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MacCrellish & Quigley Co., Printers, Trenton, N. J.

NEW JERSEY

Court of Errors and Appeals

THOMAS L. KERNEY,
Complainant-Appellee,

vs.

RICHARD H. JOHNSON,
Defendant-Appellant.

} On Appeal from the Court of Chancery.

STATE OF NEW JERSEY,
COUNTY OF CAPE MAY. } *ss.*

Personally appeared before me, James T. Hoffman, who, being sworn, upon his oath deposeth and saith that he is the said Sheriff of the County of Cape May, State of New Jersey, and that as such Sheriff he served the annexed sub ad resp. personally on Richard H. Johnson on the twenty-eighth day of July, A. D. 1927, by showing him the original and leaving with him a copy thereof.

Sworn and subscribed before me this twenty-eighth day of July, A. D. 1927.

JAMES T. HOFFMAN,
Sheriff.

H. M. ROORBACH,
Deputy County Clerk.

NEW JERSEY, to wit, THE STATE OF NEW JERSEY, to Richard H. Johnson.

GREETING: Whereas a bill of complaint has lately been exhibited against you in our Court of Chancery by Thomas L. Kerney to be relieved touching the matters therein contained.

[L. S.]

Therefore, we command you, if you intend to make a defense, that you file an answer to said bill in the office of the Clerk of our said court at Trenton, on or before the expiration of twenty days from and after the fifth day of August, 1927, and in default thereof such order or decree will be made against you as the Court shall think equitable and just.

Witness, his Honor, Edwin Robert Walker, Chancellor of our said State, at Trenton, the twenty-sixth day of July, in the year of our Lord one thousand nine hundred and twenty-seven.

JAMES J. McGOOGAN,
Solicitor.

THOMAS BARBER,
Clerk.

Personal service made July 28th, 1927, upon Richard H. Johnson by showing him the original and leaving with him a copy thereof at his usual place of abode, 813 Asbury Avenue, Ocean City, New Jersey.

JAMES T. HOFFMAN,
Sheriff.

Sheriff's fees, $5.12.

BILL OF COMPLAINT.

(*Filed July 26, 1927.*)

IN CHANCERY OF NEW JERSEY.

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

The complainant, Thomas L. Kerney, of the city of Trenton, in the County of Mercer and State of New Jersey, respectfully shows that:

1. On August 14, 1925, Shore Gardens, Inc., a corporation duly organized and existing under the laws of New Jersey, was seized in fee simple of all those certain lots of land and premises situate in the City of Ocean City, in the County of Cape May, and State of New Jersey, described as follows:

Being lots Nos. 7, 8, 9, 10, 26, 27, 28, 42, 43, 44, 45, 46, 47, Block 37A, Plan No. 1, of Shore Gardens.

2. On said date complainant entered into an agreement in writing with said Shore Garden, Inc., wherein said Shore Gardens, Inc., agreed to convey to complainant said premises with certain other lots of land, for $97,565.00, which complainant agreed to pay, a copy of said agreement being hereunto annexed marked "Exhibit A."

3. Said Shore Gardens, Inc., was thereafter always ready, willing and able to convey said premises to complainant, in accordance with said agreement, and complainant was always ready, willing and able to complete his part of said agreement.

4. On August 24, 1925, complainant entered into an agreement in writing with defendant Richard H. Johnson, wherein complainant agreed to convey said lots Nos. 7, 8, 9, 10, 26, 27, 28, 42, 43, 44, 45, 46, 47, Block 37A, Plan No. 1, of Shore Gardens to said Richard H. Johnson for $34,300.00, when the improvements in said agreement mentioned were completed, but not before September 15, 1925; a copy of said last mentioned agreement being hereunto annexed marked "Exhibit B."

5. Said Richard H. Johnson paid to complainant $2,600.00 on account of said purchase price, on August 24, 1925, and complainant has applied the same on account of said purchase price.

6. The usual restrictions, of which Richard H. Johnson had notice, that were to be incorporated in said deed, were as follows:

"No building, or any part thereof, except eaves, chimneys, steps and stairways, shall be erected on the

lots of Shore Gardens, within 10 feet of the front property line facing any street, road or avenue, or within four feet of any side line, except where a party may own two or more contiguous lots, in which event the outside lines only may be considered side lines.

No buildings shall be erected on the lots of Shore Gardens except for one of the following purposes: (a) a private detached dwelling for the use of one family, which building shall cost not less than $5,000.00; (b) a private motor garage for not exceeding two cars, which garage, if constructed as a detached building, shall not be less than twenty feet from the front property line of said lot; (c) a hotel or apartment house containing not less than fifty rooms, which hotel or apartment house only may erect a marquise or porte-cochere extending either to the front property line or to the curb line."

7. Said improvements were completed on May 10, 1927, and on April 28, 1927, complainant asked said Richard H. Johnson to arrange with him for the completion of their said contract during the first week of May, 1927, at the office of Ewing T. Corson, No. 757 Asbury Avenue, Ocean City, New Jersey, and has since frequently asked said Richard H. Johnson so to do, but said Richard H. Johnson has wholly failed and neglected to thus arrange with complainant for such completion.

8. Complainant was ready, willing and able to attend at said place, at any time designated by said Richard H. Johnson, with a valid deed conveying said premises to said Richard H. Johnson upon the payment by said Richard H. Johnson of the balance of said purchase money pursuant to the terms of his said agreement; but said Richard H. Johnson has never complied with any of complainant's said requests.

9. Complainant deferred taking title to said premises under his agreement with said Shore Gradens, Inc., until said Richard H. Johnson was ready and willing to perform his said agreement with complainant, of all of

which said Richard H. Johnson had notice, and to which he consented.

10. On June 27, 1927, said Shore Gardens, Inc., conveyed said premises to complainant, in pursuance of their said agreement, and complainant now had title thereto, free and clear of all encumbrances and liens except such as are reserved and excepted in complainant's said agreement with said Richard H. Johnson.

11. Complainant has since said improvements were completed, frequently asked said Richard H. Johnson to complete his part of said agreement, but he has refused and neglected so to do, and complainant has always been ready, willing and able, and has always tendered himself, and now tenders himself ready and willing to perform his part of said agreement with said Richard H. Johnson, and, on being paid the remainder of said purchase money, amounting to $31,700.00 with interest, to convey said premises to said Richard H. Johnson, by a special warranty deed, duly executed by complainant, in conformity with his said agreement.

12. Complainant is without adequate remedy in the courts of law, and therefore prays that:

13. Richard H. Johnson, who is the defendant to this suite may answer this bill of complaint and each statement therein made.

14. Said Richard H. Johnson may be compelled by the decree of this court specifically to perform the said agreement with complainant, and to pay to complainant the remainder of said purchase money, as in said agreement provided, with interest from the time said purchase money ought to have been paid, on the delivery by complainant to said Richard H. Johnson of a deed executed by complainant, as in said agreement provided.

15. In case said defendant, Richard H. Johnson, should, within the time limited by this court for such performance of said agreement fail and neglect, upon the tender of said deed, to pay said remainder of said purchase money as aforesaid, that then and in that

event said sum of $31,700.00, together with interest and costs, may be and become a lien upon said premises in favor of complainant, and that said premises may be sold under the direction of this court for the satisfaction of such lienn so impressed on said premises; and in case a deficiency should arise upon said sale, that said defendant, Richard H. Johnson, may be ordered by this court to pay said deficiency, together with interest and costs to this complainant.

16. A writ of subpœna may issue, commanding said defendant, Richard H. Johnson, to answer this bill of complaint and to abide by such decree as this court may make in the premises.

JAMES J. MCGOOGAN,
Solicitor for and of Counsel with Complainant.

This Agreement, Made the fourteenth day of August A. D. 1925 between Shore Gardens, Inc., a Corporation of the State of New Jersey, party of the first part, hereinafter called the "Seller," and Thomas L. Kerney of Trenton, New Jersey, party of the second part, hereinafter called the "Buyer."

Witnesseth, That the "Seller" agrees to sell and convey and the "Buyer" agrees to buy all those certain lots, tracts or parcel of land and premises situate in the City Ocean City County of Cape May and State of New Jersey, more particularly described as follows: Being Lots Nos. 1 to 33 inclusive, 42 to 47 inclusive Block 37A and Lots Nos. 1 to 33 inclusive, 42 to 47 inclusive Block 37 A and Lots Nos. 1 to 9 inclusive Block 34 B Plan No. 1 of Shore Gardens, Inc.,

Said lots to be brought to established grade, streets to be built of gravel, curbs and sidewalks of cement.

The improvements set forth above to be completed before the title is passed to the purchaser for the price or sum of Ninety-seven thousand five hundred sixty-

five ($97,565.00) Dollars, under and subject to the following terms and conditions;

1. A first payment of Nine thousand six hundred ($9,600) Dollars receipt of which is hereby acknowledged by the "Seller."

2. The balance of the purchase price shall be paid in the following manner;

A first mortgage of Forty-eight thousand seven hundred eighty-two dollars and fifty cents ($48,782.50) for two years at six per cent. and the balance Thirty-nine thousand one hundred eighty-two dollars and fifty cents ($39,182.50) to be paid in cash at the time of final settlement, which shall be made at the office of Ewing T. Corson 757 Asbury Avenue, Ocean City, N. J. when improvements are completed not before September 15, 1925, or the deposit made herewith, at the option of the "Seller" may be applied on account of the purchase price or be forfeited as liquidated damages to the "Seller," and not as a penalty, provided that the necessary title searches can be obtained from any first-class New Jersey title company by that date. Should there be any delay, not the fault of the "Buyer" in the procuring of such searches, the time for the final settlement shall extend until such searches can be obtained.

3. The title to the premises shall be free and clear of all incumbrances, including municipal liens and assessments except municipal improvements in the course of construction and not assessed, obvious easements, usual restrictions running with the land and the restrictions of Shore Gardens, Inc. and shall be a marketable title, and the "Seller" shall tender a special warranty deed conveying such title at the time of the final settlement, or in the event that such title cannot be as above, then this deposit shall be returned to the "Buyer."

4. All adjustments shall be made as of settlement date and possession shall be given the "Buyer" settlement date.

5. The "Buyer" shall pay for searches and all other expenses, excepting the preparation of the deed and

the necessary revenue stamps attached thereto, which shall be paid for by the "Seller."

6. This agreement shall extend to and be binding upon the heirs, executors, administrators, successors and asigns of the parties hereto.

7. Time is the essence of this agreement.

8. This contract includes all fixtures and appurtenances permanently attached to the building or buildings on the land herein described and also specifically the following items;

In Witness Whereof, The parties hereto have set their hands and seals the day and year first above written.

SHORE GARDENS, INC.

Signed, sealed and delivered in the presence of
FRANK D. SCHROTH, Treasurer, [L. S.]
THOMAS L. KERNEY, [L. S.]
By FRANK TRANSUE, *Attorney.* [L. S.]

This Agreement, made the twenty-fourth day of August, A. D. 1925, between Thomas L. Kerney of Trenton, N. J. party of the first part, hereinafter called the "Seller," and Richard H. Johnson of Ocean City, N. J. of the second part, hereinafter called the "Buyer."

Witnesseth, that the "Seller" agrees to sell and convey and the "Buyer" agrees to buy all those certain lots, tract or parcel of land and premises situate in the City of Ocean City, County of Cape May and State of New Jersey, more particularly described as follows: Being lots Nos. 7-8-9-10; 26-27-28; 42-43-44-45-46-47 Block 37 A, Plan No. 1 of Shore Gardens.

Said lots to be brought to established grade, streets to be built of gravel, curbs and sidewalks of cement.

The improvements set forth above to be completed before the title is passed to the purchaser for the price or sum of Thirty-four thousand three hundred dollars,

under and subject to the following terms and conditions;

1. A first payment of twenty-six hundred ($2600.00) dollars receipt of which is hereby acknowledged by the "Seller."

2. The balance of the purchase price shall be paid in the following manner;

A first mortgage of thirteen thousand nine hundred dollars ($13,900.00) for two years at 6 per cent. and the balance Seventeen thousand eight hundred dollars ($17,800.00) to be paid in cash at the time of final settlement, which shall be made at the office of Ewing T. Corson, 757 Asbury Avenue, Ocean City, N. J. when improvements are completed not before September 15, 1925, or the deposit made herewith, at the option of the "Seller." may be applied on account of the purchase price or be forfeited as liquidated damages to the "Seller" and not as a penalty, provided that the necessary title searches can be obtained from any first-class New Jersey title company by that date.

Should there be any delay, not the fault of the "Buyer" in the procuring of such searches the time for the final settlement shall extend until such searches can be obtained.

3. The title to the premises shall be free and clear of all incumbrances, including municipal liens and assessments, except municipal improvements in the course of construction and not assessed, obvious easements, usual restrictions running with the land and the restrictions of the Shore Gardens, Inc. and shall be a marketable title, and the "Seller" shall tender a special warranty deed conveying such title at the time of the final settlement, or in the event that such title cannot be as above, then this deposit shall be returned to the "Buyer."

4. All adjustments shall be made as of settlement date and possession shall be given the "Buyer" settlement date.

5. The "Buyer" shall pay for searches and all other expenses, excepting the preparation of the deed and

the necessary revenue stamps attached thereto, which shall be paid for by the "Seller."

6. This agreement shall extend to and be binding upon the heirs, executors, administrators, successors, and assigns, of the parties hereto.

7. Time is the essence of this agreement.,

8. This contract includes all fixtures and appurtenances permanently attached to the building or buildings on the land herein described and also specifically the following items;

In Witness Whereof, the parties hereto have set their hands and seals the day and year first above written.

Signed, sealed and delivered in the presence of

THOMAS L. KERNEY, [L. S.]
RICHARD H. JOHNSON. [L. S.]

IN CHANCERY OF NEW JERSEY.

Between

THOMAS L. KERNEY,
Complainant,

and

RICHARD H. JOHNSON,
Defendant.

} On Bill, Etc.

ANSWER.

(*Filed August 3, 1927.*)

The defendant, Richard H. Johnson, of the City of Ocean City, County of Cape May, and State of New Jersey, answers the Complaint filed herein and says that:

1. He neither admits nor denies the allegations in Paragraph 1 of the complaint filed herein, but demands strict proof.

2. He neither admits nor denies the allegations in Paragraph 2 of the Complaint filed herein, but demands strict proof.

3. He denies that Shore Gardens, Inc., was, after August 14, 1925, always able to convey to the complainant the premises described in Paragraph 1 of the Complaint and says that the said Shore Gardens, Inc., was not able to convey said premises until on or about June 1, 1927.

4. He admits the allegations in Paragraph 4.

5. He admits the allegations in Paragraph 5.

6. He denies the allegations in Paragraph 6 and says that the following clause was in his contract with the complainant referring to restrictions: "The Title to said premises shall be free and clear of all encumbrances including municipal liens and assessments, except municipal improvements in the course of construction, and not assessed, obvious easements and the usual restrictions running with the land and the restrictions of the Shore Gardens, Inc., and shall be a marketable title.

7. He denies the allegations in Paragraph 7.

8. He denies the allegations in Paragraph 8.

9. He denies the allegations in Paragraph 9, and especially denies that he consented to the deferring of the passing of title from Shore Gardens, Inc., to the complainant.

10. He neither admits nor denies the allegations in Paragraph 10, but demands strict proof.

11. He denies the allegations in Paragraph 11.

The defendant by way of further defense says that:

First Defense.

1. That the title of the Shore Gardens, Inc., and which the complainant now has, if title has passed to him, as set forth in the Bill of Complaint, was not free and clear of all encumbrances, as is required by Paragraph 3 of the Agrement of Sale between the complainant and the defendant in that said property is subject to the covenants, conditions, reservations and restric-

tions of the Ocean City Gardens Company as contained in a deed of Ocean City Gardens Company to Martin E. Greenhouse, dated September 18, 1917, and recorded in the Clerk's Office of the County of Cape May in Deed Book 321, pages 511 and 520; and further said property is under and subject to the restrictions and rights of the Delaware & Atlantic Telegraph and Telephone Company as set forth in an Agreement dated July 31, 1913, and recorded in Deed Book 293, on page 186.

2. Title to said property was not and it not a marketable title.

SECOND DEFENSE.

1. Said complainant, Thomas L. Kerney, has never fixed a time for settlement with the defendant, nor has he ever, at any time tendered to the defendant a Special Warranty deed purported to convey the property described in the agreement dated August 24, 1925, between the complainant and the defendant, in full compliance with the terms of said agreement.

THIRD DEFENSE.

1. That the Agreement of Sale between the complainant and defendant is dated August 24, 1925, and by the terms of said agreement, settlement for the purchase of said lots was to be made at the office of Ewing T. Corson, 757 Asbury Avenue, Ocean City, N. J., when improvements were completed, not before September 15, 1925.

2. That said improvements consisted of the filling, grading and placing of curbs and sidewalks on said property, of which the lots purchased by the defendant were but a small portion.

3. That said improvements were not completed and said lots were not filled and graded and curbs and sidewalks placed until on or about June 1, 1927, or about a year and nine months after the time set for settlement by the terms of the said agreement of sale.

4. Said defendant alleges that such delay was unreasonable and unwarranted, and that the complainant is in laches.

KREPS & BELL,
Solicitors of Defendant.

IN CHANCERY OF NEW JERSEY.

Between

THOMAS L. KERNEY,
Complainant,

and

RICHARD H. JOHNSON,
Defendant.

On Bill, &c.

REPLICATION.

(*Filed August 9, 1927.*)

Complainant joins issue on the answer of defendant.

JAMES J. McGOOGAN,
Solicitor or Complainant.

IN CHANCERY OF NEW JERSEY.

Between

THOMAS L. KERNEY,
Complainant,

and

RICHARD H. JOHNSON,
Defendant.

On Bill, &c.

NOTICE OF APPLICATION FOR REFERENCE.

(*Filed August 30, 1927.*)

To Messrs. Kreps & Bell, Solicitors of Defendant:

Please take notice that on Tuesday, August 30, 1927, at 10:30 o'clock in the forenoon (daylight saving time)

or as soon thereafter as the matter can be heard at the State House in Trenton, I shall apply to the Chancellor for an order referring the above entitled cause to one of the Vice-Chancellors of this court, to hear the same for the Chancellor and to report thereon to him and advise what order or decree should be made therein.

Respectfully yours,

JAMES J. MCGOOGAN,
Solicitor of Complainant.

Dated Trenton, N. J., August 19, 1927.

Service of the within notice is hereby acknowledged this twentieth day of August, 1927.

KREPS & BELL,
Solicitors of Defendant.

IN CHANCERY OF NEW JERSEY.

Between

THOMAS L. KERNEY,
Complainant,

and

RICHARD H. JOHNSON,
Defendant.

} On Bill, &c.

ORDER OF REFERENCE.

(*Filed August 30, 1927.*)

This matter being opened to the court by James J. McGoogan, Esq., solicitor of the complainant, and it appearing that due notice of this application has been given to Messrs. Kreps & Bell, solicitors of the defendant, and after hearing counsel for the complainant and no one appearing for the defendant, and on application of the complainant, no good reason being shown to the contrary;

It is, on this thirtieth day of August, 1927, on motion of James J. McGoogan, solicitor of the complainant, Ordered, that the above entitled cause be referred to Honorable Malcolm G. Buchanan, one of the Vice-Chancellors of this court to hear the same for the Chancellor, and to report thereon to him and to advise what order or decree should be made therein.

E. R. WALKER, *C*

IN CHANCERY OF NEW JERSEY.

Between

THOMAS L. KERNEY,
Complainant,

and

RICHARD H. JOHNSON,
Defendant.

} On Bill, &c.

DESIGNATION.

(*Filed September 13, 1927.*)

This matter being opened to the court by James J. McGoogan, Esq., solicitor of complainant; and on the subjoined consent of Kreps & Bell, Esq., solicitors of defendant;

It is, on this sixth day of September, 1927, on motion of James J. McGoogan, solicitor of complainant, ordered that Monday, the ninth day of January, 1928, at 10:30 o'clock in the forenoon, and the Chancery chambers in the State House, in Trenton, be and the same are hereby designated as the time and the place for the hearing of the above entitled cause.

MALCOLM G. BUCHANAN, *V. C.*

We hereby consent to the entry of this order.

KREPS & BELL,
Solicitors of Defendant.

IN CHANCERY OF NEW JERSEY.

Between

THOMAS L. KERNEY,
Complainant,

and

RICHARD H. JOHNSON,
Defendant.

On Bill, &c.

NOTICE OF HEARING.

(*Filed September 10, 1927.*)

To Messrs. Kreps & Beil, solicitors of Defendant:

SIRS—Please take notice of the hearing of this cause before the Honorable Malcolm G. Buchanan, the Vice-Chancellor of this court to whom said cause has been referred, on Monday, the ninth day of January, 1928, at the hour of 10:30 o'clock in the forenoon, at the Chancery chambers, in the State House, in Trenton, the time and place designated by the order of the said Vice-Chancellor made on the sixth day of September, 1927.

Respectfuly yours,

JAMES J. McGOOGAN,
Solicitor of Complainant.

Dated, Trenton, N. J., September 6, 1927.

Service of the within notice is hereby acknowledged this seventh day of September, 1927.

KREPS & BELL,
Solicitors of Defendant.

IN CHANCERY OF NEW JERSEY.

Between

THOMAS L. KERNEY,
Complainant,

and

RICHARD H. JOHNSON,
Defendant.

} On Bill, &c.

TESTIMONY.

Testimony taken in the above mentioned cause, at the State House, Trenton, New Jersey, on Monday, the ninth day of January, nineteen hundred and twenty-seven, at 12:15 o'clock P. M.,

Before Hon. Malcolm G. Buchanan, Vice-Chancellor.

Appearances: James J. McGoogan, Esq., for complainant; Messrs. Kreps & Bell, by Mr. Kreps, for defendant.

The Court—Can counsel agree that the evidence taken in the case of Thomas L. Kerney against William B. Thompson, docket 46, page 692, so far as it is relevant and material to the issues in this case, be deemed to have been received in this case?

Mr. McGoogan—Yes, sir.

Mr. Kreps—Yes, sir, that is satisfactory.

Mr. McGoogan—I offer the contract between Kerney and Johnson.

Mr. Kreps—There is no dispute about that. Said contract is marked "*Exhibit C*-1."

Mr. McGoogan—I offer the deed from Shore Gardens to Kerney, dated June 27, 1927, unrecorded.

Mr. Kreps—That is objected to on the ground that any title which may have been taken by Mr. Kerney—

The Court—The question is, as to the admissibility of this document at this time. You do not dispute the due execution and delivery of that deed as a deed on the date it bears, do you?

Mr. Kreps—No, we don't dispute that.

The Court—I will admit it.

Said deed is marked "*Exhibit C-2.*"

Mr. McGoogan—And the deed by Mr. Kerney to the defendant, Richard H. Johnson, dated June 27, 1927, unrecorded.

Said deed is marked "*Exhibit C-3.*"

Mr. McGoogan—And the release from the Trenton Trust Company, mortgagee, to the Shore Gardens, dated June 27, 1927, acknowledged June 27, 1927.

Said deed is marked "*Exhibit C-4.*"

The Court—You are offering the deed by way of a tender?

Mr. McGoogan—Yes, sir.

Ewing T. Corson, a witness produced on behalf of the complainant, being duly sworn, testified as follows:

Direct examination, by Mr. McGoogan.

Mr. McGoogan—Will you produce the letter dated April 28, 1927, written by Shore Gardens to Mr. Johnson?

Mr. Kreps—Yes. (Producing it.)

Q. I show you, Mr. Corson, a letter, the original letter, dated Ocean City, New Jersey, April 28, 1927, and I ask you if that letter was sent by you to Mr. Johnson?

A. It was.

Mr. McGoogan—I offer it in evidence.

Mr. Kreps—It is objected to. We had no contract with Shore Gardens, Incorporated.

The Court—You may argue its relevancy, but it is produced by you; it may be received.

Said letter is marked "*Exhibit C-5.*"

Q. In response to that letter what did you do, or Mr. Johnson do, about settling for these lots?

A. Mr. Johnson saw me a number of times after that letter was written. At no time did he ever say he wouldn't settle, nor did he ever say he would.

Q. Was there any arrangement made at all between you and Mr. Johnson with reference to a date for finishing the transaction or the delivery of a deed and the payment of the money?

A. There was a conversation.

Q. Tell us about that and fix the date, the month and the year.

A. It was quite some time after that.

Q. After this letter was written.

A. After the letter was written. Mr. Johnson came into my office one morning; I would say it was roughly about 11 o'clock. He said, "I'll be in at one o'clock to make settlement." I came into the office about one o'clock; he had already been there. We had a deed in our office from Shore Gardens to Mr. Johnson. Mr. Johnson said to my sister—

Mr. Kreps—That is objected to.

Q. Were you there?

A. I was not there.

Q. Don't tell it. You say you were there about one o'clock in the afternoon of that day?

A. One o'clock, or a very few minutes after one.

Q. Was he there then?

A. Mr. Johnson?

Q. Mr. Johnson.

A. Mr. Johnson was not there then.

Q. Did he come in later?

A. I have seen him a number of times later. He told me the following morning, or the same afternoon, that he had been in.

Q. Did he tell you what he had done or was ready to do?

A. He told me he came in the office and said he was ready for settlement, and said "You have no deed from

Kerney to me," and went out saying that he had made his offer of settlement. I asked him if he offered any money and he said "No," but he came in to make settlement and we weren't prepared to make settlement and he didn't make it.

Q. What?

A. He said we were not prepared to make settlement and we didn't make it.

Q. This is what he told you the day after he asked you for a settlement?

A. Yes.

Q. Was that the only reason he gave you for not taking title?

A. He has told repeatedly since then, that he didn't feel financially able to take title to the lots.

Q. Did you testify as to what he said about payment or tender of purchase price?

A. I asked him if he offered any money; he said "No," that because we weren't ready for settlement he didn't offer any money.

Q. Was that the extent of your transaction with Mr. Johnson in reference to this settlement?

A. No. Mr. Johnson is a very close friend of mine and I am in a very embarrassing position.

Q. Is there anything you ought to tell?

A. I frankly don't see how it would bear on this case. We have made overtures to Mr. Johnson.

Q. You mean concerning a settlement?

A. Yes. But Mr. Johnson has told me repeatedly he wasn't in a position to take these lots.

Q. Did he say he wasn't able to settle on this day that he came in?

A. No, he didn't say that.

By the Court.

Q. The reason he gave was, that there was no deed?

A. From Kerney to him.

Q. Although there was a deed from the Shore Gardens?

A. From the Shore Gardens to him. Mr. Johnson further said, that he wasn't supposed to give a mortgage; that he was buying the property subject to a mortgage, which is not the case. Mr. Johnson knew at the time that these lots were not settled for; that they were uncompleted, and that he was taking the other man's settlement; that he would make it the same way.

Cross-examination, by Mr. Kreps.

Q. Mr. Corson, what day was it that you had this conversation with Mr. Johnson relative to settling on these lots?

A. I couldn't tell you the exact date.

Q. You don't know?

A. No.

Q. Do you know what time of day it was?

A. Yes.

Q. What time?

A. I said it was about 11 o'clock.

Q. Was it after April 28th?

A. Yes, sir.

Q. Was it after May 10th?

A. I couldn't undertake to tell you that; I don't know.

Q. Did Mr. Johnson tell you he would be there at one o'clock, or did he tell you he would be ready to settle on these lots?

A. If my memory serves me right, he said, "I'll be in to settle on these lots at one o'clock."

Q. Did you fix the time or did he?

A. I didn't fix the time, he did.

Q. He did?

A. Yes.

Q. Were you there at one o'clock?

A. I couldn't say, but it was close to it; I couldn't say exactly.

Q. Was it between one and two?

A. I was there between one and two, I am sure.

Q. As a matter of fact, weren't you out of town that afternoon and didn't get back until five o'clock?

A. I may have gone out of town, but I am sure I was in there shortly after one o'clock, because my sister told me he had been in.

Q. Didn't you go and play golf that afternoon and didn't come back until five o'clock?

A. No, I don't think I played golf; I have played it a good many times.

Q. You had no deed in your office from Mr. Kerney to Mr. Johnson?

A. We did not.

Q. Did you have any deed prior to that date?

A. Not from Mr. Kerney to Mr. Johnson.

Q. Did you after that time?

A. I didn't in my office.

Q. You never had a deed in your office from Mr. Kerney to Mr. Johnson; is that correct?

A. I believe that is correct.

Q. Now, did you at any time other than this time mentioned, fix the time for settling on these lots?

A. No.

Q. Did you ever notify Mr. Johnson to come in at a definite time to make settlement?

A. I think not.

Q. Was anyone representing Mr. Kerney, or Mr. Kerney himself, ever present in your office ready to make settlement with Mr. Johnson?

A. They never came to my office to make settlement.

Q. The settlement was to be made at your office, wasn't it?

A. The settlement was to be made at my office by myself.

Q. You say Mr. Johnson was financially unable to settle for these lots?

A. He said so.

Q. How many lots has he bought from you?

A. He told me that, I said.

Q. Did he tell you that?

A. He told me that this morning.
Q. Did he tell you he couldn't get the money?
A. I don't know that he said that.
Q. You know Mr. Johnson's capacity?
A. I know it very well.
Q. You know he could settle for these lots?
A. I know it would seriously embarrass Mr. Johnson.
Q. You know he could do it?
A. Yes, under a sacrifice.

The Court—That is not material.

Q. Did Mr. Johnson say he could not settle on that day that he was in your office; did he tell you he couldn't settle on that date?
A. No; he said he came to settle.
Q. Did you tell Mr. Johnson you would be there for the purpose of making settlement that afternoon?
A. I don't remember whether I did or not; I told him we would have a deed ready for him.

Re-direct examination, by Mr. McGoogan.
Q. Was that at 11 o'clock?
A. As near as I can say.
Q. And you would allow from eleven to one to get a deed to Trenton for Mr. Kerney to sign?
A. No, because I didn't know Mr. Johnson wouldn't take a deed from Shore Gardens. We couldn't have done it.

Complainant rests.

Richard H. Johnson, the above-named defendant, being duly sworn in his own behalf, testified as follows:

Direct examination, by Mr. Kreps.
Q. Mr. Johnson, you have heard Mr. Corson just state that he had a conversation with you relative to settling on these lots, and on that day a certain effort to make settlement was made?
A. Yes.
Q. Do you remember what date that was?

A. June 21st.

Q. How do you fix that date in your mind?

A. The way I fix that is, the City Commissioners had that day accepted the streets and one thing and another.

Q. This map that has been filed in this case—

A. I couldn't say about the map.

Q. What time of day did you see Mr. Corson about the settlement?

A. I would say 10 o'clock or half-past ten.

Q. What conversation did you have with him?

A. I asked him, told him I came to settle on the lots for Shore Gardens; he said "Is that so?" and started to laugh. I said, "When will you be ready?" He said, "Any time you will;" he said, "I'm ready right now;" he said " Come in at one o'clock and it wall be ready."

Q. Did you fix the time or did he?

A. He fixed the time.

Q. Were you there?

A. Yes.

Q. At the time?

A. Yes.

Q. Who else?

A. Mr. Howard Stainton.

Q. Who was there representing Mr. Kerney?

A. No one that I know of.

Q. Who was in the office?

A. Mr. Corson's sister.

Q. Was Mr. Corson there?

A. No.

Q. He wasn't there when you were there?

A. No.

Q. What time was it?

A. I was there at one o'clock, and I was in there five or ten minutes.

Q. Did you ask her for a deed for those lots?

A. I did.

Q. Did she have a deed?

A. She did not.

Q. She told you that?

A. Yes.
Q. She said she had no deed?
A. She said she had no deed.
Q. Did you ask her, a deed from Mr. Kerney to you?
A. What?
Q. Did you ask her for a deed from Mr. Kerney to you?
A. That's what I asked her for.
Q. She told you she had no deed?
A. Yes.
Q. Of any kind?
A. From Mr. Kerney.

By the Court.
Q. Did you know she had a deed from the Shore Gardens Company?
A. She didn't say so.
Q. Did you know?
A. I couldn't say so, no.
Q. Didn't you know it had been customary for these prior purchasers to take those deeds direct from the Shore Gardens?
A. Not all. I bought a great many lots, and I never saw it worked before. I have always taken my title from the man—
Q. I am speaking about this day you were there; didn't you know that was the practice?
A. I didn't know.
Q. Didn't you?
A. No.
Q. You had no idea that there might be a deed from Shore Gardens to Mr. Johnson there in the office?
A. No, sir.
Q. Nothing was said about such a deed by Mr. Corson?
A. No, sir.
Q. If there had been such a deed, you would have taken it?

A. I couldn't answer that; I don't know; I don't believe I would. I wouldn't want to say I wouldn't; I would get advice of counsel to make a settlement, and let Mr. Corson fix the time.

Q. At that time you were willing to take title to these lots?

A. I had the money to do so, yes.

Q. And now you are not?

A. No, sir.

Q. But on that day, if there had been a deed from Mr. Kerney to you for these lots, you would have taken that deed and paid for it in accordance with the contract?

A. Yes.

Q. That is true?

A. Yes, sir.

Q. Well, now, if that deed, instead of being from Mr. Kerney had been from the Shore Gardens to you, would you have taken title by that deed?

A. I think I probably would have taken title, yes.

Q. Is there any doubt in your mind about that?

A. No, there isn't.

Q. You would have taken it under that deed?

A. I think so, but I didn't ask about that.

Q. I didn't ask you that. You saw Mr. Corson very shortly after your visit to the office on that day?

A. No, I didn't see Mr. Corson, I guess, it was for probably for two days after that.

Q. That was shortly?

A. Yes, it was a short time.

Q. At that time you had a conversation with him?

A. No, I don't think Mr. Corson has ever talked to me about being in there particularly. He may have. We may have said something about it. If we did it was quite a while after, because Mr. Corson was mad after I went in and offered this settlement.

Q. When you saw him approximately two days afterwards, was anything said about whether you would or would not take title?

A. I told him I would not.

Q. Did you tell him why?

A. I told him he had no deed from Mr. Kerney.

Q. You gave that as the reason why you would not then take title?

A. Yes.

Q. And that is the only reason?

A. To Mr. Corson. He didn't ask me.

Q. I didn't ask you that. Counsel will take care of your interests in the matter.

Q. Did Miss Corson say you were to execute some mortgages?

A. She did not.

Q. Well, was the reason for your refusing to make settlement, or now refusing to make settlement, because you didn't have sufficient money?

A. Positively no. I can get the money; Mr. Corson should know that. If I have to get it I can get it.

Q. At the time you entered into this contract, was there anything said to you as to when these lots were to be finished?

A. There was. I went into Mr. Corson's office. I asked about these lots he was selling, lots of them; he sold me two hundred lots, I think, and one or two large pieces of real estate, three or four hundred thousand dollars, and he sold them for me and he said "Here are the lots to buy, Dick; they will not be ready until around November or December. They will be the last ones."

Q. What year was that?

A. 1925.

Q. Mr. Johnson, have you bought and sold any other lots in that immediate vicinity of these Shore Gardens lots in the neighborhood, say between the fifteenth of September, 1925, and the fifteenth of September, 1926?

A. Several. A good many.

Q. There was a market during that time?

A. Positively. Mr. Corson sold some for me at that time.

Q. Do you know whether or not that market for real estate dropped in the City of Ocean City, whether it has dropped?

A. It has.

Q. Do you know about when the market stopped?

A. I would say it stopped in around 1926, somewhere around November. I am not a real estate man.

Q. Around November?

A. I would say so.

Q. After you went to Mr. Corson's office on June 21, 1927, were you ever asked to make a settlement?

A. Never.

Cross-examination, by Mr. McGoogan.

Q. Has Mr. Corson talked with you many times since June 21, 1927?

A. Several times.

Q. Has he talked with you since that time about settling, Mr. Johnson?

A. We have talked several times, yes. I don't think it was ever brought up about any time for settlement, no, since I talked to him.

Q. Since June 21, 1927?

A. I never talked to him about settlement. He might have asked why I didn't settle.

Q. Has he ever tried to prevail upon you to take your deed, Mr. Johnson?

A. He came in today and asked me why we couldn't get together?

Q. Is that the only time?

A. No, I think he has come in the last two weeks.

Q. Not any other time?

A. I don't think so. It may have been a month, but not within a month, I don't think.

Q. When you went in to see Mr. Corson on June 21, 1927, you took Mr. Stainton along on the advice of counsel?

A. I went in there to settle, yes; I'm not sure that I had Mr. Kreps at that time.

Q. I thought you said you went there on that day on advice of counsel?

A. That is true.

Q. And you took Mr. Stainton along on the same advice?

A. I took him; I hadn't employed Mr. Kreps as my attorney.

By the Court.

Q. You said you went there on the advice of counsel?

A. Yes.

Q. You are now asked whether you took Mr. Stainton along by advice of counsel?

A. I hadn't employed him in this case.

Q. You said you did it on the advice of counsel. It might have been any one of a hundred attorneys at law. Did you take Mr. Stainton with you on the advice of counsel or not?

A. That's right.

Q. Your first visit at ten o'clock in the morning was for the purpose of arranging a date and hour?

A. A date. I didn't set the date nor time.

Q. It wasn't for the purpose of making payment of the money, was it?

A. No; that's true.

Q. When the hour of one o'clock was set in the afternoon you came back with Mr. Stainton, after that?

A. That's right.

Q. How much money did you have with you?

A. I had about $20,000.00.

Q. In cash?

A. No, not in my pocket. I could have got the money in five minutes across the street.

Q. How much money did you have with you?

A. I couldn't say.

Q. You don't know?

A. No.

Q. $17,800.00?
A. I had it so I could get it.

By the Court.
Q. Did you have it with you in the office there?
A. No, I didn't.
Q. Just answer the questions that are asked of you.

Q. Did you tell Miss Corson that you could have got it across the street if she had a deed ready?
A. I don't recall that I did. She said she didn't have the deed.
Q. From Kerney?
A. That's right.
Q. But she told you she had the deed from the Shore Gardens, didn't she?
A. No, she didn't.
Q. Didn't you know that there was a deed from the Shore Gardens there for you?
A. I had no idea there was a deed from the Shore Gardens to me. I never knew it yet.
Q. No idea?
A. No.
Q. Did Mr. Corson tell you he had one?
A. No.

Howard S. Stainton, a witness produced on behalf of the defendant, being duly sworn, testified as follows:
Direct examination, by Mr. Kreps.
Q. Mr. Stainton, you went to Mr. Corson's office with Mr. Johnson, June 21, 1927?
A. I believe that is the date.
Q. Can you tell us what Mr. Johnson did—what time of day was that?
A. Around one o'clock.
Q. Who was there?
A. Miss Louise Corson.
Q. What did Mr. Johnson say to Miss Corson?
A. He come in to settle for those lots.
Q. What did he say?

A. He said he had come in to settle for those lots he bought from Mr. Kerney.

Q. What did Miss Corson say?

A. Well, I just don't remember what she said.

Q. Did Mr. Johnson ask her for a deed from Mr. Kerney?

A. He did.

The Court—Do not lead the witness.

Q. Was any deed offered—

The Court—Let him tell what transpired, what was said and what was done.

Q. Tell us just what happened?

A. Mr. Johnson asked for a deed from Mr. Kerney, and also asked if a mortgage had been executed, and she said she didn't have any deed from Mr. Kerney, and she didn't have the mortgage.

Cross-examination, by Mr. McGoogan.

Q. Did you say this was at one o'clock?

A. About one o'clock.

Q. You didn't go in in the morning?

A. I don't remember that I did.

Q. You recall that you went there at one o'clock with Mr. Johnson?

A. Yes.

Q. Was Mr. Corson there at one o'clock?

A. No.

Q. How long did you wait?

A. We were in there for about five minutes.

Q. Five minutes?

A. Yes, sir.

Q. Was it before one o'clock when you got there?

A. Well, it was a little after one when we came out. I noticed the clock outside.

Q. What did Mr. Johnson say to you?

A. He said he was going over to settle for those lots. That's the remark he made to me.

Q. What time was that?

A. Just before one.

Q. Just before one o'clock he met you in your office?

A. In our store, yes, sir.

Q. And he said he was going to settle for the Kerney lots, did he?

A. No, he didn't say the Kerney lots.

Q. What did he say?

A. Some lots in the Shore Gardens.

Q. And you left your business and went with him?

A. I went right over with him.

Q. And he asked for a deed from Mr. Kerney to him and a bond and mortgage?

A. He said a mortgage.

Q. Just a mortgage?

A. Yes.

Q. And what did Miss Corson say?

A. She didn't have them.

Q. What did she promise about them?

A. I don't remember what she promised.

Q. Don't remember that?

A. No.

Q. But she made some promise?

A. She said something about being in later.

Q. And she said something about mortgages being ready later, and the deed?

A. I don't remember that.

Q. You don't remember?

A. No.

By the Court.

Q. What is your business?

A. Men's furnishing store.

Q. What interest did you have in the settlement?

A. None at all.

Q. What led you to drop everything you had in your business and go right over with Mr. Johnson?

A. He asked me to do it.

Q. Had you ever done it before?

A. I had never been called upon, no.

Q. Had he taken it up with you before that morning?

A. Not as to going over, no.

Q. What had he taken up with you in regard to it?

A. I knew he had bought some lots from the Shore Gardens.

Q. You mean he came in just before one o'clock and said, "I am going to settle for the Shore Gardens lots; come on over with me." That is the first knowledge you had that you were to be concerned in the settlement?

A. I believe it is.

Q. And without any argument or explanation you went over?

A. Yes, sir.

Q. What interest did you have?

A. He asked me to go.

Q. Why?

A. He was going to make a settlement.

Q. Did you ask him why he wanted you to go?

A. I may be a witness sometime.

Q. Did you ask him why he wanted you to go?

A. I don't remember.

Q. Did he tell you why he wanted you to go?

A. He said he might need me as a witness sometime.

Q. That is a question you can answer yes or no. Did he tell you why he wanted you to go?

A. To use me as a witness.

Q. Pay attention to the questions and then answer those questions. Now, what did he say was the reason he wanted you to go?

A. He might want to use me as a witness sometime.

Q. Did you ask him for what?

A. I did not.

Q. Did Miss Corson ask you to wait until her brother came in?

A. She didn't ask me to wait.

Q. Did she ask Mr. Johnson to wait?

A. I don't remember.

Q. She did say he would be in in a few moments?

A. Yes, sir.

Q. And notwithstanding that Mr. Johnson went out?
A. He did.

Redirect examination, by Mr. Kreps.

Q. You have other business besides the store business?

A. Yes.

Q. You buy and sell real estate?

A. I do.

Q. You are familiar with real estate transactions?

A. Yes, sir.

Q. You were vice-president of the First National Bank?

A. I was.

Q. And you are very friendly with Mr. Johnson?

A. Very friendly.

Q. You did this as a favor for him?

A. I did.

Redirect examination, by Mr. Kreps.

Q. The only reason you went is that it is always customary to have a witness for the buyer?

A. No.

Defendant rests.

Ewing T. Corson, being recalled on behalf of the complainant, testifies as follows:

Direct examination, by Mr. McGoogan.

Q. After June 21, 1927, Mr. Corson, did you make any effort at all to get Mr. Johnson to make settlement for these lots?

A. I talked with Mr. Johnson repeatedly—

The Court—He has already said that, and in view of Mr. Johnson's testimony that he would not have taken it, I do not think you need go further.

Cross-examination, by Mr. Kreps.

Q. Mr. Corson, after you came back to your office, you say you came back that afternoon, did you try to

get Mr. Johnson to come back and make settlement?

A. I did not.

Mr. McGoogan—We rest. I didn't know until this morning at ten o'clock that there was a conversation between Mr. Johnson and Miss Corson. She is available in Ocean City, but not in Trenton.

The Court—Except for Miss Corson's testimony, both sides have completed their evidence?

Mr. McGoogan—Yes, sir.

Mr. Kreps—Yes.

Recess until two-thirty o'clock.

After recess.

Mr. McGoogan—During the recess Mr. Corson was on one line of the telephone and Mr. Kreps on the other, and they heard the statement of Miss Corson and I understand it was this: Mr. Johnson came to her office while her brother was absent, and asked for a deed. She said she had a deed there from Shore Gardens to an unnamed grantee to the Thompson lots, duly acknowledged. And that is all, I think.

Mr. Kreps—We will admit that she would have said that.

The Court—Let it be stipulated, then, that it be deemed that this witness was called and testified to that effect. Did she say anything as to the hour of his calling?

Mr. Kreps—She wasn't sure as to the hour.

The Court—As to what was said by Mr. Johnson in response?

Mr. Kreps—She said that Mr. Johnson would not take that deed, and then he left.

Both sides rest.

Argument.

The case of Thomas L. Kerney *vs.* William B. Thompson was tried at the same time as this case now on Appeal, and counsel agreed that so much of the

Thompson case as is relative to the stated case be deemed to be received in the same.

IN CHANCERY OF NEW JERSEY.

Between

THOMAS L. KERNEY,
Complainant,

and

WILLIAM B. THOMPSON,
Defendant.

} On Bill, &c.

TESTIMONY.

Testimony taken in the above-entitled cause, at the State House, Trenton, New Jersey, on Monday, the ninth day of January, nineteen hundred and twenty-eight, at 11:15 o'clock, A. M.,

Before Hon. Malcolm G. Buchanan, Vice-Chancellor.

Appearances: James J. McGoogan, Esq., for complainant; George H. Jacobs, Esq., for the above-named defendant.

Frank D. Schroth, a witness produced on behalf of the complainant, being duly sworn, testified as follows:

Direct examination, by Mr. McGoogan.

Q. Your name is Frank D. Schroth?

A. Yes.

Q. Are you an officer of the Shore Gardens—

A. Yes.

Q. What officer?

A. Secretary and President.

Q. I show you the original certificate of incorporation of your company, filed July 30, 1925, and ask you if you incorporated on that date?

A. Yes, sir.

Q. And if you are still a corporation of New Jersey?

A. Yes, sir.

Q. Recorded in the County Clerk's office on July 30, 1925?

A. Yes.

The Court—It speaks for itself.

Mr. Jacobs—There is no question about that.

Q. I show you two deeds, one from David Paul Brown and wife, and one from Asa P. Childs and wife, to the Shore Gardens, Incorporated, on the twentieth of August, 1925; and another from Ewing T. Corson and wife to the Shore Gardens, Incorporated, recorded August 20, 1925; and ask you if you can identify those two deeds as the deeds for the tract of land called "Shore Gardens?"

A. Yes, sir, they are.

Mr. McGoogan—I offer them in evidence.

Said deeds are marked "*Exhibits C*-1" and "*C*-2," respectively.

Q. I show you these two maps and ask you if you can identify in those maps the tracts described in those two deeds?

A. Yes.

Q. And did you have an engineer make the subdivision made on those two maps?

A. Yes, sir.

Q. I show you now a contract between the Shore Gardens, Inc., and Thomas L. Kerney, and ask you if your company agreed to sell Mr. Kerney those lots mentioned in the contract?

A. Yes, sir.

Q. Are those lots mentioned in the contract described in the two deeds?

A. Yes.

Q. And part of the lots delineated on those two maps?

A. Yes.

The Court—Are you seeking to prove that as a contract of sale?

Mr. McGoogan—I think it is admitted.

The Court—Is this contract admitted?

Mr. Jacobs—We will admit it, your Honor.

Mr. McGoogan—I offer it in evidence.

Said contract is marked "*Exhibit C*-3."

The Court—And is the contract from Mr. Mr. Kerney to Mr. Thompson, as alleged in the bill, admitted?

Mr. Jacobs—Yes, sir, that will be admitted, your Honor.

Q. I show you a deed, dated June 27, 1927, made from the Shore Gardens, Inc., to Thomas L. Kerney, unrecorded; and ask you if that is the conveyance of the Shore Gardens to Mr. Kerney for the Thompson lots?

A. Yes.

Mr. McGoogan—I offer that in evidence.

Said deed is marked "*Exhibit C*-4."

By the Court.

Q. Has it been delivered?

A. Yes, sir.

Q. I show you now a release executed, but unrecorded, made by the Trenton Trust Company, to Shore Gardens, Inc., and ask you if you can identify that?

A. Well, I have never received this release, but I take it refers to the release of the land—

The Court—I suppose it speaks for itself.

Mr. McGoogan—I offer the release.

Mr. Jacobs—We object to the offer; there is no reference to it in the pleadings, and it is an unrecorded instrument. I don't know what it is about.

The Court—Do you want to insist upon counsel making formal proof of the execution and delivery of the paper?

Mr. Jacobs—I object to it; the defendant Thompson is not bound by anything it contains, and it is not recorded.

The Court—You are entitled to object to it and insist upon formal proof, if you so desire;

but you are going to put a number of people to some inconvenience.

Mr. Jacobs—Well, we will admit it, your Honor.

The Court—What was the date of its delivery?

Mr. McGoogan—The date of the release is August 21, 1926.

The Court—What is the date of the acknowledgment?

Mr. McGoogan—August 21, 1926.

The Court—Let it be marked.

Said release is marked *"Exhibit C-5."*

Q. When you bought this tract of land, Mr. Schroth, of what did it consist?

A. Some barren land lying between Greater Egg Harbor bay and the inlet, forty-five or forty-six acres as I recall it.

Q. In Ocean City?

A. In Ocean City.

Q. After you took title, what did you do with reference to improvements?

A. We made a contract with Monahan and Hall.

Q. What did the development consist of?

A. Grading, and there were jetties and bulkheads, and general development.

Q. Any dredging?

A. Considerable, out from the ocean.

Q. What did the contractors do under that contract?

A. They immediately began work.

Q. Do you recall the contract price?

A. Yes, sir, it was approximately $180,000.

Q. Do you recall as to any time being stipulated in the contract for the completion of these improvments?

A. Yes, the month of February, 1926.

Q. Were they completed within that time?

A. They were not.

Q. Why not?

A. Because the contractor wasn't able to procure a dredge, as I recall it, that was the height of the market and dredges were rather scarce.

Q. Do you know when he did procure a dredge?

A. I know he made a dredge; the date of that I don't recall.

Q. Were the improvements finally completed?

A. Yes.

Q. In what month and what year, approximately; do you know?

A. No, I don't. I wouldn't know, because the transfer of some of the lots was made before the contract was completed; and I wouldn't know the exact time.

Q. Do you know whether or not the improvements on the Thompson lots were executed simultaneously with the improvements on the entire tract?

A. Absolutely.

Q. Has your company, since you took title, made deeds and delivered them?

A. Many of them.

Q. For other lots on this same tract?

A. Very many.

Q. And did all your conveyances contain all the same restriction and covenants as the deed from Corson to you contained?

A. Right.

Q. Were they all the same?

A. I understand so.

Q. How many lots were comprised in the subdivision?

A. 333, I think.

Q. Can you tell what portion of those had been conveyed by your company to purchasers?

A. I should say between 75 and 80 per cent.

Q. And so far as you know, no improvements have been made on these lots?

A. I wouldn't know; I haven't been in Ocean City for many months.

Cross-examination, by Mr. Jacobs.

Q. Have you a certified copy of a resolution of the

Shore Gardens Company, Inc., directing the conveyance to Mr. Kerney?

A. I don't think so.

Q. Did your corporation pass such a resolution?

A. I don't know; our by-laws or minutes will speak for themselves.

Q. You don't know?

A. No.

Q. When your maps were filed in the office of the Clerk of Cape May County—when was that?

A. I don't know. Counsel does. I have no knowledge of it. That is work that counsel did.

Q. You don't know that?

A. No.

Q. Mr. Schroth, what other restrictions were there cast upon these lands and premises besides the restrictions of the Shore Gardens Company?

A. The deeds must speak for themselves; I don't know.

Q. Do you know, as a matter of fact, that there were other restrictions?

A. You will have to look at the deeds or contracts; I didn't fix the restrictions. I don't know. I am a mere owner.

Q. When was the consideration paid by Kerney to your company for this conveyance for which you have shown a deed here, and what was that consideration?

A. The consideration was the written obligation of Rose for the entire account, just the date of it I don't know.

Q. Was it in money?

A. No; he gave me his written contract or word to settle for the whole thing, not only for this lot, but for all of his lots.

Q. And on the strength of that you gave him the deed?

A. Absolutely; I gave him the deed for all the lots, and would have given it to him on the strength of his word.

Q. Had there been money paid by Kerney to you?

A. I don't think so on these particular lots.

Q. You don't?

A. No. There has been money paid, but not on these lots.

Q. What is the balance due to you?

A. The balance of Kerney and Rose is for twenty lots, whatever that is.

Q. Do you know the figures?

A. He owes the complete balance on this deed.

Q. What is that?

A. Approximately $40,000, I should say.

Q. Isn't it true, as a matter of fact, that this deed has not been recorded because you still hold a string on it for the unpaid balance?

A. Not at all; I don't know why it isn't recorded.

Q. You don't know why?

A. No.

Q. Did you take back anything to secure the balance due on that?

A. No, sir.

By the Court.

Q. You have been associated with Mr. Rose in large financial enterprises for a period of some years?

A. Very much, yes, sir.

Edward C. Rose, a witness produced on behalf of the complainant, being duly sworn, testified as follows:

Direct examination, by Mr. McGoogan.

Q. Mr. Rose, what arrangements have you made with Mr. Schroth and the Shore Gardens, Inc., to pay for this conveyance to Mr. Kerney?

A. Mostly informal. These lots were purchased by Thomas Kerney, whom I was financing in the transaction. All deals and settlements were left entirely with Corson, a man of good standing in Ocean City, with whom neither Kerney nor myself thought it was necessary to even carry on the customary precaution in such

a matter. Kerney had all these lots, in which I was an interested party, for which I made all settlements that were made and made all payments that were made, for the purpose of re-selling them at a profit; the manner of sale, to whom they were to be sold, and to whom they were sold, the time of delivery, or existing contracts or restrictions, were not treated by ourselves or by our own attorneys; it was left entirely in the hands of Corson. He had been the agent for the Shore Gardens Company, the principals of which were more or less intimate friends of ours. The delay occasioned by the improvements, of having the improvements completed, was not a matter of embarrassment to us, except that it ran our contracts of sale a longer period than expected. As we came to the times of settlement and payment, as in the instance of Mr. Thompson, I took up in behalf of Kerney, the manner and times of settlement. I said to Mr. Corson, that I had unconditionally agreed with Mr. Schroth, the treasurer of the company, that I would pay down on a call notice, I think, of five days, all moneys due him on contracts signed by Kerney; I, in turn, requested that he take that up with his parties. That seemed to satisfy him. I said this to Corson: "We want to complete these contracts; we feel we are entitled to the profits in accordance with the contract and sale made; whatever step you may take with the purchasers, who are, in a number of instances, your friends, will probably be acceptable to Kerney, with the only exception that the Shore Gardens, the people with whom we have contracts and with whom we have, at least, a very definite business obligation, must be satisfied."

Q. Have you received the five days' notice for the purchase of these lots?

A. Fortunately, no.

Q. You had some correspondence with the defendant, Mr. Thompson, did you not, Mr. Rose?

A. I did—

Mr. McGoogan—I ask the other side to produce a letter written by Mr. Rose to Mr. Thompson, dated October 7, 1926.

Mr. Jacobs—Here it is (handing paper to counsel).

Mr. McGoogan—And one dated September 27, 1926.

Mr. Jacobs—We have the copy, but not the original of that.

Mr. McGoogan—And one dated October 29, 1926.

Mr. Jacobs—That is the one we don't have.

Q. I show you a letter dated September 27, 1926, written on your stationery, addressed to Mr. William V. Thompson.

A. Yes.

Q. And I ask you if you recall sending that letter?

A. Yes, I am quite sure that is mine.

Q. Here is an original letter written by you, dated October 7, 1926, referring to the letter of September 27th; that is your signature?

A. Yes.

Q. You wrote that letter?

A. Yes, sir.

Q. And I show you a copy of a letter written by you, presumably, to Mr. William V. Thompson, October 7, 1926, and ask you if you sent that letter?

A. I think so.

Q. I ask you the same question in regard to the copy of the letter dated October 29, 1926, from you to Mr. Thompson.

A. I think so.

Q. I show you a letter dated October 8, 1926, addressed to you, signed "William V. Thompson," and I ask you if you received that letter from Mr. Thompson?

A. Yes, sir.

Q. And I ask you the same question about a letter dated October 19, 1926, addressed to you, signed by Mr. Thompson?

A. Yes, sir.

Mr. McGoogan—I offer these copies and letters in evidence.

Said letters are marked *"Exhibits C-6" to "C-11,"* respectively.

Q. In your letter of September 27, 1926, Mr. Rose, you speak of a conversation over the telephone which you had that day with Mr. Thompson; can you tell us what that conversation was?

A. I am sorry I can't; I don't remember the details of it. As a matter of fact, my letter of confirmation which you just gave me, shows pretty well what the conversation probably was or might have been.

Q. Can you tell from that letter, whether or not you had arrangements with Mr. Thompson to make a settlement on September 23, 1926?

A. Of the day specified.

Q. Do you recall that his telephone conversation asked a postponement until the 15th of October?

A. I can't answer that.

Q. You don't know?

A. I can't answer that; I don't recall the conversation.

Cross-examination, by Mr. Jacobs.

Q. Did Mr. Thompson ever request any further extension or indulgence of you, after October 15, 1926?

A. I can't answer that without referring to that correspondence. If you refer to that, I will be glad to answer.

Q. Your later letter is dated October 19; that is Mr. Thompson's last letter?

A. Your question is, after the 15th or 19th?

Q. After the 15th.

A. I believe not.

Q. There is no doubt in your mind, is there?

A. No, except I don't remember in detail; I just don't remember. You say after the 19th; my answer "No, I believe not."

Q. Were you a silent partner of Mr. Kerney's in this contract with Mr. Thompson?

A. That is difficult to answer; we had no partnership. Mr. Kerney is a purchaser. For your own information, I put up the money when that was put up, and I was to share in the profits.

Q. What is the balance of the consideration due to the Shore Gardens Company from Mr. Kerney for the lots contracted to be sold to Mr. Thompson?

A. The best I can do, without referring to our own cashier, who ran the books, would be a guess. I would say roughly $16,000; that is a guess.

Q. Was there any mortgage given back by Mr. Kerney to protect the Shore Gardens Company, to protect—

A. Certainly not, with my knowledge.

Q. Is there any writing of any character respecting the transaction existing between Kerney and the Shore Gardens Company for the unpaid balance?

A. I can't answer that; I will give an opinion as "No," however.

Q. Has anything been paid to the Shore Gardens Company at all on this particular set of lots to be sold to Mr. Thompson?

A. That is, in a measure, a matter of interpretation. I considered my word given that they might call in five days a reasonably good means of payment.

Q. Has Mr. Kerney paid to the Shore Gardens any consideration for the conveyance of this particular five lots?

The Court—Do you mean money?

Mr. Jacobs—Yes, sir.

A. No money.

Q. No money payment?

A. No.

Q. Do you know of any other restrictions on these lots besides the Shore Gardens?

A. I don't know; I haven't ever known.

Q. You don't know?

A. I don't know; I haven't ever known. To go further, I might say that Mr. Corson, with whom we left this matter, gave us to understand most definitely, that settlement had been made, as a matter of fact, by Thompson and by—

Q. We won't be interested in that.

A. I am answering your question.

Q. Do you know when the improvements were completed on the lots of Thompson? **10**

A. Roughly, about the first of August.

Q. What year?

A. 1926.

Q. The date alleged in your—I will withdraw that question. There is no doubt in your mind, Mr. Rose, that the improvements were not completed on September 15, 1925?

A. I would say they were not.

Q. The date set forth in the contract is the date of settlement? **20**

A. I don't agree with that. Not before—

Q. Not before September 15, 1925?

A. Yes.

Q. It was not completed on that day?

A. What?

Q. They were not completed on that date?

A. I don't think they were.

The Court—Isn't that admitted?

Mr. Jacobs—I think it is.

Q. Were you in Ocean City on October 15, 1926, at the office of Mr. Ewing Corson? **30**

A. Probably not.

Q. For the purpose of making settlement with Mr. Thompson in this matter?

A. Probably not.

Q. Was Mr. Kerney there, to your knowledge?

A. Not to my knowledge, as Mr. Corson had not been authorized to make such settlement.

Q. He wasn't there, to your knowledge?
A. No.

Thomas L. Kerney, the above-named complainant, being duly sworn in his own behalf, testified as follows:
Direct examination, by Mr. McGoogan.
Q. Mr. Kerney, are you the complainant in this case?
A. Yes, sir.
Q. I show you, Mr. Kerney, a deed dated June 27, 1927, and acknowledged today, January 9, 1928, to William V. Thompson, of lots 1, 2, 3, 4, 5, 6, 7, 8, 9, in Block 34B of the Shore Gardens.
A. Yes.
Q. I ask you if that is your signature?
A. Yes.
Q. Is that the deed you tender now to Mr. Thompson under your contract that has been offered in evidence?
A. Yes, sir.
Q. You make that tender?
A. Yes.

Mr. McGoogan—I make the tender at the present time.

Q. Have you been paid any amount of the purchase price mentioned in the contract?
A. I don't know anything about that; Mr. Rose handled all the details.

By the Court.
Q. Well, you personally have not received anything?
A. No, I have not.

Mr. McGoogan—I offer that in evidence.

Said deed is marked "*Exhibit C*-12."

Cross-examination, by Mr. Jacobs.
Q. Did you send Mr. Thompson any notice that you would tender that deed today?
A. Not to my knowledge; Mr. Rose handles that.
Q. Mr. Rose handles it?
A. He would handle the deed.

Q. Is that the first deed you have ever tendered to Mr. Thompson for the settlement of this matter?

A. I believe it is; I don't know.

Q. You don't know?

A. I do not.

Q. You didn't get title until June 26, 1927?

A. I believe that is the date.

Q. Were you in Ocean City at Mr. Corson's office on October 15, 1926?

A. No, sir.

Q. You had no executed deed from you to Mr. Thompson at Mr. Corson's office?

A. No.

Q. You were not there?

A. No, sir.

Q. You are a single man, in accordance with the description set forth in that deed?

A. Yes.

Q. Never having been married?

A. No, sir.

Q. When were the improvements completed on the lots which you were to convey to Mr. Thompson?

A. I couldn't tell you that.

Q. You have no knowledge?

A. No.

Q. Your counsel's bill sets up August 1st, 1926, as the date when the improvements were completed; do you believe that to be the correct date?

A. Yes, sir.

Q. Would you be satisfied to accept that date?

A. Yes, sir.

The Court—It would seem to me that he had accepted that date by the filing of the bill.

Q. What have you paid the Shore Gardens Company on your contract of August 14, 1925?

The Court—Is that material, Mr. Jacobs?

Q. When did the Shore Gardens Company deliver to you the deed which has been offered as an exhibit, and unrecorded?

A. In June, I think it was, 1927.

Q. Why did you not record that deed?

A. Why didn't I?

Q. Yes.

A. I couldn't tell you that. Mr. Rose, I think, could tell you that; he handled the deeds; he handled that deed; I didn't handle it at all.

Q. Was the deed actually delivered to you?

A. Last June, yes.

Q. Was it physically put in your hands, or was it delivered to some one elese for you?

A. It was delivered to me.

Q. Where?

A. Over to my office in the Trenton Times.

Q. What unpaid balance do you owe on these lots?

A. I couldn't tell you that; Mr. Rose could.

Q. Do you know, of your own knowledge, that there is now a first mortgage of $9,450.00 on these lots that you are to convey to Mr. Thompson?

A. Not to my knowledge; I don't know.

Q. You don't know that?

A. No, sir.

Q. Your contract provides that you convey, subject to that mortgage, don't it?

Mr. McGoogan—I don't think it does, your Honor.

Mr. Jacobs—There is a reference to a mortgage—

The Court—Well, the contract speaks for itself, whatever it is.

Q. You have not seen any first mortgage of $9,450.00 covering these lots to be conveyed to Mr. Thompson, have you?

A. Not to my knowledge, no.

Q. And you have not created any such mortgage?

A. Not to my knowledge.

Q. Well, but you would know if you had created it?

A. Yes.

Q. And as far as you know, you don't know if there is a mortgage already existing on the lots—

The Court—He has already said so. Don't let us waste time in repetition.

Q. What consideration have you paid the Shore Gardens Company for the delivery of this deed?

The Court—Strike it out; it is immaterial.

Ewing T. Corson, a witness produced on behalf of the complainant, being duly sworn, testified as follows:

Direct examination, by Mr. McGoogan.

Q. Mr. Corson, where do you live?

A. Ocean City, New Jersey.

Q. Your business is real estate?

A. And insurance.

Q. Are you duly licensed in New Jersey?

A. Yes, sir.

Q. Are you the agent who had charge of Ocean City Gardens development?

A. I am.

Q. Referring to the Thompson matter, after your company sold to Mr. Kerney, do you know whether or not you had a deed in your office from Mr. Kerney to the defendant Thompson after the contract was made between you and Kerney?

A. Do I understand if we had a deed?

Q. Did you have ready a deed in your office?

A. Not from Mr. Kerney.

Q. From the Shore Gardens to Mr. Kerney.

A. From the Shore Gardens to Mr. Johnson.

Q. Why was that arrangement made, do you know?

A. Because the settlements were to be made at one time; they called for the same time on the completion of the contract.

Q. Did you have any understanding with Mr. Thompson that the deed would be taken directly from the Shore Gardens?

A. We did not; we had done that in many cases before. We had drawn the deeds straight through and

drawn assignments from the original purchasers, because those lots had been sold a number of times.

Q. You were, then, following your custom?

A. Yes, sir.

Q. Has Mr. Thompson, the defendant, appeared at your office at any time, to your knowledge, since the Shore Gardens took title to this land?

A. I think not.

Q. He hasn't?

A. I think not.

Q. Was he there on October 15, 1926?

A. No.

Q. As far as you know?

A. As far as I know he was not there.

The Court—There isn't any question about that, is there? My understanding of the situation is, that the defendant refused to take title on the ground of the restrictions or the unmarketability of the title; isn't that the fact?

Mr. Jacobs—That is part of the defense.

The Court—Is there any claim that you were ever willing to take title?

Mr. Jacobs—We were up to the fourth day of December, 1926, when I advised Mr. Transue that we would not.

Q. Do you know, of your own knowledge, when these improvements were completed on the Thompson lots?

A. The Thompson lots were completed about August 1, 1926. They were among the first lots on the tract to be finished.

Q. I show you a copy of a letter, dated July 20, 1926, addressed to Mr. William V. Thompson, and ask you if you can identify that as a copy of the letter you wrote to the defendant?

A. It is a copy of the letter I wrote to Mr. Thompson.

Q. I show you a copy of a letter of July 26, 1926; did you receive that letter, of which that is a copy?

A. Yes, I received that letter.

Mr. McGoogan—I offer those letters in evidence.

Said letters are marked "*Exhibits C*-13" and "*C*-14," respectively.

(It is stipulated that they be received as though they were the originals.)

Q. With reference to the delay in completing the improvements, can you tell us anything about that, why the delay occurred?

A. Yes.

Q. What?

A. The Shore Gardens Company entered into a contract with Monahan and Hall to complete the property on the date stated in their agreement, I believe was in February; we drew the contract—

By the Court.

Q. February, 1926?

A. February, 1926. We drew contracts with all individuals who purchased lots in the Gardens with the same stipulation in each contract, that the settlement would be made not before September 15th. The reason that was stipulated was, because in one particular corner of the property there were a few sandhills that might have been scraped down; and those lots could have been forced so that settlement could be made within a week; and in order that everybody might be on the same basis, we stated that the improvements would not be completed before September 26th, and I believe, in almost every case we felt that the improvements would not be completed before the time stipulated in the contract. Mr. Monahan immediately started the building of a bulkhead and entered into a contract with Mr. Gibbs to do the plumbing. He had recently purchased a new motor for about $28,000, which repeatedly broke down, and in the succeeding six months he had about two weeks' work and was not able to complete the contract he was working on in Atlantic City, and the owners of the property refused to let him come to Ocean

City. Mr. Monahan then went up with him to see the owners of a small dredge in Atlantic City, the S. & G. Development Company. We drew a contract for them to come and pump until Mr. Gibbs could get there. They came over and saw the situation, that the place they had to pump was near the ocean, and it was approaching winter, and they refused to pump. We started to make negotiations to buy the dredge, and the development company—another company had come in and purchased the dredge before he closed the deal. Then, in desperation, he built a dredge of his own, and he came near losing that, too; and then he went away until the following spring; and shortly before it was finished, Mr. Gibbs got through his other contract and came and helped him finish the contract.

Q. Do you know, of your own knowledge, whether the defendant, Thompson, has taken title to other lots in the same tract in which these lots mentioned in the contract are?

Mr. Jacobs—That is objected to; I don't think that is material.

The Court—The question is, does he know of his own knowledge.

A. I do.

Q. Do you know whether or not the Shore Gardens has conveyed to Mr. Thompson, the defendant, or a buyer from Shore Gardens, has conveyed to Mr. Thompson, lots in this same block, subject to the same restrictions, subject to the same restrictions and conditions that the Kerney contract calls for?

Mr. Jacobs—That is objected to; that has no bearing on this contract; it is immaterial and irrelevant.

The Court—The objection is overruled.

A. Yes, sir, Mr. Thompson owns lots I would say within 200 feet of the lots in question, and in the same tract under the same restrictions.

Q. You know that?

A. Yes, sir.
Q. Do you know when he bought them?
A. I don't recollect the exact date.
Q. You don't know?
A. No.
Q. Was it since Kerney bought the lots from the Shore Gardens?
A. Yes.
Q. Since that time?
A. Yes, sir.
Q. Did Mr. Thompson make any engagement with you to appear at your office and take title to these lots at any time?
A. Mr. Thompson?
Q. Yes.
A. No.
Q. No engagement was made?
A. No, sir.

Cross-examination, by Mr. Jacobs.
Q. Do you know Mr. Morrison, of Ocean City?
A. I do.
Q. Do you recall a telephone conversation with Mr. Morrison at your office, on October 15, 1926, advising that Mr. Morrison wanted to make a settlement, and inquiring if Mr. Kerney was at your office?
A. I don't recollect a conversation of that character.
Q. You don't?
A. No.
Q. Do you recall any conversation with Mr. Morrison on October 15, 1926, respecting Mr. Thompson and the Kerney matter?
A. I don't recall a conversation with Mr. Morrison; there may have been, but I don't recall.
Q. There might have been?
A. There might.
Q. Did Mr. Thompson have any supervision or control over the dredging and filling in and grading of these lots?

A. He did not.

Q. Not a particle?

A. None whatever.

Q. Was Mr. Kerney at your office on October 15, 1926?

A. Was Mr. Kerney there?

Q. Was he there?

A. He was not.

Frank Transue, a witness produced on behalf of the complainant, being duly sworn, testified as follows:

Direct examination, by Mr. McGoogan.

Q. Mr. Transue, you are the attorney for the Shore Gardens, Incorporated?

A. I am.

Q. You have been the attorney for that company since its incorporation?

A. Yes, sir.

Q. Are you familiar with the title to these lots sold to Mr. Kerney by the Shore Gardens and by him to Mr. Thompson?

A. Yes, sir, I am.

Q. Can you tell whether or not, from any records before you, there is an encumbrance on the Thompson lots at this time?

A. There is no encumbrance on the Thompson lots at this time.

Q. None?

A. No.

Q. And are there any restrictions on the Thompson lots at this time?

A. There are restrictions on all the lots.

Q. Do you know what the restrictions are on these Thompson lots?

A. No, not without getting my records.

The Court—That is a thing for the defense to show.

Mr. McGoogan—I will withdraw the witness and the question.

N. Harvey Collison, a witness produced on behalf of the complainant, being duly sworn, testified as follows:

Direct examination, by Mr. McGoogan.

Q. Mr. Collison, are you a civil engineer?

A. I am.

Q. And live and practice in Ocean City, New Jersey?

A. I do.

Mr. Jacobs—We will admit his qualifications.

Q. Are you the engineer who subdivided the Shore Gardens tract in Ocean City?

A. I am.

Q. Can you explain what these two maps are, presuming that you made them; did you make them?

A. Yes, I did.

By the Court.

Q. Suppose we deal with the original tracing map; what is that?

A. It is Plan No. 2, Shore Gardens, Inc., Ocean City, New Jersey, showing the layout, size and dimensions of the lots, streets and outside bounds.

The Court—It is in evidence that the map shows the tract in question, and that the lots are shown by lot numbers and block numbers, as shown in the bill of complaint.

Mr. Jacobs—I haven't seen it. This wasn't made until 1927, and can't be binding upon the defendant; the contract was made in August, 1925.

The Court—The only reason for the offer was, that it would inform the court of the lay-out of these lots. Is there anything involved in the issue between the parties to this suit, which makes this a material factor in the evidence?

Mr. Jacobs—It may affect the materiality of the contract. We had a contract we couldn't seek to enforce against them because we wouldn't know the lines of the property, and they could tender us a deed, which they now—

The Court—The lots which you agreed to buy are specified in your contract of sale.

Mr. Jacobs—Yes, but suppose they had shown Thompson—

The Court—What are your defenses?

Mr. Jacobs—The defenses are, that on the day of the settlement, the complainant did not have a good and marketable title to convey to us, and that he did not do those things on his part which he should have done, namely, to tender to us a deed conveying the property; also, that the contract is filled with uncertainty; that time was the essence of the contract and they are in laches in bringing their suit.

The Court—Then, is there any doubt that that map shows the lots you contracted to buy?

Mr. Jacobs—I have no knowledge, but I feel it does go to the question of the materiality of the contract.

The Court—How can a map which purports to show lots, have anything to do with the materiality of the contract?

Mr. Jacobs—I think it does.

By the Court.

Q. Does that map show lots 1, 2, 3, 4, 5, 6, 7, 8 and 9, on Block 34B, Plan No. 1, of the Shore Gardens?

A. Yes, sir, it does.

Q. Does it correctly delineate those lots?

A. It does.

Q. Did you make this map?

A. Yes, sir, I did.

Q. And those lots as shown on that map, are designated by the same lot numbers I have just mentioned and the same block number?

A. That is correct.

Cross-examination, by Mr. Jacobs.

Q. Is that Plan No. 1 or Plan No. 2?

A. Yes.

Q. You said Plan No. 1, did you not?

The Court—I asked him if that shows the lots on Plan No. 1 and he said it did.

Q. Is there a difference in measurement between the lots shown on that plan of 1927, the lots of Thompson, and the lots shown on your plan of 1926?

A. Not to my knowledge there isn't. I think those maps are identical in every instance.

Q. No difference in the frontage of the lots? 10

A. I don't believe so; I couldn't tell you without comparing them.

The Court—Let the map be received and marked.

Said map is marked *"Exhibit C*-15."

Redirect examination, by Mr. McGoogan.

Q. From the time the Shore Gardens bought the tract, did you have supervision of the improvements that were later finished? 20

A. I did.

Q. Can you tell when the improvements began and what they consisted of, and when they were finished, from records in your possession?

A. Yes.

Q. Do so.

A. The work under the contract was started in August, 1925; the initial work consisted of building a bulkhead and jetties, a bulkhead that was necessary because we had extreme height of fill and we had to have something to retain it. The final estimate for 30 the completion of the entire work was issued May 14, 1927, and the work consisted of a bulkhead, jetties and fill by hydraulic dredge, grading, gravelling and gravel for cement sidewalks and curbs and gravel roadways.

Q. Can you explain why it took so long to complete these improvements?

A. The development took place at a very inopportune

time, because dredges could not be secured, not only in our vicinity, but in any vicinity as far as I am able to understand.

The Court—Is there anything further that you want to show by this witness, over what was said by Mr. Corson?

Mr. McGoogan—No, sir.

The Court—Is there anything else you want?

Mr. McGoogan—No.

By the Court.

Q. That was for the development work of the entire tract?

A. The entire tract.

Q. Do you know when the improvements were completed with respect to the lots which were to be sold to Thompson?

A. I think I could ascertain very quickly by referring to my monthly estimates.

Q. Suppose you do so.

A. I should say those lots were completed within a month at the very latest from the date of starting. They should have been done a month after August, 1925. They were completed, to the best of my knowledge, almost immediately, but I say a month to allow ample time.

Q. August, 1925?

A. That is when they started; I have no knowledge of the exact date.

Re-cross examination, by Mr. Jacobs.

Q. You say August, 1925; don't you mean August, 1926?

A. The work was started in August, 1925—I am in error there; they didn't dredge; I am in error by a year.

By the Court.

Q. August, 1926?

A. Yes, that's correct.

Q. Then they would have been completed in September, 1926?

A. That is correct, that is, allowing ample time.

Q. In that statement you have no absolute definite proof?

The Court—I don't know what you mean by this witness having no absolute definite, certain proof.

Mr. Jacobs—He said he thought he could determine by reference to certain things; now he fixes the date. I feel that we are entitled to ask him whether he has definite, certain and positive proof, or whether he is certain and positive with reference to that date.

The Court—Well, you may ask him that.

Q. Are you certain that the work on the lots was completed on September 1st, 1926?

A. I will answer that in this way: I have never located these lots by an accurate survey to determine at that time whether they were done; but my knowledge of the work on the contract, together with my knowledge of how the work progressed in that particular vicinity, would lead me to believe that I am certain the work was completed at that time.

Q. Do you have any written memorandum or data showing the completion of the work on a certain date?

A. I have a monthly report here and estimates certified to by our—

Q. That's all.

Mr. McGoogan—I have Mr. Monahan and Mr. Gibbs to offer cumulative proof as to the time it was completed.

The Court—Your adversary says that he has no proof in contradiction of that.

Mr. McGoogan—Then we rest.

Mr. Jacobs—Will you produce a letter of December 4th, 1926?

Mr. McGoogan—Yes, here it is.

Mr. Jacobs—With the permission of the court and counsel, I offer in evidence a letter written by myself to Mr. Transue on December 4, 1926.

Said letter is marked "*Exhibit D*-1."

Mr. Jacobs—Thompson rests.

Both sides rest.

Argument.

10

In Chancery of New Jersey.

Between

Thomas L. Kerney,
Complainant,

and

Richard H. Johnson,
20 *Defendant.*

CONCLUSIONS ON FINAL HEARING.

(*Filed April 21, 1928.*)

Mr. James J. McGoogan, for complainant.
Messrs. Kreps & Bell, for defendant.

Buchanan, *V. C.*

Vendor seeks decree against vendee for specific performance of contract to purchase seashore lots.

30 The defense relied on is that time was of the essence of the contract and that at the time for performance defendant was ready and willing to perform but complainant failed to perform at that time.

A number of other defenses were set up in the answer but were not argued at the hearing or in the brief, and being thus waived need not be considered.

When the contract was made, August 24th, 1925, the lots were the property of Shore Gardens, Inc., with

whom complainant had, ten days before, made a written contract of purchase, to be consummated upon the completion of extensive fills and improvements which were to be made to the entire tract by said Shore Gardens, Inc.

Similarly, defendant's contract contained the provision that consummation and settlement should take place "when improvements are completed not before September 15th, 1925." In view of this clause and the attendant circumstances, it is difficult to understand defendant's contention that time was of the essence of the contract. It is true that there was a printed clause in the contract (which was on a printed form) that "time is the essence of agreement;" but such clause is of course not conclusive where it is clear from the contract as a whole or from the evidence as to the circumstances, that the parties in fact did not intend that time should be of the essence. If the clause quoted had been followed by a clause "Time shall not be of the essence of this agreement," defendant would scarcely make his present contention—yet, considering the contract as a whole, and the attendant circumstances, it seems clear that just such a second clause was in effect written into the contract.

In any event, if time had been of the essence, it is quite clear from the evidence that it was waived by both parties.

No date is fixed for performance other than as hereinbefore mentioned. The time for performance, therefore, if time were not of the essence, would be a reasonable time after notice of the completion of the improvements; if time were of the essence, it would be *immediately* after notice of completion of the improvements.

The general expectation of all was that the improvements would be completed by the spring of 1926. Due to delays, not occasioned by the fault either of complainant or defendant, or of Shore Gardens, Inc., the improvements were not completed until about the last

of April, 1927. On April 28th, 1927, notice was sent by Shore Gardens, Inc., to defendant, that the work would be completed within the then next week and asking him to advise what time would suit him for settlement. (This letter was signed by Mr. Corson as agent of Shore Gardens; he was also an agent for the complainant, Kerney, and it appears that Johnson knew that Kerney was a contract buyer for Shore Gardens and was making his settlements with Shore Gardens contemporaneously with his settlements with his vendees.) No written reply was made to this letter. Johnson saw Corson a number of times, after the letter, but never said that he would not settle. On June 21st, 1927, he saw Corson, and told him he would come in at one P. M. and make settlement for the lots, and he himself testifies that he did go to Corson's office at that time and was willing to make settlement.

Obviously then, if time ever was of the essence of the contract, it was waived. It is also clear that the real reason for Johnson's failure to make settlement was not that complainant was not ready and able to settle on June 21st, but was his own financial condition.

Corson testifies that Johnson told him later that he didn't feel financially able to take the title to the lots. Johnson does not deny this.

Indeed it is quite clear from defendant's own testimony that he not only made no tender, but was not able at the time and place to make a tender; he did not have the money with him (he says he could have gotten it across the street in five minutes) nor did he have the mortgage which he was to give in part payment under his contract. It is further clear that he went to Corson's office expecting, or at the very least, hoping to get out of the contract by finding some objection to seize upon and then relying on the "time is of the essence" clause. He took advice of counsel, took a man with him for the purpose of being a witness, and waited not over five minutes for Corson and thereafter refused to take title, giving as the stated reason, because

complainant had not been ready at exactly one P. M. on June 21st, 1927.

As has been said, his contention that time was of the essence, was without foundation. Complainant had been waiting for defendant, from May 1st to June 21st. On June 27th, complainant took title from Shore Gardens, Inc., and procured release of mortgage encumbrance. On July 26th, finding defendant was not willing to perform, he filed his bill. He is entitled to decree.

IN CHANCERY OF NEW JERSEY.

Between

THOMAS L. KERNEY,
Complainant,

and

RICHARD H. JOHNSON,
Defendant.

} On Bill, &c.

NOTICE TO SETTLE FORM OF DECREE.

(*Filed May 1, 1928.*)

To Messrs. Kreps & Bell, Esqs., Solicitors of Defendant:

SIRS—Please take notice that on Tuesday, the first day of May, 1928, at the hour of 10:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, I shall apply to the Honorable Malcolm G. Buchanan, the Vice-Chancellor to whom this cause has been referred, at the State House, in Trenton, to settle the form of the final decree to be entered in the above entitled cause, and that annexed hereto is a draft of such final decree which I shall ask the court to enter.

And further take notice that I shall then and there apply for the allowance of a counsel fee of $500.00 and costs to complainant, to be taxed against said defendant.

Respectfully yours,

JAMES J. McGOOGAN,
Solicitor for Complainant.

Dated, Trenton, N. J., April 23, 1928.

Service of the within notice is hereby acknowledged this twenty-fourth day of April, 1928.

KREPS & BELL,
Solicitors of Defendant.

IN CHANCERY OF NEW JERSEY.

Between

THOMAS L. KERNEY,
Complainant,

and

RICHARD H. JOHNSON,
Defendant.

} On Bill, &c.

FINAL DECREE.

(*Filed May 1, 1928.*)

This cause coming on to be heard in the presence of James J. McGoogan, solicitor of the complainant, and Kreps & Bell, solicitors of the defendant, and the court having examined the pleadings and having taken proofs orally and in open court and heard and considered the arguments of counsel thereon; and it appearing to the satisfaction of the court that the complainant, Thomas L. Kerney, was, on the ninth day of January, 1928, seized in fee simple of all those certain lots, tracts,

or parcels of lands and premises, situate, lying and being in the City of Ocean City, in the County of Cape May, and State of New Jersey, being lots Nos. 7, 8, 9, 10, 26, 27, 28, 42, 43, 44, 45, 46 and 47, Block 37A, Plan No. 1, Shore Gardens; that on the twenty-fourth day of August, 1925, complainant entered into an agreement in writing with the defendant, Richard H. Johnson, wherein and whereby complainant agreed to convey the said lands and premises to said Richard H. Johnson, by deed of special warranty, when certain improvements were to be completed, not before the fifteenth day of September, 1925, and said Richard H. Johnson agreed to pay therefor the sum of $34,300.00 by the payment of $2,600.00, which was paid at the execution of said agreement, and by the payment of the remainder of the purchase price upon the delivery of said deed, $17,000.00 in cash, and the execution of a purchase money mortgage in the sum of $13,900.00, said title to be passed on the completion of said improvements.

And it further appearing to the satisfaction of the court that said improvements were duly completed, and the defendant duly requested to perform said agreement; that defendant has refused and failed to perform said agreement on his part, and that complainant has always been and still is ready and willing in all things to comply with the terms of said agreement on his part.

And the court being of the opinion that complainant is entitled to the specific performance of the aforesaid agreement as prayed for by him in his bill of complaint filed herein;

It is on this first day of May, 1928, ordered, adjudged and decreed, that said agreement be in all things specifically performed by defendant, Richard H. Johnson, and by said complainant and that defendant, on the eleventh day of May, 1928, at the hour of 10:30 o'clock in the forenoon, at the office of Ewing T. Corson, at 757 Asbury Avenue, in the City of Ocean City, in the County of Cape May and State of New Jersey, pay to complainant the sum of $17,800.00 with

interest thereon from the twenty-eighth day of April, 1927, together with the taxed costs of this suit as hereinafter allowed and, at the same time, make, execute and acknowledge in due form of law and deliver to complainant, Thomas L. Kerney, a purchase money mortgage on said lands and premises in the sum of $13,900.00, payable in two years from said twenty-eighth day of April, 1928, with interest at the rate of six per centum per annum, upon the delivery at the same time and place by complainant to defendant, Richard H. Johnson, of a special warranty deed, duly executed and acknowledged by complainant, conveying to defendant, Richard H. Johnson, said lands and premises, in fee, subject to the restrictions mentioned in said agreement.

It is further ordered, adjudged and decreed, that if at the time and place hereinbefore mentioned, defendant should fail or neglect to pay said sum of $17,800.00 with interest as hereinbefore mentioned, together with said taxed costs as hereinbefore mentioned, and to deliver said mortgage duly executed and acknowledged, upon the tender of said deed the aforesaid sums of $13,900.00 with interest as aforesaid, and $17,800.00 together with interest thereon from the twenty-eighth day of April, 1927, being a total of $33,602.00, together with said taxed costs of this suit, shall be and become and are hereby impressed as a lien upon said lands and premises in favor of complainant, to the end that said lands and premises may be sold, pursuant to law, and under the direction of this court, to satisfy such lien, and that in case a deficiency should arise upon such sale, defendant may be ordered by this court to pay such deficiency.

It is further ordered, that defendant pay to complainant or to his solicitor the costs of this suit to be taxed including a counsel fee of five hundred dollars, which is hereby allowed to said complainant.

It is further ordered that true but uncertified copies of this decree and of said taxed costs be served on said

solicitor of defendant within three days after the date hereof.

Respectfully advised: E. R. WALKER, *C.*
MALCOLM G. BUCHANAN, *V. C.*

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IN CHANCERY OF NEW JERSEY.

Between

THOMAS L. KERNEY,
Complainant,

and

RICHARD H. JOHNSON,
Defendant.

} On Bill, &c.

20

ACKNOWLEDGMENT OF SERVICE OF FINAL DECREE.

(*Filed May 8, 1928.*)

Service of a copy of the final decree and of a copy of the taxed bill of costs in the above entitled cause is hereby acknowledged this third day of May, 1928.

KREPS & BELL,
Solicitors of Defendant.

30

IN CHANCERY OF NEW JERSEY.

Between

THOMAS L. KERNEY,
Complainant,

and

RICHARD H. JOHNSON,
Defendant.

On Bill, &c.

NOTICE OF APPEAL.

(*Filed May 9, 1928.*)

The defendant, Richard H. Johnson, hereby appeals from the Final Decree made in the above entitled cause, on the first day of May, A. D. 1928, and from the whole and every part thereof, to the Court of Errors and Appeals, in the last resort in all causes, said decree having been advised by Malcolm G. Buchanan, Vice-Chancellor.

KREPS & BELL,
Solicitors for and of Counsel with Defendant.

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

F. STANLEY KREPS,
Of Counsel with Defendant.

Due and legal service of the within notice acknowledged this seventh day of May, A. D. 1928.

JAMES J. MCGOOGAN,
Solicitor of Complainant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

THOMAS L. KERNEY,
Complainant-Appellee,
vs.
RICHARD H. JOHNSON,
Defendant-Appellant.

On Appeal from the Court of Chancery.

PETITION OF APPEAL.

(*Filed May 23, 1928.*)

To the Honorable Court of Errors and Appeals, in the Last Resort in All Cases:

The petition of Richard H. Johnson, the appellant in the above entitled cause, respectfully shows that:

1. Petitioner finds himself aggrieved by a Final Decree, made in our Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date, the first day of May, 1928, in a certain cause in said Court of Chancery, wherein the said Thomas L. Kerney was complainant, and wherein the said Richard H. Johnson was defendant, in this respect, to wit: That the said decree adjudges that a certain agreement of sale between the said Thomas L. Kerney and Richard H. Johnson, dated August 24, 1925, whereby the said Kerney agreed to convey to the said Johnson certain lots situate in Ocean City, New Jersey, and more particularly described in said agreement, be in all things specifically performed by the said Richard H. Johnson, and that the said defendant pay the costs of said action above referred to.

2. The petitioner appeals from the Decree of the Chancellor which decrees as aforesaid upon the ground that the same is erroneous for the following reasons:

1. The said Thomas L. Kerney was not the owner in fee simple of the lands in question, even at the time of the hearing before the Court of Chancery.

2. That between the date of the signing of the Agreement of Sale and the time fixed for settlement by Johnson and the agent of Kerney the lots had greatly depreciated in value, and Johnson would suffer a great loss by reason of said depreciation if he were compelled to settle for said lots; the depreciation arising from the fact that there was an unreasonable delay in the filling of the lots of said Kerney which could not in any way be attributed to the fault or neglect of Johnson.

10 3. That Ewing T. Corson, the admitted agent of Kerney and Johnson, agreed on a time for settlement, and while Johnson was present, ready, willing and able to settle, neither Kerney nor his agent were at the time and place fixed, nor were they represented.

4. At the time fixed for settlement by Kerney through his agent, there was a one hundred thousand dollar ($100,000.00) blanket mortgage covering the property in question, together with other lands, but the lots which Johnson had agreed to purchase had not been released from under said mortgage.

20 5. That the title to the property was not a good, clear, and marketable title, and not in accordance with the terms of the contract.

6. That the settlement in Corson's office was the only one fixed by Kerney or his agent, and although Johnson was present at that time, ready and able to settle, and Kerney was not, there was never any other time fixed for settlement, nor has there at any time been a deed tendered to Johnson except at the time of trial.

7. Time is the essence of the contract.

8. The complainant was in laches.

30 Petitioner therefore prays that the said Decree of the Chancellor may be wholly reversed, set aside and for nothing holden, and that the petitioner may have such other relief in the premises as this court shall deem proper.

KREPS & BELL,
Solicitors of Appellant.
F. STANLEY KREPS,
Of Counsel with Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

THOMAS L. KERNEY,
Complainant-Appellee,

vs.

RICHARD H. JOHNSON,
Defendant-Appellant.

On Appeal from Chancery.

ANSWER TO PETITION OF APPEAL.

(*Filed May 24, 1928.*)

The answer of Thomas L. Kerney, the above-named appellee, to the petition of appeal of Richard H. Johnson, the above-named appellant:

1. This appellee, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless, admits that a decree was, on May 1, 1928, made and entered in the New Jersey Court of Chancery, in the above-entitled cause, for the purposes in said petition mentioned and set forth; but, as to the substance and form of said decree, this appellee begs leave to refer thereto when the same shall be produced.

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

JAMES J. McGOOGAN,
Solicitor for and of Counsel with Appellee.

EXHIBIT C-4.

This Indenture, made this 27th day of June, in the year of our Lord One thousand nine hundred and twenty-seven (1927), between Trenton Trust Company, a corporation of the State of New Jersey, party of the first part, and Shore Gardens, Inc., a corporation of the State of New Jersey, party of the second part;

Whereas, Shore Gardens, Inc., by indenture of mortgage bearing date the twentieth day of August, A. D. 1925, for the consideration therein mentioned, and to secure the payment of the money therein specified, did convey certain lands and tenements, of which the lands hereinafter described are part, unto David Paul Brown and Asa P. Childs, Jr., and which said mortgage has been assigned to the Trenton Trust Company by deed of assignment, dated the fourth day of August, A. D. 1926, said mortgage being recorded in the office of the County Clerk of the County of Cape May, in the State of New Jersey, in Book 225 of Mortgages, on page 451; And Whereas, the said party of the First Part at the request of the said party of the Second Part, has agreed to give up and surrender the lands hereinafter described, unto the said party of the second part, and to hold and retain the residue of said mortgaged lands as security for the money remaining due on the said mortgage;

Now This Indenture Witnesseth, that the said party of the First Part, in pursuance of the said agreement, and in consideration of the sum of Fifty-two Hundred dollars to it paid at the time of the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, has released, quit-claimed, given, granted and conveyed and by these presents does release, quit-claim, give, grant and convey unto the said party of the Second Part, all that part of the said mortgaged lands, to wit:

All those certain lots, tracts or parcels of land and premises, hereinafter particularly described, situate in the City of Ocean City, in the County of Cape May, and State of New Jersey, known and designated as Lots No. 7, 8, 9, and 10; 26, 27, and 28; 42, 43, 44, 45, 46 and 47, Block 37-A, as laid down on a certain Map, entitled Plan No. 2, Shore Gardens, Ocean City, New Jersey, prepared by William H. Collisson, Jr., Engineer, Ocean City, N. J., and to be filed in the office of the Clerk of Cape May County, New Jersey.

Beginning at a point in the northeasterly line of Cardiff Road at a distance of 90.96 feet southeastwardly from the intersection of the northeasterly line of Cardiff Road and the southeasterly line of Bay Road, said distance being measured along the said northeasterly line of Cardiff Road; and extends thence (1) northeastwardly along the rear line of lots #1, 2 and 3, 101.13 feet to a point; thence (2) southeastwardly along the rear line of lots 7, 8, 9 and 10, said line being parallel to and 100.00 feet distant from Cardiff Road, 103.70 feet to a point; thence (3) southwestwardly along the division line between lots 10 and 11, said line being at right angles to Cardiff Road, 100.00 feet to the northeasterly line of Cardiff Road; thence (4) northwestwardly along the said northeasterly line of Cardiff Road, 120.00 feet to the place of beginning.

Beginning at a point in the southwesterly line of Edinburgh Road at a distance of 81.85 feet southeastwardly from the intersection of the southeasterly line of Bay Road, and the southwesterly line of Edinburgh Road; and extends thence (1) southeasterly along the said southwesterly line of Edinburgh Road, 90.00 feet, and of that width extending southwesterly between parallel lines said lines being at right angles to said Edinburgh Road, 100.00 feet.

Beginning at a point in the southwesterly line of Edinburgh Road at a distance of 561.85 feet southeastwardly from the intersection of the said southwesterly line of Edinburgh Road and the southeasterly line

of Bay Road, said distantce being measured along the said southwesterly line of Edinburgh Road, and extends thence (1) southeastwardly by a curve to the left, along the said southwesterly line of Edinburgh Road 100.00 feet more or less, to the intersection of the same with the northwesterly line of Bridge Boulevard (2) southwestwardly along the said northwesterly line of Bridge Boulevard, by a curve to the right, 200.91 feet to the intersection of the same with the northeasterly line of Cardiff Road; thence (3) northwestwardly, by a curve to the right, along the said northeasterly line of Cardiff Road, 100.00 feet more or less, thence (4) northeastwardly along the southeasterly line of Lots #25 & 41; 200.20 feet to the intersection of the same with the said southwesterly line of Cardiff Road and the place of beginning.

Being part of the same premises conveyed to the party of the first part by David Paul Brown, et ux, and Asa P. Childs, Jr., et ux, by deed dated August 20, 1925 and recorded in Cape May County Clerk's office in Book 412, of Deeds, page 28.

Together with the hereditaments and appurtenances thereunto belonging, and all the right, title and interest of the said party of the first part to the same, to the intent that the lands hereby conveyed may be discharged from the said mortgage, and that the rest of the lands in the said mortgaged contained may remain to the said party of the first part as heretofore, to have and to hold the lands and premises hereby released and conveyed to the said party of the second part, its successors and assigns, forever, free from the encumbrance of the indenture of mortgage aforesaid.

In Witness Whereof, the said party of the first part has caused these presents to be signed by its Vice-President, attested by its Secretary, and its Common Seal to be hereto affixed, the day and year first above written.

Signed, sealed and delivered in the presence of:

TRENTON TRUST COMPANY
By NELSON L. PETTY
Vice-President.

Attest:
W. F. VOLK
Secretary
[SEAL]

STATE OF NEW JERSEY,
COUNTY OF MERCER } *ss:*

Be It Known, that on this 27th day of June, A. D. 1927, before me, a Master in Chancery of New Jersey, personally appeared Walter F. Volk, who, being by me duly sworn according to law, on his oath says that he is the Secretary of the Trenton Trust Company mentioned in the foregoing Release of Mortgage; that he knows the Corporate Seal of said Corporation, that the seal affixed to said Release is the seal of the said Trenton Trust Company; that Nelson L. Petty is Vice-President of said Trenton Trust Company and did by its order, sign, seal and deliver the said Release as its voluntary act and deed in the presence of said deponent; and that the said deeponent did at the execution thereof subscribe his name as a witness thereto.

Sworn and subscribed to before me this 27th day of June, A. D. 1927.

WALTER F. VOLK

FRANK TRANSUE
Master in Chancery of New Jersey.

MacCrellish & Quigley Co., Printers, Trenton, N. J.

NEW JERSEY
Court of Errors and Appeals.

THOMAS L. KERNEY,
Complainant-Appellee,
vs.
RICHARD H. JOHNSON,
Defendant-Appellant.

On Appeal from the Court of Chancery.

APPELLANT'S BRIEF

This is an appeal from the Court of Chancery from the Final Decree for specific performance of an agreement of sale, for the purchase of real estate, which was ordered by the Court of Chancery.

The action was brought by Thomas L. Kerney, to compel Richard H. Johnson to specifically perform a contract of sale dated August 24th, 1925, for the sale and purchase of certain lots in the City of Ocean City, New Jersey, for the price or sum of Thirty-four Thousand Three Hundred ($34,300) Dollars. Mr. Johnson has paid the sum of Twenty-six Hundred ($2,600) Dollars on account of the purchase price, and a balance of Seventeen Thousand Eight Hundred ($17,800) Dollars was to have been paid in cash at the time of final settlement, and a mortgage to be given for the remainder.

Settlement was to have been made at the office of Ewing T. Corson, No. 757 Asbury Avenue, Ocean City, New Jersey, when the improvements on the lots were completed, but not before September 15th, 1925; and by the terms of the contract, time is the essence of the agreement.

The lots in question are a part of a large tract of land which was being developed by a company known as Shore Gardens, Inc., which company had agreed by written agreement to sell said lots to Thomas L. Kerney, who, in turn, entered into an agreement of sale with the appellant, as mentioned aforesaid.

At the time these agreements of sale were entered into, the entire tract of land was in an undeveloped and barren state, and one of the conditions which Kerney agreed would be fulfilled was the filling, grading, and gravelling of said lots, and the placing of the curbs and sidewalks, which, according to the terms of the agreement, was not to be completed before September 15th, 1925, and according to the testimony (S. C., page No. 53, line No. 12), the contract for the filling of said land was not entered into between the Shore Gardens, Inc., and the contractor, until February 26th, 1927.

That the only written notice sent to Mr. Johnson requesting him to settle for said lots, was a letter written by the Shore Gardens, Inc., dated April 28th, 1927 (S. C., page No. 18, line No. 24); that this letter did not fix a time for settlement, but merely stated that the Shore Gardens, Inc., would be ready to make settlement in the near future. There is nothing in the testimony relative to a request from Kerney to Johnson to make settlement for the lots, and the only time that they fixed for such settlement was, according to the complainant's own witness, when Mr. Johnson went to the office of Ewing T. Corson, the admitted agent of the complainant, and agreed to make settlement for said lots. This occurred about 11:00 o'clock on June 21st, 1927, and that both Mr. Corson, agent of Kerney, and Mr. Johnson, agreed that settlement should be made at 1:00 o'clock in the afternoon of that day (S. C., page No. 19; S. C., page No. 24, line No. 1). That Mr. Johnson went to the office of Ewing T. Corson at 1:00 o'clock on June 21st, 1927, for the purpose of making settlement. That the said Ewing T. Corson was not present, and there was no deed from Thomas L. Kerney to this appellant for the

property in question. That the said Johnson asked for such a deed, but none was produced, and although he was there, ready, willing, and able to make settlement, the said Kerney was unable to unprepared to give a deed to Mr. Johnson for the property described in the agreement of sale, free and clear of all encumbrances. That on June 21st, 1927, there was a blanket mortgage, covering not only the lots in question, but the remainder of the Shore Gardens tract, and no attempt was made to release these lots from under the lien of said mortgage until at least June 27th, 1927, which is the date of the Release from the Trenton Trust Company to Shore Gardens, Inc. (Ex. C-4).

That time is the essence of the contract of sale. Mr. Johnson waited in Mr. Corson's office until ten minutes after 1:00 o'clock (S. C., page No. 24, line No. 31), and when Mr. Corson did not appear, and no deed was tendered, he left the office without making settlement.

That no further demand has been made upon Mr. Johnson to make settlement for these lots, no time has been fixed for settlement, and no deed was ever tendered to him until the time of this action.

1. Where parties to a contract deliberately agree to the time when settlement shall be made, a delay in the matter of minutes will be fatal in an action of specific performance.

In the case of *Solomon Doctorman et al.* v. *Walter L. Schroeder et al.*, 92 N. J. Equity, page 676, the facts were these:

The contract for the sale of land provided for a second payment of Fifteen Hundred ($1,500) Dollars to be made on December 19th, 1919, the sum of Five Hundred ($500) Dollars having been previously paid by the purchaser. On that day, Mrs. Doctorman, the purchaser, was unable to raise the Fifteen Hundred ($1,500) Dollars, which she was required to pay by the terms of the contract. That the owner of the property agreed to

accept Five Hundred ($500) Dollars, and extend the time for the payment of the remaining One Thousand ($1,000) Dollars until the hour of 2:30 P. M., on Saturday, December 20th, 1919.

It transpired that the purchaser defaulted at 2:30 o'clock on the afternoon of the date named in the supplemental contract.

The Court held: The time limit is fixed, and the contract between these parties is that the payment must not be made later than that hour, whereas, in fact, the purchaser undertook to make the payment later than the time stated; that attempt, it seems to me, was entirely ineffectual, unless, of course, there was some waiver on the part of the owner of the property. The court further held that the fact that the owners of the property remained at the place appointed for some half hour after the time designated for settlement, did not amount to such a waiver.

When the time expired, within which payment should be made, the rights of the owners were to accept payment at a later hour, or to refuse the same, according as they might choose, *no matter what their motives or purposes were.*

It may be that had the purchaser arrived five minutes after the appointed time, that they would have been inclined to accept the payment, but whether they would, or whether they wouldn't, their rights, if they have any rights in the matter, were to accept payment or to refuse it.

The Court thereupon advised a decree dismissing the bill.

We think that the facts in the case of *Doctorman* v. *Schroeder,* as above stated, are analogous to those as stated in the present case, and after Mr. Johnson and Mr. Corson, the agent of Kerney, agreed upon the hour of settlement, and Mr. Corson, or no other person representing Mr. Kerney appeared for the purpose of making such settlement, that the buyer, after waiting five or ten minutes, had a right to refuse to go through with the

contract, and had a right to leave Mr. Corson's office without waiting longer for him to return.

2. The title of the property was not a good and marketable title, free and clear of encumbrances.

That on June 21st, 1927, there was a blanket mortgage covering the entire Shore Gardens tract, including the lots in question, which said lots were not released from under the lien of the mortgage, until the very earliest, June 27th, 1927, which is the date of the release from the Trenton Trust Company to the Shore Gardens, Inc. (Ex. C-4).

It is therefore very obvious that on June 21st, 1927, the time agreed upon for settlement between the parties, that Mr. Kerney could not deliver to the appellant, a good and marketable title, free and clear of all encumbrances.

3. A vendee is not required to make such a tender as will sustain a plea of tender in an action at law, in order to maintain a suit for specific performance of a contract for the sale of land; it is sufficient if he is ready and willing to pay the contract price at the time fixed.

The learned Vice-Chancellor in his conclusions states that it is clear, from the defendant's own testimony, that he not only made no tender, but was not able, at the time and place, to make the same.

We do not believe this is quite the true state of facts, nor do we believe that such a tender was necessary. On page No. 26, State of Case, Mr. Johnson testified that he had the money with which to purchase the lots, and he was ready, willing, and able to do so on June 21st, 1927, if a deed for good and marketable title had been tendered to him. A formal tender of the purchase price of property is not a prerequisite to the compelling in equity of a specific performance of a contract to convey, where the purchaser was at the place where the

conveyance was to have been made, ready and willing to perform his part of the contract, but the seller was not ready to perform his part.

Roche v. *Osborne,* 69 Atl. 176.
Meyer v. *Reed,* 91 N. J. Eq. 237.
Worch v. *Woodruff,* 61 N. J. Eq. 78.

4. A notice and a demand to make settlement is a prerequisite to bringing a suit for specific performance.

In the case of *Nass* v. *Munzing,* 100 N. J. Eq. 421, at the bottom of page No. 423, the court held, a notice and demand to make settlement is a prerequisite to bringing a suit for specific performance, and such a suit cannot be regarded as substitute for said notice and demand.

5. Time is the essence of the contract.

That by the terms of the contract of sale (Sec. 7, S. C., page No. 10, line No. 6) time is the essence of the agreement.

In the case of *Collins* v. *Delaney Company,* 64 Atlantic 107, the court held, "The time of the performance of a contract for the sale of lands may be made the essence of a contract by its express terms. A bill which seeks relief upon such a contract but which discloses that by its terms time was the essence of the contract, and admits that contract was not performed according to its terms, is demurable."

In the case of *Singer* v. *Kavanna,* 98 New Jersey Equity 159, the court held, "Finding that the defendants did not waive such right, and did not extend the time for making such settlement, the bill must be dismissed."

CONCLUSIONS.

In view of the fact that time was the essence of the contract, and a definite fixed hour was agreed upon between the parties when settlement was to have been made, and there was a default on the part of the seller,

and at that time his title was not free and clear of encumbrances, it is therefore must respectfully submitted that the Hon. Vice-Chancellor erred when he directed the decree for the complainant.

Respectfully submitted,

F. Stanley Kreps,
Solicitor for and of Counsel with Appellant.

conveyance was to have been made, ready and willing to perform his part of the contract, but the seller was not ready to perform his part.

Roche v. *Osborne,* 69 Atl. 176.
Meyer v. *Reed,* 91 N. J. Eq. 237.
Worch v. *Woodruff,* 61 N. J. Eq. 78.

4. A notice and a demand to make settlement is a prerequisite to bringing a suit for specific performance.

In the case of *Nass* v. *Munzing,* 100 N. J. Eq. 421, at the bottom of page No. 423, the court held, a notice and demand to make settlement is a prerequisite to bringing a suit for specific performance, and such a suit cannot be regarded as substitute for said notice and demand.

6. There was no duty on the part of Johnson to accept a deed from Shore Gardens, Inc.

His contract was with Kerney, and he had a right to demand a deed from him. This is especially true in view of the fact that Kerney brought an action for specific performance. The alleged deed from Shore Gardens to a blank grantee would have passed to Johnson a clouded and doubtful title if he had taken it, the instrument having been changed after its execution. Further the release from under the blanket mortgage was from the Trenton Trust Co. to the Shore Gardens, and there can surely be no merit in the contention that Johnson's money should be used to make a settlement between Shore Gardens and the Trenton Trust Co., neither of the parties having any contractual relationship with Johnson.

This question was argued at great length before the Vice-Chancellor and I believe he is mistaken when he says it was not so argued.

between the parties when settlement was to have been made, and there was a default on the part of the seller,

and at that time his title was not free and clear of encumbrances, it is therefore must respectfully submitted that the Hon. Vice-Chancellor erred when he directed the decree for the complainant.

Respectfully submitted,

F. Stanley Kreps,
Solicitor for and of Counsel with Appellant.

The VanBuskirk Press, Inc., 109 E. Hanover St., Trenton.

New Jersey Court of Errors and Appeals

Between

THOMAS L. KERNEY,
Appellee,

and

RICHARD H. JOHNSON,
Appellant.

On Appeal From Chancery.
Brief for Appellee.

A decree for specific performance was entered in favor of vendor Kerney, and vendee Johnson appeals, giving eight reasons for reversal.

The only questions argued for appellant before the Vice Cancellor were: (1) Time was the essence of the contract and (2) the vendee was ready and willing to perform but vendor failed to perform at the time for performance. The remaining reasons advanced for reversal are therefore improperly before this court, the Vice Chancellor finding (Case p. 62) that all other defenses were waived, and were not considered by the court. *Engelhard v. Schroeder*, 92 *Eq.* 663.

However, taking up a discussion of all the reasons in their order, appellee contends that:

Reason 1 is controlled by *Kobrin v. Drazin*, 97 *Eq.* 400, where it is held that, if vendor can give good title at time of decree, performance will be decreed.

Kerney tendered to Johnson a deed, in conformity with his contract, at the hearing. There was no proof in the case that Kerney did not have good title.

Reason 2 is met by the proofs which fail to show any depreciation in value, and a complete acquiescence on Johnson's part in the delay, with the reasons for which he was thoroughly conversant.

Reason 3 is not borne out by the proofs. Johnson did not convince the court below that he was ready willing and able to take title, and the Vice Chancellor was convinced that, had Johnson been ready and able to take title, he did not wait long enough at Corson's office for a settlement which could easily and readily been arranged had Johnson the mind to perform his contract.

Reason 4 is no ground for reversal, because the blanket mortgage was released within a few days after Johnson went to Corson's office, and Johnson had not advanced that objection as a reason for refusing to take title on the different occasions when Corson tried to conclude the transaction.

Reason 5 has no basis in fact, because there is a total lack of proofs in the case showing the state of the title.

Reason 6 correctly states the fact that only one date was set for the passing of title, but all the authorities hold that, even if vendor is unable to perform on the day set, a reasonable time is allowed him to perform. Kerney was ready to perform within six days from the date of the scheduled meeting in Corson's office, having in mind, however, that the essence feature of the contract had long since been waived by both parties.

Reason 7 is met by the proofs that Johnson waived the time clause, and *Kobrin v. Drazin,* 97 *Eq.* 400, holds that the time clause may be waived by inconsistent conduct subsequent to the time designated,

if it can be said with certainty that there was in the instant case, any definite time set for performance.

On July 27, and August 20, 1925, Shore Gardens, Inc., took title to a tract of unimproved land in Ocean City, and began to improve it extensively for subdivisions and sale as building lots. There was unavoidable delay in completing the improvements.

Kerney, on Augst 14, 1925, agreed to buy 48 lots from Shore Gardens.

On August 24, 1925, Kerney agreed to sell 13 of his lots to Johnson for $34,300.00, and Johnson paid Kerney a deposit of $2,600.00 on account of the purchase price.

The Kerney-Johnson agreement provides in substance that:

(a) Title should pass to Johnson on completion of improvements, but not before September 15, 1925.

(b) If searches could not be obtained at time of transfer, sufficient time would be allowed for procuring them.

(c) Time was the essence of contract.

(d) Vendor could elect to apply deposit either as liquidated damages, or on account of the purchase price, in case of default.

The improvements were not completed until April, 1927, and on April 28, 1927, Ewing T. Corson, Kerney's agent in Ocean City, wrote Johnson to that effect, and asked Johnson to designate a time for settlement.

The proofs are barren of any action between April 28, 1927, and June 21, 1927, when Johnson called at Corson's office and said that he was ready to take title, and Corson agreed to meet him at one o'clock of that day to complete the transaction.

Corson was not in his office at one o'clock but said he came in a few minutes late, and Johnson had left, and that he tried within the next two days and

on several occasions thereafter to persuade Johnson to take title, but Johnson refused, because Corson says he claimed he could not raise the funds and would not take title direct from Shore Gardens, but insisted on a deed from Kerney, and also balked at giving the purchase-money mortgage required by the agreement.

On June 21, 1927, the mortgage of $100,000.00 held by the Trenton Trust Company was still a lien, the release not being procured until six days later, June 27, 1927.

The bill for specific performance was accordingly filed on July 26, 1927, and a decree was entered that Johnson perform his contract with Kerney.

Kerney has since June 27, 1927, been ready, willing and able to convey to Johnson by reason of the deed to him from Shore Gardens, dated June 27, 1927, and his deed to Johnson dated June 27, 1927. Both the deeds were received in evidence at the hearing, and neither deed was recorded. The deed from Kerney to Johnson, was tendered to Johnson at the hearing.

Johnson did not make formal tender of the purchase price, either in cash or a mortgage, on June 21, 1927, and no effort was made by Johnson to show that he has rescinded his contract.

It was established by Corson's sister, who was in Corson's office when Johnson came back at one o'clock, that she told Johnson there was a deed ready to be delivered to him then, with the name of the grantee omitted, duly executed and acknowledged by Shore Gardens, for the Johnson lots, and that Johnson, making no contention or complaint about the title, insisted on a deed from Kerney, refusing to take the same title to the same lots that Kerney had agreed to sell him, evidently knowing full well that Kerney's deed was not then available.

Johnson's offer to take title on June 21, 1927, was a ruse. He admitted he did it on advice of counsel. His effort was insincere, and cannot be regarded in any other wise than as a mere gesture.

Johnson had permitted Kerney's grantor to expend a large sum of money in completing the improvements. Kerney had completed all the terms of his bargain, and if Johnson dealt with Corson on June 21, 1927, as the agent of Shore Gardens, Johnson has not, since Corson afterwards asked him to take title from Kerney, made any effort or shown any willingness to do so.

Shore Gardens letter to Johnson was sufficient notice of the completion of the improvements, and Johnson's attendance with a witness in Corson's office, was not a bona fide effort to meet the requirements of his contract, which he has never surrendered.

Kerney, relying on his contract with Johnson, has taken title from Shore Gardens. See last paragraph of syllabus in *Young v. Paul,* 10 *Eq.* p. 402.

Johnson's conduct in waiting until June 21, 1927, to take title, after receiving notice in April, 1927, of the near completion of the improvements, is inconsistent with his contention now that time was of the essence. This time feature can be waived. See *Kobrin v. Drazin,* 97 *Eq.* 400. Johnson's conduct indicates, with Kerney's acquiescence in delay, a clear waiver of the time clause.

In *Moore v. Galupo,* 65 *Eq.* at p. 199, this court said:

> "It is therefore of no significance that when a deed was tendered the defendant, this mortgage was a lien on the title. He was invited to perform the contract. If he had told the complainant that he was willing to accept the deed upon the cancellation

of the mortgage, and the complainant had refused to obtain it to be cancelled, the circumstances would have presented a different aspect. It clearly appears that the defendant was at all events determined not to perform the contract, and that he made known this determination to the complainant. Under such circumstances there was no need of formal tender of a deed."

Although Johnson's case showed no change in the value of the land between the date of the agreement and the date of final hearing, yet, even if the land had depreciated in value, such a change was in the contemplation of the parties, Johnson being an extensive buyer of unimproved Ocean City real estate, and the inactivity of the market for lots in Ocean City, is not a defense, particularly because Johnson did not attempt to show that the lots he bought from Kerney are worth less now then when he agreed to buy them. See *Keim v. Lindsay,* 30 *Atl.* (N. J.) 1063.

While the contract expressly provides that time was its essence, yet there is sufficient in the case to conclude that the parties had waived that provision. For instance, there are: the silence of Johnson as to speeding up the improvements, which took from August, 1925, to April, 1927, for completion; the failure of Johnson to respond to the letter of April 29, 1927, notifying him to arrange for transfer of title, until he conferred with Corson on June 21, 1927: the absence of any evidence that Johnson was injured by the delay of six days in procuring the release of mortgage: the testimony of Corson that he had frequently asked Johnson to take title, after June 21, 1927: Kerney's contract with Shore Gardens that contained the same provisions as to time: the gesture of Johnson in seeking title from

Corson on the advice of counsel: Johnson's failure to show that he was anxious to take title on June 21, 1927, in order to effect a resale of the lots, or to anticipate by a sale, a possible decline in market value, and the failure of Johnson to show that the lots have decreased in value.

Having before us all these equities in Kerney's favor, the case of *Gerba v. Mitruske,* 84 *Eq.* 141, indicates that a decree in favor of Kerney has already received the sanction of this court. It was there held that:

> "A vendor is entitled to a decree of specific performance, where time of performance is not of the essence of the contract, if he can, at the time of the decree, give a clear title.
>
> As a general rule, in equity, time is not deemed to be of the essence of the contract unless the parties have so treated it, or it necessarily follows from the nature and circumstances of the contract."

In the case of *Doctorman v. Schroeder,* 92 *Eq.* on page 677, the opinion of the court shows that time was "distinctly and clearly" essential in the agreement of sale, and that the "purchaser's rights as purchaser shall cease and become void unless payment is made at the time stipulated." This case is relied on by appellant, but it was decided on a state of facts entirely different from those in the case at bar, and therefore does not control here. Neither Kerney nor Johnson agreed that a forfeiture should occur if neither attended at one o'clock in Corson's office.

This court has even in a law case, held, in *Kadow v. Cronin,* 97 *L.* 301, that:

"A vendee of real estate to be conveyed clear of encumbrance has no right to repudiate his contract because the vendor has not paid off encumbrances before the time fixed for settlement. All that such vendee is entitled to is to have the encumbrances removed at the time of settlement, and the fact that such encumbrances are to be satisfied at the settlement out of the purchase-money to be then paid by him instead of out of other funds, is a matter in which he has no legal concern."

In the last cited case, on page 303, this court's opinion clearly indicates that the case at bar comes squarely within the letter and spirit of the decision, where it is said:

"When, therefore, the parties in this case met in pursuance of their extended agreement and found the lawyer's office closed, so that the prearranged plan to call up the secretary of the mortgagee building association and have him attend the settlement and accept payment of and satisfy the mortgage, was temporarily thwarted without fault of either party, we think the plaintiff did not thereby acquire a right to forthwith repudiate his contract, but that he was in duty bound to co-operate to a reasonable extent with defendant's evident purpose to carry through the settlement in good faith. The lawyer could have been sent for, or the parties might have repaired to the building association secretary's office and there made settlement and paid off the mortgage, or some other reasonable expedient might have been adopted to overcome the unexpected

mishap. Instead of this the plaintiff elected to stand upon what he conceived to be his legal rights to repudiate his contract, because the mortgage had not been paid off and satisfied before the settlement, and, as we think, for the reasons hereinbefore stated, that he had no such legal right, the judgment of the Supreme Court affirming the judgment of the District Court in defendant's favor is affirmed.''

10

Respectfully submitted,

JAMES J. McGOOGAN,
Solicitor and of Counsel
For Appellee.

MacCrellish & Quigley Co., Printers, Trenton, N. J.

NEW JERSEY
Court of Errors and Appeals

BETWEEN
THOMAS L. KERNEY,
Appellee,

and

RICHARD H. JOHNSON,
Appellant.

SUPPLEMENT TO STATE OF CASE.

By way of supplement to the State of Case, the Appellant submits the following copy of the defendant's brief, which was sent to Vice-Chancellor Buchanan, on January 26th, 1928, the same being made a copy of the State of Case by permission of the Court of Errors and Appeals, on motion of F. Stanley Kreps, Solicitor of the Appellant.

Said brief was not made a part of the original State of Case by reason of the fact that it was not filed in the Chancery Clerk's office and is now being submitted to disprove the contention that certain defenses were not argued before the Vice-Chancellor orally and by brief, and especially to disprove that there had been a waiver of the defense of the blanket mortgage covering the lots in question by reason of that point having not been argued as stated aforesaid.

IN CHANCERY OF NEW JERSEY.

BETWEEN
THOMAS L. KERNEY,
Complainant,

and

RICHARD H. JOHNSON,
Defendant.

On Bill, Etc.

DEFENDANT'S BRIEF

This is an action brought by Thomas L. Kerney to compel Richard H. Johnson to specifically perform a contract of sale, dated August 24th, 1925, for the sale and purchase of certain lots in the City of Ocean City, New Jersey, for the price or sum of thirty-four thousand three hundred dollars ($34,300). Mr. Johnson has paid as part of the purchase price the sum of twenty-six hundred dollars ($2,600), and there is still a balance of seventeen thousand eight hundred dollars ($17,000) to be paid in cash to complete the settlement.

Settlement was to have been made at the office of Ewing T. Corson, No. 757 Asbury Avenue, Ocean City, New Jersey, when the improvements on the lots were completed, but not before September 15th, 1925; by the terms of the contract, time is the essence of the agreement.

It has been argued in the Complainant's Brief that Ewing T. Corson was not the agent of Kerney; I wish to call to the Court's attention the fact that the sale of these lots was made through the office of Mr. Corson, and that he was the broker that consummated the deal, and it will be remembered that both Mr. Rose (who is admitted to be the real party in interest) and Mr. Kerney both testified that they knew very little about the

entire transaction, and had left everything to Corson, as their representative and agent. We think there can be little doubt but that Corson was the agent of the Complainant and had full power and authority to act for him.

There was no definite time fixed for settlement in the contract, except the clause which stated that settlement should be made when the improvements were completed, but not before September 15th, 1925, as the tract of land of which these lots were a part was a large tract consisting of some three hundred lots, the improvements consisting of a four to seven-foot fill, and the laying of curbs and sidewalks and gravelling of streets. It is ridiculous to suppose that these improvements would be made between the 24th day of August and the 15th day of September, but it was testified to by Mr. Rose and Mr. Corson that when the lots were sold to Johnson, he was told that the improvements would be completed some time in February in the following year.

As a matter of fact, the improvements were not completed for almost two years, from the date of the agreement and we contend that this is an unreasonable time within which to make the same, and that even though the delay was not the direct fault of the Complainant it is certainly not the fault of Johnson and he should not be made to suffer by reason of it, and would be, in view of the fact that there is uncontradicted testimony to the effect that these lots, as well as the lots in the immediate vicinity have decreased in price and value, and that there has been no market for the same for over a year and a half last past.

There seems to be some dispute between Johnson and Corson as to who fixed the time of one o'clock in the afternoon of June 21st, 1927, as the time for settlement, but there can be no question but that they both agreed upon this hour and date, and that the settlement should be made at the office of Ewing T. Corson in accordance with the terms of the agreement.

The testimony shows conclusively that Mr. Johnson went to the office of Mr. Corson at one o'clock on June 21st, 1927, for the purpose of making settlement with Mr. Kerney; that Mr. Corson was not there, and that there was no one there ready with a deed to be tendered to Mr. Johnson;

At that time there was a one hundred thousand dollar ($100,000) blanket mortgage covering the lots in question, and that they were not released from under said mortgage until June 27th, 1927.

Mr. Johnson testified to the fact that he was ready, willing and able to make settlement at that time, that he had the money in the bank with which to perform his part of the contract, and went to Mr. Corson's office for the sole purpose of fulfilling the same. The fact that he was there at one o'clock, as was agreed upon by Mr. Corson, who was acting as agent of Kerney, is corroborated by the testimony of Howard Stainton and Louisa Corson, the latter being a witness for the Complainant.

It is undisputed that Mr. Corson was not present at one o'clock and that Mr. Johnson waited in the office for five or ten minutes and as Corson did not appear that he then left.

Time is the essence of this contract. In view of this fact, the cases mentioned in the Complainant's brief do not apply to the present facts, for in those cases, time was not the essence of the contract. Mr. Johnson had a right to demand a special warranty deed, to be delivered to him from Mr. Kerney at one o'clock, on June 21st, 1927, and that the lots should have been released from under the one hundred thousand dollar ($100,00) blanket mortgage. It has been decided in this State, in the Court of Errors and Appeals, the case of *Doctorman* v. *Schraeder,* 92 New Jersey Equity 676, "The single question, then, which is presented for consideration to my mind is whether this court has power after the parties have deliberately and solemnly contracted to the time when the payment should fall due

under a contract, and equally, deliberately and solemnly agreed upon the consequences that should flow from the failure to pay, at the time, to say that the different consequences shall flow from a default as a matter of minutes."

In the case of *Collins* v. *Delaney Company*, 64 Atlantic 107, the court held: "The time of the performance of a contract for the sale of lands may be made the essence of a contract, by its express terms. A bill which seeks relief upon such a contract but which discloses that by its terms time was the essence of the contract, and admits that the contract was not performed according to its terms, is demurable."

In the case of *Singer* v. *Kavanna,* 98 New Jersey Equity 159, the Court held: "Finding that the defendants did not waive such right, and did not extend the time for making such settlement, the bill must be dismissed."

It seems very clear, therefore, that the tender which was attempted to be made at the trial of this case was not sufficient, and was not in fact a legal tender, such as was called for by the contract between the parties.

There has been no waiver of time, as the essence of this contract, on the part of Mr. Johnson; he never, at any time received any notice from anyone as the representative of Kerney that the lots were ready for settlement.

He did receive notice from the Shore Gardens on April 28th, 1927, that the improvements would be completed some time in May, but the agreement which he made with Corson, whereby they fixed one o'clock on June 21st, 1927, as the time for settlement, was the first and only agreement made, fixing such a time. Making an agreement to settle at this time was not a waiver on the part of Mr. Johnson, for it was necessary considering the wording of the contract that some time be fixed.

We argue that the deed which Miss Corson says was in the office on the day Mr. Johnson went to make settle-

ment, and which was executed by Shore Gardens as the grantor to a blank grantee, was not such a deed as Mr. Johnson would have to accept for his contract was with Kerney and no one else. There is no contention that there had been as assignment between the Shore Gardens and Kerney. It will also be noted that the testimony of Miss Corson is disputed by both Johnson and Stainton, for they both say that no deed of any kind was in Mr. Corson's office for these lots, or if it were, they did not see it, and it was never tendered to Johnson. There was no obligation on the part of Mr. Johnson to make settlement after the failure of Kerney to tender a deed or a good and marketable title on June 21st, as time was the essence of the contract.

It may be that Mr. Johnson is standing on technicalities; we think that he has a right to do so, in the defense of an action for specific performance. This particular point was emphasized in the case of *Doctorman* v. *Schraeder,* above cited.

In view of the foregoing facts, and statements of law, we think that the bill should be dismissed.

Respectfully submitted,

F. Stanley Kreps,
Of Counsel with Defendant.