testament of Edwin S. Wilson.

Reply to Answer of Defendant, American Trust Company, as Trustee of Edwin S. Wilson, deceased.

Filed June 19, 1928.

IN CHANCERY OF NEW JERSEY

On Bill for Specific Performance. 10

Complainant by way of reply to the answer of the American Trust Company as Trustee of Edwin S. Wilson, deceased, says that;

1. Complainant denies so much of Paragraph 2 of said answer as alleges that the power and authority to sell the lands of Edwin S. Wilson was specifically given to the American Trust Company as executor; complainant admits that said Edwin S. Wilson by his will directed that any sale or conveyance of his real estate, if made during the lifetime of his wife was to be made only on her written consent; but complainant insists that such provision effected no limitation upon the power of the trustee to grant a lease and option. 20

2. Complainant joins issue on Paragraphs 3 to 12 inclusive of said answer. 30

By way of reply to the General Defense of said defendant, Complainant says that:

1. Complainant objects to Paragraph 1 as immaterial and irresponsive as complainant had no dealings with the executor of Edwin S. Wilson; and complainant knows of no limitations upon the power of disposition given the trustee of Edwin S. Wilson, with whom complainant and those under 40

Reply to Answer of Defendant, American Trust
Company, as Trustee of Edwin S. Wilson,
deceased.

whom complainant claims dealt, except as contained
in the last paragraph of the will of the said Edwin
S. Wilson attached as Schedule A to the Bill of
10 Complaint filed in this cause; and complainant has
no knowledge as to whether or not the widow of
said Edwin S. Wilson was living at the date and
time of said lease or as to whether or not she
consented to the option granted by this defendant
to complainant and William C. Silva; and com-
plainant insists that such consent by the widow of
Edwin S. Wilson to the option granted complain-
ant and William C. Silva was not required; and
20 as to the allegations of this paragraph complain-
ant leaves this defendant to his proof.

2. This action is the first action instituted by
complainant to enforce his rights under the option
granted him by this defendant as Trustee of Edwin
S. Wilson. Complainant has no knowledge of the
other allegations of paragraph 2; objects to them
as immaterial; and leaves defendant to its proof
thereof.

30

3. Complainant insists that Edwin S. Wilson
by his last will and testament gave power of sale
over his real estate to both his executor and his
trustee.

4. Complainant denies paragraph 4.

MARTIN R. O'KEEFE.

Solicitor for Complainant.

40

Replication by American Trust Company, Trustee, of Edwin S. Wilson, deceased.

Filed June 22, 1928.

IN CHANCERY OF NEW JERSEY

Defendant, American Trust Company, Trustee of ¹⁰
Edwin S. Wilson, deceased, by way of replication to
the reply of complainant, says:

1. It denies so much of Paragraph One as constitutes a denial of this defendant's answer.

2. It denies Paragraph One of the reply to the General Defense.

3. It joins issue on Paragraph Two of the reply ²⁰
to the General Defense.

4. It denies Paragraph Three of the reply to the General Defense.

KING & VOGT
Solicitors of American Trust
Company, Trustee of Edwin S.
Wilson, deceased.

**Answer of William Q. Wilson and Mary
Wilson his wife, Edith Delmonico
and Louis C. Delmonico her husband,
and William Wilson and Madeline O.
Wilson, his wife.**

Filed June 14, 1929.

10 The defendants, WILLIAM Q. WILSON and MARY WILSON, his wife, of Whippany, EDITH DELMONICO and LOUIS C. DELMONICO, her husband, WILLIAM WILSON and MADELINE O. WILSON, his wife, FLORHAM PARK, all in Morris County, New Jersey, answering say that:

1. Defendants admit the first paragraph.
2. Defendants admit that American Trust Com-
20 pany was appointed Trustee and Executor under said Will. The power and authority to sell the real estate of said deceased was specifically given the American Trust Co. as Executor, and with the limitation or condition that a sale or conveyance, if made during the life time of the wife was "to be made only on her written consent."
3. These defendants leave complainant to make
30 proof of the statements contained in this paragraph; they believe a lease was made for the land mentioned in the first paragraph of the bill, but deny that the American Trust Company as Trustee, gave any option to complainant and William C. Silva to purchase said premises as said Trustee, as such, had no such power or authority.
4. The defendants deny the fifth paragraph.
5. The defendants leave complainant to his proof
40 under this paragraph.

Answer of William Q. Wilson and Mary Wilson his wife, Edith Delmonico and Louis C. Delmonico her husband, and William Wilson and Madeline O. Wilson, his wife.

6. The defendants leave complainant to his proof under this paragraph.

7. The defendants leave complainant to his proof under this paragraph. 10

8. Defendants admit the eighth paragraph.

9. Defendants leave complainant to his proof under this paragraph.

10. Defendants leave complainant to his proof under this paragraph.

11. Defendants admit the eleventh paragraph.

12. Defendants deny the twelfth paragraph. 20

GENERAL DEFENSE.

These defendants set up as a general answer to said complaint:

1. That the defendant American Trust Company, as Trustee, had no authority or right to enter into any agreement or contract concerning the sale or conveyance of said premises; that the sale right to enter into such an engagement is vested in the American Trust Company as Executor. 30

2. That this right of the Executor, if exercised during the lifetime of the widow of deceased, could only be made on her written consent; that the widow of testator was living at the date and time of said lease and did not, in writing, consent to the alleged option to sell and convey said land, but on 40

Answer of William Q. Wilson and Mary Wilson his wife, Edith Delmonico and Louis C. Delmonico her husband, and William Wilson and Madeline O. Wilson, his wife.

the contrary, protested in writing against the same.

3. That no attempt was made by complainant to exercise the alleged option during the life time of the widow of deceased; she died April 1, 1928; on April 4th, 1928 an offer was made by complainant to exercise the alleged option: The death of the widow could not galvanize into legal life, an option which was legally dead.

4. The will gives the Executor power to sell and convey, any real estate of which the deceased might die seized, "such sale and conveyance, if made during the lifetime of my wife, to be made only on her written consent." The sale under the alleged lease was not consented to by the widow in writing, and was therefore invalid.

5. There was no legal consideration for the alleged option.

6. The Executor, as such, could not sell the property for any consideration, but cash.

7. The alleged option is inequitable, because the present value of said property is greatly in excess of the sale price referred to in said option.

KING & VOGT

Solicitors of Defendants, William Q. Wilson, Mary Wilson, Edith Delmonico, Louis C. Delmonico William Wilson and Madeline O. Wilson,

**Reply to Answer of William Q. Wilson
and Mary Wilson, his wife, Edith
Delmonico and Louis C. Delmonico,
her husband, and William Wilson
and Madeline O. Wilson, his wife.**

Filed June 22, 1928.

10

On Bill for Specific Performance.

Complainant by way of reply to answer of WILLIAM Q. WILSON and MARY WILSON, his wife, EDITH DELMONICO and LOUIS C. DELMONICO, her husband, and WILLIAM WILSON and MADELINE O. WILSON, his wife, Defendants, says that:

1. Complainant denies so much of Paragraph 2 of said answer as alleges that the power and authority to sell the lands of Edwin S. Wilson was specifically given to the American Trust Company as executor; complainant admits that said Edwin S. Wilson by his will directed that any sale or conveyance of his real estate, if made during the lifetime of his wife was to be made only on her written consent; but complainant insists that such provision effected no limitation upon the power of the trustee to grant a lease and option.

2. Complainant joins issue on Paragraphs 3, 4, 5, 6, 7, 9, 10, and 12 of the answer.

By way of reply to the General Defense of said Defendants, Complainant says that:

1. Complainant denies the allegations of Paragraph 1.

40-

Reply to Answer of William Q. Wilson and Mary Wilson, his wife, Edith Delmonico and Louis C. Delmonico, her husband, and William Wilson and Madeline O. Wilson, his wife.

2. Complainant denies the allegations of Paragraph 2, except that the widow of said Edwin S. Wilson was living at the time said lease and option were executed and complainant has no knowledge
10 as to whether or not the said Clara L. Wilson, the widow of said Edwin S. Wilson, consented in writing to said lease and option; and complainant insists that such consent by said Clara L. Wilson to such lease and option was not required, and complainant has no knowledge as to whether or not said Clara L. Wilson protested in writing against said lease and option, and leaves defendants to their proofs on said allegations.

20 3. Complainant exercised the right of option within the life thereof and complainant insists that the date of the death of the widow of Edwin S. Wilson bears no relationship to the time of the exercise of said option by complainant, and has no effect on the question and is immaterial. Complainant claims that said option was fully alive when exercised by complainant, and did not then need to be galvanized, or even soldered.

30 4. Complainant denies that power of sale was given to the Executor of Edwin S. Wilson alone, but complainant insists that such power was given to both the executor of and trustee under the last will and testament of said Edwin S. Wilson, subject to the limitation contained in said will that "such sale and conveyance, if made during the life
40 time of my wife to be made only on her written consent". Complainant insists that no sale of the

Replication of Defendants William Q. Wilson and Mary Wilson, his wife, Edith Delmonico and Louis C. Delmonico, her husband and William Wilson and Madeline C. Wilson, his wife.

real estate described in the will was made during the lifetime of the wife of Edwin S. Wilson, and no consent by the widow of Edwin S. Wilson was needed.

5. Complainant denies the allegations of Paragraphs 5, 6, 7. ¹⁰

MARTIN R. O'KEEFE.
Solicitor for Complainant.

Replication of defendants William Q. Wilson and Mary Wilson, his wife, Edith Delmonico and Louis C. Delmonico, her husband and William Wilson and Madeline C. Wilson, his wife. ²⁰

Filed June 22, 1928.

Defendants, William Q. Wilson and Mary Wilson, his wife, Edith Delmonico and Louis C. Delmonico, her husband, and William Wilson and Madeline C. Wilson, his wife, by way of replication to the reply of complainant, say: ³⁰

1. They deny so much of Paragraph One as constitutes a denial of these defendants' answer.

2. They deny so much of Paragraph Two of the reply to the General Defense as constitutes a denial of the defendants' answer.

Answer of Defendant All Souls' Hospital,
of Morristown, N. J.

fore the Surrogate of Morris County, New Jersey; and that the defendant, American Trust Company is the sole duly qualified Executor thereof and Trustee thereunder.

2. This defendant is informed that the said Edwin S. Wilson on or about July 5, 1912, died ¹⁰ in and a resident of Morris County, New Jersey, testate of a last Will and Testament in writing, being the writing above mentioned, and that the said writing has been duly proved before the Surrogate of Morris County, New Jersey, and recorded in the Records of Wills of said County; and that said defendant, American Trust Company, is the sole Executor thereof and Trustee thereunder; and that by the terms thereof, this defendant has a contingent interest in a substantial estate of said ²⁰ Edwin S. Wilson.

And this defendant prays: That so far as the Orders and Decree of this court shall affect said estate of Edwin S. Wilson, the interest of this defendant therein may be protected and preserved.

HENRY F. DEMPSEY
Solicitor for and of counsel with
Defendant, All Souls' Hospital ³⁰
of Morristown, New Jersey.

**Reply of Complainant to Answer of
Defendant All Souls' Hospital.**

Filed June 22, 1928.

IN CHANCERY OF NEW JERSEY

10 Between

ROBERT C. NELSON,
Complainant,

and

AMERICAN TRUST COMPANY,
Trustee under the Will of Edwin S.
Wilson, and others,
Defendants.

} On Bill &c.

20

Complainant by way of reply to the answer filed herein by the defendant All Souls Hospital does hereby join issue with said defendant upon its answer.

MARTIN R. O'KEEFE.
Solicitor for Complainant.

30

40

**Answer of Defendant The Morristown
Memorial Hospital.**

Filed June 19, 1928.

IN CHANCERY OF NEW JERSEY

D. 68-300

<p>Between</p> <p style="text-align: center;">ROBERT C. NELSON, Complainant</p> <p style="text-align: center;">and</p> <p style="text-align: center;">AMERICAN TRUST COMPANY, Trustee under the will of Edwin S. Wilson <i>et als.</i></p> <p style="text-align: center;">Defendants</p>	}	<p style="text-align: right;">10</p> <p style="text-align: right;">On Bill for Specific Performance</p> <p style="text-align: right;">20</p>
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THE MORRISTOWN MEMORIAL HOSPITAL, one of the defendants, herein, answering the Bill of Complaint of Robert C. Nelson, herein, says:

1. Respecting the matters of fact set forth in said bill this defendant has no certain knowledge other than that derived from the public records and files, to which reference is made.

But, upon information, it believes and admits that paper-writing, in the term of "Schedule A" annexed to said bill, was on or about July 29th, 1912, admitted to probate and duly proved as the Last Will and Testament of Edwin S. Wilson before the Surrogate of Morris County, New Jersey; and that the defendant American Trust Company is the sole duly qualified executor thereof and trustee thereunder.

Answer of Defendant The Morristown Memorial
Hospital.

2. This defendant is informed that the said Edwin S. Wilson on or about July 5th 1912 died in and resident of Morris County New Jersey, testate of a last will and testament in writing, being the writing above mentioned, and that the said writing has been duly proved before the Surrogate of Morris County, New Jersey, and recorded in the Records of Wills of said County; and that said defendant, American Trust Company is the sole executor thereof and trustee thereunder; and that by the terms thereof, this defendant has a contingent interest in a substantial estate of said Edwin S. Wilson.

And this defendant prays: That, so far as the orders and decree of this court shall affect said Estate of Edwin S. Wilson, the interest of this defendant therein may be protected and preserved.

HENRY C. PITNEY,
Solicitor for and of Counsel with
Defendant The Morristown
Memorial Hospital.

**Reply of Complainant to Answer of
Defendant The Morristown Memo-
rial Hospital.**

Filed June 22, 1928.

IN CHANCERY OF NEW JERSEY

Between

ROBERT C. NELSON,
Complainant,
and

AMERICAN TRUST COMPANY,
Trustee under will of Edwin S. Wil-
son, and others,
Defendants.

On Bill &c.

10

20

Complainant by way of reply to the answer filed herein by the defendant The Morristown Memorial Hospital does hereby join issue with said defendant upon its answer.

MARTIN R. O'KEEFE,
Solicitor for Complainant.

30

40

Case.

IN CHANCERY OF NEW JERSEY.

10	Between ROBERT C. NELSON, Complainant, and AMERICAN TRUST COMPANY, Trustee under the will of Edwin S. Wilson, deceased, Defendant.	}
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TRANSCRIPT OF SHORTHAND NOTES OF TESTIMONY
 taken on final hearing in above stated cause, April
 20 4, 1929, at Chancery Chambers, Jersey City, before
 His Honor James F. Fielder, Vice Chancellor.

APPEARANCES.

MARTIN R. O'KEEFE, Esq., for complainant.

MESSRS. KING & VOGT (Mr. King and Mr.
 Price), for defendants, American Trust
 Company, *et al.*

30 HENRY F. DEMPSEY, Esq., for defendant All
 Souls Hospital of Morristown, N. J.

COMPLAINANT'S CASE.

Mr. O'Keefe.—It is stipulated and agreed
 that the copy of the will of Edwin S. Wilson
 shown by Schedule A attached to the bill of
 complaint filed herein, is a true copy thereof;
 that the American Trust Company appointed
 therein as executor and trustee qualified and
 40

Case.

acted in both capacities and is still acting as executor and trustee; that in 1914 the American Trust Company presented to the Morris County Orphans Court its account, which, by decree of the Morris Orphans Court entered September 4, 1914, was allowed; that no subsequent account has been filed by the executor and no account has been filed by the trustee; 10 that under date of May 12, 1920, the American Trust Company, as Trustee under the will of Edwin S. Wilson, made and executed to Robert C. Nelson, the complainant herein, and William C. Silva a lease of the premises involved in this suit, a true copy of which lease is annexed to the bill of complaint as Schedule B; that under date of September 1, 1921, Robert C. Nelson and William C. Silva dissolved the partnership then existing between them; and 20 William C. Silva assigned his interest in the partnership and in the lease and option to Robert C. Nelson, the complainant, and that a true copy of that instrument is attached to the bill of complaint as Schedule C; that under date of September 1, 1921, notice of that assignment was given to the American Trust Company, as trustee under the will of Edwin S. Wilson and consent to that assignment was 30 executed by the American Trust Company as trustee under the will of Edwin S. Wilson, a true copy of which consent is annexed to the bill of complaint as Schedule D; that under date of April 4, 1928, Martin R. O'Keefe, as attorney for Robert C. Nelson, notified American Trust Company that his client accepted the option granted by the instrument of May

12, 1920, and that a true copy of that notice is attached to the bill of complaint as Schedule E; that under date of April 13, 1928, King and Vogt, attorneys for the American Trust Company, as trustee under the will of Edwin S. Wilson, advised Martin R. O'Keefe, attorney for complainant, that the trustee could not execute and deliver a deed, a true copy of which letter is annexed to the bill of complaint as Schedule F; that under date of May 3, 1928, a formal demand by Martin R. O'Keefe, attorney for Robert C. Nelson, was served on the American Trust Company, trustee under the last will and testament of Edwin S. Wilson, demanding performance of the contract and tendering payment of the contract price of \$7,000 in cash, and that a copy thereof is attached to the bill of complaint as Schedule G.

I offer in evidence copy of decree entered in the Morris County Orphans Court September 4, 1914.

(Marked Exhibit C-1)

Mr. Price.—It is further stipulated that on August 12, 1924, while the widow was still living, the complainant, Robert C. Nelson, by Martin R. O'Keefe, his attorney, served on the American Trust Company, acknowledgment thereof being dated August 14, 1924, a notice that said Nelson exercised the alleged option under the lease.

It is further stipulated that Clara L. Wilson, the widow of Edwin S. Wilson, died April 1, 1928.

Robert C. Nelson—Direct.

ROBERT C. NELSON, the complainant, sworn as a witness in his own behalf, testifies as follows:

DIRECT-EXAMINATION BY MR. O'KEEFE:

Q. You are the gentleman who made the contract with the American Trust Company? A. Yes.

Q. You executed the lease shown in Schedule B 10 annexed to the bill of complaint? A. Yes.

Mr. King: We admit the identity.

Q. Tell the circumstances, the description of the property and the circumstances which led up to your leasing of these premises.

Mr. King: I object as being immaterial.

Mr. O'Keefe: We were induced to make this lease upon the promise that we were to have 20 certain rights.

(Argument.)

The Court: Objection sustained.

Q. What was the condition of the premises at the time you took them over?

Mr. King: I object.

The Court: How is that admissible?

Mr. O'Keefe: As to the question of value— 30 whether the price set was too low or whether the value has gone up or down; also on the theory that we have made considerable improvements on the premises contingent on the rights which we claim to have under the option and the consent of the widow, as we supposed.

The Court: I will admit evidence tending to show that the price mentioned in the lease and option was fair as of that date.

Robert C. Nelson—Direct.

Q. Generally, Mr. Nelson, what was the character of the property?

The Court: Why need we go into that question of the character of the property? The question is whether the price named in the option was a fair price as of that date.

10 Mr. O'Keefe: He is not competent to say that.

The Court: Then, I cannot admit his testimony.

Q. Since the execution of your lease have you paid your rent for the premises regularly? A. Always a month in advance.

Mr. Price: It is admitted he paid his rent. It is immaterial.

20 Mr. O'Keefe: Will you admit these checks in evidence? We want to show we performed our contract and that the American Trust Company, even though they refused to perform or grant to us——

The Court: Is there any objection to putting on the record that rent was paid according to the terms of the lease?

Mr. King: We don't dispute it. We don't think it is material.

30 Mr. O'Keefe: And that rent was received by the American Trust Company as executor and trustee?

Mr. King: Yes.

Q. What led you to enter into this lease?

Mr. King: Objected to.

The Court: Objection sustained.

40 No cross-examination.

Vincent D. Roache—Direct.

Mr. O'Keefe: There is no use of our going on any further and producing any more witnesses.

The Court: Not if their testimony is to be along the lines of the questions put to Mr. Nelson.

Mr. O'Keefe: We have Mr. Silva, the other partner.

The Court: He would corroborate the testimony that you expected to bring out by Mr. Nelson.

Mr. O'Keefe: He would have gone further. Silva was the one who went out and looked it up. Nelson stayed on his job, and after Silva had entered into the contract with the American Trust Company, the lease and the option, Nelson came out and went into the bargain, too. So, if Your Honor still makes the same ruling—

The Court: If the same questions that you have asked Mr. Nelson were asked Mr. Silva, I would rule the same way.

Is it admitted that the sum of \$7,000, the option price mentioned in the lease, was a fair price as of the date of the lease?

Mr. King: Mr. Wilson prefers that they prove it.

VINCENT D. ROACHE, sworn as a witness on the part of the complainant, testifies as follows:

DIRECT-EXAMINATION BY MR. O'KEEFE:

Q. What is your business? A. Real estate and insurance and appraisal.

Q. How long have you been engaged in that business? A. Sixteen years.

Vincent D. Roache—Direct.

Q. Are you president of the Morris County Real Estate Board? A. Morristown Real Estate Board, president, 1928, and during the present year, 1929.

By the Court:

10 Q. Where is your office located? A. In Morristown.

Q. How long has it been in Morristown? A. All of the sixteen years.

By Mr. O'Keefe:

Q. Have you examined the premises known as the Edwin S. Nelson premises at Whippany, Morris County, particularly described in the bill of complaint in this case? A. I have.

20 Q. When did you examine them? A. April 3, 1929.

Q. Tell generally what you saw as to the character of the premises.

Mr. King: Objected to.

The Court: Objection sustained.

30 Q. What, in your opinion, was the value of the property described in the bill of complaint as of May 12, 1920?

Mr. King: I object.

The Court: Objection sustained. Mr. O'Keefe, why do you want to prove it? It is not raised in the answer.

Mr. O'Keefe: I withdraw the witness.

40 The Court: I rule out the last question because Mr. Roache testified that he examined the property in 1929. There is no testimony

Harold A. Price—Direct.

that he knew anything about its condition in 1920, which was the date fixed for the valuation.

No cross-examination.

[COMPLAINANT RESTS.]

10

DEFENDANTS' CASE.

HAROLD A. PRICE, sworn as a witness on the part of the defendants, testifies as follows:

DIRECT-EXAMINATION BY MR. KING:

Q. You are connected with the law firm of King & Vogt? A. Yes.

Q. Solicitors of the defendant, the American Trust Company? A. Yes. 20

Q. The executor and trustee under the will of Edwin S. Wilson? A. Yes.

Q. I show you notice signed "Martin R. O'Keefe," and addressed to the American Trust Company, trustee under the last will and testament of Edwin S. Wilson, deceased, and dated August 12, 1924. Did this notice come into your possession? A. Yes.

Q. Through the bank? A. Yes. 30

Q. When, in reference to its date, if you know?
A. The date that I have is August 13, 1924.

Q. Following that notice, did you communicate with Mr. O'Keefe in reference to the notice and its contents? A. Yes; I delivered the original notice to him with my acknowledgment of service, which appears to be dated August 14, 1924.

Q. And that was during the life time of Mrs. Wilson, the widow of Edwin S. Wilson? A. Yes. 40

Harold A. Price—Direct.

Q. After that did you have a written communication with Mr. O'Keefe? A. I do not recall that I wrote him about that, but after the deed was drafted or in process of drafting, I had directed Mr. Litsey, secretary and treasurer of the American Trust Company to communicate with Mrs. Clara Wilson. In the mean time I had examined the will
10 of Edwin S. Wilson and saw the clause to which reference has been made and advised Mr. Litsey to communicate with her and secure her consent and signature to the deed.

After I had talked with Mr. Litsey, and following my request to him to communicate with Mrs. Wilson, I advised Mr. O'Keefe, as attorney for Mr. Nelson, that the American Trust Company could not legally make this conveyance because of the
20 fact that Mrs. Wilson refused to sign any deed. There is a letter dated August 25, 1924, which I wrote to Mr. O'Keefe before the bank had communicated with Mrs. Wilson and before, of course, I notified him that the conveyance could not be made, this letter being merely an acknowledgment of the service of the notice and a request from me that he supply me with a description for the deed.

Mr. King: I offer the notice and letter in
30 evidence.

(Notice is marked Exhibit D-1. Letter is marked Exhibit D-2.)

Q. Following this refusal was any deed given by or tendered by the American Trust Company to Mr. Nelson, the complainant?

Mr. O'Keefe: I object.

The Court: Objection overruled.

40 A. No.

Harold A. Price—Cross.

CROSS-EXAMINATION BY MR. O'KEEFE:

Q. Where did you advise me, Mr. Price, that the American Trust Company would not perform and would not comply with my request to deliver a deed? A. At your office.

Q. Personally? A. Yes.

Q. Do you remember when? A. I think it was about the 27th or 28th of August, 1924. 10

Q. How do you fix the date? A. Why, the letter that you have before you, which is marked as the last exhibit, shows that I delivered the acknowledgment to you under date of August 25, 1924, and almost immediately—within a day or so after that time—I received the advice from Mr. Litsey as to the result of his talk with Mrs. Wilson, and immediately after Mr. Litsey informed me of Mrs. Wilson's attitude, I communicated with you. That is 20 why I say it is within a space of two or three days after my letter of acknowledgment that I so advised you.

Q. How do you know that no deed was delivered? A. Because I am at the present time and was then in 1924 chairman of the trust committee of the American Trust Company and the deed would have been prepared and at least pass through my hands before the tender thereof. 30

Q. How long have you been chairman of the trust committee? A. I have been either chairman or a member of the committee I think for four or five years.

Q. So that the bank has executed nothing in the way of a trust instrument for the last four or five years without such instrument going through your hands? A. I think I can truthfully say to that, yes, so far as I can recall. 40

Charles B. Litsey—Direct.

CHARLES B. LITSEY, sworn as a witness on the part of the defendants, testifies as follows:

DIRECT-EXAMINATION BY MR. KING:

Q. You are connected with the American Trust Company? A. I am.

10 Q. In what capacity? A. Secretary and treasurer.

Q. Were you secretary and treasurer in 1924? A. I was.

Q. And prior to that time? A. Since 1915.

Q. In 1924, in August, a demand was made upon your bank, as shown by Exhibit D-1, in which Mr. Nelson requested a deed for the property at Whippany mentioned in the lease. After receiving that
20 notice, what did you do with it? A. I took it up with Mr. Price.

Q. After taking it up with Mr. Price, did you subsequently communicate with Mrs. Wilson, the widow of the testator? A. I wrote Mrs. Wilson a letter.

Q. I show you this letter addressed to Mrs. Clara L. Wilson and apparently signed by you. Is that the letter which you sent her? A. That is the letter; yes, sir.
30

Q. It is dated—— A. August 26, 1924.

Mr. King: I offer the letter in evidence.

(Marked Exhibit D-3.)

Q. Following that letter did Mrs. Wilson communicate with you? A. She called me on the phone 'phone rightaway.

Q. In relation to the subject-matter of the letter?
40 A. Yes.

Charles B. Litsey—Cross.

Q. What did she say in reference to your suggestion that she execute the deed?

Mr. O'Keefe: I object.

The Court: Objection overruled.

A. She said that she would not execute the deed.

Q. And following that refusal on her part, was that communicated to Mr. Price? A. Yes; I informed Mr. Price that Mrs. Wilson would not sign the deed. 10

Q. After notification to Mr. Price that Mrs. Wilson would not join in a deed, so far as you know, was there any proceeding instituted by Mr. Nelson to compel the performance of that contract? A. No.

Q. When did Mrs. Wilson die? A. April 1, 1928.

Q. And then was the present suit instituted after her death? A. I understand it was. 20

CROSS-EXAMINATION BY MR. O'KEEFE:

Q. Were you secretary and treasurer, Mr. Litsey, when the lease was executed by the American Trust Company?

The Court: He has been since 1915.

A. Yes.

Q. Did you take any part in the negotiations which led up to the lease? A. I did not. 30

Q. Who dealt with the lessees or possible lessees, on behalf of the bank? A. Charlton A. Reed, who was our attorney and he was also trust officer for the bank.

Q. You didn't see Mr. Nelson or his former partner, Mr. Silva, at all? A. Well, they opened an account with the bank and I did see them and meet them both. 40

Charles B. Litsey—Cross.

Q. With regard to the lease? A. I don't think so.

Q. No communication between you at all? A. No, sir.

Q. Did you see Mr. Nelson after you had received from Mrs. Clara L. Wilson her notification that she would not sign the deed with you? A. Yes; he was in and talked it over.

Q. What did you tell Mr. Nelson at that time
10 with regard to the situation between you two parties?

Mr. King: Under the pleadings, that is inadmissible. I object.

The Court: Objection overruled.

A. We talked the matter over and—

By the Court:

20 Q. After getting notice that Mrs. Wilson would not sign the deed, what did you say to Mr. Nelson? A. Well, Mr. Nelson was in and we talked the matter over and he seemed considerably put out because he could not buy the property at that time, and he remarked that he might wait until she died; she was getting rather old.

Q. What was that? A. Mr. Nelson remarked that he might have the advantage of taking title to the property after she died and before the lease expired. He expressed that idea.
30

By Mr. O'Keefe:

Q. Was there any agreement or promise that you would extend the lease to afford Mr. Nelson that opportunity, in case Mrs. Wilson did not die before its expiration?

Mr. King: Objected to.

40 The Court: Objection sustained.

William Q. Wilson—Direct-Cross.

WILLIAM Q. WILSON, sworn as a witness on the part of the defendant, testifies as follows:

DIRECT-EXAMINATION BY MR. KING:

Q. Was Clara L. Wilson your mother? A. She was.

Q. And she was the widow of your father, Edwin S. Wilson, the testator in this case? A. Yes. 10

Q. Have you seen your mother's writing? A. Yes.

Q. (Showing witness.) Will you look at that paper and see if not only the letter but the signature is in your mother's handwriting? A. Yes; it is.

Q. When did this paper come into your possession? A. Shortly after her death.

Q. Where did you find it? A. In her private 20 desk.

Mr. King: The letter is dated August 24, 1924, and I want to offer it in evidence.

Mr. O'Keefe: Let me see it.

Mr. King: I show it to counsel. Do you object, Mr. O'Keefe?

Mr. O'Keefe: No.

(Letter is marked Exhibit D-4.) 30

CROSS-EXAMINATION BY MR. O'KEEFE:

Q. How did you come to find that letter? A. I knew that the letter was there. My mother showed it to me very shortly after she had written it, enclosed in the letter of the American Trust Company.

Q. Did she tell you anything about it at the time she showed it to you? A. I don't understand you. 40

William Q. Wilson—Cross.

By the Court:

Q. She showed this paper to you shortly after it was written? A. Yes.

Q. Did she say anything to you on the subject at that time? A. She said she didn't care to sell the property to anyone, and that she would leave this in case anything happened. She showed it to me. I also read it.

By Mr. O'Keefe:

Q. What good did you think it was gonig to do in the desk? A. I had no right to take it. That was mother's property.

Q. You were interested in this property. Why didn't you make a recommendation to her that she send it to the American Trust Company?

20

Mr. King: I object.

The Court: Objection sustained.

Q. And it stayed there all the time until her death? A. As far as I know.

[DEFENDANT RESTS.]

[CASE CLOSED.]

30

40

Exhibit D-1.**Notice.**

TO AMERICAN TRUST COMPANY,
TRUSTEE UNDER THE LAST WILL & TESTAMENT OF
EDWIN S. WILSON, LATE OF THE TOWNSHIP OF
HANOVER, IN THE COUNTY OF MORRIS AND
STATE OF NEW JERSEY, DECEASED: 10

YOU ARE HEREBY NOTIFIED, That I, Robert C. Nelson, of the Township of Hanover in the County of Morris and State of New Jersey, do hereby accept and take advantage of the right and privilege of purchasing the premises situate in the Township of Hanover, aforesaid, specied in the Lease made between you, as party of the first part, and William S. Silva and myself, as parties of the second part, dated May 12, 1920 (the rights of said William C. Silva in said lease and said option having been assigned and conveyed and transferred by him to me, and you by instrument dated September 1, 1921 having consented in writing to said assignment and agreed thereto), for the sum of Seven thousand Dollars (\$7000.), to be paid: \$2000. in cash, and \$5000. by a purchase-money mortgage upon the premises described in said lease and option and to be conveyed in accordance therewith in the amount of \$5000. payable in one year from the date thereof with interest thereon at five per cent. per annum payable semi-annually, which mortgage shall contain the usual fire-insurance and tax exemption clauses. 20 30

And you are hereby requested to prepare your proper deed conveying said premises to me, in accordance with the terms of the option mentioned in the instrument of lease dated May 12, 1920; and 40

Exhibit D-2.

you are requested to notify me or my attorney, Martin R. O'Keefe, Esq., 10 Washington Street, Morristown, N. J., when the said deed is ready for delivery.

Dated at Morristown, N. J., August 12, 1924.

ROBERT C. NELSON,

By MARTIN R. O'KEEFE

Attorney

10

Service the above Notice is hereby acknowledged this 14th day of August.

AMERICAN TRUST COMPANY,

KING & VOGT

By HAROLD A. PRICE

Attorney

20

Exhibit D-2.

KING & VOGT

COUNSELLORS AT LAW

Morristown, N. J.

10 Washington St. Telephone 1011

AUGUST 25TH, 1924.

MR. MARTIN R. O'KEEFE,

30 Morristown,
New Jersey.

DEAR SIR:

I am handing to you herewith our acknowledgment of service of notice of your client Mr. Nelson, in the matter of the Edwin S. Wilson Estate, by the American Trust Company, as Trustee. I understand that you are to supply me with a description for the deed.

40

Exhibit D-3.

I expect to be out of town until Tuesday the 26th, and can prepare the deed that morning if you have the description by that time.

Very truly yours,

HAROLD A. PRICE
K.

HAP/RK
Enc.

10

Exhibit D-3.
Letter.

AMERICAN TRUST COMPANY
MORRISTOWN, N. J.

20

AUGUST 20, 1924.

MRS. CLARA L. WILSON,
Whippany, New Jersey,

DEAR MRS. WILSON:—

You may have heard that Mr. Robert C. Nelson is arranging to purchase the property in Whippany in accordance with the terms of the lease which provides that he may purchase the property for \$7000. upon the payment of \$2000. cash and execution of a 5% mortgage in the amount of \$5000. 20

It has been suggested by one of the attorneys that you should sign the deed in connection with this Company as executor. We know of no objection that you would have of so doing and if you will kindly drop us a line stating whether this is all satisfactory we can arrange to have someone 40

Exhibit D-4.

call at your home with the deed for execution when it is prepared.

With kind regards. I am

Very truly yours,

C. B. LITSEY

Sec-Treas.

CBL:ELG

10

Exhibit D-4.

Statement by Clara L. Wilson.

WHIPPANY, N. J.

August 24, 1924.

As I have not been consulted in the sale of the Store property, which was made necessary by the will of Mr. Wilson, I hereby do not consent to the selling of the property to anyone. I am able to carry it, and expect to do so. Do not think I can be compelled to do so. Do not accept any mortgage at 5% on the property, only invest at 6%. The lease was made out to Nelson and Silvia, I never knew of any other arrangements being made with Mr. Nelson.

CLARA L WILSON

30

I hereby affirm the above is a true copy of original letter written and signed by Clara L Wilson.

signed

W. Q. WILSON

Sworn and subscribed before me, this Fourth day of April 1928.

PIERCE J WELSH

40 (SEAL)

Notary Public of New Jersey

Conclusions.

Filed June 12, 1929.

A trustee under a will, with power of sale, gave a written lease of estate land containing an option to purchase. The will contained a provision requiring consent of the testator's widow to any sale made by the trustees during her life. When the lessee demanded a deed under the option the widow refused to join in a conveyance and thereafter the trustee and lessee continued their relations as landlord and tenant under the lease. The widow died prior to the expiration of the lease, whereupon the lessee again demanded a deed under the option. Held, that the lease and option were not invalid because the widow had not joined in the lease; that the lessee's first demand for a deed did not exhaust his right to purchase under the option and that his demand after the widow's death made it obligatory on the trustee to convey.

MR. MARTIN R. O'KEEFE for complainant

MESSRS. KING & VOGT, for defendants, American Trust Company, *et al.*

MR. HENRY C. PITNEY for defendant Morris- town Memorial Hospital. 30

June 11, 1929

MR. HENRY F. DEMPSEY for defendant All Souls Hospital.

FIELDER, V. C.

The defendant, American Trust Company, as trustee under the will of Edwin S. Wilson, deceased, entered into a written lease with the com- 40

Conclusions.

plainant and William C. Silva as lessee, covering certain land owned by the estate, which lease was to run for ten years from May 15, 1920, at a monthly rental. The lease contained an option to the lessee to purchase the leased premises and the premises in the rear thereof for \$7,000, subject to
10 the right of the lessor to sell to any person other than the lessees at any time during the term of the lease, provided that the lessees should have the right to exercise their option before the lessor could convey to any other purchaser. Silva assigned his interest in the lease and option to the complainant, with the defendant's consent. In August, 1924, the complainant notified the defendant that he wished to exercise the option and desired a conveyance, whereupon the defendant prepared a deed for the purpose of conveying the land
20 to the complainant, but when counsel for defendant examined the will of Edwin S. Wilson, he discovered that the power to sell and convey therein given to the defendant, was limited by a provision that any sale and conveyance during the lifetime of the testator's wife should be made only on her written consent. Thereupon the defendant requested Mrs. Wilson to join in the proposed deed to the complainant and upon her refusal to do so the defendant
30 notified the complainant that because of such refusal the defendant could not convey and the complainant replied that he would wait until Mrs. Wilson's death to get title. The complainant continued in possession of the lease and paid rent regularly to the defendant, Mrs. Wilson died April 1, 1928, and immediately thereafter the complainant notified the defendant that he desired to exercise the option and demanded a deed, tendering
40

Conclusions.

himself ready to pay the purchase price, but the defendant refused to convey. This suit to compel performance of the option was brought promptly after such refusal and the defendant defends on the grounds hereinafter stated.

1. That the option is invalid because the lease¹⁰ was not executed by the defendant in its capacity as executor, as well as trustee.

By the second clause of the will the testator gave all his property, real and personal, to his trustee in trust for certain purposes specified in the will and by the last clause appointed "as executor of this my will and as trustee hereunder without bonds the American Trust Company with power to sell and convey any real estate I am die seized²⁰ or possessed of and he directed "said trustee" to care for the trust property; to use the income and principal for the purposes of the will; to keep the estate invested and to pay the income and principal as in the will directed. The testator died July 5, 1912; his will was probated shortly thereafter and letters testamentary were granted to the defendant. The defendant filed but one account and that as executor; it was allowed by decree entered Septem-³⁰ber 4, 1914, and showed a balance of more than \$16,000 of principal on hand. The defendant's duties as executor merely required it to collect the assets of the estate and to pay debts and administration charges and thereafter its duties were performed as trustee of the property given it in trust. The lease and option in question relate to trust property and the rent reserved by the lease was received by the defendant and paid to the bene-⁴⁰

Conclusions.

10 ficiaries of the trust. I think it beyond doubt that the power of sale given the defendant, was given to it as trustee and not as executor, but if the will gives the executor, as such, a power of sale, such power was solely for the purpose of raising money to pay debts and the power certainly expired within the nearly six years which elapsed between the
10 filing of the executor's account and the execution of the lease in question.

2. That the option to purchase was equivalent to a sale and is void because it was given without the widow's consent.

20 After giving the trustee power to sell and convey real estate, the will provides that "such sale and conveyance, if made during the life time of my wife, to be made only on her written consent." If, at the execution of the lease, the parties had in mind that the widow's consent was necessary to effectuate a valid conveyance in case the complainant desired to exercise the option in her lifetime, they may have believed that such consent could be obtained when asked. And so it might. In 1924, when the complainant first attempted to exercise the option, the widow might have consented and so the option would have been forceable and valid
30 from its date; it was merely inoperative during the widow's lifetime except with her consent. The situation is similar to the case of a vendor giving an option to purchase land which he believes he owns absolutely in fee when, in fact, his fee is subject to a life estate or a dower right. Can it be said that the option is void for want of title in the vendor when during the option period, the life tenant or doweress may be willing to join in a con-
40 veyance or may die?

Conclusions.

In *Brown v. Pinniger*, 81 N. J. Equity, 229, the vendor at the time she entered into a contract to convey the fee, was possessed of an estate in dower only, but she subsequently acquired the fee and it was held that having situated herself so that she could, if willing, carry out the terms of the contract, specific performance should be decreed. In *Union &c. Co. v. Lorillard*, 44 N. J. Equity 1, a 10 married woman gave an option in which her husband did not join, for the purchase of land. The husband subsequently died and thereafter the holder of the option elected to purchase. It was held that at the death of the husband the limitation of the Married Women's Act upon the execution of the contract by conveyance, and with it the objection to specific performance of the contract, were removed. This case was affirmed on other 20 grounds in 45 N. J. Equity 292. In *Hollander vs. Abrams*, 99 N. J. Equity 254, the contract to convey was made by a married woman without the joinder of her husband and the husband and wife were thereafter divorced. It was held that during coverture the contract was enforceable only at the will of the husband but when the right to exercise such will ceased to exist, performance was no longer subject to his will and the removal of cover- 30 ture before the time fixed for performance, rendered the contract enforceable. This case was affirmed on other grounds in 100 N. J. Equity, 298. In *Hollander vs. Abrams*, 99 N. J. Equity 254, the contract to convey was made by a married woman without the joinder of her husband and the husband and wife were thereafter divorced. It was held that during coverture the contract was enforceable only at the will of the husband but when the right to exercise such will ceased to 40

Conclusions.

exist, performance was no longer subject to his will and the removal of coverture before the time fixed for performance, rendered the contract enforceable. This case was affirmed on other grounds in 100 N. J. Equity, 298.

The cases cited seem to me to be similar in principle to the instant case and to lead to the
10 conclusion that the option in question was not void either at the time it was given, or at any time, during the period for which it was given. From the evidence it appears that Mrs. Wilson's refusal to join in a conveyance was arbitrary. She did not assign inadequacy of consideration as a reason for her refusal and the defendant does not now urge that defense. Neither did she, nor does the defendant now, claim that the option is in any way inequitable. The right of the widow to veto
20 a conveyance by the defendant evidently was given her for some supposed benefit to accrue to her or to the estate by its exercise during her life and the testator determined that after her death there could be no advantage to the estate in limiting in any way, the defendant's power to convey. Therefore, when the reason for restricting free action by the defendant ceased, there can be no valid reason for refusing to give effect to a contract
30 which seems in all respects to be fair and just. The widow being dead, there is nothing to prevent the defendant from entering into a new contract to convey to the complainant at the option price, unless the defendant believes that such price would now be considered inadequate and if the property has enhanced in value since the date of the option, it is inequitable to deprive the complainant of the benefit of his bargain for a reason
40 which seems to me to be most technical.

Final Decree.

3. That the complainant having attempted to exercise the option in 1924 and being then unable to enforce it, must be held to have exhausted or abandoned his rights under the option.

There is nothing in the evidence to show that the complainant and defendant did not enter into the lease in their mutual purpose to then purchase and sell, but they showed no intention to modify their rights and obligations under the lease and continued their relations as lessor and lessee with all the rights to each as specified in the lease. In the absence of any evidence to the contrary, I shall hold that the complainant did not abandon his rights under the option and that the complainant and defendant understood and acquiesced in the postponement of the assertion of those rights until the widow's death, provided the lease was then still in effect. (*McCormick v. Stephany*, 61 N. J. Equity, 208; *Thommen v. Smith* 38 N. J. Equity, 876). 10 20

The other defendants herein are beneficiaries under the will of Edwin S. Wilson and their interests are subject to the trustee's power of sale. A decree will be advised in favor of the complainant.

Final Decree.

Filed July 29, 1929.

This cause coming on to be heard in the presence of Martin R. O'Keefe, Solicitor for the Complainant, and Messrs. King & Vogt, Solicitors for American Trust Company, Trustee under the will of Edwin S. Wilson, and others; and the court having examined the pleadings and taken proofs orally and in open court and having heard and considered the 40

Final Decree.

arguments of counsel thereon; and it appearing to the satisfaction of the court that under date of May 12, 1920 the defendant American Trust Company, as trustee under the will of Edwin S. Wilson, deceased, entered into a written agreement with the complainant Robert C. Nelson and one William C. Silva, whereby said American Trust Company,
10 Trustee under the will of Edwin S. Wilson leased to the said Robert C. Nelson and William C. Silva a portion of lands and premises hereinafter described, and in and by said lease further granted unto the said Robert C. Nelson and William C. Silva the option to purchase the whole of the premises hereinafter described for the sum of \$7,000.; and that the said William C. Silva assigned, transferred and set over, with the written consent of
20 said American Trust Company, Trustee under the will of Edwin S. Wilson, all his right, title and interest in said lease and option, to the said complainant Robert C. Nelson, by assignment dated September 21, 1921; and that the said complainant Robert C. Nelson has duly exercised the said option to purchase; and that said American Trust Company refused and still does refuse to execute and deliver to said complainant a deed of conveyance for the premises in question;

30 And the court being of the opinion that the said complainant is, in accordance with the prayer of his bill, entitled to the specific performance of said agreement;

It is on this 29th day of July 1929 ORDERED, AD-
JUDGED AND DECREED that the said agreement be specifically performed by the said defendant American Trust Company, Trustee under the will of Edwin S. Wilson, and that in that capacity it do make,
40 execute, acknowledge or prove in due form of law

Final Decree.

and deliver to the complainant Robert C. Nelson on the fourth day of September 1929 between the hours of ten and eleven in the forenoon at the office of Martin R. O'Keefe, Counselor at law, 10 Washington Street, Morristown, New Jersey a good and sufficient trustee's deed of conveyance, conveying in fee simple, free from all encumbrances, all those lands and premises more particularly described as follows, to wit:

10

"All that lot or parcel of land in the Township of Hanover, County of Morris and State of New Jersey, butted and bounded as follows:

BEGINNING in the middle of the road between the store house of the said Edwin Wilson and the store house of N. P. Thomas where the middle of the road that passes the old Bleything Paper Mill intersects the Whippany road; thence (1) along the middle of the Whippany road South 65 degrees 15 minutes West 2.26 chains to a stake; thence (2) North 29 degrees West 2.25 chains to a stake; thence (3) North 65 degrees 15 minutes East 2.26 chains to the middle of the road leading to the paper mill aforesaid; thence (4) South 29 degrees East 2.25 chains to the beginning. Containing half an acre of land. Being the same premises conveyed by Willard W. Cutler, one of the Special Masters in Chancery of New Jersey, to said Edwin S. Wilson by deed dated August 2, 1911 and recorded in the Morris County Clerk's Office on August 11, 1911 in Deed-Book A-21 page 396;"

30

and deliver at the same time to the said Robert C. Nelson possession of the said lands and premises, and that at the said time and place the said complainant, upon the delivery of said deed to him, do

40

Final Decree.

pay to the said defendant the sum of Seven Thousand (7,000.) Dollars, the agreed purchase price for said lands and premises in cash, after deducting therefrom the costs of these proceedings to be taxed, including a counsel fee of \$350.00.

which is hereby allowed to said complainant and which costs are hereby directed to be paid by the said defendant American Trust Company, Trustee as aforesaid to said complainant:

10 And it is further ORDERED that in case said defendant American Trust Company, Trustee under the will of Edwin S. Wilson, Deceased, should not comply with this decree and should not appear at the time and place aforesaid and perform said agreement, as hereby ordered and directed, that the said complainant may have execution against the goods, chattels lands, tenements, hereditaments and real
20 estate which form part of the assets of the estate of Edwin S. Wilson, deceased according to the practice of this court to make such taxed costs and counsel fees, and may have such other relief as the practice of this Court permits, for the enforcement of this decree:

It is further Ordered that true copies of this decree, certified as such by the solicitor of the complainant, be served upon the solicitors of the respective defendants herein fifteen days after the
30 date hereof; and that a copy of the bill of taxed costs be served upon the solicitor of the defendant American Trust Company, Trustee under the Will of Edwin S. Wilson, deceased, within the same period.

E. R. WALKER, C.

Respectfully advised

JAMES F. FIELDER

40 V. C.

Notice of Appeal.

TO MARTIN R. O'KEEFE, Solicitor of complainant
or ROBERT NELSON, complainant:

The defendants, American Trust Company, trustee &c. of Edwin S. Wilson deceased, William Q. Wilson, and Mary Wilson, his wife, Edith Delmonico and Louis C. Delmonico, her husband, William Wilson and Madeline Wilson, his wife, 10
hereby appeal from the final decree made in the above entitled cause on July 29th 1929 by the Chancellor on the advice of Vice-Chancellor James F. Fielder, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated August 15th, 1929

KING AND VOGT

Solicitors for and of counsel with 20
American Trust Company trustee &c Edwin S. Wilson deceased, William Q. Wilson, and Mary Wilson, his wife, Edith Delmonico and Louis C. Delmonico, her husband, William Wilson and Madeline Wilson, his wife.

30

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

HAROLD A. PRICE,
Of Counsel with Defendants.

Service of the within Notice of Appeal is hereby acknowledged as of August 16, 1929.

MARTIN R. O'KEEFE,
Solicitor of Complainant. 40

Petition of Appeal.

Filed September 5, 1929.

NEW JERSEY COURT OF ERRORS AND
APPEALS

10 Between

ROBERT C. NELSON,
Complainant-Respondent

and

AMERICAN TRUST COMPANY, trustee &c.
of Edwin S. Wilson, deceased, Wil-
liam Q. Wilson and Mary Wilson, his
wife, Edith Delmonico and Louis C.
20 Delmonico, her husband, William
Wilson and Madeline O. Wilson, his
wife, Morristown Memorial Hospital
and All Souls Hospital.

Defendants-Appellants

On Appeal from the
Court of Chancery

Petition of Appeal

30 TO THE HONORABLE, THE COURT OF ERRORS AND AP-
PEALS IN THE LAST RESORT IN ALL CAUSES:

The petition of American Trust Company, Trustee &c. of Edwin S. Wilson, deceased, William Q. Wilson and Mary Wilson, his wife, Edith Delmonico and Louis C. Delmonico, her husband, William Wilson and Madeline O. Wilson, the appellants in the above entitled cause, respectfully shows that:

40 1. Petitioners find themselves aggrieved by a
final decree made in the Court of Chancery by his

Petition of Appeal.

Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date July 29, 1929 in a certain cause in said Court of Chancery wherein the said Robert C. Nelson is complainant and the said American Trust Company, Trustee of Edwin S. Wilson aforesaid *et als.* are defendants, in this respect to wit; that the said decree adjudged that the said American Trust Company, Trustee as 10 aforesaid, do specifically perform an alleged agreement dated May 12, 1920 and, pursuant thereto, execute and deliver to complainant a trust deed for a tract of land located in Hanover Township, Morris County, New Jersey, described in said bill of complaint, and in that it further adjudged that the defendants should pay a counsel fee of \$350, to the complainant and the taxed costs of Court:

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And the petitioners appeal from the decree of the Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous, in that

1. Said decree for specific performance was based upon an alleged option for the purchase of said property dated May 12, 1920 signed by American Trust Company, as Trustee, to which alleged option the widow of the said Edwin S. Wilson, she, Clara L. Wilson, did not give her written consent, which 30 was requisite.

2. On the further ground that the said Clara L. Wilson dissented from the making of sale under said option;

3. That her written consent was necessary to make the said option enforceable by virtue of the terms of the last Will and Testament of the said 40

Petition of Appeal.

Edwin S. Wilson, deceased, which provided as follows:—

10 “I do constitute and appoint as executor of this my will and as trustee hereunder without bonds the American Trust Company of Morristown, New Jersey with power to sell and convey any real estate I may die seized or possessed of; such sale and conveyance, if made during the life time of my wife, to be made only on her written consent.”

4. That the complainant having attempted to exercise the option in 1924, and being then unable to enforce it, exhausted and abandoned his rights under said option.

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

KING & VOGT
Solicitors for and of Counsel
with Appellants.

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Answer to Petition of Appeal.

Filed September 5, 1929

NEW JERSEY COURT OF ERRORS AND
APPEALS

The answer of Robert C. Nelson, the above-named appellee, to the petition of appeal of American Trust Company, Trustee &c., of Edwin S. Wilson, deceased, and others, the above-named appellants. 10

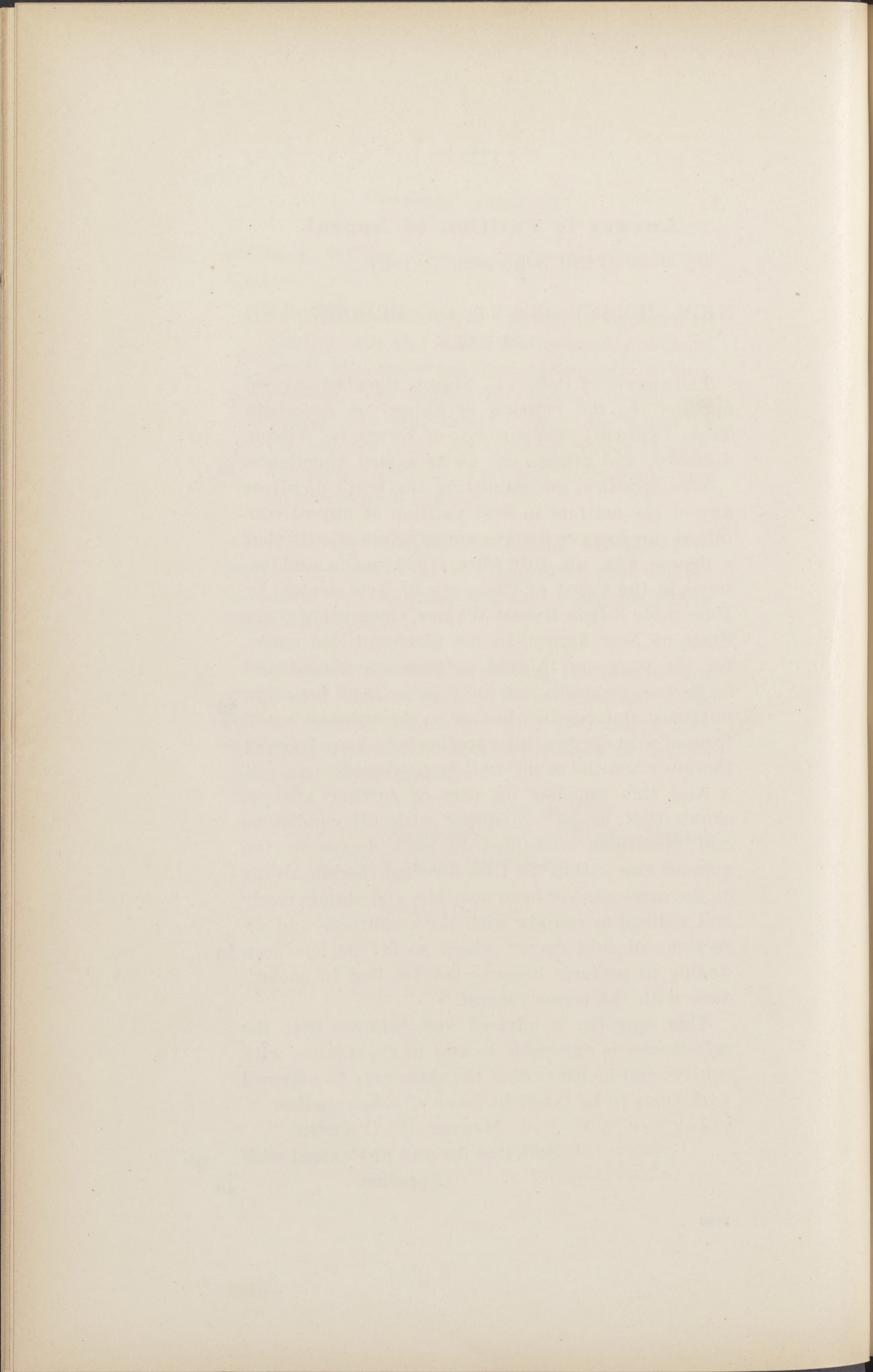
This appellee, not admitting the truth of all or any of the matters in said petition of appeal contained, for answer thereto nevertheless admits that a decree was, on July 29th, 1929, made and entered in the Court of Chancery of New Jersey, by Honorable Edwin Robert Walker, Chancellor of the State of New Jersey, in the above-entitled cause, for the purposes in said petition mentioned and as therein generally set forth, as well as for other purposes and results; but as to the substance and form of said decree, this appellee begs leave to refer thereto when the same shall be produced; 20

And this appellee by way of further answer, shows that he has complied with all conditions and directions contained in said decree in the manner and within the time directed therein, so far as the same has yet been possible, and stands ready and willing to comply with the conditions and directions of said decree which so far he has been 30 unable to perform because not yet due in accordance with the terms thereof.

This appellee is advised and believes that the said decree is agreeable to and in accordance with equity; and he prays that the same may be affirmed with costs to be taxed in favor of this appellee.

MARTIN R. O'KEEFE

Solicitor for and of Counsel with
Appellee, 40



New Jersey Court of Errors and Appeals.

Between

ROBERT C. NELSON,
Complainant-Appellee,

and

AMERICAN TRUST COMPANY, Trustee,
&c., of Edwin S. Wilson, deceased,
and others,
Defendants-Appellants.

On Appeal from the
Court of Chancery.

BRIEF ON BEHALF OF COMPLAINANT-
APPELLEE.

Facts.

Generally, the facts as shown by Brief on behalf of Defendants-Appellants are correct and are conceded by the Complainant with few exceptions.

To avoid error, the statement in Defendant's brief that the premises consisted of two parcels is corrected. The tract affected by the action consists of but one parcel of land described as in the bill of complaint (p. 1) improved by two buildings.

It is noticed that Defendants, on page 2, of their brief, have failed to recite that Mary Wilson, wife of William Q. Wilson, son of the testator still lives. The solicitors for defendants are her solicitors.

Reference is made to that fact to avoid any doubt as to the existence of the trust and the control of

the trustee over the trust property and the power of the trustee under the will.

But the defendants have omitted from their statement of facts an item which is of more or less importance, to wit (p. 56, line 9), that complainant after being advised by Defendant American Trust Company in 1924 that the trustee would not execute to Complainant its deed for the premises, Complainant declared to the Secretary of the trustee his intention and expectation of awaiting the death of Clara L. Wilson in order to obtain the title to the property, and that the trustee knowing the attitude of Complainant and his expectations of his rights under the lease and option, accepted the rent paid by Complainant in full compliance with his obligation under the lease and option down to the filing of the bill (p. 48, line 13).

The attention of the court is called to Exhibit D-4 (p. 62), wherein Clara L. Wilson in the memorandum supposed to have been made by her to indicate her objection to the sale to Complainant in 1924, made the comment at the end thereof,

"The lease was made out to Nelson and Silva, I never knew of any other arrangements being made with Mr. Nelson."

Apparently Clara L. Wilson had no objection to the provisions of the lease made to Nelson and Silva (which is the lease and option now in question, Schedule B, p. 13); and in her memorandum of 1924 indicated the idea that some new arrangement had been made with Nelson alone. No such arrangement had been made. It is the old agreement with Nelson and Silva, assigned by Silva to Nelson, which Complainant is trying to enforce.

Nowhere in the pleadings, nor in the proofs, is there any denial that the consideration specified in the option was sufficient and adequate.

POINT ONE.

The consent of Clara L. Wilson, widow of Edwin S. Wilson, to the lease and option now under consideration was not needed to make its execution valid by the trustee and to make it enforceable by the complainant upon the death of the widow within the term of the lease.

Complainant acknowledges the provision of the will of Edwin S. Wilson that no sale and no conveyance of his premises were to be made during the lifetime of his widow, Clara L. Wilson, without her written consent.

The Complainant denies that the lease and option under consideration are in violation of the provisions of the will of the testator; and in contravention insists that the lease and option are within the full power of the Trustee, limited only by the provision that during the life time of the widow no sale or conveyance of the premises could be made without her written consent. Complainant concedes that no conveyance could be made by the trustee during the lifetime of the widow without her written consent, but on the other hand denies that as a corollary the trustee had no power during the widow's life to obligate itself without her consent to sell at a future date. Complainant does not pretend to hold any new contract from the trustee made after the widow's death, and on the other hand insists that no new contract was needed. The old contract, which is just and fair, was performable and enforceable, at the time of the decree, which is the test.

To give effect to the present option would not remove from the will of the testator his intent that

the wisdom of any sale during the lifetime of his widow should be approved by her. No sale was made during the lifetime of the widow and none is asked by the bill; and no control was denied her during her life. Under the will, after her death she had no control over the sale of testator's property. No sale or conveyance of decedent's premises during the widow's life is asked by the bill in this cause.

The attempt to distinguish the cases cited by the Vice Chancellor from the cause under consideration seem to be without result. The situation which surrounded the *Union Brick vs. Lorillard*, 44 New Jersey Equity 1, as declared by the defendants, to wit, that the right to make the contract existed, but that the obligor was unable to perform is exactly the same situation which attended the present lease and option prior to the death of the widow. In the former case, when the disability was removed, the Court directed performance of the contract, and the same course should be followed here.

The comment of the Defendants on *Brown vs. Pinniger*, 81 New Jersey Equity 229, that it differs from this cause because in this cause Complainant entered into possession of the premises not by virtue of the option, but by virtue of the lease, is not accurate. The entry of the Complainant was by virtue of an unseverable agreement containing both the lease and the option, for which the same consideration was paid, with no apportionment thereof to either one of the benefits.

The instrument of May 12, 1920, containing both the lease and option, was acknowledged, respected and recognized by all Defendants and by the widow during her lifetime, and all of the beneficiaries under the will took the consideration which was paid, not as rental alone, but as rental and consideration for the option, combined, and Complainant is now entitled to enforcement thereof when the trustee is capable of performing.

Hollander vs. Abrams, 99 New Jersey Equity 254, is an analogy of the present case. The trustee is under no legal disability or inability to convey in accordance with the prayer of the bill; and was under no more legal inability to enter into the lease and the option sought to be performed in this case than was the married woman to enter into the contract for sale (without her husband) which was enforced against her in *Hollander vs. Abrams*, after his death. As Vice Chancellor Berry remarked at page 263 of the last cited opinion :

“The law excuses her (the married woman) if she cannot perform because of her husband’s refusal, but it does not excuse her merely because she will not perform. One who can, but will not, ought to be made to perform. That is the situation here.”

And so it is here.

The testator only limited the power of the trustee to make a sale or conveyance during the widow’s life. The most that might be presumed from that limitation was that he wished his real estate to be preserved by the trustee during the life of his widow unless she consented to a sale and conveyance thereof; but no limitation whatever was put upon the power of disposition by the trustee after the death of the widow, and no wish was expressed by the testator that the property should be retained after she had died; and, disregarding the doctrine of power raised by implication, as in *Crane vs. Bolles*, 49 New Jersey Equity 373, and *Lindley vs. O’Reilly*, 50 New Jersey Law 636, even in opposition to the testator’s direction, and the rule of strict construction of limitation on powers, Complainant insists that the trustee had full power during the life of the widow and without her consent to make the contract in question and that such contract is enforceable against the trustee upon the widow’s death. Except the limitation to make sale and con-

veyance during the widow's life without her consent, or to build without her consent, Defendants can not point to the slightest limitation upon the power of the trustee to handle the estate for the purpose of the will, or upon the power of the trustee to sell after the death of the widow or to contract to do so during her life.

Little doubt is there that if Mrs. Wilson had consented in writing to any sale of the premises at any time after the execution of the lease and option (Schedule B, p. 13) and particularly after Complainant had accepted the option, binding himself thereby, if Complainant had later refused to perform it, that the trustee would be entitled to a decree of performance, with damages, against Complainant. It would then have been an agreement for a sale, to which sale the consent of Clara L. Wilson had been given, and would have complied with all the terms of decedent's will. If that be true, the option must have been good from its beginning, and only unenforceable by Complainant, during the life of the widow, because of the lack of her consent to the sale or conveyance of the premises, in compliance with testator's will. The option could not be both good and bad, from its making.

If the Defendant by putting itself in position to convey could, after the acceptance of the option by the Complainant, compel Complainant to perform the contract, there is no reason why the same right should not be given the Complainant.

POINT TWO.

Lease and option was not a sale and conveyance; and, if defendant-trustee was able to comply with it at time decree was sought, it is enforceable against it. It is an entire contract, dependent upon the same consideration, and is not severable.

No "sale and conveyance" of the premises was made or attempted by the trustee during the life of the widow and no sale and conveyance during the life of the widow was requested by the bill filed in this cause.

The lease and option executed by the trustee with the complainant and his partner (Schedule B, p. 13) was not a sale and conveyance, because it carried with it no title to the premises and did not make the complainant and his partner the owners thereof. It was entirely an executory contract.

In *White vs. Treat*, 100 Fed. 290, the United States Supreme Court in defining a sale said (on p. 291):

"A 'sale' is a contract, an agreement and a meeting of the minds of two or more people founded on a money consideration by which absolute or general property in the subject of the sale is transferred from seller to buyer."

And this definition is accepted generally throughout the land.

One of the best distinctions was made by the Pennsylvania Superior Court in *Strong Demmer Co. vs. Dinninny*, 34 Atl. 919, wherein the distinction between a sale and an agreement to sell was

characterized as that the former was executed and the latter was executory.

Brooks vs. Wentz, 61 New Jersey Equity, 474;

Meyers vs. Metzgar, 61 New Jersey Equity, 522 (reversed on other grounds).

It is a recognized doctrine (under one of the exceptions of the rule of mutuality) that, though the contract could not be performed by one of the parties at the time of the making thereof, if it could be performed at the time the decree was sought, it is enforceable against that party. Some cases have gone even further and held that even though one of the parties was unable to perform at the time of the filing of the bill, if he were so able at the date of the decree, performance will be decreed against him.

The rule is laid down in *Frye on Specific Performance*, page 480, sec. 972, as follows:

“It is not necessary to the specific performance of a contract that it should be one which the parties at the time of entering into it had the power of carrying into effect *nor one with regard to which it depends on themselves alone whether they would ever be able to perform it.* For where a party enters into a contract without at the time having the power of performing it and afterwards acquired that power, he is bound to perform the contract he entered into.”

Numerous cases can be cited wherein a contract, unenforceable when made and even when the bill was filed, if enforceable at the date of the decree, has been recognized and enforced by a decree of specific performance. In *Day vs. Devitt*, 79 New Jersey Equity, 342, wherein Devitt, at the request of one Fallon, acquired title to certain premises for the benefit of Fallon's children, and later refused to comply with a contract of sale with Day, and on

hearing presented the defense that the contract was not enforceable because of lack of mutuality, insomuch as Devitt held the title in trust for the Fallon children, and that it could not be enforced against him because he was not capable of performing it when it was made, Vice Chancellor Garrison, in commenting on the defense, said (on p. 355):

“If it be determined that Devitt was the trustee of infants’ lands and that he must receive the confirmation of this court of any sale before he could properly make such sale, there was nothing to prevent Devitt after having negotiated this bargain from coming to this court and obtaining its confirmation, and then enforcing his rights against Day if Day had refused to carry out the contract. And, as I hold in this case, a similar right rested in Day, namely, to come to this court and bring the trustee and the *cestui que trustent* here, and the bargain made between the trustee and Day, and ask the court to confirm the sale and then enforce it.”

This situation is practically parallel to the one now before the court in this cause. There was nothing to have prevented the defendant-trustee from going to the widow and procuring from her the necessary consent during her lifetime, and then enforcing the option against the complainant, after complainant, by his acceptance in 1924, had turned it into a contract. And, if such were the case, it is hard to see why a similar right did not exist in favor of the complainant, now that the need for consent by the widow is gone and the trustee alone is capable of performing the contract which it made.

Green vs. Richards, 23 New Jersey
Equity, 32;
Cavanna vs. Brooks, 97 New Jersey
Equity, 327;
Gerba vs. Metruske, 84 New Jersey
Equity, 141.

The real test is whether or not the contract is enforceable at the time the decree is sought.

Second Union Co-Operative Land & Building Society vs. Hardy, 31 New Jersey Equity, 442;

Cramer vs. Mooney, 59 New Jersey Equity, 164;

Agens vs. Koch, 74 New Jersey Equity, 530;

Moore vs. Galupo, 65 New Jersey Equity, 194.

With the acceptance of the option by complainant, all doubt as to its mutuality was wiped away. As Vice-Chancellor Bentley put it in *Gordon vs. Schellhorn*, 123 Atl. 549:

“Complete performance by complainant is the greatest cure for lack of mutuality in a contract.”

The filing of the bill eliminated all question of mutuality, though such elimination was not needed under the doctrine of Chancellor Zabriskie in *Green vs. Richards*, 23 New Jersey Equity, 32, that a lease and option to purchase is one of the exceptions to the old rule against mutuality.

All question of the possibility of the trustee being unable to enforce the contract against the complainant is removed by this action.

The lease and option executed by the trustee with the complainant under date of May 12, 1920 was an entire contract. Though granting two separate rights, it was based upon one consideration which could not be apportioned to either right and is enforceable as to both its features.

In *Haslack vs. Meyers*, 26 New Jersey Law, 284, Mr. Justice Potts (on p. 287), in commenting upon the entirety of the contract which was for the sale

of land, notes and stock, for the consideration of a lot of groceries, said :

“The contract is an entirety. The defendant did not contract to have the land, the notes or the stock separately. He did not agree to take either without the other, or to allow a specified sum for either parcel alone; it was the whole together that he bargained for * * * .

“The rule as stated in *2 Parsons on Contracts, 29*, is that ‘if the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the other is *apportioned* to each item to be performed, or is left to be *implied by law*, such a contract will generally be held to be severable’. But here the price of the land, the stocks and the notes was not apportioned nor left to be implied by law. The price for the whole was the lot of groceries. And, in *2 Parsons on Contracts, 31*, we have the rule that ‘if the consideration to be paid is *single and entire*, the contract must be held to be entire, although the subject of the contract may consist of wholly independent items * * * !”

Just the same here, the contract was not severable. Complainant paid no portion of his rental for the right to occupy the premises and no portion of it for the right to have the option to purchase. He paid the whole rental for both rights combined. And, despite the fact that the trustee was unable to perform the contract when first requested so to do by the complainant in 1924, the trustee continued to accept the rental paid continuously by complainant down to the filing of the bill, with full knowledge that complainant expected performance of the contract by the trustee when the trustee was in a position to grant that performance (p. 56, line 20) without in any way refuting the contract nor advising complainant that complete performance would not be granted when possible; and all parties in interest, charged with the knowledge of the con-

tract by the occupation of the premises by complainant, stood by and permitted the complainant to continue in the faithful performance of his obligations under the contract with the understanding that he in time would be given the title to the property in accordance with the option which he accepted, if at all possible during the term of the lease.

All parties have taken from complainant the full consideration he was to have paid both for the occupation of the premises and for the opportunity to acquire the title thereto; and now that performance is rendered possible, they are estopped from denying it to complainant.

The true test of the validity of the contract between the trustee and the complainant is its enforceability as of the date of the decree. At that date it was enforceable. The trustee had full power to make the conveyance. No consent by any party was required.

With all elements essential to a valid contract and a just and equitable compulsion of performance on behalf of the trustee at the request of the complainant present, the decree of the Chancellor in favor of the complainant was proper.

POINT THREE.

Complainant never abandoned his rights under lease and option, but performance of complainant's original demand was postponed by mutual agreement between complainant and the trustee until trustee was able to perform; and in the interim complainant performed and complied with all obligations of his original contract of lease and option, which compliance was accepted by the trustee and all beneficiaries.

Under date of August 12, 1924 complainant, by his attorney, served on the trustee notice that he accepted the option as granted in the lease of May 12, 1920, which notice was acknowledged August 14, 1924 by the attorneys for the trustee (Exhibit D-1, p. 59; p. 52). Under date of August 25, 1924 the attorney for the trustee advised the attorney for complainant that in the course of a few days he could prepare the deed requested by the complainant if complainant's attorney would provide the description required (Ex. D-2, p. 60; p. 52).

The trustee advised the widow of the request of the complainant for a deed for the premises in accordance with the option by letter of August 20, 1924 (Ex. D-3, p. 61; p. 64, line 23).

According to the proofs the widow executed a statement under date of August 24, 1924 that she did not consent to the sale of the property to any one and that

"The lease was made out to Nelson & Silva. I never knew of any other arrangements being made with Mr. Nelson."

(Ex. D-4, p. 62; p. 57, line 30.)

Comment is made with regard to Exhibit D-4, that, according to the testimony of William Q. Wilson, the exhibit, being the objection of the widow to the sale, was kept in her private desk until after her death on April 1, 1928 (pp. 57 and 58); and the wonder is that the filing-system of the widow should have been so properly conducted as to make available at her death and the commencement of the suit the Exhibit D-4, which is supposed to have been executed by her four years earlier.

Upon the refusal of the widow to consent to the deed to the complainant when requested in 1924 (p. 55, line 1), conversation was had between complainant and the secretary of the trustee wherein complainant expressed to the secretary his surprise and disappointment at the refusal of the widow to execute the deed and declared that he would wait until the death of the widow in order to obtain the deed to which he felt he was entitled under his option and which the trustee was ready and willing to give in 1924, before it observed the limitation in the will (p. 56, line 4, *et seq.*; Ex. D-2, p. 60).

Being fully aware of the attitude and expectation of the complainant under the original lease and option of May 12, 1920, the trustee continued to accept the rental paid regularly by the complainant down to the filing of the bill (p. 48, line 13 to line 33).

All beneficiaries were charged with notice of the terms of the lease by complainant's occupation of the premises. *McClung Drug Co. v. City Realty Co.*, 108 Atl. 767, affirmed 111 Atl. 926. The widow knew that he had demanded the title in accordance with the option; the trustee knew that, despite the widow's refusal to consent to or join in the execution of the deed requested by the complainant, complainant had declared that he intended to await

the death of the widow in order to procure the deed and that with that expectation in mind he would continue to perform his duties and fulfill his obligations under the original contract. No objection whatever was made by anyone, and no refusal of complainant's request nor intimation that his hopes would not be fulfilled upon the death of the widow was expressed by the trustee or any of the beneficiaries (except by the widow in her refusal to consent to or join in the execution of the deed).

No intention or no attempt whatever to change or modify the rights or liabilities of the parties under the original instrument was made on behalf of any of the defendants. No claim was ever made by anyone that the contract of May 12, 1920 was not a fair and honest bargain entered into for a sufficient consideration whereby it was agreed to grant an option at a price which was adequate.

The trustee continued to accept complainant's money with full knowledge of complainant's attitude and expectation and with full knowledge that complainant was not abandoning any rights which he claimed under the lease and option, but, on the other hand, was merely awaiting the time when the trustee would be able to perform the agreement.

No notice was given complainant that when the trustee was able to perform the original agreement, performance would not be granted.

The option was an integral part of the lease. And the lease was continuously performed by both parties thereto up to the time of commencement of this action. No pretense whatever has been made that defendant-trustee was not entitled to its rental under the lease; and no effort whatever was made by it, or anyone else, to remove complainant from the premises.

By mutual consent, and with the full knowledge of all interested parties (because they were charged with notice of the terms of the lease and

option by reason of complainant's possession, *McClung Drug Co. vs. City Realty Co.*, 108 Atl. 767, affirmed 111 Atl. 926) complainant and the trustee continued to perform the agreement of May 12, 1920 down to the date of the filing of the bill, recognized all rights and claimed all liabilities thereunder; and as a result agreed to the extension of the time for the acceptance and performance of the option until the trustee should be able to perform. There was no abandonment by complainant upon the inability of the trustee to give a deed in 1924 due to the refusal of the widow to join therein. As soon as complainant was advised of the situation he expressly declared his attitude to the Trustee (p. 56, line 20) and made it plain that he would await the death of the widow for a reassertion of his rights.

The lease and option were inseparable. And the trustee by the acceptance of complainant's rent, with full notice of complainant's attitude and expectations relative to the option, acquiesced in the postponement of the assertion of those rights until the widow's death, provided the lease was then still in effect.

No objection whatever was made by the trustee that the consideration to be paid for the conveyance of the premises in accordance with the option was insufficient. Its refusal was based entirely upon its inability to convey without the widow's consent.

Bearing in mind the attitude of the trustee in 1924, the express declaration of the complainant that he would postpone his rights until the death of the widow, the acceptance of the rental by the trustee with full knowledge of and acquiescence in complainant's attitude, coupled with the notice to all interested parties, by reason of complainant's possession, and the participation by them in the money paid by complainant, partly as consideration for the option which he had expressly declared

that he still claimed to be alive and enforceable; the postponement of any action by complainant until the trustee was capable of performing the contract, can do the complainant no harm.

McCormick vs. Stephany, 60 New Jersey Equity, 208;

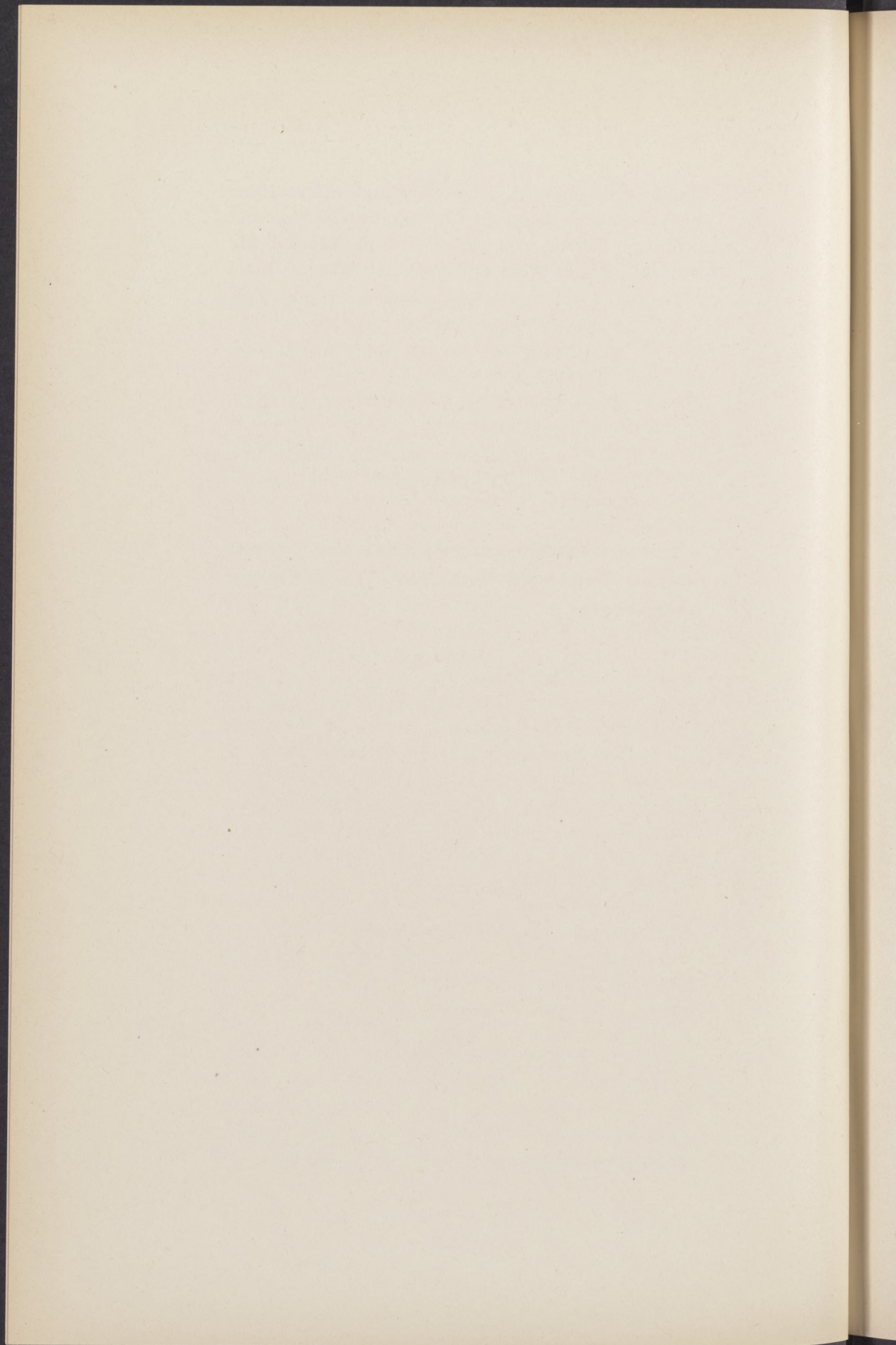
Thommen vs. Smith, 88 New Jersey Equity, 476;

New Barbadoes vs. Vreeland, 4 New Jersey Equity, 157;

McClung Drug Co. vs. City Realty Co., 108 Atl. 767, affirmed 111 Atl. 926.

I respectfully submit that the decree of the Court of Chancery be affirmed with costs.

MARTIN R. O'KEEFE,
Solicitor for and of Counsel with
Robert C. Nelson, Complainant-
Appellee.



New Jersey Court of Errors and Appeals.

Between

ROBERT C. NELSON,
Complainant-Respondent,

and

AMERICAN TRUST COMPANY, Trustee,
&c. of Edwin S. Wilson, deceased,
et al.,

Defendants-Appellants.

On appeal from the
Court of Chancery.

BRIEF ON BEHALF OF DEFENDANTS AMERICAN TRUST COMPANY, Trustee, under last will and testament of Edwin S. Wilson, deceased, WILLIAM Q. WILSON, and MARY WILSON, his wife, EDITH DELMONICO and LOUIS C. DELMONICO, her husband, WILLIAM WILSON and MADELINE O. WILSON, his wife.

Facts.

This is an appeal from a final decree in the Court of Chancery in favor of complainant.

The suit is for specific performance. Complainant seeks to compel American Trust Company, in its capacity as trustee under the last will and testament of Edwin S. Wilson, deceased, to convey to him two parcels of improved property located at Whippany, Morris County, New Jersey.

Edwin S. Wilson died July 5, 1912, leaving a last will and testament appointing American Trust

Company, executor and trustee thereunder. The pertinent clause in his will with reference to the case at bar is as follows (p. 12, line 18) :

“I do constitute and appoint as executor of this my will and as trustee hereunder without bonds the American Trust Company of Morristown, New Jersey with power to sell and convey any real estate I may die seized or possessed of; such sale and conveyance, if made during the lifetime of my wife, to be made only on her written consent.”

The decedent was survived by his widow, Clara L. Wilson, who died April 1st, 1928 (p. 46, line 40), and by his son, William Q. Wilson, husband of Mary Wilson, and by his two grand-children, Edith Delmonico and William Wilson, defendants herein. The All Souls Hospital and the Memorial Hospital of Morristown are residuary conditional beneficiaries (p. 12, line 13).

On May 12, 1920 (p. 13, line 28), American Trust Company, *as trustee*, entered into a lease with Robert C. Nelson, complainant, and William C. Silva, whereby it leased the store property, a portion of the land above referred to, for the term of ten years from May 15, 1920 (p. 14, line 14). Clara L. Wilson did not join in said lease.

The lease contained the following provision :

“It is also agreed by and between the parties hereto that the said party of the second part shall have the right and privilege of purchasing said premises and the premises immediately in the rear thereof with the house thereon belonging to the estate of said Edwin S. Wilson for the sum of \$7000.00.”

The lessee, Silva, later assigned his interest in the lease to the complainant (Schedule C, p. 17).

On August 12, 1924, complainant advised the American Trust Company, as trustee, that *he exercised the option to purchase the property* (p. 46,

line 29) (Ex. D-1, p. 59), which included the store property and the premises in the rear thereof. The said complainant was then advised by American Trust Company that it could not convey the property to him because the widow, Clara L. Wilson refused to consent thereto (p. 55, line 8; p. 52, line 14; p. 53, line 10, etc.).

Among the personal effects of the said Clara L. Wilson after her death there was found a memorandum dated *August 24, 1924*, signed by her, which reads as follows (Ex. D-4, p. 62) :

“As I have not been consulted in the sale of the store property, which was made necessary by the will of Mr. Wilson, I hereby do not consent to the selling of the property to anyone. I am able to carry it, and expect to do so do not think I can be compelled to do so. Do not accept any mortgage at five percent on the property, only invest at 6 percent. The lease was made out to Nelson & Silva, I never knew of any other arrangements being made with Mr. Nelson.”

(Signed) CLARA L. WILSON

Complainant took no steps seeking to enforce compliance with the exercise of the option at that time and did nothing further until three days after the death of the widow, namely April 4, 1928, when the solicitor for the complainant served the American Trust Company, as trustee, with a new notice advising that the purchaser “exercises the option” and demanding delivery of a deed (Schedule E, p. 22), which notice was followed by a formal notice on May 4, 1928 (Schedule G, p. 24). Compliance with the notice was refused and the present suit resulted.

POINT ONE.

Complainant has no right to specific performance of the alleged option to purchase, for the reason that at the time when the lease containing the option was given by the trustee, the widow of Edwin S. Wilson, who was then living, did not consent thereto.

In the case of *Bettcher vs. Knapp*, 94 N. J. E. at 435 (E & A) the Court held that a person seeking to compel conveyance of property by the legal representative of an estate is *chargeable with notice of the trust*.

In the will of Edwin S. Wilson the power to *sell* and *convey*, if made during the lifetime of the widow, Clara L. Wilson, was to be made only on her written consent.

The alleged option clause in the lease speaks as of *May 12, 1920*, the date of its *execution*.

The *obligation* of the trustee to make *sale* of the property of the decedent either did or did not exist at that time by virtue of the lease.

By the provision of the will the trustee could not then make sale or obligate itself to sell without the consent of the widow. *Complainant was charged with notice of that fact*. He could have obtained an effective contract to purchase *only by securing the signature of the widow thereto*.

The situation, disclosed by the case, is not comparable with one where a Trustee, similarly restricted, *after* the death of the widow, enters into an agreement to sell or gives an option to buy, for there the necessity of the widow's consent would have been removed by her death.

Here the option was *void*, because of the failure of the widow to consent and could not be given validity by the death of the widow during the life of the lease.

The testator by his will, said that not only could no *conveyance* be made during the lifetime of the widow without her consent but no *sale* could be made without similar consent. Therefore, at the time the American Trust Company, as trustee, attempted to obligate itself to sell, it was without power to do so. *The option is the basis of the suit.* The conditions, existing at that time, control, not the conditions existing at the time of the attempted exercise of the option.

Complainant seeks to place this case in the category with one where, *after the death of the widow*, the Trust Company could, in the exercise of its discretion, obligate itself to sell the property.

The testator clearly intended that the Trust Company should be without power to *sell* during the widow's life. As a corollary thereto he must have equally intended that the American Trust Company was without power during the widow's lifetime, without her consent, *to obligate itself to sell*, for he wanted the widow's wish to control any disposition of the property.

To hold that the Trustee could not *sell* or *convey* without the widow's consent, but could grant an enforceable option without her consent, would be to import a new provision in the will.

The position of the complainant is anomalous. He says in effect: *The option I hold is valueless if the widow continues to live during the term of the lease; if she dies it becomes an enforceable contract.* This ignores the fact that the option, which is the sole basis of complainant's suit, speaks as of its making. *Complainant holds no new contract made after the widow's death.* The testator's in-

tent that the widow should pass favorably on the sale is nullified by complainant's contention.

Giving an option to purchase (alleged by complainant to be enforceable in a Court of Equity) is in effect equivalent to a *sale*. It is settled in this state that such a provision as that which is contained in the lease in question is tantamount to an agreement to convey the land.

Howarltty vs. Warren, 3 C. E. Gr. 124;
Lounsberry vs. Locander, 10 C. E. Gr. 554;
Union Brick and Tile Mfg. Co. vs. Lorillard (44 N. J. E. 1).

Can it be said that the testator intended that the American Trust Company should not have power to sell without the consent of the widow, but could have power, *during the life of the widow*, to bind itself to convey without the widow's consent at some future time, and then, if the widow dies before the term of the option expires, that the contract, unenforceable when made, becomes a valid instrument upon which this Court can base a decree of conveyance?

Would not such a result remove from the will the intent of the testator that the wisdom of the sale should be approved by his widow?

In the conclusions filed by the Vice-Chancellor it is asserted that the case at bar is analogous to that of a contract made by a *feme covert* to sell real estate, where, after her husband's death, specific performance of such a contract may be decreed (*Union Brick & Tile Mfg. Co. vs. Lorillard*, 44 N. J. E. 1).

The distinction between the cases is apparent. In the case cited the right to make the contract existed, but the obligor was unable to perform. When the disability was removed the court compelled performance of the contract.

The case at bar is the antithesis of the cited case; here the obligor was without right to make the contract to sell without the widow's consent. This was not an inability to perform, but inability to make the contract.

Chancellor McGill, in the case of *Union Brick and Tile Mfg. Co. vs. Lorillard* (above cited), said at page 5 of 44 N. J. L.:

"I conceive that the only purpose of the limitation is to enable the husband to preserve from alienation a property of his wife in which he may acquire an estate. The *possibility of such acquisition is extinguished at his death.*"

The case at bar presents no such purpose for the restriction. The testator directed that his wife's consent was necessary to any sale or conveyance made in her lifetime. He undoubtedly intended thereby to clothe her with the determination of the wisdom of such sale. It was not "to preserve from alienation property in which she might acquire an estate" as in the case cited in 44 N. J. L. Her judgment was undoubtedly primarily for the benefit of the ultimate beneficiaries.

The Court below also cited *Brown vs. Pinniger*, 81 N. J. E. 229, where it was held that though a vendor only had a dower estate in the premises which she contracted to convey, the contract will be specifically enforced where the vendor acquired the fee and the vendee entered into possession under the contract with the vendor's acquiescence.

The Court there said at page 232:

"It is further urged by the demurrant that at the time the defendant made the contract to convey the fee, she was possessed only of an estate in dower in the lands, and that the entry into possession by the complainant thereunder was not such a part performance as to take the agreement out of the statute. The answer to this is that the *complainant entered into pos-*

session of the land in pursuance of the defendant's contract of sale, and not in virtue of her supposed freehold estate. So far as she was concerned, it was a lawful entry and possession. The subsequent acquisition by the defendant of the fee in the premises accrued to the complainant, and enlarged his right of possession, and this having been acquiesced in by the defendant, and she having situated herself so that she could, if willing, carry out the terms of her contract, a court of equity will decree a specific performance."

There is no analogy in the cited case. In the case at bar the entry of the complainant was not by virtue of the option but by virtue of the lease.

The case of *Hollander vs. Abrams*, 99 N. J. E. 254, cited by the Court below (p. 67, line 21), is not analogous. That case held that (from syllabus) :

"A married woman is estopped in equity to interpose the defense of coverture in a suit for specific performance of her contract for the sale of her lands, where, at the time of the execution and acknowledgment of that contract, she falsely represented herself to be a widow and accepted a part of the purchase price, the vendee relying on such false representation; and that a married woman's contract for the sale of land, unenforceable at its date because not joined in by her husband, is enforceable in equity if at the time fixed for performance she has become discovert by death or divorce."

There can be no estoppel in the case at bar. It is not a case of the Trust Company's *unwillingness* to perform but its *legal inability*. This distinction was noted by Vice-Chancellor Berry at page 263 of the last cited decision.

In the last cited case the Court said that the married woman's contract was not void, but merely unenforceable at the will of the husband.

The distinction between the line of cases relied upon by the court below, and the case at bar is clear.

There is no doubt that an *individual* may enter into a contract, which he is temporarily unable to perform: and when the disability is removed, the court may compel performance. In such a case the obligor had a legal right to make the contract, and when the disability was removed performance was required.

In the case before the court the Trustee could not make the contract without the consent of the widow who was then living. As the will was recorded, and the complainant was dealing with the trustee, he was chargeable with notice of the limitation of the right of the trustee to obligate itself to convey. The death of the widow could not create a right to sell where none existed.

POINT TWO.

The complainant having attempted to exercise the option in 1924 and having been then refused cannot later seek to re-assert that right.

In the year 1924 the widow, being alive, complainant gave notice of the acceptance of the option. Refusal to convey was made by the trustee because the widow refused to consent. If complainant had any rights under the option his proper procedure would have been to then institute a suit seeking to compel specific performance.

In other words, having attempted to exercise the option, his rights, if any, under the lease, changed from a mere option to a chose in action, namely to

assert by proper procedure in the Court of Equity his alleged right to purchase the property.

Having refrained from taking this course he cannot again revert to the lease and assert that the option is still outstanding and subject to acceptance.

The Court below found no merit in the foregoing contention of defendants, citing the case of *Thommen vs. Smith*, 88 N. J. E. 476. This case is not analogous because there the lessor and lessee *mutually agreed to surrender a contract made pursuant to the tenant's exercise of the option.*

Having mutually agreed to the surrender of the contract the Court held that the option was still alive.

We respectfully submit that the decree of the Court of Chancery be reversed.

KING & VOGT,
Solicitors of American Trust
Co., *et al.*

ELMER KING,
HAROLD A. PRICE,
of Counsel.



