

INDEX

	Page
Bill of Complaint	1
Affidavit, verified June 21, 1915	14
Order for Preliminary Injunction	20
Answer	21
Replication	29
Testimony	30
Conclusions	68
Decree	70
Notice of Appeal	72
Affidavit of Service of Petition of Appel	74
Petition of Appeal to the Court of Appeals ..	73

WITNESSES

Complainant's:

Samuel H. Bowman,	
Direct	30
Cross	41
Re-direct	46
Re-cross	47

Defendants':

William M. Brown,	
Direct	47
Cross	51
Frederick M. Payne,	
Direct	60
Cross	62
Allan Lindsley,	
Direct	65

EXHIBITS

<i>Complainant's:</i>	Offered Page	Printed Page
Exhibit C-1—Sheriff's deed, abstract	93	75
Exhibit C-2—Deed to Kiesler, abstract	94	75
Exhibit—Deed from Kiesler to Brown		76
Exhibit C-3—Receipt from Whitehead	110	81
Exhibit C-4—Deed, Brown to Kies- ler	116	81
 <i>Defendants':</i>		
Exhibit D-1—Yellow envelope		182

New Jersey Court of Errors and Appeals

Bill of Complaint

(Filed June 22, 1915)

IN CHANCERY OF NEW JERSEY

*To his Honor Edwin Robert Walker, Chancellor
of New Jersey:* 20

Humbly complaining shows unto your Honor,
your orator Samuel H. Bowman, of the Borough
of Caldwell, in the County of Essex and State of
New Jersey, that on or about the third day of
December, eighteen hundred and ninety-eight,
your orator bid for and purchased at public ven-
due, held by Henry M. Doremus, then sheriff of
the County of Essex, at the court house in the
City of Newark, in said county, certain lands and
premises in the township of North Caldwell, in
said county, bounded and described as follows: 30

The first lot being a part of the real estate
formerly of Josiah Francisco, deceased, bounded
as follows: on the east by lands formerly of Jona-
than Beach deceased, on the north by the same
lands, on the west by lands of Cornelius Courter
and on the south by lands of Josiah Vanness, con-
taining ten acres, more or less.

The second lot beginning on the southeast cor-
ner of Henry Courter's lot on the line of Peter
and John Francisco; thence on the line of the said 40

Bill of Complaint

Henry Courter's land north 42 degrees 30 minutes east 33 chains and 35 links to the line of Stephen J. Gould; thence on his line the whole distance of the north end of said lot; thence bounding on the east on line of Calvin and Peter Francisco, Josiah Vanness, Henry Courter and Jefferson Vanness, and bounding on the south on line of Peter and John Francisco to the place of beginning containing nine acres, be the same more or less.

10
20
Third lot; Beginning on the northeast corner of the lot hereby intended to be conveyed and adjoining land now or formerly of John C. Bush; thence along the same south $25\frac{3}{4}$ degrees east 5 chains 64 links; thence south 64 degrees 15 minutes east 26 chains 60 links to land sold by John Munn and others, commissioners, to Rynier Vanness' lands: thence along his line north $25\frac{3}{4}$ degrees, east 5 chains 64 links; thence north 64 degrees 15 minutes west 26 chains 60 links to the place of beginning, containing 15 acres. Being the same premises conveyed to the said John Bowden by John Munn and others, commissioners, by deed recorded in Book A 27 of deeds for Essex County on pages 361 &c.

30
40
4th lot: Beginning in line of lands of Cornelius Speer; thence (1) north 43 degrees west 96 chains to the line of lands of Isaac Kent, dec'd; thence along the same north 47 degrees east 1 chain 46 links; thence south 43 degrees east 96 chains 50 links to the aforesaid Speer's line; thence along the same south 65 degrees west 1 chain 51 links to the place of beginning. Containing 14 acres and $14/100$ ths of an acre with the appurtenances.

Being the same premises conveyed to said Kies-

Bill of Complaint

ler by Stephen J. Gould *et al* Exrs. by deed dated March 1, 1855 and recorded in Book V 10 of Deeds for Essex County on page 443 &c.

And your orator further shows that thereafter the said Henry M. Doremus, sheriff as aforesaid, made and delivered his deed of conveyance bearing date on said December 3, 1898, whereby he conveyed to your orator and to his heirs and assigns, all the right, title and interest one Isaac Kiesler had in the said lands and premises as above described, and which deed having been duly acknowledged and proved, according to law, was recorded in the office of the Register of the County of Essex on the eighteenth day of April, 1905, in Book M-38 at page 410. 10

And your orator further shows that he entered into possession of the said lands and premises under said deed and has ever since been, and still is in possession of the said premises under a claim of right, claiming to be the owner thereof, and that hitherto his title to and possession thereof, and his full and absolute ownership therein in his own right, in fee simple, has never been questioned except as hereinafter shown. 20

And your orator further shows that before the said sheriff's sale and in or about the month of February, 1898, the said Isaac Kiesler made his certain deed of conveyance bearing date on said day, which deed purported to convey to one William M. Brown of the City of Newark, in the County of Essex aforesaid, all and singular the first three parcels above described for the nominal consideration of One Dollar. The deed after being acknowledged was recorded in the Office of the Register of the County of Essex on the fourth 30 40

Bill of Complaint

10 day of February, 1898, in Book I 31 at page 178, and that thereafter and at exactly what date your orator is ignorant the said William M. Brown made, executed and delivered to John W. Whitehead, of the City of Newark, then a counsellor at law of the Supreme Court of this State, engaged in the practice of law in the said City of Newark, and acting as counsel for the said Isaac Kiesler, his deed of conveyance whereby he re-conveyed all and singular the premises described in the said deed, bearing date February 4, 1898, to the said Isaac Kiesler.

20 And your orator further shows that the said deed re-conveying the said premises was made and delivered by said William M. Brown and received by the said John W. Whitehead, as attorney for the said Isaac Kiesler, before the said lands were levied upon and sold by the said Henry M. Doremus, sheriff, as hereinbefore set forth, and that at the time of the said sale by the sheriff the said Isaac Kiesler was seized of an absolute indefeasible estate in fee simple of all the said lands and premises, which title and estate were by virtue of the proceedings and sale hereinbefore set forth transferred to and became
30 vested in your orator.

And your orator further shows that the said deed made and delivered by said William M. Brown to the said John W. Whitehead was not recorded but was retained by said John W. Whitehead in his office, but your orator was informed by the said John W. Whitehead and believes, and therefore alleges that the delivery of the said deed to him was an absolute
40 delivery and that it was the intent and purpose

Bill of Complaint

of the said John W. Whitehead, acting for the said Isaac Kiesler, to record the same, and that the said John W. Whitehead stated and repeated to your orator before your orator purchased the said lands and premises at the sheriff's sale, that he had said deed in his possession subject to be recorded, and that it was his intention to record the same, and he thereupon informed your orator that it was safe for him to bid in the premises and that he would acquire a good and valid title thereto by the said sale, and that he, the said John W. Whitehead, would forthwith record the said deed, so that your orator's title should be made perfect of record. 10

And your orator further shows that for some reason unknown to your orator the said John W. Whitehead neglected to record the said deed during his lifetime and same was, after his death, found in his safe by one Frederick M. Payne, a counsellor-at-law, of the City of Newark, who was then a clerk or a partner of the said John W. Whitehead, and was retained by the said Frederick M. Payne in his possession; and has ever since been retained by him and is now in his possession. That your orator has frequently asked the said Frederick M. Payne to give up and surrender the said deed to your orator as the legal and equitable owner of the said premises and entitled thereto, to the end that the same might be recorded, and that your orator might hold the same as a muniment of title, but the said Frederick M. Payne has refused so to do, stating that the said William M. Brown asserted some right, title or interest in the said deed or in the said lands and premises described therein adverse to 20 30 40

Bill of Complaint

the interest of your orator therein, and further stating that the said deed had been handed to him, the said Frederick M. Payne "in escrow" and has exhibited marks or writings upon the envelope containing the said deed in hand-writing of the said Frederick M. Payne, purporting to show that the said deed was held in escrow, but why the said deed was held in escrow or upon what terms or upon what conditoins the said deed was to be delivered, if any, the said Frederick M. Payne does not disclose, nor does he exhibit any writing signed by the said Isaac Kiesler or by the said John W. Whitehead or by any other person, purporting to have authority to represent the said John W. Whitehead or the said William M. Brown or to have any authority to state any terms or conditions, or any agreement of the said Isaac Kiesler or the said William M. Brown, whereby the said William M. Brown could claim or assert any right, title or interest in the said deed or in the said lands described therein.

And your orator further shows that at the time he purchased the premises at sheriff's sale as aforesaid, the said John W. Whitehead acted as his counsel and attended the sale and bid in the property for him and in his presence, and that your orator bid in the said property and paid the consideration therefor upon the faith of the representations made to him by the said John W. Whitehead, acting as attorney and counsel for the said Isaac Kiesler.

And your orator further shows that since the death of the said John W. Whitehead the said William M. Brown notified your orator that he had some claim upon the said premises or upon

Bill of Complaint

the said deed as security for the payment of an alleged sum of money due him from the said Isaac Kiesler and on the 28th day of September, 1908, your orator received a letter purporting to come from the said William M. Brown but signed by the typewriter in the words and figures following: 10

“Newark, N. J., September 28, 1908.

Samuel Bowman Esq.,
Post Office Building,
Newark, N. J.

Dear Sir:

In relation to the Issac Kiesler property, I would say that I am about to make an applica- 20
tion to the Court of Chancery for the enforcement of the payment of money as per agreement at the time I gave a deed in escrow for the said property. I understand that you are interested in the said property, therefore, I write you in order that you may communicate with me before I add these costs to the property.

Yours truly,

WILLIAM M. BROWN, 30
Per R. M. R.”

Previous to this your orator had been informed of some such claim and had called upon the said Payne and was then informed by him that there were no charges nor any agreement, nor any notation to hold the said deed as security for or in escrow for the said William M. Brown. 40

Bill of Complaint

And your orator, therefore, took no action in response to the said letter of September 28th, expecting that the said William M. Brown would make his application to the Court of Chancery as therein stated.

- 10 Subsequently and on or about the 20th day of May, 1910, your orator received a second letter from the said William M. Brown, a true copy of which is as follows:

“Newark, N. J. May 20, 1910.

Mr. Samuel Bowman,
Caldwell, N. J.

Dear Sir:

- 20 In the year 1897 a deed was made to me by Isaac Kiesler for services rendered in bringing suits and in the settlement of the estate of his brother Jacob Kiesler. I subsequently in the month of October, 1907, re-deeded this property back to him (Isaac Kiesler) which deed was placed in escrow to secure to me the payment of a bill due as an account stated between us of \$250.00.

- 30 You subsequently purchased the property deeded by said Kiesler to me under execution issued and as I understood took possession of the same.

- 40 There is due me at the present time on this claim the sum of \$430.00. I am about to file a bill in chancery to have the said deed and mortgage and foreclose it upon said property. I did not want to take this step as it will entail a cost of over \$100 and, therefore, I notify you before

Bill of Complaint

so doing. Please give this your prompt attention, otherwise I shall demand that my deed be reinstated.

This deed has never been placed upon record and is still off of record, therefore, the title to the property in whose hands it may be at the present time is absolutely void and the income, if any, derived from the same I shall demand an account for. 10

Yours very truly,

WM. M. BROWN."

And again your orator took no action with respect to the same, expecting that a proceeding would be brought in the Court of Chancery, in which suit all matters could be brought to the attention of the Court and adjudicated upon, and that your orator would, in such proceedings, obtain a decree that he was entitled to receive the said deed either absolutely or upon such terms and conditions as the Court should find and determine to be just. 20

But your orator says that no proceeding in chancery was ever brought by the said Payne or the said William M. Brown.

And your orator further shows that on or about the tenth day of June instant the said William M. Brown commenced an action in the District Court for the First Judicial District of the County of Essex against the said Frederick M. Payne, to recover possession of the said deed and filed his State of Demand therein, which State of Demand is as follows: 30

40

Bill of Complaint

DISTRICT COURT

FIRST JUDICIAL DISTRICT—ESSEX COUNTY

10	WILLIAM BROWN, <div style="text-align: center;">vs.</div> FREDERICK M. PAYNE,	Plaintiff, Defendant.	}	In Replevin Demand
----	--	------------------------------	---	-----------------------

The defendant in this suit was summoned to answer the plaintiff herein of a plea wherefore he took the goods and chattels of the said plaintiff, and unjustly detained the same.

20 And thereupon the said plaintiff, by Helm & Ready, his attorneys, complains for that the said defendant on or about the first day of May, nineteen hundred and fifteen, in the City of Newark, Essex County aforesaid, took the goods and chattels, to wit, one certain deed dated the 14th day of February, eighteen hundred and ninety-eight, made by said William M. Brown and Minnie Brown, his wife, to one, Isaac Kiesler and acknowledged before Frederick W. Leonard, a Mas-

30 ter in Chancery of New Jersey, belonging to said plaintiff of great value, to wit, value at Four Hundred (\$400.00) Dollars, and unjustly detained the same.

Wherefore the said plaintiff says he is injured and has sustained damages to the amount of Four Hundred Dollars (\$400.00) for which amount judgment will be claimed.

HELM & READY,
Attorneys for Plaintiff."

Bill of Complaint

And that on or about the 14th day of June your orator was notified by the said Ferderick M. Payne of the commencement of the said action and that the same was returnable on the sixteenth day of June in the District Court of the First Judicial District of the County of Essex, which is located at Montclair, N. J. 10

And your orator is informed that the said action was adjourned one week and may come up for hearing in said District Court on the 23d day of June instant.

And your orator is advised that the said State of Demand does not show any ground or basis upon which the said William M. Brown bases any claim to have said deed returned to him and that if the said Brown had any claim at all upon the said deed or upon the premises thereby conveyed by him to the said Isaac Kiesler the said rights are equitable in their nature and that the said District Court is without jurisdiction to determine the same, and that your orator is a necessary party to the determination thereof, and that by reason of his not being a party to the said action and also by reason of the nature of the action and of the proper remedy, and of your orator's rights in the premises there is danger that the said Frederick M. Payne may be compelled to deliver the said deed to the said William M. Brown, to the great wrong and injury of your orator and to the prejudice of his title to the said lands. 20 30

And your orator further shows that he is without remedy in the premises except by the aid of this honorable Court. 40

Bill of Complaint

In consideration whereof and to the end that the said Frederick M. Payne and William M. Brown may full, true and perfect answer make to all and singular the matters therein set forth, but without oath, the oath of the said defendant
10 being hereby expressly waived, and that as fully and particularly as if the said matters were herein repeated, and more especially that they may set forth and disclose whether at the time of the delivery of the said deed to the said John W. Whitehead, as counsel for the said Isaac Kiesler, there was any agreement between said Kiesler and said William M. Brown, whereby the said deed was to remain in escrow, and if so whether the said agreement was in writing or oral, and if
20 in writing may set forth a full and true copy thereof, and that your orator may have the decree of this honorable Court, ordering the said Frederick M. Payne forthwith to deliver the said deed made by the said William M. Brown to the said Isaac Kiesler to your orator, to the end that the same may be placed on record and may be retained by him as a muniment of title or, if it shall appear that any legal or binding agreement was made, whereby the same was to remain as
30 security for the said William M. Brown, for any sum, that the said sum may be determined and that the said deed may be decreed to be delivered to your orator upon the payment of the said sum, and that the said William M. Brown may be restrained from continuing and prosecuting his said suit in replevin in the District Court of the First Judicial District of the County of Essex, and that your orator may have such other
40

Bill of Complaint

and further relief as shall be proper in the premises and as shall seem to this Court to be equitable and just.

May it please your Honor, the premises considered, to grant unto your orator, not only the State's writ of injunction issuing out of and under the seal of this honorable court, restraining and enjoining the said William M. Brown from further prosecuting his said action in replevin in the District Court of the First Judicial District of the County of Essex, for the recovery of the said deed, but also the state's writ of subpoena directed to the said William M. Brown and Frederick M. Payne, commanding them and each of them, by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor in this Honorable Court, then and there to answer all and singular the said premises and to stand to abide by and perform such order and decree therein as to your Honor shall seem meet, and shall be agreeable to equity and good conscience. And your orator, as in duty bound, will ever pray &c.

EDWIN B. and PHILIP GOODELL,
Solicitors for and of
Counsel with Complainant. 30

Affidavit

IN CHANCERY OF NEW JERSEY

10	SAMUEL H. BOWMAN, <div style="text-align: right;">Complainant,</div> <div style="text-align: center;">vs.</div> WILLIAM M. BROWN <i>et al.</i> , <div style="text-align: right;">Defendants.</div>	}	On Bill &c.
----	--	---	-------------

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

Samuel H. Bowman, being duly sworn according to law says: I am the complainant in the bill of complaint hereto annexed.

20 I have read the said bill of complaint and it is true, so far as relates to my own acts, and as to the acts of others I believe it to be true.

On or about the 17th of January 1899, I purchased at sheriff's sale the premises described in the bill of complaint, which sale was upon execution against the property of one Isaac Kiesler, who then lived in Caldwell, New Jersey.

30 I am not sure whether the sale took place on January 17th or an adjourned date, but I find by the advertisement that it was first advertised on January 17th. I subsequently received a deed from the sheriff which deed bears date the third day of December 1898, and was acknowledged on May 22, 1899. I do not recollect exactly what I paid for the property, but it was in the neighborhood of Five Hundred Dollars.

40 I was well acquainted with Isaac Kiesler, the owner, I have known him ever since I was a boy. In 1898 he was a very old man.

Affidavit

The land described in the bill of complaint is outlying land and did not affect the homestead upon which the said Isaac Kiesler lived. I have made large payments to assist Mr. Kiesler and this property was taken in by me upon judgments obtained by myself and others against him. It came to my knowledge some time before this that said Isaac Kiesler had made a deed for this outlying land described in the bill to one William M. Brown, a lawyer of Newark. 10

I heard this first from Mr. Beach who was one of the executors of the will of Jacob Kiesler, the brother of Isaac Kiesler, against whom the said Brown had recently brought a suit in the name of Isaac Kiesler. After Mr. Beach told me this, Mr. Kiesler, himself, came to see me about it and said that he had given Mr. Brown such a paper but that he did not know what he was signing and he was troubled about it. At that time Mr. Kiesler was a very aged man and he was also an ignorant man who could not read nor write. At his request I went to see John W. Whitehead, then a prominent lawyer in Newark, and retained Mr. Whitehead on his behalf. 20

Mr. Whitehead, after hearing what I had to say told me to bring Mr. Kiesler down there which I did the next day. Mr. Whitehead questioned Mr. Kiesler thoroughly and after that turned to me and said he thought he could get the deed back, and asked if Mr. Kiesler had any money to pay his bill. I told him he had no money and he replied that he wanted a retainer. I then paid Mr. Whitehead twenty-five dollars as a retainer and received from him a receipt in the following language. 30 40

Affidavit

“Rec'd from Mr. Sam'l H. Bowman twenty-five dollars account of fee in case of Isaac Kiesler, in matter connected with estate of Jacob Kiesler and others, matter of Mr. Isaac Kiesler. February 9, 1898.

10

J. W. WHITEHEAD.”

I still have the original receipt signed by Mr. Whitehead.

A short time after this, but at just what time I do not remember, Mr. Whitehead told me that he had secured a reconveyance of the property from Brown to Kiesler, and said if I would come to his office he would show it to me. I went there and he showed me a deed. I recollect distinctly
20 that it was signed by William M. Brown and his wife, and that it was made to Isaac Kiesler and that it described, as nearly as I could tell, some property which I afterwards bought in.

At this time I had paid considerable money to help Mr. Kiesler out of his difficulties, with the expectation that I would be reimbursed in some way, and negotiations on the part of myself and Mr. Kiesler and others, in an attempt to bring out Kiesler's affairs, extended through the summer and fall of 1898. By that time there had been
30 judgments entered up against Kiesler, and I had Mr. Whitehead take out judgments in my favor and the property went to sheriff's sale upon all the judgments, and I bought in the property, as I have stated above, and paid off all the liens and claims on the property, including the other judgments.

Mr. Whitehead acted as my counsel at the time
40 I bid in the property, and advised me that he

Affidavit

could put the deed from Brown on record at any time, and that he would do so, and thus make my title good of record, and that I was perfectly safe in buying the property as I did. I relied on him to record the deed as promised, and also relied upon him to record my deed from the sheriff. In April 1905 I discovered that neither deed had been recorded. 10

I saw Henry M. Doremus, the sheriff, who sold me the property and he stated that he would see to it that his deed to me would be recorded, and it was recorded on the 18th of April 1905. I consulted with Mr. Robert H. McCarter of Newark, with reference to obtaining the deed from Mr. Payne, and at his advice went and saw Mr. Payne about it. Mr. Payne showed me the deed, I asked him if he had found an agreement and bond drawn up by Mr. Whitehead for the maintenance and care of Kiesler and signed by Joseph Beach, administrator of Isaac Kiesler's brother. He said that he did not. I then asked him if he found any charges, or any agreement or any notation made by Mr. Whitehead that the deed was to be held in escrow. Mr. Payne stated that there was nothing of the sort, and I saw for myself that there was no notation marked on the deed. 20 30

I am told that there is a memorandum on the envelope containing the deed, made in Mr. Payne's handwriting, but if so I do not recollect seeing it. I asked the defendant Payne at that time to give me the deed or to have it put on record. He replied that Mr. William M. Brown had been in there after Mr. Whitehead's death and claimed that he had some interest in the deed. He did not explain what the nature of Brown's 40

Affidavit

claim was but said to me, "Why don't you go and see Mr. Brown"? Acting under advice of Mr. McCarter I did not go and see Mr. Brown. Some time after this I had a little business in Mr. Payne's office and then I asked him again about this deed, and requested that I could have it to record. He then said that Mr. Brown claimed the deed was to be held until his bill was paid. I do not recollect his words but the substance of his reason for refusing to give me the deed was a claim of some sort for money which Brown claimed was due to him and that the deed was held in escrow until he should be paid. Afterwards I had a letter from Brown, dated September 1908. It came to me by mail. It was signed in type-writing and it reads as copied into the bill of complaint which I have compared. I did not pay any attention to this letter because of the statement that he would bring an action in chancery and it appeared to me that that was the proper way to have the matter adjusted. He took no action, however, and on May 20, 1910 he wrote me again. I compared this letter with the copy written in the bill of complaint and the copy is correct. I have both of these letters in my possession. When I received the second letter I consulted Thomas A. Davis, of Orange, and acting upon his advice I did not go to see Brown, but did keep the letter. He told me what he had told Brown and he advised me that if Mr. Brown would bring his action in chancery as he said he would, the proper adjustment of the matter would soon be brought about. I expected, therefore, that Brown would file a bill in chancery as he said. However,

Affidavit

Brown took no such action and I have never been able to get the deed. I had another letter from Brown in February 1913, simply requesting me to talk the matter over with him but I did not pay any attention to it.

On the 14th of June 1915 I received a letter signed F. M. Payne, informing me that a suit had been brought against him in connection with this deed, which was returnable in the Montclair District Court on Wednesday. The court room of the District Court for the First Judicial District of Essex County is located in Montclair, and I immediately retained my present counsel

SAMUEL H. BOWMAN.

Subscribed and sworn to before me this
21st day of June, 1915.

Margaret Murray,
Notary Public for New Jersey.

(Seal.)

A true copy.
Robert H. McAdams,
Clerk.

Order for Preliminary Injunction

(*Filed, June 30, 1915*)

IN CHANCERY OF NEW JERSEY

10

Between, SAMUEL H. BOWMAN, <div style="text-align: right;">Complainant,</div> <div style="text-align: center;">vs.</div> WILLIAM M. BROWN and FRED- ERICK M. PAYNE, <div style="text-align: right;">Defendants.</div>	}	Upon Bill &c.
---	---	---------------

20 This matter being opened to the Court by Edwin B. Goodell, of counsel with complainant, upon the return of an order to show cause made herein on the twenty-second day of June instant, and the defendants appearing by their counsel and consenting to the issuing of a preliminary injunction herein,

30 IT IS ON THIS TWENTY-NINTH DAY OF JUNE, NINETEEN HUNDRED AND FIFTEEN, ordered that a preliminary injunction issue herein restraining the defendant William M. Brown, his agents or attorneys, from prosecuting his action in the District Court of the First Judicial District of Essex County against the defendant Frederick M. Payne to recover the possession of the deed made by him to one Isaac Kiesler as specified in the complaint and enjoining and restraining the defendant Frederick M. Payne from delivering the

40 said deed to the said William M. Brown or to any

Answer

other person whatsoever until the further order of this Court.

Respectfully advised,
E R. WALKER,
JOHN R. EMERY,

V. C. 10

Entry of the within order is hereby consented to

HELM & READY,
Sol'rs for Defts.

A true copy.
Robert H. McAdams,
Clerk.

20

Answer

(Filed, July 1, 1915)

IN CHANCERY OF NEW JERSEY

Between,
SAMUEL BOWMAN,

Complainant,

and

WILLIAM M. BROWN, *et al.*,

Defendants.

On Bill &c.

30

The answer of William M. Brown, defendant, to the bill of complaint of Samuel Bowman, complainant.

40

Answer

This defendant answering says, that if the said complainant purchased at public sale, the lands and premises described in said Bill of Complaint, that the judgment and sale thereon was subsequent to the recording of your orator's said deed
10 to the premises mentioned and described, as by the record thereof will more fully appear.

And this defendant further answering says that if the sheriff of Essex County made and delivered the deed of conveyance, as alleged by the said complainant in said Bill of Complaint, that the said Sheriff did not, by said deed, convey to said
20 Isaac Kiesler of said lands and premises, because any such conveyance as alleged, would be subsequent to your orator's deed to said premises.

And this defendant further answering says that he admits that the complainant entered into possession of the said lands and premises and did so illegally and had no warrant of right, legal or otherwise, to enter into such possession as alleged, but without warrant of law the said complainant entered in and upon said premises and sold therefrom several hundred dollars worth of personal property belonging to the said Isaac
30 Kiessler.

That the amount due to the said complainant from the said Isaac Kiesler was a very small amount and in the opinion of this defendant, placed on information and belief, there was not as much as \$50.00 due from the said Isaac Kiesler to the said Samuel Bowman. In fact this defendant charges that the said complainant was, as
40 a matter of fact indebted to the said Isaac Kiesler.

Answer

And this defendant further answering admits that before the said sheriff's sale as alleged, the said Isaac Kiessler made a certain deed to the said defendant for the first three parcels so described in said bill of complaint and that the said deed was duly recorded in the office of the Register February 4th, 1898 Book I-31 page 178. 10

And this defendant further answering says that this defendant did execute a deed in escrow to one Frederic M. Payne, counsellor-at-law of the State of New Jersey, but did not deliver any deed to the said John W. Whitehead, who was acting as counsel for the said Isaac Keissler as alleged in said Bill of Complaint.

And this defendant further answering denies that the said deed so placed in escrow aforesaid, was made and delivered by this defendant and received by the said John W. Whitehead as attorney for the said Isaac Keissler, but was made and delivered to the said Frederic M. Payne for the express purpose to be placed in escrow for one week from the date thereof with the express understanding that the fee due to this defendant from the said Isaac Keissler would be paid within said week or that the property so conveyed by the said Isaac Keissler to this defendant would be his absolutely. 20 30

And this defendant further answering denies that at the time of the sale by the sheriff as aforesaid the said Isaac Keissler was seized of an absolute indefeasible estate in fee simple of all the said lands and premises which title and estate were by virtue of the proceedings and sale as alleged in said bill of complaint and transferred 40

Answer

and became vested in said complainant, but on the contrary said complainant has no estate or title whatsoever in said land and premises described in the deed made and executed to this defendant.

10 And this defendant further answering denies that there was any deed made by this defendant to the said John W. Whitehead as alleged in said bill of complaint, but that the only deed made by this defendant to the said Isaac Keissler was the one held in escrow by the said Frederic M. Payne and that said deed was not an absolute delivery and that it was not the intent and purpose of the said John W. Whitehead, who was not acting for the said Isaac Keissler to record the same.

20 And this defendant further answering denies that the said John W. Whitehead stated and repeated to the said complainant at any time that he had said deed in his possession, subject to be recorded and that it was not his intention to record the same and that he informed the said complainant that it was safer for him to bid in the premises and that he would acquire a good and valid title thereto by the said sale, and that he, the said John W. Whitehead, would forthwith record the said deed so that the complainant's title should be
30 made perfect; but on the contrary no such conversation ever took place between the said John W. Whitehead and the said complainant and that the said John W. Whitehead never had any such intention to record said deed or to help said complainant perfect his title.

40 And this defendant further answering denies that for some unknown reason the said John W. Whitehead neglected to record the said deed during his life time, but on the contrary says that the

Answer

said John W. Whitehead lived until the year of 1905 and never intended and never made any attempt to record said deed.

And this defendant further answering denies that after the death of said John W. Whitehead the deed was found in his safe by one Frederic M. Payne, but on the contrary says that the deed was originally given to Frederic M. Payne to be held in escrow by him with the full consent of all the parties concerned therein, and that the said Frederic M. Payne has ever since retained said deed in escrow and still has it in his possession. 10

And this defendant further answering says that the said Frederic M. Payne referred said complainant to this defendant in reference thereto.

And this defendant further answering admits that the said Frederic M. Payne did inform the said complainant that he held the deed "in escrow" as alleged in said bill of complaint and did exhibit marks or writing upon the envelope containing the said deed in the handwriting of the said Frederic M. Payne, setting forth that the said deed was held in escrow, and that it was unnecessary for the said Frederic M. Payne to exhibit to the said complainant any writing signed by the said Isaac Keissler or any other person stating any terms or conditions, or any agreement between the said Isaac Keissler or the said William M. Brown. 20 30

And this defendant further answering denies that the said John W. Whitehead acted as the complainant's counsel and attended the sale and did bid in the property for him, but that the said complainant did those things himself, but not upon the faith of the representations made by the 40

Answer

said John W. Whitehead, acting as the attorney of the said Isaac Keissler, as this defendant says that he, at all times, was the attorney for the said Isaac Keissler.

10 And this defendant further answering admits that he did notify the said complainant since the death of the said John W. Whitehead and before the death of the said John W. Whitehead that he had a claim upon the premises in question and held a deed as security for the payment of a certain sum of money due this defendant from the said Isaac Keissler, and that this defendant did, on the 28th day of September, 1908 write a letter to the said complainant in reference to said premises.

20 And this defendant further answering denies that the complainant called upon the said Frederic M. Payne and was informed by him that there was no agreement or any notation to hold the said deed as security for or in escrow for the said William N. Brown.

And this defendant further answering admits that he did in May 1910 send a second letter to the said complainant in reference to the said premises.

30 And this defendant further answering says that he admits that he took no action in the matter, expecting that the said complainant would bring proceedings as threatened by him.

And this defendant further answering says that he did on the 10th day of June instant, institute a replevin action in the District Court of the First Judicial District of the County of Essex for the recovery of said deed from the said Frederic M.
40 Payne, but since the filing of the Bill herein has

Answer

instructed his attorney to discontinue said suit so that the matter may be determined in this Court, and that said suit was instituted for the purpose of determining whether the said complainant still claimed any interest in said lands and premises.

And this defendant further answering says that he admits that the complainant was notified of the commencement of said action and at the request of complainant's attorneys, the same was adjourned.

10

And this defendant further answering says that he denies that the delivery of the said deed by the said Frederic M. Payne to the said defendant would cause any wrong or injury to the said complainant or to prejudice his title to said lands, as the complainant has no such title.

20

And this defendant further answering says that the agreement between himself and the said Isaac Keissler whom he represented as attorney, was a verbal one, to the extent that the said Isaac Keissler would convey to the said defendant the property mentioned and described in the deed made and executed by the said Isaac Keissler to this defendant and that the defendant would make and execute a deed and place it in escrow for one week from the date thereof so as to commit the said Isaac Keissler to pay the fee agreed upon between the said Isaac Keissler and this defendant, at that time, being the sum of \$250.00 in full settlement of all claims and demands by the said defendant against the said Isaac Keissler, and after one week's time the said deed was to be returned to this defendant to be destroyed by him so as to give this defendant full and perfect title

30

40

Answer

to the lands theretofore conveyed to him by the said Isaac Keissler.

10 And this defendant further answering says that he was led to believe by the said complainant that he intended to bring an action in the Court of Chancery to determine any rights he claimed to have in said premises because the said complainant consulted several attorneys in that regard, including the Hon. Robert H. McCarter and former Judge Thomas H. Davis, both of whom, this defendant is informed and verily believes explained to the said complainant that he had no legal right in said premises.

20 And this defendant further answering denies that the said complainant had retained the said John W. Whitehead as attorney for the said Isaac Keissler or paid a retainer to the said Whitehead on any matters connected with the said Isaac Keissler, but on the contrary says that any money paid by the said complainant to the said John W. Whitehead was paid to the said John W. Whitehead on personal matters of the said complainant.

30 And this defendant humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

Solicitors for Defendant.

Testimony

IN CHANCERY OF NEW JERSEY

10	Between, SAMUEL H. BOWMAN, <div style="text-align: right;">Complainant.</div> and WILLIAM M. BROWN, <i>et al.</i> , <div style="text-align: right;">Defendants. </div>
----	--

Before His Honor VICE CHANCELLOR STEVENS.

Messrs. Edwin B. & Philip Goodell for complainant.

Mr. Mathew J. Ready, for the defendants.

20

Transcript of shorthand report of the evidence given upon the trial of the above stated cause, on March Twenty-third, 1916, at Chancery Chambers, Newark, New Jersey.

SAMUEL H. BOWMAN, sworn:

Direct-examination by Mr. Goodell:

30 Q. You are the complainant in this action, are you not? A. I am.

Q. Where do you reside? A. Caldwell, New Jersey.

Q. I show you a certified copy of a deed made by Henry M. Doremus, sheriff, to Samuel H. Bowman, and ask you if you are the Samuel H. Bowman named in that deed?

Mr. Ready: We will admit the deed.

40

A. That is the deed.

Samuel H. Bowman—Direct

Mr. Goodell: Then I will offer in evidence certified copy of the deed made by Henry M. Doremus, sheriff, to Samuel H. Bowman dated March 7, 1899, recorded in the Register's office April 18, 1905.

Mr. Ready: We consent to its admission. 10

The Court: The consideration?

Mr. Goodell: The consideration is one hundred dollars I think; that is right, one hundred dollars.

The Court: Your bill says that the deed was made on the third of December, 1898.

Mr. Goodell: That the deed was made on that date. Well, I don't know how that date got in there. It appears from the recitals that the sale took place on the 7th 20 day of March, 1899.

The Court: The bill then is wrong.

Mr. Goodell: The bill evidently is wrong in that respect; third day of December is the date mentioned there.

The Court: Yes.

Mr. Goodell: That was the date of the issuing of the fi fa; it got in there by mistake.

Marked Exhibit C-1. 30

Mr. Goodell: I would like also to offer in evidence certified copy of the deed from Abigail Francisco and Stephen I. Gould, executors to Isaac Keisler, dated first day of March 1855, and recorded in the Register's office on the third day of June, 1859, in book U-10, page 443.

Mr. Ready: No objection. 40

Samuel H. Bowman—Direct

Mr. Goodell: That shows Mr. Keisler's title; he was the judgment debtor.

Marked Exhibit C-2.

10 Mr. Goodell: I have here certified copy of the judgment against Isaac Keisler, in the First District Court; the judgment was for \$40.72 damages, \$10.26 costs of suit.

The Court: What is the date of it?

Mr. Goodell: Dated the 21st day of June, 1898, docketed in the Essex County Clerks office the third day of December, 1898 in book 2 of docketed judgments at page 2, Samuel H. Bowman plaintiff and Isaac Keisler defendant.

20 The Court: Were there any prior encumbrances on this property?

Mr. Goodell: There were, I understand, back taxes and judgments against Mr. Keisler.

The Court: Any execution been issued?

Mr. Goodell: No, I don't understand that there had.

The Court: Then this was first lien on taxes, on the property subject to taxes.

30 Q. Will you state what the property consisted of? A. It consisted of wild wood land from which the timber had been cut off and removed, leaving a large growth of underbrush and briars, saplings, known as sweet gum.

Q. How many acres? A. According to the bill the taxation is twenty-six acres altogether.

Q. Whereabouts is it located? A. About three or four miles from the homestead of Mr. Keisler.

40 Q. Well, that does not tell us. A. It is in a re-

Samuel H. Bowman—Direct

mote part of North Caldwell, distant back from any road; there is no access to it except through other property.

Q. No part of it is upon any public street? A. None.

By the Court: Q. Any buildings on it? A. No 10
buildings on it.

Mr. Ready: Before certified copy of that judgment is offered in evidence I think I ought to be permitted to cross examine to see if the debt is really due from Mr. Keisler to Mr. Bowman. I may consent to the admission without any further effort at all, but I think we should get the details a little more fully, that is all.

The Court: I do not think this is the pro- 20
per time to cross examine. You may cross examine at the proper time. You want to object to the judgment on what ground, to the offer of the judgment? Do you object to it on any ground?

Mr. Ready: I will make no objection except I did want to know the details, that is all.

Q. Now at the time you bid in this property, Mr. Bowman, had you any knowledge of a deed 30
for this property to Mr. Brown? A. I learned that Mr. Keisler had given Mr. Brown a deed.

Mr. Goodell: Now have you that deed here, Mr. Ready, I mean the deed from Mr. Keisler to Mr. Brown?

Mr. Ready: No, we haven't got it; Mr. Brown states that was handed to Mr. Whitehead or Mr. Payne with the other 40

Samuel H. Bowman—Direct

deed. We will admit there was such a deed.

Mr. Goodell: Then I will ask leave to put that deed in evidence.

Mr. Ready: That deed did not cover all the property in question.

10 Mr. Goodell: It covered three of the four tracts.

Mr. Ready: I will make this statement. The deed from Keisler to Brown was dated and recorded prior to the entering of the judgment of Mr. Bowman against Keisler; that is admitted I believe.

Mr. Goodell: Yes; my memorandum here is, and I have no reason to doubt this is correct, that it was dated February 4, 1898 and acknowledged the same day and recorded the same day.

20

The Court: Deed from whom to whom?

Mr. Goodell: Deed from Isaac Keisler to William M. Brown, dated February 4, 1898 and recorded Feb. 4, 1898 in book Y-31 of deeds, page 178, and conveys three of the four tracts described in Exhibit C-1.

The Court: What is the consideration?

Mr. Goodell: The consideration is one dollar and other considerations.

30

Q. How did you come to know about that deed, Mr. Bowman? A. I learned of it in Mr. Whitehead's office through examination of Mr. Keisler.

Q. What Whitehead? A. Mr. John Whitehead.

Q. Mr. John W. Whitehead, the Newark lawyer? A. Counsel for Mr. Keisler.

Q. And how did the knowledge of that deed come to you? A. Through what Mr. Keisler stated to Mr. Whitehead.

40

Samuel H. Bowman—Direct

Q. In your presence you mean? A. In my presence; he stated he had signed a paper, did not seem to know exactly what it was.

Mr. Ready: I object to that and ask to have it stricken from the record, "did not seem to know exactly what it was". 10

The Court: Oh, yes; I think so; that is part of the conversation, that is a part of the notice.

Q. Now in consequence of that knowledge what was done, anything? A. Mr. Whitehead said that he would look the matter up the next day; he apparently looked it up; he told me to bring Mr. Keisler down again.

Q. And did you? A. I brought him down the following day. 20

By the Court: Q. Well, what were you doing in Mr. Whitehead's office? A. As a friend of Mr. Keisler I had taken him down to Mr. Whitehead for advice.

Q. And what was said on the second visit, the second day?

The Court: Well, Mr. Whitehead had been your counsel too?

A. Not on these matters; in some other matters.

By the Court: Q. In other matters he had been your counsel? A. In other matters; I had known him for a long time. 30

By the Court: Q. How did you happen to bring Mr. Keisler down there, what led to it, what was the matter? A. He came to my house in apparent distress over something, didn't know exactly what, he had signed some papers and he was in trouble about his affairs at the house. 40

Samuel H. Bowman—Direct

By the Court: Q. So you took him down to Mr. Whitehead? A. I took him down to Mr. Whitehead to see what he could do to straighten him out.

By the Court: Q. And when he got to Mr. Whitehead's office he told you he had executed a paper; now tell us just exactly what he said, as far as you can recollect. A. Mr. Whitehead had to draw him out; he didn't seem to know what he had signed; after the second interview with Mr. Whitehead, it was the day after, two days afterward, the first day, then there was a day intervening, and the third day I brought him down again, and I think it was about the ninth day of February.

20 Q. What year? A. That was 1898, I think, ninth day of February, 1898.

Q. Now on this second interview what was said? A. Then Mr. Whitehead said that he would get that deed back.

Q. Well now, what did he say about it being a deed? A. He said he had probably sent it to be recorded, he said it was a deed from Mr. Keisler to Mr. Whitehead—

30 Q. You don't mean Mr. Keisler to Mr. Whitehead. A. He asked him a question I think in regard to his signing, that he had signed by a mark, a cross, Mr. Keisler being a rather feeble old man and not able to either read or write.

Q. Now Mr. Bowman, you said a deed from Mr. Keisler to Mr. Whitehead; you didn't mean that? A. Deed to Brown.

40 Q. Deed from Mr. Keisler to Mr. Brown. A. To Brown, which Mr. Whitehead said he would recover for him.

Samuel H. Bowman—Direct

Q. Now in consequence of that was Mr. Whitehead retained as counsel? A. He said there would be some expense to it; I told him Mr. Keisler had no money and I would advance it for him.

Q. Well, did you? A. I did.

Q. And did Mr. Whitehead give you a receipt for the money? A. He did. 10

Q. Look at that paper and answer if that is the receipt that Mr. Whitehead gave you at the time? A. That is the receipt.

By the Court: Q. You may read it. A. "Received from Mr. Samuel H. Bowman Twenty-five dollars on account of fees in the case of Isaac Keisler in matters connected with the estate of Jacob Keisler, and other matters of Mr. Isaac Keisler." 20

Q. And other matters. A. "Other matters of Mr. Isaac Keisler. February 9, 1898; John Whitehead".

Receipt offered in evidence and marked Exhibit C-3.

Q. Now what next did you know, what was the next that you knew about this transaction with Mr. Brown? A. Sometime after that—

Q. Well, about how long after? A. Well, it was some months afterward; I could probably verify the date by the deed; Mr. Whitehead told me he had the deed back from Mr. Brown to Mr. Keisler. 30

Q. Now I show you a deed from William M. Brown to Isaac Keisler dated February 14, 1898; was that the deed that Mr. Whitehead showed you? A. I believe that is the same deed.

Q. Where were you when Mr. Whitehead showed it to you? A. I came to his office. 40

Samuel H. Bowman—Direct

Q. And what part of his office, were you in his private office? A. In his own private office.

Q. Where did Mr. Whitehead get it from when he showed it to you? A. He took it out of the safe immediately back of his desk.

10 Q. Safe in his— A. In his private office, took it out, as near as I could see, from the center pigeon-hole; he had it tied up with a piece of red tape with other papers; he slipped this deed out of it; he said "This is the deed I made Brown give back to Keisler".

Q. That is what he said? A. That is what he said.

Q. And what did he do with it after that? A. He put it back in the papers again, put it in his
20 desk.

Q. Was anything said at that time about recording this deed? A. Not at that particular time, but that was the expression afterward, he was going to put it on record.

Q. Now how near was that to the date which appears on this deed, February 14, 1898? A. I think it must have been just two weeks probably, or more when I had my attention called to it, I think he told me very shortly after he got it back.

30 Q. You remember the day of this receipt is February nine? A. Nine. Yes.

Q. And the date of this deed is February 14? A. February 14.

The Court: You are offering this in evidence, Mr. Whitehead's declarations as evidence against Keisler, is that it?

40 Mr. Goodell: No; I am offering this in evidence as against Mr. Brown as evidence that this deed was delivered,

Samuel H. Bowman—Direct

The Court: How can Mr. Whitehead bind Mr. Brown?

Mr. Goodell: Well, his statement may be stricken out. However it was part of the *res gestae*. The point of this evidence is that here is the deed in the hands of Mr. Keisler's counsel, and that is a fact I wish to prove. 10

The Court: I will allow the proof; I will allow you to show the deed, but the effect of it is a different matter. I will call your attention to it now so that we may have no misunderstanding hereafter.

Deed offered in evidence and marked Exhibit C-4.

Q. Now at the time you took this judgment against Mr. Keisler who acted as your counsel? 20

A. Mr. Whitehead.

By the Court: Q. The judgment was recovered for this money that you advanced to Mr. Keisler?

A. That was part of it.

Q. It was recovered for that and other money you advanced to Mr. Keisler? A. Other moneys.

By the Court: Q. On what was the judgment based? You lent to Mr. Keisler or you paid to Mr. Whitehead for Mr. Keisler \$25. Now what made up the balance of the amount for which you recovered judgment? A. That twenty-five dollars was not in this judgment, was not a part of that judgment. 30

Q. The twenty-five dollars was not a part of the judgment? A. No.

Q. Well, the Court asks what it was, if you can tell now. A. This judgment was in connection with some personal property which I advanced 40

Samuel H. Bowman—Direct

10 money to Mr. Keisler so as to retain it on the place; it had been sold by execution of a previous judgment of Mr. Speer, and it was paying for his personal property, household effects, etc, on the place; I advanced the money to Mr. Speer and got a bill of sale; then an action was commenced against me in the First District Court.

Q. Against you? A. Against me in the First District Court by the man living on the place claiming that he owned the property.

Q. You advanced this money to Mr. Speer on Mr. Keisler's account? A. Yes.

Q. Well, was that the money that was involved in this suit? A. That is in this suit, yes.

20 Q. Now Mr. Whitehead acted as your counsel in bringing this suit against Mr. Keisler, I understand you? A. Yes; this suit was not against Mr. Keisler, it was against Rodhouse.

Q. I am talking about this suit against Mr. Keisler in which you bought in this property to satisfy your judgment. A. Yes, that is it.

Q. And at the time this property was bid in who acted for you? A. Mr. John Whitehead.

Q. And at that time was anything said about this deed which he had?

30 The Court: What do you mean?

Mr. Goodell: About this deed which he had shown him in his safe.

The Court: What time?

Mr. Goodell: At the time he bid in the property for him.

A. At the sheriff's sale.

40 The Court: You mean when they were at the sheriff's office, is that what you mean?

Samuel H. Bowman—Cross

Mr. Goodell: Well, at or prior to that time.

The Court: Do you object to this?

Mr. Ready: I certainly do; I think there is a lot of illegal evidence going in.

The Court: I will let the evidence go in, 10
subject to the objection. As it strikes me now, the evidence is not evidence against Mr. Brown. I will let it go in so that the whole case may be developed. I do not see how you can bind Mr. Brown by statements made by other people.

Mr. Goodell: Well, I don't think that this evidence of what Mr. Whitehead told Mr. Bowman at that time does bind Mr. Brown. It shows, however, the basis upon which 20
Mr. Bowman acted, that is all.

The Court: If you want to put it in I will let you put it in subject to the objection. It ought not to bind Mr. Brown.

Mr. Goodell: I simply want to show that Mr. Bowman bought in this property relying on Mr. Whitehead's statements to him that he was going to record the deed.

The Court: Mr. Whitehead was his own counsel, and he bought it in I suppose in ac- 30
cordance with the advice of his counsel; I do not suppose he would have bought it in if Mr. Whitehead had not advised him.

Mr. Goodell: If that is the presumption that is all I want.

CROSS-EXAMINATION by Mr. Ready:

Q. You were a neighbor of Mr. Keisler's, were you? A. Yes, sir.

Samuel H. Bowman—Cross

Q. For a number of years. A. All my life known him.

Q. You did not sue Mr. Keisler for this \$25. that you paid Mr. Whitehead?

10 The Court: That will not make any difference; he has stated what he did sue him on; he says he did not; there is no use asking him questions in reference to what he has already stated.

Q. I call your attention, Mr. Bowman, to that date of the receipt for \$25. that you paid to Mr. Whitehead; you claimed that was for the recovery by Mr. Whitehead of the deed from Mr. Brown, don't you? A. That was part of the arrangement with him.

20 Q. I call your attention, Mr. Bowman, to the fact that the deed from Mr. Keisler, from Mr. Brown to Mr. Keisler is dated February 14, and your receipt is dated February 9; that was prior to the services; how do you show, how do you connect the two dates by claiming the services were paid for to recover back a deed which was then not in existence? A. Well, it was to recover the property back which he had deeded to Mr. Brown.

30 Q. To recover the property back? A. Back from Mr. Brown.

Q. Your receipt does not show that was the purpose, does it? Did you call Mr. Whitehead's attention to the fact that he did not state in his receipt just what this money was for? A. No; I had no reason to do that, in view of all the facts.

40 Q. That receipt refers to Mr. Jacob Keisler, doesn't it? A. He had trouble with the executors of Jacob Keisler to sue Mr. Brown for it, and to get him out of the difficulty I had taken him to

Samuel H. Bowman—Cross

Mr. Whitehead to recover the deed back and to give him good legal advice.

Q. Jacob Keisler, was he a brother of Isaac?

A. Brother.

Q. He was dead at this time the receipt was dated? A. He was dead; the estate was there yet. 10

Q. And wasn't this twenty-five dollars paid on that matter instead of on the matter you claim it was paid for? A. No, it was not; I had no knowledge of this suit until afterwards.

Q. Wasn't the first knowledge that you had of the deed from Keisler to Brown the fact that you saw it in the newspapers, saw it mentioned in the newspapers? A. I never saw Mr. Keisler or Brown's notice in the newspapers of the deed.

Q. Didn't you go to Mr. Keisler's house and say to him that you would get his property back for him from Mr. Brown? A. I didn't go to his house and tell him anything of the kind. 20

Q. Didn't you meet him somewhere in the neighborhood and tell him that? A. No; he was told that when he came to my office, or when he came to my house and I had taken him to Mr. Whitehead.

Q. Now you knew he owed Mr. Brown some money, didn't you? A. No, I didn't know that he owed Brown money. 30

Q. You knew Mr. Brown had been doing business for Keisler for four or five or six years? A. I did not.

Q. You had often seen Mr. Brown consulting with Mr. Keisler, hadn't you? A. No.

Q. You didn't know anything about that? A. No, didn't know anything about that, except what I knew from Mr. Lindsley, an executor of Jacob 40

Samuel H. Bowman—Cross

Keisler, that he had brought a suit against the estate, against Mr. Brown.

Q. Who had done that? A. Mr. Brown had induced Mr. Keisler to bring suit against the estate of his brother.

10 Q. Then you knew that Mr. Brown was acting for Mr. Keisler? A. I learned that afterwards when he came to me in his troubles and revealed that to me.

Q. That was before the deed from Keisler to Brown? A. That was just about the time when this deed had been given, about February 4 or 5.

Q. You did not know that suit had been started about a year and a half prior to this deed transaction. A. I didn't know that, no.

20 Q. And you did not know Mr. Keisler then was in consultation with Mr. Brown a year and a half prior to this deed? A. I didn't know Mr. Brown had anything to do with it; I never knew Mr. Brown in connection with the case until Mr. Keisler came to me with his trouble.

Q. What do you say this judgment was for? A. Which judgment do you mean?

Q. The judgment that you sold this property under. A. At the District Court?

30 Q. Yes. A. That was to defend myself against replevin suit.

Q. No, no; you brought suit against Mr. Keisler, didn't you, and sold this property under it? Now what was that suit for? A. I don't know which way the suit was brought; I think, it was replevin suit started by Mr.—I am not very clear about the details, which way the suit was brought.

40 The Court: Have you got a copy of the State of Demand? What does the State of Demand show?

Samuel H. Bowman—Cross

Q. Didn't you bring this suit against Mr. Keisler on assigned grocery claims? A. No.

Q. Didn't you go around and collect up these few small grocery bills and have them assigned to you by payment of them to the holders, and then bring your suit on those assigned claims in the District Court, amounting to Forty dollars in all? 10

A. That is not my understanding of it at all.

Q. You don't remember that? A. No.

The Court: The state of demand will show. It is not worth while going into what is proved by the record.

Q. Didn't you tell Mr. Keisler that if he did not get the property back from Brown that you would take it from him yourself? A. Tell what to Keisler? 20

Q. (Question read.) A. No.

Q. And didn't Mr. Keisler say that the property was Mr. Brown's because he had agreed that he should have it? A. No, never did.

Q. Didn't you consult with Mr. Brown about this matter? A. No.

Q. Didn't you offer to sell out your whole interest, after you obtained your deed from the sheriff, for \$100. A. Never had any dealings with Mr. Brown. 30

Q. Didn't you make that offer to Mr. Brown? A. No.

The Court: That does not make any difference.

Q. Do you mean to say that Mr. Whitehead told you that he would recover the deed from Mr. Brown? A. He said he would make Mr. Brown give that deed back.

Q. Didn't you know that the deed in question 40

Samuel H. Bowman—Re-direct

was in escrow at that time in the hands of Mr. Payne? A. No.

Q. And don't you know that it has been there ever since? A. No, only knew he claimed it after Mr. Whitehead's death.

10 Q. Who claimed it? A. It was claimed to be in escrow.

Q. Mr. Payne claimed that? A. Mr. Brown I think claimed that.

RE-DIRECT-EXAMINATION by Mr. Goodell.

Q. You were asked if you did not know that this deed was in Mr. Payne's hands in escrow. When did you first know that Mr. Brown claimed it was held in escrow? A. Sometime afterwards, in a
20 letter.

Q. How long after? A. Some time afterwards, after Mr. Whitehead's death.

Q. When did Mr. Whitehead die? A. I think in March, 1905.

Q. In March, 1905. A. Yes, I think so.

Q. Now your deed from the sheriff was not recorded until April, 1905; can you account for that? A. I was made aware that Mr. Whitehead had not attended to his papers, affairs, for some
30 time, properly; I inferred that he had not been very well, and I think sheriff Teed, who was pretty well conversant with these affairs, told me if there was anything wrong there I better look the matter up, and I saw Henry Doremus, the sheriff, and then the matter was rectified I guess, on the records, so far as the sheriff's deed was concerned. Then I wrote to the executor of Mr. Whitehead to ask him about the deed of Brown to
40 Keisler, why that had not been put on record.

William M. Brown—Direct

Q. Then you discovered they claimed it was in escrow? A. Then after that I was informed that it was in escrow, Mr. Brown claimed some money for services rendered Mr. Keisler in the law suit against his brother's estate.

10

RE-CROSS-EXAMINATION by Mr. Ready:

Q. Did the sheriff sell you Mr. Keisler's chattels? A. No.

Q. You took possession of Mr. Keisler's chattels though, didn't you?

The Court: That does not make any difference.

Mr. Ready: I think I can show that Mr. Bowman's judgment was satisfied by the chattels which he took from the farm after taking possession. 20

The Court: What do you mean by "satisfied"?

Mr. Ready: That he had recovered three or four hundred dollars worth of chattels for his forty dollars, and therefore he would never have the right to this deed; at any rate, if my answer does not cover that I would like to amend.

The Court: Oh, it is too late now. I over- 30 rule the evidence.

Mr. Goodell: We rest.

WILLIAM M. BROWN, sworn.

Direct-examination by Mr. Ready:

Q. You are a counsellor at law of this state? A. Yes, sir.

40

William M. Brown—Direct

Q. Are you Mr. Keisler's attorney? A. I was Mr. Keisler's attorney from about 1900 until 1909.

Q. Did Mr. Keisler owe you any money? A. He owed me; in 1908 we agreed upon a settlement of \$250.; he had never paid me any money before; he was an old gentleman, he and his brother, and I did a great deal of work for them.

Q. How old about? A. I think he was about seventy odd years old.

Q. Did he pay you this \$250.? A. No, he never did pay the \$250.

Q. Did he make any arrangement for the payment thereof? A. In 1898 he came into the office one day and he told me that he was—his brother I think at that time was dead, I know he was—and he told me that he had no money; he recognized that I had brought suits for him and done a great deal of work, and he told me, he said "Now I will deed you this property, three pieces out of four, and the fourth piece I have got a sale for, and I am going to sell it".

Q. Was the property very valuable at that time? A. The property at that time was not worth I don't suppose more than \$200; I had never seen the property; I had no idea of its value. I inquired of Mr. Lindsley, and Mr. Lindsley told me it was worth about two hundred dollars. And he made a deed on that day to me, excluding one piece of property which he was going to sell for himself.

Q. Was that deed executed and recorded? A. That deed was executed and delivered to me and recorded the same day.

Q. And was there any other deed drawn about that time, or that time? A. There was no other

William M. Brown—Direct

deed drawn at that time that I know of. Subsequently, a few days after, Mr. Keisler and Mr. Bowman, I think it was, came to my office, if I remember rightly.

Q. This was some eighteen years ago? A. And wanted to know, Mr. Bowman wanted me to deed the property back himself; Mr. Whitehead was not in it at that time; I told Mr. Bowman that I would deed the property back to Mr. Keisler; Mr. Keisler said, "Now don't do anything until I see you again," the old man told me; I said, "You are perfectly welcome to the property; I don't want this property." 10

Q. You wanted your money? A. Yes. Then he went away with Mr. Bowman; and the next I heard was from Mr. Whitehead, of the firm of Whitehead & Payne; I immediately told Mr. Whitehead and Mr. Payne— 20

By the Court: Q. Did you see Mr. Whitehead personally? A. I saw Mr. Whitehead personally, and Mr. Whitehead said, "Mr. Bowman has retained me," he says, "to look into this Keisler matter," and I asked him what there was about it, and he said "You seem to have got a deed, and the old man don't seem to think you ought to have the deed;" I said, "Very well, I will take the money." At that time there was a suit pending between the Beaches and Mr. Keisler; I think I was either defending or prosecuting the suit, I don't know which, and on that day Mr. Mac Lear and Mr. Lindsley represented Mr. Keisler, and they discussed the matter of return of the deed, and I handed it to them, and told them I told them there was two hundred and fifty dollars due me, which was the amount agreed on; Mr. Keisler 30 40

William M. Brown—Direct

sat there and said "Yes"; Mr. Whitehead was there and said "Yes," and I said, "I will turn the property back to you and give you the deed now and let Mr. Whitehead hold it in escrow, the firm of Whitehead & Payne to hold in escrow," which
10 Mr. Whitehead agreed to, and Mr. Payne agreed to, and I was to receive the two hundred and fifty dollars within one week, or very shortly thereafter, or the deed was to become absolute, and I was to have the deed put in escrow returned to me, and it was to be destroyed if the property was to belong to me. I went on and did Mr. Keisler's work after that, saw him, Mr. Keisler, frequently after that; and Mr. Keisler came to me and told me Mr. Bowman had gone around the town and
20 collected small bills, butcher bills and grocery bills, to the amount of twenty-nine or thirty dollars and had caused them to sue him, and Mr. Bowman was now prosecuting a suit against him; he said "I don't want you ever to give up that deed," I don't know whether that was in Mr. Bowman's presence or not, but that occurred. I wrote after that and Mr. Bowman entered his judgment in the Court for forty dollars, whatever it was, after being docketed up with costs,
30 and sold the property at public sale for a hundred dollars to the highest bidder as he says—I then wrote to him and asked him—

By Mr. Goodell: Q. Wrote to who? A. Wrote to Mr. Bowman and asked Mr. Bowman whether he would settle, notified him and asked him whether he would settle the claim; this was long after the time expired; he paid no attention; one day he came down and talked with me, he said, "Mr.
40 Brown, you give me a hundred dollars and I will

William M. Brown—Cross

make my deed over to you." I said "No, sir, I will do nothing of the kind." I wrote him again later and endeavored every way under the sun to get the money that was due me on the deed that was placed in escrow; then I made up my mind I would adhere to the first principles of the agreement, and the property became more valuable, and I would just simply hold the property, and I have taken that stand since. 10

Q. Then Mr. Bowman brought a suit in this action, is that it, in this case? A. Then Mr. Bowman brought a suit.

CROSS-EXAMINATION by Mr. Goodell:

Q. How long had you known Mr. Keisler in the year 1900? A. Oh, I think about well, I formed his acquaintance at that time, he came down to see me something about some materials which had been taken from his place. 20

Q. You mean in 1900? A. Oh, in 1900?

Q. Yes, you stated in your direct-examination that you were his counsel from 1900 to 1908? A. I should say 1890.

Q. Now you say you were his counsel from 1890 to 1898. A. Yes, 1899, 1900; I did some business for him afterwards, long after this. 30

Q. Have you any recollection what particular business you did at the time this deed was given to you? A. Yes, Jacob Keisler had died.

Q. I just asked you if you remembered? A. I am going to remember.

Q. You can tell me if you remember? A. I do remember, yes.

Q. One of the actions then pending was the suit brought by Isaac Keisler against the executors 40

William M. Brown—Cross

of his deceased brother to recover a lot of money?

A. Recover for the care of his brother, yes.

Q. Now you stated in your testimony you did not know whether you were counsel for the plaintiff or defense in that suit; did you mean that? A. I didn't say in that particular suit; I was speaking of another suit.

Q. Maybe I don't recollect correctly. A. What I said was I didn't recollect whether he brought the action or they brought the action.

Q. You don't remember who brought that action? A. I remember now, yes, he brought the action and I was counsel for Mr. Keisler and tried the case.

Q. And you brought the action? A. I brought the action.

Q. Do you remember what the result of the action was? A. No, I do not.

Q. You don't remember whether Mr. Keisler won that suit or not?

Mr. Ready: I object.

A. I don't remember, no, I haven't looked it over.

Mr. Ready: I don't think it is material; it has nothing to do with this issue.

A. I know there was an arrangement whereby Beach and the others took care of him, gave him money.

Q. That was a suit for quite a large amount of money, wasn't it? Something like thirteen hundred dollars? Do you remember about how much it was for? A. I couldn't tell you that, no.

Q. And you don't remember whether you won or lost it? A. I have no recollection.

William M. Brown—Cross

Mr. Ready: I object; I don't think it has any bearing.

A. I have no recollection; I know Beach and the others were to take care of him; whether the suit was discontinued or tried I don't remember.

Q. You don't even remember that? A. No. 10

Q. Do you know who was on the other side? A. I think MacLear.

Q. Mr. MacLear was on the other side? A. And Mr. Lindsley.

Q. What other action did you have for Mr. Keisler? A. Oh, there was the action at the time his brother died in relation to the probate of the will and the looking after the property generally.

Q. What will was that, whose will? A. I think that was Jacob's will. 20

Q. Did he leave a will? A. I am under the impression he did, as near as I can remember; I know he left a will.

Q. You know he left a will. Was there any contest over its probate? A. Yes, there was a question raised as to the condition of the old man, if I remember rightly, at the time he made the will.

Q. Did Mr. Isaac Keisler contest the probate of that will? A. It was not contested in open Court; it was a question of calling at the office, 30 and advice, etc; I went up to see him a number of times.

Q. You went up to see Mr. Keisler a number of times? A. Yes.

Q. When? A. Shortly after the death of Jacob Keisler; I raised money for him, went to Mr. Lindsley and raised money for him on the property he had there.

Q. That was the homestead? A. I don't know 40

William M. Brown—Cross

what the property was, don't remember—eighteen years ago, and I have had considerable business since then and cannot remember these things.

10 Q. You remember you raised some money but don't remember on what property? A. I think it was on the homestead property, and I think it was sold after that under foreclosure.

Q. How long after? A. A couple of years or so after; there was no interest paid, and Mr. Keisler through my solicitation was allowed to remain there a number of years after the foreclosure in the place.

Q. Do you mean to say you were acting as counsel for him about various matters about eight years from 1890 on? A. From 1890? No.

20 Q. Well, I understood you to say—you said from 1890? A. From 1890 I said until 1900 as near as I could remember, covering a period from 1890 for about twelve years, something like that.

Q. And during all that period you were constantly engaged? A. Not constantly, no.

Q. During all that period did he ever pay you? A. He never paid me a dollar in his life, except turning the property over to me.

30 Q. Now at the time that he turned that property over to you you say he came in and made a proposition, who were present when he made that proposition, besides you and Mr. Keisler? A. Well, I don't remember now who was present; I think Frederick Leonard, the former referee in bankruptcy was there; I think a man by the name of Judge Lomax, who was working for me at the time.

40 Q. Where did this conversation take place? A. In my office.

William M. Brown—Cross

Q. Your private office? A. Well, I had at that time one office, it was not very private.

Q. You had no ante-room, it was all one room?

A. One room.

Q. Well, were these gentlemen privy to this conversation that was taking place between you and your client? A. I think probably they were, they knew the old gentleman well; they had been up there to do different things for him when he got in trouble; I think I advanced him money once to pay a small bill. 10

Q. You are fond of hunting, aren't you? A. I am, yes.

Q. And that was good hunting ground up there, wasn't it? A. Yes; I went up there hunting.

Q. You went up there hunting during the season every year, didn't you? A. No, sir, I did not; I went up there I think two years, that is I stopped at his place, I didn't go up there to live with him, or didn't stay there over night, or to eat any meals at his place. 20

Q. That was where you got acquainted with him, wasn't it, first? A. No; I think I got acquainted with him through Mr. Thomas L. Martin of the City of Newark.

Q. Now coming back to the time he gave you this deed, did any of these other people take part in the conversation between you and your client? 30

A. I can't remember.

Q. And who drew the deed? A. To the best of my recollection I drew it myself. If you let me see the deed I may be able to tell you in whose handwriting it is.

Q. I wish I could let you see it. I notified you to produce it. A. Why, the deed was handed over 40

William M. Brown—Cross

in the office the morning that I got the other; I said it was handed to Mr. Whitehead and Payne, and they were in partnership.

Q. I am talking about the deed Mr. Keisler made to you? A. I can't tell you what became of that deed, I am sure.

10 Mr. Ready: It is a matter of record.

Q. Do you remember who took the acknowledgment, can you tell that now? A. No, I cannot.

Q. Do you remember whether Mr. Keisler signed his name or made his mark? A. I don't remember that.

Q. Do you remember whether Mr. Keisler could read or write, or whether he could not? A. I don't think he could read or write, I am not sure.

20 Q. Do you remember whether you read that deed to him after you had drawn it? A. I read the deed to him I think in the presence either of Frederick Leonard or Judge Lomax, he was clerk in my office at that time, I know I read it to him because I never would have taken a deed unless I did read it under conditions of that kind.

Q. Is Judge Lomax living now? A. He may be; I haven't any idea; I haven't seen him in eight or ten years.

30 Mr. Ready: He is dead.

Q. And Mr. Leonard is dead?

Mr. Ready: They are both dead.

A. They were both with me at the time.

Q. And at the time this deed was drawn back from you to Mr. Keisler whose handwriting was that in? A. I don't know, I think it was Mr. Payne's, I think Mr. Payne had, practically, charge of that entire matter.

40 Q. This is Mr. Payne's handwriting? It ap-

William M. Brown—Cross

pears that Mr. Leonard took the acknowledgment. Now do you recollect distinctly whether Mr. Whitehead was present when this deed was signed, or whether he was not? A. When the deed was executed you mean?

Q. Yes, signed by you? A. I don't presume he 10
was; I don't know.

Q. You don't remember whether he was or not?
A. He was present, I think Mr. Payne was present at the time of the delivery of that deed.

Q. Who else was present at the time of the delivery of the deed? A. Why, Mr. Malcolm MacLear I think.

Q. Where did that delivery take place? A. In Mr. Whitehead's office, Mr. Whitehead and Payne's office. 20

Q. Did Mr. Whitehead and Mr. Payne have separate rooms in that office? A. Well, I don't remember now.

Q. But your recollection is that they were together at the time the deed was delivered? A. Yes, as near as I can remember; I am not going to swear positively about it.

Q. Now what was said about payment? A. At the time the deed was handed over to Mr. Whitehead and Payne there was a special stipulation agreed to that the payment of two hundred and fifty dollars was to be made to me within a week or a short time, very short time, and Mr. Keisler consented to it, and I think Mr. Whitehead or Payne, whoever was his attorney, MacLear, assented to it, and they were going to sell this piece of property on the outside, they were going to sell that very day; I don't know why it was not sold, but it was never sold. 30 40

William M. Brown—Cross

Q. Was there any memorandum made in writing to that arrangement? A. Not that I know of.

Q. You did not ask to have it put in writing, or suggest it be put in writing? A. No, I don't think I did; I expected to get the money so soon I didn't think writing was necessary.

10 Q. How long was it after that that you first wrote to Mr. Bowman about this thing? A. I think it was in the same spring.

Q. Did you keep a copy of that letter? A. No, sir; you have got a copy of it on your bill, haven't you, in your bill of complaint?

Q. I think I have got a copy of the first letter you wrote, which was quite a good many years after that. It was after Mr. Whitehead died, aren't you thinking now of the letter you wrote after Mr. Whitehead's death, when you say you wrote to Mr. Bowman? A. I wrote Mr. Bowman when he was in the post office; if I remember rightly I spoke to him numerous times about it; he promised to pay it. While Mr. Whitehead was alive I went to Mr. Whitehead and Mr. Whitehead said, "I will never give that to Mr. Bowman or anybody else; it ought to be paid; if it is not paid pretty soon I will give you your deed back;" Mr. 20 Whitehead told me that himself.

Q. You say Mr. Bowman promised to pay you this money? A. I was after Mr. Bowman to pay this money.

Q. Do you say Mr. Bowman promised to pay it? A. I asked him to pay it and he said he would try to get it fixed; then I offered to settle with him and he offered to take a hundred dollars, and I wrote him again and asked him to make pay- 40 ments and he wouldn't do it.

William M. Brown—Cross

Q. How many letters in all did you write to Mr. Bowman about this matter? A. I couldn't tell you, sir, I haven't any idea.

Q. And you were not in the habit of keeping any copies of the letters you wrote? A. I may have kept copies, I don't know, I don't generally keep copies of letters more than ten years; I destroy them. 10

Q. When did you destroy these letters you wrote to Mr. Bowman? A. I don't know; you have got them.

The Court: Have you not got them.

Mr. Goodell: I haven't got any letters within six or eight years of the time he wrote.

The Court: You were custodian of the 20 letters Mr. Brown wrote your client.

Q. Now, I show you three envelopes there bearing post-marks of September 29, 1908, May 20, 1910, and February 4, 1913, respectively, addressed to Mr. Samuel Bowman. You sent those three letters. Now can you be sure that you have sent any others? A. I don't know. I think I had a claim once against Mr. Bowman from some company in New York, which I wrote him a number of times about; that may have been those for all I know. 30

Q. Running along from 1908 to 1913?

Mr. Ready: There is one there within six years, isn't there, Mr. Goodell?

Mr. Goodell: These letters are all set out in the bill and they are all admitted.

Q. Who first made the request upon you that you give this deed back to Mr. Keisler? A. I think Mr. Bowman did, if I remember rightly. 40

Frederick M. Payne—Direct

Q. Where was he and where were you when he made it? A. I think he met me on the street, or it was in the post office or somewhere, or maybe he was up at the office, probably came up there with Mr. Keisler, if I remember rightly.

10 Q. When did you first get acquainted with Mr. Bowman? A. Oh, I knew him when he was in the post-office, a long while.

Q. How long ago did he leave the post-office? A. Sometime prior he was in New York or in the Federal department of the post-office building.

Q. As a matter of fact you don't know whether he was in the post-office or not, do you? A. I know he was in the building.

20

FREDERICK M. PAYNE, sworn:

Direct-examination by Mr. Ready:

Q. You are a member of the bar of the State of New Jersey? A. Yes.

Q. Did you know Mr. Isaac Keisler in his lifetime? A. I have seen him, yes.

30 Q. You were a member of the firm of Whitehead & Payne, were you? A. Yes.

Q. Mr. Whitehead is dead? A. Yes.

Q. When did he die? A. February 14, 1905.

Q. Do you remember this transaction regarding this deed from Brown to Mr. Keisler? A. Yes, I remember there was such a transaction.

Q. I will show you Exhibit C-4, and ask you if that is the deed that was delivered to you. A. Yes, sir, this was delivered to Whitehead &
40 Payne our firm, in escrow.

Frederick M. Payne—Direct

Q. Who delivered it to you? A. I think Mr. Brown did, after he executed it.

By the Court: Q. Delivered it to you personally? A. Well, either to Mr. Whitehead, I have forgotten which now.

By the Court: Q. You personally? A. I don't remember that. 10

Q. I show you yellow envelope with the writing on "Due from Brown to Keisler; hold in escrow by Whitehead & Payne. Miss Ella Jacobus, 290 Summer Avenue, city," and ask you whose writing that is in? A. That is in my hand-writing.

Q. Was the deed put in that envelope? A. Yes.

Q. By whom, you? A. By me, yes.

Q. And what was done with the deed and envelope? A. Put in our safe. 20

Q. What do the words mean "Hold in escrow," just what they state? A. Yes.

Q. Why were those words put there? A. Well, because that was the way we had the deed.

Mr. Ready: I offer that envelope in evidence.

Marked Exhibit D-1.

Mr. Goodell: I would like to ask him first when he wrote that there. 30

Q. Now, will you kindly tell us just what you know about this transaction, as to the way the deed was put in escrow, and how long it was to be held in escrow, and how it is that you,—you still have the deed, haven't you? A. Yes.

Q. Just tell us how it is that you happen to still have this deed in your possession? A. Well, there were some differences between Mr. Brown and Mr. Keisler about some money that 40

Frederick M. Payne—Cross

10 Mr. Keisler owed to Mr. Brown, and this deed was given, as I understood it, because Mr. Brown held some property that Mr. Keisler had deeded to him, and Mr. Brown was willing to give it up if he got his money, and Mr. Whitehead had charge of it, and they arranged about this deed that I hold in escrow, and at Mr. Whitehead's suggestion I drew the deed and took it to Mr. Brown for execution; Mr. Brown executed the deed and brought it back to our offices, and delivered it to us, and the deed has been in our safe ever since.

20 Q. What was said about the length of time that it should be held in escrow while Brown and Keisler were there, in your presence? A. Well, as I understood it, Mr. Keisler wanted time to raise some money.

Q. How much time? A. Why, a short time, as I understood about a month or something like that.

Q. Was Brown and Keisler there at that time? A. Yes.

Q. When that understanding was had? A. Yes.

30 Q. Who stated that? A. Well, I don't know exactly who said it, but it was suggested by some of them at that meeting, and it was agreed to by all, as I understood it.

CROSS-EXAMINATION by Mr. Goodell:

Q. Did you and Mr. Whitehead have separate offices, private offices at that time? A. Yes, we had two rooms.

Q. You were partners? A. Yes, sir.

40 Q. And it was Mr. Whitehead who suggested

Frederick M. Payne—Cross

to you that you draw this deed, prepare it, and take it over, wasn't it? I think you said that?

A. Yes, I think he asked me to do it.

Q. You knew that Mr. Whitehead had been retained on Mr. Keisler's behalf, didn't you, or didn't you? A. Well, I knew he was acting for him; I didn't know how he had been retained. 10

Q. Now, how long after you prepared this deed and took it over to him was it before Mr. Brown brought it back to your office? A. Well, I can't remember that exactly, only a short time.

Q. Few days? A. Yes.

Q. Just a few days? A. Yes.

Q. Do you remember what room you were in when this conversation took place about the money which Mr. Keisler was going to pay? A. In Mr. Whitehead's room. 20

Q. And where was the deed at the time this conversation took place, in whose hands was it?

A. You mean the deed in escrow?

Q. Yes, this deed which you have marked "Hold in escrow"? A. I don't think it had been drawn at that time.

Q. You think this conversation in Mr. Whitehead's room was before the deed had ever been drawn? A. Yes, at a meeting that day where they agreed upon the deed. 30

Q. That was before you prepared the deed? A. Yes.

Q. Now when the deed was prepared did Mr. Brown bring it to your office? A. Yes.

Q. And did he take it into Mr. Whitehead's room? A. Why, I think so.

Q. Did you go in yourself, did you go in Mr. Whitehead's room on that occasion? A. I was almost always in there. 40

Frederick M. Payne—Cross

Q. That don't quite answer the question, you see? A. Well, I couldn't say absolutely.

Q. You cannot tell whether you were in there or not? A. No, I wouldn't want to say that.

Q. So when the deed was actually handed over
10 you cannot say whether you were present or not?

A. I couldn't say whether it was delivered to Mr. Whitehead or me personally; we always considered it was delivered to both of us, and we put it in the safe.

Q. Of course you did not both put it in the safe, one of you did and the other looked on I suppose. Now who put it into that yellow envelope? A. I did.

Q. And when was that, can you tell when it
20 was? A. I think about that time, or right at that time.

Q. You don't know whether it was a few days or a few weeks afterwards or not, do you? A. Well, I think it was pretty near at that time; that is in my handwriting, that is just about the way I used to write at that time.

Q. Has your handwriting changed so you can tell by the looks of your hand writing? A. Yes, it has changed quite a little.

30 Q. You could not tell within a week or a month? A. No.

Q. And when you put it into that envelope who handed it to you? A. I couldn't tell you who did.

Q. And you have really told all you do remember about the transaction, have you? A. I think
40 I have, yes, as much as I recall of it.

Allan Lindsley—Direct

ALLAN LINDSLEY, sworn:

Direct-examination by Mr. Ready:

Q. You are a civil engineer? A. Yes.

Q. Where do you reside? A. Caldwell, New Jersey.

Q. Were you acquainted with Mr. Keisler in his lifetime, Isaac Keisler? A. All my life. 10

Q. Did you ever have any conversation with him regarding this property in question? A. On several occasions.

Q. When and where? A. In my office in Caldwell.

Q. Who was present? A. My father and Mr. Keisler and myself.

Q. What did Mr. Keisler tell you regarding this property? 20

Mr. Goodell: I think I shall object to that.

The Court: It depends on when the conversations were had.

Mr. Goodell: I don't think conversation with Mr. Keisler can bind Mr. Bowman in this suit.

The Court: I don't know what the conversations are, and I do not know when they were had. 30
When did you have these conversations? A. Well, it was just after, a short time after the foreclosure proceedings on the farm.

Q. And when was that? A. I have no idea of the date.

Q. How long prior to Mr. Keisler's death, about? A. Oh, a good while previous, because my father bought the property in at foreclosure sale. 40

Allan Lindsley—Direct

Q. Your father bought it? A. Yes, and he lived on the farm there until he got so infirm he couldn't take care of it himself.

Q. And you say you had a conversation with him regarding these other three pieces? A. Yes.

10 The Court: What do you want to prove by this witness?

Mr. Ready: I want to show that Mr. Keisler told him that Mr. Brown owned the property.

The Court: When do you date the statement, at what time?

Mr. Ready: Some time shortly before his death. I would like to find out whether before or after the sheriff's sale.

20 The Court: Find out, because I am going to overrule this evidence if it took place after the sheriff's sale.

Q. Do you know when Mr. Keisler died? A. No, I don't, I don't remember.

The Court: Can anybody state when he died?

Mr. Goodell: It was after Mr. Whitehead's death I understand, but I don't know how long after, 1907 or 1908.

30 Q. Did you ever have any conversation with Keisler if it was after that time, after 1908? What did he tell you as to the ownership of this property?

The Court: After the sheriff's deed was made.

Mr. Goodell: It appears the deed was made in the early part of 1899.

40 The Court: There is no proof that this conversation took place before the deed was made.

Allan Lindsley—Direct

Mr. Ready: I still contend I have a right to put in this evidence.

The Court: I am going to overrule the evidence unless you can show this conversation took place before the sheriff's deed was made.

Mr. Ready: My offer is this: To show that there was an absolute conveyance from Keisler to Brown and that the subsequent recovery of this judgment and sale by the sheriff could not offset that absolute conveyance. 10

The Court: That is your argument. I will hear you on the argument. I am relying on the evidence. It is a well settled rule of evidence that a man's title cannot be impeached by anything said by the grantor after the deed was made. 20

Q. About when was this foreclosure suit that you were telling us about, just try and recollect that, will you? A. Well it was 1908 or 1909, 1907; that is mere recollection.

Q. How many conversations did you have with Mr. Keisler on this subject as to the quantity of this property? A. I think but once.

Q. And that was when? A. Just after the foreclosure proceeding. 30

Q. And you think that was in 1907? A. 1907, that is a matter of record.

Testimony closed.

Conclusions

IN CHANCERY OF NEW JERSEY

	Between SAMUEL H. BOWMAN, and WILLIAM M. BROWN, <i>et al.</i> , 		Compl't, Deft's.
10		}	

Mr. Edwin B. Goodell, for Complainant.
 Mr. Mathew J. Ready, for Defendants.

STEVENS, V. C.

20 The first question raised by the bill is whether the late John Whitehead was in a position to hold a deed in escrow. One Kiesler had in February 1898 conveyed a piece of woodland of small value to William M. Brown in satisfaction of Mr. Brown's claim against him for legal services. After he had made the deed, he became dissatisfied and consulted Mr. Whitehead as to what he could do. Mr. Whitehead entered into a correspondence with Mr. Brown. Mr. Brown saw Mr.

30 Kiesler and told him that he would re-convey, on payment of the sum of \$250 which was agreed upon between them as the value of the service rendered. To ensure the carrying out of this agreement Mr. Brown agreed to place and did place in escrow in the hands of Mr. Whitehead a deed re-conveying the lot with the understanding that Mr. Whitehead was not to deliver it until Kiesler had paid Mr. Brown the above sum.

40 The money was not paid and Mr. Whitehead held

Conclusions

the deed unrecorded until his death. Kiesler is also dead.

The complainant was a judgment creditor of Kiesler to whom in April, 1905, after execution issued, the Sheriff of Essex County made a deed purporting to convey the property in question with other property. He contends that the delivery to Mr. Whitehead was in law a delivery to Kiesler, and vested in him the fee of the land; his insistment being that a deed can no more be delivered in escrow to the party's agent than it can be to the party himself. If this be so, Kiesler, on the delivery of the deed to Mr. Whitehead, acquired the fee and this fee passed under the sheriff's deed to Bowman. Whether the action begun in the District Court is the proper action to raise the question I need not decide but it is certain that the question is one of legal title, capable of being tried in an ejectment suit and not an equitable question.

I am of opinion however that Mr. Whitehead was able to hold the deed in escrow. The law is thus stated in 10 R. C. L. 631. "It has now become the settled rule that if the agent's or attorney's relation to his principal is such that his acting as custodian of the deed or paper is not antagonistic to his principal's interests and the paper was put in his hands, not as a delivery but as an escrow, such general agent or attorney of the grantee, payee or obligee of an instrument is not incapacitated from acting as depository of the instrument but becomes the agent of both parties for the purposes of the escrow." I can see nothing antagonistic to Mr. Kiesler's interests, in the action of Mr. Whitehead. In *Watkins v.*

Decree

10 Nash, L. R. 20 Eq. 262, it was held that the delivery to the solicitor of the grantee of an instrument executed by the grantor will not convert the instrument from an escrow into a deed provided the delivery is of a character negating its being a delivery to the grantee. This ruling was approved by the Court of Appeals in the later case of London Freehold Co. v. Baron Suffield (1897) 2 Ch. 608. The case of the Ordinary v Thatcher, 12 Vr., 403 is not in point. The decision was expressly rested upon a ground peculiar to cases of the class then under consideration.

20 As the bill prays, in the alternative, for a redemption and as the defendant does not contest complainant's right to redeem, he is entitled to a decree for a re-conveyance on payment of principal and interest from the date of defendant's agreement with Kiesler.

Decree

IN CHANCERY OF NEW JERSEY

30	Between SAMUEL H. BOWMAN, <div style="text-align: right;">Complainant,</div> <div style="text-align: center;">and</div> WILLIAM M. BROWN, <i>et al.</i> , <div style="text-align: right;">Defendants. </div>
----	---

40 This cause coming on to be heard in the presence of Edwin B. Goodell, of counsel with the

Decree

complainant and Mathew J. Ready, solicitor of the defendant and the pleadings and proof having been read and considered and the Court having duly considered the said pleadings proofs and arguments;

It is, on this 8th day of May, 1916, by the Chancellor of the State of New Jersey, ordered, adjudged and decreed that the deed dated February 14th 1898, made by William M. Brown to Isaac Kiesler and held by Mr. Whitehead and described in the complainant's bill of complaint is a deed held in escrow; and as the bill of complaint prays in the alternative for a redemption of the said premises, it is further ordered, adjudged and decreed that the defendant, William M. Brown, re-convey the lands described in said deed to the complainant, Samuel H. Bowman, upon the complainant paying to the said William M. Brown, the sum of two hundred and fifty dollars, with interest thereon from the date of said deed, to wit, February 28th, 1898. And it is further ordered, adjudged and decreed that the complainant pay to Mathew J. Ready, solicitor of the defendant, a counsel fee of twenty-five dollars.

And it is further ordered, adjudged and decreed that the complainant pay to the defendant his costs of this suit to be taxed.

That in default of the said complainant so paying unto the said defendant the said sum of two hundred and fifty dollars, with interest and costs as aforesaid, within thirty days from the date of service of a copy of this decree upon him, it is ordered that the said complainant's bill of complaint do forthwith stand dismissed.

E. R. WALKER,
Clerk. 40

Notice of Appeal

Respectfully advised,
 (Signed.) Frederick W. Stevens,
 V. C.

A true copy.
 Robert H. McAdams,
 Clerk.

10

Notice of Appeal

IN CHANCERY OF NEW JERSEY

20	SAMUEL H. BOWMAN, <div style="text-align: right;">Complainant,</div> <div style="text-align: center;">vs.</div> WILLIAM M. BROWN, <i>et al.</i> , <div style="text-align: right;">Defendants.</div>
----	---

The complainant hereby appeals from the whole of the decree of the Chancery Court to the Court of Errors and Appeals in the last resort in all causes.

30 EDWIN B. and PHILIP GOODELL,
 Solicitor of Complainant of Counsel.
 Dated, June 2d. 1916.

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

EDWIN B. GOODELL,
 Of Counsel with Complainant.

Service of the within notice is acknowledged this 5th day of June, 1916.

40

HELM and READY,

Affidavit of Service of Petition of Appeal

aforesaid, upon the grounds that the same is erroneous for that said deed was not held in escrow, but was absolute in terms and effect and should be delivered to the complainant. Your petitioner therefore prays that the said decree of the said Chancellor may be set aside and for nothing hold-
 10 en; and that your petitioner may have such relief in the premises as to this honorable Court shall seem meet.

EDWIN B. and PHILIP GOODELL,
 Solicitors of Appellant,
 (Of Counsel with Appellant.)

Endorsed:

“Filed, June 6, 1916,
 Thomas F. Martin,
 Clerk.”

20

Affidavit of Service of Petition of Appeal

IN CHANCERY OF NEW JERSEY

30	Between, SAMUEL H. BOWMAN, <div style="text-align: right;">Complainant,</div> <div style="text-align: center;">and</div> WILLIAM M. BROWN and FRED- ERICK M. PAYNE, <div style="text-align: right;">Defendants.</div>
----	---

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

40 James B. Scott, of full age being duly sworn says that he is a clerk in the office of Edwin B.

Exhibit C-2

& Philip Goodell, solicitors of complainant that on June 6, 1916, he served a copy of the petition of appeal hereto annexed on Matthew J. Ready, the solicitor for the defendant, William M. Brown, at his office. No. 197 Market St. in the City of Newark, by leaving a copy of said petition with the Clerk in charge of said Ready's office and on Frederick M. Payne on the same day by leaving a copy thereof at his office, No. 197 Market St., Newark, with his office associate George A. Mc-Call. 10

JAMES B. SCOTT.

Subscribed and sworn to before me this

8th day of August, 1916.

Charles O. Truax,

Master in Chancery.

of New Jersey. 20

Exhibit C-1

Sheriff's Deed to Samuel H. Bowman, his heirs and assigns dated the seventh day of March, 1899, recorded April 18, 1905, Book M-38, page 410, conveying four tracts of land in Caldwell, New Jersey, three of which are the lands described in the Bill of Complaint. 30

Exhibit C-2

Deed, Abigail Francisco and Stephen I. Gould Extrs., to Isaac Keisler, dated March 1, 1855, acknowledged the same date, recorded June 3, 1859 40

Exhibit

said party of the second part and to his heirs and assigns forever. All that certain tracts or parcels of land and premises hereinafter particularly described, situate, lying and being in the Township of Caldwell, in the County of Essex and State of New Jersey:

Being a part of the Real Estate formerly of Josiah Francisco, deceased, and being also that part which the party of the first part bought of Peter H. Francisco & Elizabeth, his wife, Calvin Francisco and Harriet, his wife, by warrantee deed bearing date March 28th, 1854, and recorded in Book V 10 of Deeds of Essex County on pages 441 and 442 bounded as follows; on the East by lands formerly of Jonathan Beach, dec, on the North by the same lands on the West by lands of Cornelias Courter and on the South by lands of Josiah Vanness containing 10 acres more or less: And a certain lot of land deeded to party of the first part by Cornelius Courter and Abigail T. his wife by warranty deed dated November 15, 1852 and recorded in Book V 10 of Deeds for Essex County on pages 439, 440 and 441 described as follows:

BEGINING at the South east corner of Henry Courter's lot in the line of Peter and John Francisco thence on the line of said Henry Courters North $41^{\circ} 30'$ East 33 chains and 35 links to the line of Stephen J. Gould thence on his line the whole distance of the North end of said lot thence binding on the East on line of Calvin and Peter Francisco, Josiah Vanness, Henry Courter and Jefferson Vanness and binding on the South on line of Peter and John Francisco to the place of Begining. Containing 9 Acres be the same more

10

20

30

40

Exhibit

or less. And a certain lot conveyed to party of the first part by Stephen Personette, Charles Smith and Roswell D. Jacobus, Commissioners appointed to divide real estate of John Bowden deceased, dated April 21, 1869.

- 10 BEGINING on the North east corner of the lot hereby intended to be conveyed and adjoining land now or formerly of John C. Bush, thence along the same S. 25 3/4° E. 5 chains and 64 links thence S. 64° 15 E. 26 chains and 60 links to lands sold by John Mum and others Commissioners to Rynear Van Gieson thence along his line N. 25 3/4° E. 5 chains and 64 links, thence N. 64° 15' W. 26 chains and 60 links to the place of begining. Containing 15 Acres being the
- 20 same property conveyed to the said John Bowden by John Munn and others Commissioners by deed recorded in Book A-7 of deeds for Essex County on pages 361 etc.
- Together with all and singular the houses, buildings, trees, ways, waters, profits, privileges and advantages with the appurtenances to the same belonging or in anywise appertaining. Also all the estate, right, title, interest, property, claim and demand whatsoever of the said party of the
- 30 first part of in and to the same and of in and to every part and parcel thereof. To Have and To Hold all and singular the above described land and premises with the appurtenances unto the said party of the second part his heirs and assigns to the only proper use, benefit and behoof of the said party of the second part his heirs and assigns forever. And the said Keislar doth for himself, his heirs, executors, and administra-
- 40 tors covenant and grant to and with the said par-

Exhibit

ty of the second part his heirs and assigns that the said Isaac Keislar is the true lawful and right owner of all and singular the above described land and premises and of every part and parcel thereof with the appurtenances thereunto belonging and that the said land and premises or any part thereof at the time of the sealing and delivery of these presents are not encumbered by any mortgage judgment or limitation or by any encumbrance whatsoever by which the title of the said party of the second part hereby made or intended to be made for the above described land and premises can or may be changed, charged, altered or defeated in any way whatsoever. And also that the said party of the first part now has good right full power and lawful authority to grant, bargain, sell and convey the said land and premises in manner aforesaid. And also that Isaac Keislar will warrant, secure and forever defend the said land and premises unto the said William M. Brown, his heirs and assigns forever against the lawful claims and demands of all and every person or persons freely and clearly freed and discharged of and from all manner of encumbrances whatsoever:

In Witness Whereof the said party of the first part has hereunto set—hand and seal the day and year first above written.

his
ISAAC X. KEISLAR (L. S.)
mark

Signed, sealed and delivered
in the presence of
Marcy Z. Trusdell.
Frederick W. Leonard.

Exhibit

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

BE IT REMEMBERED that on this Fourth day of February, in the Year of Our Lord One Thousand Eight Hundred and Ninety-Eight Before me one
 10 of the Masters in Chancery of New Jersey personally appeared Isaac Keisler, who I am satisfied is the grantor mentioned in the within indenture and to whom I first made known the contents thereof and thereupon he acknowledged that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed.

FREDERICK W. LEONARD,

Master in Chancery of New Jersey.

20 Received in the Office, February 4, A. D. 1898, at 3:27 p. m.

ESSEX COUNTY REGISTER'S OFFICE

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

I, Walter A. Evans, Register of the County of Essex, do hereby certify that the foregoing is a true and correct copy of the record of a certain
 30 Deed made by Isaac Kieslar to William M. Brown and also of the certificate of acknowledgment thereto annexed, as the same may be found recorded in my office in book I-31 of Deeds for said County on pages 178-181.

In Testimony Whereof, I have hereunto set my hand and official seal this 29th day of March, A. D., 1916.

WALTER A. EVANS,
 Register.

(Seal.)

40 (Revenue Stamp.)

Exhibit C-4

(Endorsed)

The original Deed, of which this is a copy, was received in the Register's Office of the County of Essex, State of New Jersey, on the 4th day of February, A. D., 1898, at 3:27 o'clock in the afternoon and recorded in Book I-31 of Deeds for said County on pages 178-181. 10

ALFRED F. SKINNER,
Register.

Exhibit C-3

Received from Mr. Samuel H. Bowman, Twenty-five Dollars on account of fees in case of Isaac Kiesler, in matter connected with estate of Jacob Kiesler and other matters of Mr. Isaac Kiesler. 20

February 9, 1898.

J. WHITEHEAD.

Exhibit C-4

30

THIS INDENTURE, made the fourteenth day of February, in the year of our Lord One Thousand Eight Hundred and Ninety-Eight Between William M. Brown and Minnie, his wife, of the City of Newark in the County of Essex and State of New Jersey, part of the first part and Isaac Kiesler, of the Township of Caldwell in the County 40

Exhibit C-4

of Essex and State of New Jersey part of the second part:

10 *Witnesseth* that the said part of the first part, for and in consideration of One Dollar (and other valuable consideration) lawful money of the United States of America, to them in hand paid by the said party of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, release, convey and confirm unto the said party of the second part, and to his heirs and assigns, forever, All those certain lots tracts or parcels of land and premises, hereinafter particularly described, situate, lying and being in the Township of Caldwell in the County of Essex and State of New Jersey. Being the same premises conveyed to said William M. Brown by said Isaac Kiesler by deed dated February fourth, 1898 and recorded same day in the register's office of Essex County. The first lot being a part of the real estate formerly of Josiah Francisco dec'd bounded as follows: on the east by lands formerly of Jonathan Beach, deceased, on the North by the same lands, on the West by lands of Cornelius Courter and on the South by lands of Josiah Vanness, containing 10 acres more or less— Second lot described as follows: Beginning at the Southeast corner of Henry Courter's lot in the line of Peter & John Francisco, thence in the line of said Henry Courter, North 41° 30', East 33 chains and 35 links to the line of Stephen J. Gould, 40 thence on his line the whole distance of the North

Exhibit C-4

end of said lot, thence binding on the east on line of Calvin & Peter Francisco, Josiah Vanness, Henry Courter & Jefferson Vanness and binding on the South on line of Peter and John Francisco to the place of beginning containing 9 acres be the same more or less. Third lot, Beginning on the N. E. corner of the lot hereby intended to be conveyed and adjoining land now or formerly of John C. Bush, thence along the same South $25\frac{3}{4}^{\circ}$, East 5 chains, 64 links, thence South 64° , 15', East 26 chains, 60 links to lands sold by John Munn and others, Commissioners to Rynnor Vanness, thence, along his line North $25\frac{3}{4}^{\circ}$, East five chains sixty-four links thence North 64° , 15', West 26 chains, 60 links to the place of beginning. Containing 15 acres being the same property conveyed to the said John Bowden by John Munn and others, Commissioners by deed recorded in Book A 27 of Deeds for Essex County on pages 361 etc.

TOGETHER with the tenements, herditaments and appurtenances thereunto belonging or in anywise appertaining: and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and ALSO all the estate, right, title, interest, property, possession, claim and demand whatsoever, of the said party of the first part as well in law as in equity or the above described premises of the first part, of, in, and to, every part and parcel thereof, with the appurtenances.

To HAVE AND TO HOLD all and singular, the above mentioned and described premises together with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever:

Exhibit C-4

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

WM. BROWN (S)

MINNIE BROWN (S)

10 Signed, Sealed and Delivered
in presence of
Frederick W. Leonard.

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

BE IT REMEMBERED, that on this 14th day of February in the year of our Lord One Thousand Eight Hundred and Ninety-Eight before me, a Master in Chancery of New Jersey personally appeared
20 William M. Brown and Minnie, his wife, who, I am satisfied, are the grantors in the within Deed of Conveyance named and I having first made known to them the contents thereof, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed; and the said Minnie Brown being by me privately examined, separate and apart from her husband did further acknowl-
30 edge that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband.

FREDERICK W. LEONARD,
Master in Chancery of New Jersey.

New Jersey Court of Errors and Appeals

Between
SAMUEL H. BOWMAN,
Complainant and Appellant,
and
WILLIAM M. BROWN, et al.,
Defendants and Respondents.

On Bill, Etc.

REPLY TO DEFENDANTS' BRIEF.

The defendants' counsel has, inadvertently, of course, made some serious mistakes in his statement of fact, one or two of which might be deemed material. They will be noticed very briefly. Upon page 2 counsel commences a series of citations from the testimony by page and line. These are cited in such a way as to make them read as if they were all testified to by Bowman. The first one begins in this way: "It appears from the testimony of Bowman (Page 35, L. 35) that Keisler came to him and said," etc. That quotation is correct, but nothing else that appears on the second and third pages of the brief is stated by Bowman, and some of it is not testified to by anybody. The other alleged quotations from the testimony on those pages are from the testimony of Brown and are directly contradicted by Bowman. Bowman says on page 44,

line 22, "I did not know Mr. Brown had anything to do with it; I never knew Mr. Brown in connection with the case until Mr. Keisler came to me with his trouble." On page 45 he is asked, "Didn't you consult with Mr. Brown about this matter?" The answer is "No"; and again, on the same page, he asserts he never had any dealings with Mr. Brown.

Moreover, the brief does not accurately state Brown's testimony. Mr. Brown does not say positively that the conversation with Keisler, which he details on pages 49 and 50, took place in the presence of Bowman. He says, (Page 49 at the top), "Subsequently, a few days after, Mr. Keisler and Mr. Bowman, *I think it was*, came to my office, if I remember rightly." And, after some observation by his counsel about the lapse of time, he says, "And wanted to know, Mr. Bowman wanted me to deed the property back himself"; etc. But even Mr. Brown does not assert that his proposition was to deed it back in escrow. He says, "*I told Mr. Bowman that I would deed the property back to Mr. Keisler.*" The point is that Mr. Bowman claims, as was amply shown by the testimony quoted in the principal brief, that the first knowledge he had of any claim of escrow was after the death of Mr. Whitehead in 1905.

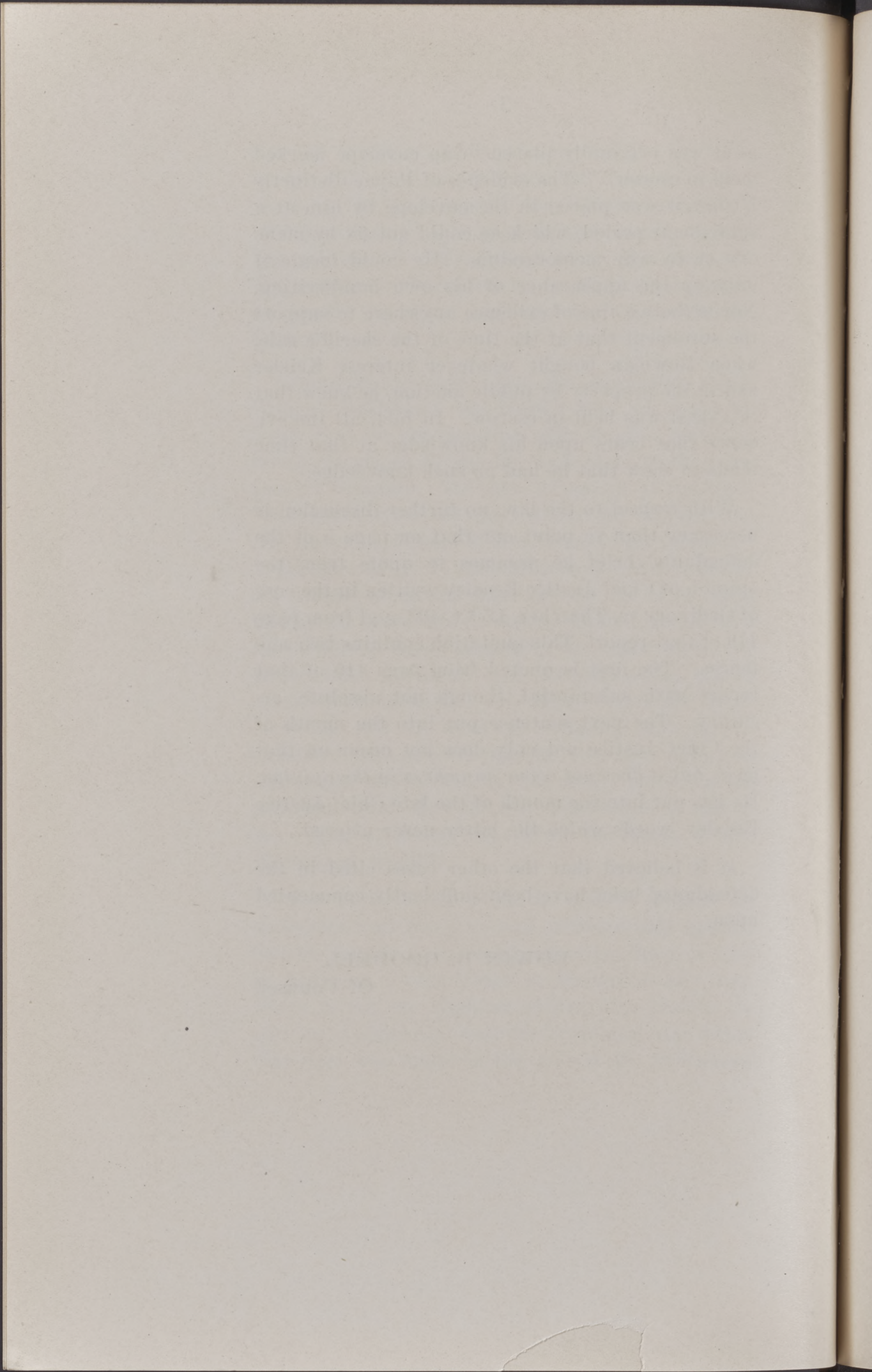
There is no testimony in the case to support the statement that Bowman had collected bills against Keisler for the purpose of enforcing them or that he had been a bad friend to Keisler in any way. There is not the slightest evidence to justify the statement appearing near the bottom of page 3 that "the deed was found in the safe of Mr. Whitehead

as it was originally placed in an envelope marked 'held in escrow.'” The evidence of Payne distinctly is that it was placed in the envelope by him at a subsequent period, which he could not fix by memory or by any memorandum. He could locate it only by the appearance of his own handwriting. Nor is there a line of evidence anywhere to support the statement that at the time of the sheriff's sale, when Bowman bought whatever interest Keisler had in the property by public auction, he knew that this deed was held in escrow. In fact, all the evidence that bears upon his knowledge at that time tends to show that he had no such knowledge.

With respect to the law, no further discussion is necessary than to point out that on page 5 of the defendants' brief he assumes to quote from the opinion of Chief Justice Beasley written in the case of Ordinary vs. Thatcher, 12 Vr. 403, and from page 410 of that report. This quotation contains two sentences. The first is quoted from page 410 of that report with substantial, though not absolute, accuracy. The next sentence put into the mouth of the Chief Justice not only does not occur on that page, *but it does not occur anywhere in the opinion.* He has put into the mouth of the late Chief Justice Beasley, words which the latter never uttered.

It is believed that the other cases cited in the defendants' brief have been sufficiently commented upon.

EDWIN B. GOODELL,
Of Counsel.



New Jersey Court of Errors and Appeals

Between	}	On Bill, etc.
SAMUEL H. BOWMAN,		
Compl't and Appellant,		
and		
WILLIAM M. BROWN, <i>et al.</i> ,		
Def'ts and Respondents.		

COMPLAINANT'S BRIEF

The following facts appear and are substantially uncontroverted. In the early part of February, 1898, the complainant introduced Isaac Kiesler to John W. Whitehead, a counsellor at law (p. 35, ll. 20-25 and 30-40), because Kiesler had informed him that he had signed some kind of a paper for the defendant, William M. Brown, and that he did not know what it was (p. 35, ll. 2, 3). The said Keisler was unable to read or write (Test. p. 36, ll. 30-33 and p. 56, ll. 17-19). Mr. Whitehead made an investigation of the record and two days later informed Mr. Kiesler that the paper which he had signed was a deed (Exhibit, p. 76) and he then told Mr. Kiesler, in the complainant's presence, that he would get this deed

back again, or get the property back again (pp. 36 and 37). Whitehead then intimated that there would be expense connected with the business, and accepted a retainer paid by Bowman because Kiesler had no money, but paid on Kiesler's behalf, and gave the following receipt for the money:

“Received from Mr. Samuel H. Bowman Twenty-five Dollars on account of fees in case of Isaac Kiesler in matter connected with estate of Jacob Kiesler and other matters of Mr. Isaac Kiesler.

February 9, 1898.

J. WHITEHEAD.”

(p. 37, ll. 15-20). At that time Mr. Brown was Mr. Kiesler's counsel in certain litigation with the estate of Jacob Kiesler and the deed was given, according to his story, to secure, or to pay, Brown's fees (p. 48, ll. 1-25). Upon request from Mr. Whitehead, Brown made his deed back to Mr. Kiesler for the same property (Exhibit C-4, p. 81), and delivered it to Mr. Whitehead (Test. of Brown, p. 57, ll. 10-20 and Test. of Payne p. 61, l. 4 and p. 63, l. 34 to p. 64, l. 2). Mr. Whitehead showed this deed to the complainant, taking it out of his own safe for that purpose, and putting it back into his own safe or into his desk after he had shown it (Test. p. 37, l. 34 to p. 38, l. 20). Subsequently, the complainant, having obtained a judgment against Mr. Kiesler, acting under the same Mr. Whitehead's advice and instruction, bid in the property described in the deed, and other property at public sale (Test. p. 40, ll. 26 and 27). Mr. Whitehead received the sheriff's deed, and kept both deeds, unrecorded, until his death, which

occurred nearly seven years later (Test. p. 46, ll. 27-40). Then for the first time the complainant discovered that he had not any title of record, and he succeeded in obtaining the sheriff's deed and getting it recorded, but was met by the claim on behalf of the defendant Brown as to the deed in suit, that it was claimed by Brown to be held in escrow (p. 46, ll. 1-6).

It is perfectly plain that the alleged escrow was handed to Whitehead and not to Payne who was his partner. Whitehead's possession of it in his own private safe is evidence. Brown says the delivery took place in Mr. Whitehead's office (p. 57, l. 19). He afterwards changes it to "Whitehead and Payne's office" (*idem*). He is unwilling to swear positively that Whitehead and Payne were together at the time the deed was delivered (p. 57, ll. 26, 27), and Payne, in his testimony says (p. 62, ll. 13-16):

"Mr. Brown executed the deed and brought it back to our offices and delivered it to us and the deed has been in our safe ever since."

He says under cross-examination that he and Mr. Whitehead had separate rooms (p. 62, l. 38). He further says that when the deed was prepared Mr. Brown took it into Mr. Whitehead's room (p. 63, ll. 36-40). *He could not tell whether he was in the room at that time or not* (p. 64, l. 4). And in lines 10-14 on the same page he further says:

"I could not say whether it was delivered to Mr. Whitehead or to me personally; we always considered it was delivered to both of us, and *we* put it in the safe."

After Mr. Whitehead's death it was shown to complainant in a yellow envelope with the words marked on the outside in Mr. Payne's handwriting:

"Due from Brown to Kiesler; hold in escrow by Whitehead and Payne. Miss Ella Jacobus, 290 Summer Avenue, city" (Test. p. 61).

Payne states that *he* put it into the yellow envelope (p. 64, ll. 18 and 19). When he is questioned as to the time when he put it in, he argues from the form of his handwriting as it appears on the envelope that "must have been about that time"; but he admits that he could not locate the date simply by the looks of his handwriting within a week or a month. It is perfectly manifest that he could not locate it within a year, and we therefore are without the evidence of any contemporaneous writing or memorandum, stating either the fact or the terms of any agreement in escrow.

Law

The bill is filed to obtain a decree that this deed should be surrendered to the complainant to clear his title of record. It contains the alternative prayer that if it be found that the deed was never delivered but was held in escrow until some money should be paid to Brown, that the sum should be determined and the complainant allowed to redeem. The Court found on the foregoing facts that the deed was held in escrow in the hands of Mr. Whitehead and that to redeem it the complainant must pay the defendant \$250 with interest from 1898 besides his taxed costs and a counsel fee of \$25; and a decree was entered accordingly. From that decree the complainant appeals.

POINT ONE

The Court erred in decreeing that this deed was held in escrow.

It is of the very nature of an escrow that the document should be held by a stranger. Here it was delivered to the attorney of the grantee, who had been retained by the grantee and had undertaken to get it.

It seems to be conceded by the learned Vice Chancellor that a deed in the hands of the grantee himself cannot be an escrow, but he thinks a deed may be delivered to the grantee's agent and still be shown by parol evidence at any time afterwards to be only an escrow.

Until very recently it seems to have been taken for granted that the delivery of a deed to an agent charged with the duty of receiving it, is equivalent to a delivery to the party himself; a conclusion which would seem to follow naturally from the relation of principal and agent. *Qui facit per alium facit per se.*

Thus in *Ordinary v. Thacher*, 12 Vr., 403, decided in the Supreme Court in 1879, Chief Justice Beasley assumes, without any argument, that it is immaterial whether the delivery be to the grantee or to one who stands in such a relation to him in the transaction involved as to be disqualified to act for the other party. The case was whether a bond to the *Ordinary* placed in the hands of the Surrogate, with the alleged condition that it was not to become effective until another surety should sign, was valid or not. The learned Chief Justice directs his inquiry in the first instance simply to the question as to the legal

status of surrogates in affairs of that kind. He inquires:

“Does he stand sufficiently aside of the obligation, so as to be capable of taking, for the benefit of the sureties, the bond in escrow; or does he, in its reception, represent, *simpliciter*, the obligee? Can this officer in such a matter be the agent of the surety, as well as the agent of the Surrogate-General?”

Finding that his relation was such that he could not represent both parties, he finds that the bond must be considered as delivered absolutely, upon the familiar principles already cited.

Before proceeding to discuss the argument or theory upon which the Vice Chancellor has decided that there was nothing inconsistent in Mr. Whitehead's acting in relation to this deed as the agent or attorney for both parties to it, I wish to call attention to the remarks of the late Chief Justice in the above decision on page 410, upon the reason for the rule and the danger to be apprehended from any laxity in its application. He says:

“The law reasonably provides that the instrument delivered shall be conclusive, with respect to its contents, as to the intention of the parties to it; and in the same manner, and in view of the same considerations, the act of delivering the instrument should be equally conclusive. The danger to be apprehended from fraud and false swearing, as well as from the infirmity of human memory, would be as great in the one case as in the other.”

But the learned Vice Chancellor sweeps aside the authority of this case because, as he conceives it, it has no application except to a case where the agent is a public officer whose duties are defined by law. There is nothing in the opinion of the Chief Justice which would indicate that any such distinction was in his mind, nor does it appear why the distinction creates any valid difference in the application of the principle. However, there are other authorities outside of the State of New Jersey equally applicable and applying to private agents. Some of these are:

Hubbard vs. Greeley, 84 Me., 340, 17
L. R. A., 511.

Worrall vs. Munn, 5 N. Y., 229, 55 Am.
Dec., 330.

Duncan vs. Pope, 47 Ga., 445.

The Vice Chancellor makes no comments upon any of these cases, but finds as a fact that the deed was to be held in escrow upon the condition which the defendant alleges, and he admits all the evidence and finds in favor of the defendant upon this broad ground, which he states in a single sentence at the bottom of page 69:

"I can see nothing antagonistic to Mr. Kiesler's interest in the action of Mr. Whitehead."

We contend that this is not the question here; that it would not be possible at this date to determine whether or not the transaction as outlined by the defendant Brown was or was not antagonistic to Mr. Kiesler's interests, because we are not in possession of facts enough to enable us to determine the question; nor has there been any attempt made in this case to frame an issue which

involves such a question nor has there been any attempt to produce evidence to enable the Court to answer it. However, the Vice Chancellor justifies his theory that this is the real crux of the question by a quotation from 10 R. C. L., 631, which quotation he makes an attempt to support by the citation of one case only, namely: *Watkins vs. Nash*, L. R., 20 Eq., 262, where he says it is held that

“the delivery to the solicitor of the grantee of an instrument executed by the grantor will not convert the instrument from an escrow into a deed, provided the delivery is of a character negating its being a delivery to the grantee” (p. 70).

So far as the authority cited by the Vice Chancellor is concerned it does not hold what the Vice Chancellor states it does, thus leading to the suspicion that he did not read it. The instrument in that case was a deed of release from a mortgage. The mortgagor's solicitor had asked the mortgagee to have it in readiness as the mortgagor was about to pay the mortgage. The mortgagee complied with the request but it was necessary that the instrument should be taken to London to be stamped. The solicitor undertook to be his errand boy for that purpose, whereupon the mortgagee delivered to him the instrument *being careful to take back a written receipt explaining the purpose for which it was taken*. The solicitor took the instrument to London, procured it to be stamped, brought it back and handed it back to the mortgagee. Some years afterwards it transpired that the solicitor had, subsequently to this date, received the money to pay the mortgage and had converted it to his own use and an attempt was

made on behalf of the mortgagor to make out that entrusting the deed to his solicitor to take it to London to be stamped, constituted an absolute delivery.

This case therefore is not in point for two reasons. First, because the purpose for which the deed was entrusted to the keeping of the solicitor was carefully expressed in writing and by no means left to be decided by the memory of participants or onlookers. And, secondly, because it was not an escrow. The deed was not handed over to be delivered to the other party upon conditions, but it was put in his hands in an incomplete state, for a specific purpose and then to be returned. This was not a delivery, either absolute or conditional.

The only other authority for his doctrine which the Vice Chancellor cites is a statement by the text writer of Ruling Case Law as follows (10 R. C. L., 631):

“It has now become the settled rule that if the agent’s or attorney’s relation to his principal is such that his acting as custodian of the deed or paper is *not antagonistic to his principal’s interests* and the paper was put into his hands not as a delivery, but as an escrow, such general agent or attorney of the grantee, payee or obligee of an instrument is not incapacitated from acting as depositary of the instrument, but becomes the agent of both parties for the purposes of the escrow.”

The words I have italicized above are identical with the words adopted by the Vice Chancellor. Does that language, *taken in the sense in which he has employed it*, correctly express the rule

which, according to the text writer, "has now become settled"? The answer must be found by interpreting the language used by the author in the light, first, of the settled rules of agency, and second, of the authorities which he cites to sustain his text.

But we feel that this examination would have been unnecessary if the Vice Chancellor had read the very next sentence to the one he quotes, and which reads as follows:

"In order to disqualify the agent from being the depositary of a deed, the agency *must include the very matter of obtaining the conveyance for the grantee.*"

Surely, and that it did, in the case at bar.

1. Reading the above language in the light of settled principles of agency, how is it to be interpreted? The situation arises, when the agent's or attorney's *relation to his principal* is such that his "acting as a custodian" of an escrow. *i. e., acting as the agent of both parties*, is not "antagonistic to his principal's interest." When that happens, the agent is not "incapacitated from acting as a depositary" of the instrument.

This aspect of the question resolves itself, therefore, into this: When may the agent of one party undertake to act *also* for the other party? Clearly not where the matter is one for negotiation, and what one party gains in the bargain, the other loses. There, the interests *are* antagonistic, and that was precisely the case as between Brown and Keisler. The latter, an old man, and an ignorant one, had signed a paper to his lawyer, and did not know what it was. He employed Whitehead to find out for him and when he found out, he wanted it back. *Prima facie* he was entitled to have it back, because a deed from client to lawyer is

presumed to be unfair. In arranging to get this deed back, Whitehead was "incapacitated" from acting for the other side in any capacity whatever. It was "antagonistic to his employer's interest" that he should become Brown's agent, even though the bargain, as Brown now states it, *may* have been a fair one. The question of the fairness of the bargain was not in issue and was not tried. Whitehead was employed to get a deed. He was incapacitated, *by the law of agency*, to accept an escrow.

2. Upon examination of the authorities cited by the text writer to sustain his text the same result is reached. These authorities are:

Ashford vs. Prewitt, 102 Ala., 264, 48 A. S. R., 37.

Dixon vs. Bristol Savings Bank, 102 Ga., 461, 66 A. S. R., 193.

J. I. Case Threshing Machine Co. vs. Barnes, 133 Ky., 321, 19 Ann. Cases, 246.

NOTES: 130 A. S. R., 925; 5 L. R. A., 697; 12 L. R. A., 175; and 19 Ann. Cas. 251.

In *Ashford vs. Prewitt*, the delivery of the deed in question was part of a transaction in compromise of a litigation. The compromise agreement was carefully reduced to writing by the attorneys for the respective parties, signed, and, in accordance with its terms, a deed was delivered to one of the attorneys, *accompanied by this written stipulation as to the conditions and terms of its delivery.*

Dixon vs. Bristol Savings Bank, 102 Ga., 461, 66 A. S. R., 193.

In this case there is nothing in the report to show that the attorney who acted as depositary had been acting for either party in this connection, before being asked to hold the deed. *Both* parties called on him, and he seems to have acted for both, *ab initio*.

J. I. Case Threshing Machine Co. vs. Barnes, 133 Ky., 321, 19 Ann. Cas., 246.

This was where the selling agent persuaded a farmer to sign a contract and note for a threshing machine by promising him that he would not deliver the papers to his principal until the defendant should test the machine, the next day, and if it was not as represented, the papers should be returned to him. But, before the test could be made he had handed the papers to his principal. The Company sued on this note, and, the jury having found in the defendant's favor on the facts, the verdict was allowed to stand.

This is one of a pretty large class of cases. Although the judge who read the opinion says that, *if the note had been delivered to the plaintiff by the maker*, he could not have set up this defense, and puts the decision upon the ground that the *agent* might hold the note in escrow, I cannot believe this is the true ground upon which to rest the decision. In some of the cases of a similar nature, as in *MacFarland vs. Sykes*, 54 Conn., 250, the note *was* delivered to the payee, but the condition, which was undisputed, was enforced. It is material, in all these note cases, that no rights of third parties have intervened. The threshing machine case, like all of its class, was really a case of fraud and deceit. No technical rule will be allowed to permit a man to be cozened. And the

question of agency has, as I conceive, nothing to do with it. And it is well established in New York, and in some other states, that a document *not under seal* may be delivered to the party, himself, under conditions which will be enforced, if proved, and rights of third parties have not intervened.

See:

Benton vs. Martin, 52 N. Y., 570.

Note in 130 A. S. R., 925. This reads as follows:

“A deed cannot be delivered in escrow to the agent or attorney of the grantor, nor to the agent or attorney of the grantee.”

Then follows a paragraph to the effect that a releasor may make the agent of the releasee his own agent to hold the deed or release as an escrow, provided he there and then constitutes him his own agent for the purpose of holding and returning to him the paper in case of the non-performance of the condition, in a case where the depository can accept the trust *without violating a duty owed to either party*. We then find this statement:

“The delivery of a deed to an agent or attorney of the grantee employed to obtain possession of the instrument, or to make the purchase for the grantee, is tantamount to delivery to the grantee; *provided the agency includes the very matter of obtaining the conveyance for the grantee*; but while this rule applies where the delivery is made to the agent of the grantee as such agent, it has no application to a transaction, in the nature of an escrow, where the depository is, though an agent or attorney of the grantee, *yet not an agent to procure the*

conveyance, and the delivery is to him as the agent of both parties.”

Note 5 L. R. A., 696.

Two cases only are cited in this note. It contains a statement that a deed may be delivered as an escrow to an attorney acting for *all the parties* and the case cited (*Millership vs. Brooks*, 5 Hurl. and N. 797), was a case of that kind, the attorney having been employed by both parties to prepare the agreement and represented one no more than the other. The indenture delivered, moreover, was incomplete in form and thereby distinguished from the cases which we are interested in. The other case is *Souverbye vs. Arden*, 1 Johns. Ch., 240.

This case upon examination is found to apply to an absolute delivery, and is not at all pertinent to an escrow nor is it apropos to the rest of the note.

Note, 12 L. R. A., 175.

The only thing in point in this note is the following:

“A real estate agent is not necessarily incapacitated by his agency from acting as the custodian of an escrow between his principal and the purchaser.”

The citation is “*McLaughlin vs. Wheeler* (S. Dak.), Jan. 30, 1891, see *Cin. W. and Z. R. R. Co., vs. Ilif*, 13 Ohio St., 254.”

The *Zanesville R. R. Co. vs. Ilif* case is a strong authority for the old doctrine. The instrument in the case was delivered to the agent of the railroad company employed to obtain deeds for rights of way. The instrument delivered to him was incomplete upon its face and could not be effective in

that condition. It was held to be not an absolute delivery, but the Court (Brinkerhoff, J.), says in his decision:

“There can be no doubt according to the uniform current of authority that, if in this case the instrument of release had been as a completed instrument delivered to Carroll, simply as the agent of the company to procure the right of way, although the delivery may have been accompanied by the verbal stipulation that the instrument should not operate as a release until and unless certain conditions were first performed, the release would have been operative according to its terms and the verbal stipulations with respect to its operation after delivery would have amounted to nothing.”

McLaughlin vs. Wheeler, the other case quoted in the aforementioned note, will be found in 1 S. Dak., 497, 47 N. W., 816. There a broker was suing the vendor of real estate for his commissions. The vendor set up as one of the defenses that the broker had agreed with the purchaser to take a deposit of a thousand dollars and hold it until the seller should put the deed into his hands, which deed he would then hold for the seller until he got the balance of the purchase money. The Court held that the making of this agreement was not a violation of his duty. No question as to the validity or effect of the deed so to be placed in his hands was raised. The question was wholly between principal and agent, and the decision rested upon the character of his employment and the usual course of conducting such business in South Dakota.

The last note cited is to be found in 19 Ann.

Cas. at page 250. This note, after stating what it calls the "ancient rule," which is the rule we contend for here, and citing numerous authorities in support of it, proceeds (p. 251, column 1), as follows:

"An exception to the rule was established by early decisions in several states, it being held that, if the instrument was not one under seal, it might be delivered in escrow to the agent of the person to be benefited by a delivery."

After this dictum, which is not especially important here, it cites, among other cases, *Worrall vs. Munn*, 5 N. Y., 299. But *Worrall vs. Munn*, was a case where the so-called "ancient rule" was strictly enforced. It also cites *Harnickle vs. New York Life Insurance Co.*, 111 N. Y., 290, 18 N. E., 632, 2 L. R. A., 150. In that case the action was to recover certain policies which had been surrendered by the plaintiff to the insurance company's agent in exchange for a new policy, upon the understanding *expressed in writing* that, unless the agent procured surrender values satisfactory to the plaintiff, the old policies were to remain in force and the new policy was to be cancelled. Two facts take this case entirely out of the rule. One is that the old policies could not be cancelled by their mere delivery to the agent of another company, and the other is that the whole agreement was reduced to writing. We are not concerned with any case where a deed is made and delivered pursuant to a written agreement expressing the full contract and delivered at the same time. The note further relies upon *Murray vs. Kimball Co.*, 10 Ind. Appeals, 188; 37 N. E., 736. This was the case of a promissory note, and

it was squarely held that the note could not be delivered in escrow to the attorney employed by the payee *to collect the debt for which the note was given.*

We have thus made an examination of all the authorities cited by the text writer and they show conclusively that the learned Vice Chancellor has not correctly interpreted the meaning of the passage which he cites. We have found that in every case where the attorney or agent holding the alleged escrow had been employed by the grantee to represent him in the transaction which resulted in giving the conveyance, he was *incapacitated* by his duties as agent to make himself the agent of the other party, so far as to agree to hold the deed in escrow. Delivery to him has always been equivalent to delivery to the grantee. We have found that where the depositary was a general agent, and the *nature of his duties* did not preclude *him* from acting for the other party in this matter, that is, where the nature of his employment was such that it was not "antagonistic to his principal's interests" that he should undertake to act for the other party, then he might accept a deed in escrow.

In other words, the antagonism to his principal's interest, or the want of it, is not to be determined by considering whether the transaction itself, as conducted, was or was not to his principal's interest; but whether or not he stood "sufficiently aside of the obligation" so as to be capable of taking, *for the benefit of the other party*, the deed in escrow, or whether he, in its reception represented *simpliciter* the grantee. The Vice Chancellor has apparently endeavored to put himself in the place of the parties then acting, taking his facts wholly from the testimony of the defendant

Brown, and having decided that, such being the facts *he* would have advised Kiesler to have the deed placed in escrow, *therefore* it was not antagonistic to Kiesler's interests that it should be done. We submit that the law does not impose upon the Courts in such connection any such impossible function.

But there is a second reason why a delivery to a party or his agent, accompanied by a verbal stipulation only, cannot be an escrow. It is not merely because the agent is incapacitated from acting for the other party, it is because the instrument in the hands of the grantee or his agent has a language of its own, which third parties are entitled to accept as final. As the Chief Justice pointed out so strongly in *Ordinary vs. Thacher*, in the language heretofore quoted, the act of delivering the instrument should be equally conclusive with the wording of the instrument. The complainant here saw the deed in the hands of the man who, as he knew, had been employed by Kiesler to obtain it. He was told the deed had been delivered. He had the right to rely upon it. He purchased the property upon the faith of it, and the proposition now is to contradict the effect of the deed by oral testimony of an interested party, supported by one who was a mere onlooker, nearly twenty years after the event.

The utter improbability of Brown's story will be passed by. Here were two lawyers dealing together and, according to Brown's account, he was attempting to turn what had been, in the first instance, an absolute deed to himself into a mortgage, by giving back a deed absolute in form, attaching to it an oral agreement which essentially changed its nature. Both must have known by experience the danger of such a loose arrangement,

and both must have been presumed to know the law relating to the delivery of an escrow to the party or his agent.

It is hard to believe that if Mr. Whitehead could be heard he would admit that he had made so un-lawyerlike an arrangement. This, however, is merely incidental to the point, which is that oral evidence ought not to be admitted to contradict and annul the effect of a deed, perfect in form, and handed over to the agent appointed to receive it for the grantee, and made use of by that agent to induce another to purchase the property.

POINT TWO

Mr. Kiesler was prima facie entitled to have an absolute deed made back to him.

According to Brown's story Mr. Kiesler had made this deed to him to pay, or to secure, he does not seem to be clear which, his fees as counsel, which he now states were placed at \$250. He makes no attempt to justify his charge in detail. In his direct testimony he mentions in a casual way (p. 48, l. 20), that he, Kiesler, "recognized that I had brought suits for him and done a great deal of work." On cross-examination he is unprepared with any bill of particulars and can only state generally that he had been engaged for him more or less from 1890 until the date of the deed, but the only two matters he can mention are a suit brought by Mr. Kiesler against his brother's estate and raising some money for him on a mortgage. He remembers he brought an action for him, but does not remember the result (p. 52). He remember that he raised some money for him, but

does not seem to be sure when nor upon what security (p. 54). He gives no evidence which would justify any Court in passing upon the amount of his bill, and he evidently relies wholly upon what *he says* was the agreement, namely, that it should be \$250.

But it is settled that

“when the relation of solicitor and client exists and a security is taken by the solicitor from his client, the presumption is that the transaction is unfair, and the onus of proving its fairness is upon the solicitor.”

This quotation is from Mr. Justice Sherwood's lecture on professional ethics, quoted with approval by Chancellor Green in *Brown v. Bulkley*, 1 McCarter, 451, at page 458. This case is cited with approval by the Court of Errors and Appeals in *Lynde v. Lynde*, 19 Dick Ch., 736, at page 750 and also by Dixon, J., speaking for the Court of Errors and Appeals in *Porter v. Bergen*, 54 Eq., 405. See also decision by Chief Justice Beasley in *Schomp v. Schenck*, 11 Vr., 195, at page 200.

The deed to Brown was not necessarily fraudulent, but the burden of sustaining the justice of his charge rested upon the defendant Brown, and the agreement between him and Kiesler, if there was one at all, was subject to the scrutiny of the Court. No attempt was made to take up the burden, and the learned Vice Chancellor who decided the case pays no attention to this question in his opinion. He is quite contented to find that \$250 was a just charge without making the slightest investigation of the question.

But we submit that this principle has a very important bearing upon the question which the Vice Chancellor has assumed to determine, namely, whether or not it was consistent with the interests

of Mr. Kiesler that his counsel should enter into the stipulation which the defendant Brown sets up. *The Vice Chancellor could not know this without first determining whether the alleged agreement was a fair one.*

POINT THREE

Rights of third parties, acquired upon the faith of this deed, take precedence over the rights of the defendant, Brown.

Brown made a deed, absolute on its face, and delivered it to Whitehead, the attorney of the grantee. If his story be true, he made Whitehead his attorney also, and is bound by his statements as to the terms of the delivery. Whitehead took the deed out of his safe and showed it to complainant, and told him he could safely bid in the property. The situation was such as to presuppose a delivery, and Bowman was in the same situation as if he had seen it on the record.

He cannot now be deprived of his property by oral testimony that the deed was not a deed.

POINT FOURTH

The decree should be reversed and a decree made that the defendant Payne deliver the deed to the complainant.

EDWIN B. GOODELL,
Of Counsel with the Complainant.



