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In Chancery of New Jersey.

BILL OF COMPLAINT.

(Filed May 5, 1943.)

To His Honor LUTHER A. CAMPBELL, *Chancellor of The State of New Jersey:* 10

Complainant, Ward T. Gulvin, of Hamilton Township, in Atlantic County and State of New Jersey, respectfully shows that,

1 On or about the 19th day of June, 1936 complainant entered into a written contract of sale with one Sunshine Park, Inc., a corporation of New Jersey, for the purchase of a parcel of lands situate in Hamilton Township, aforesaid, designated as lots 1, 2 and 3 in Block 11 on map of Sunshine Park Inc. Said map is filed in the Clerk's Office of Atlantic County; and attached hereto, as a part hereof is a copy of said contract (Schedule A). 20

2. The consideration to be paid for said lands was the sum of $208.50, to be paid in installments of $8.00 per month, after the down payment of $5.00; and pursuant to said agreement complainant paid to said Sunshine Park, Inc. the sum of $187.85, leaving a balance of the purchase price in the sum of $20.65. 30

3. Complainant has on several occasions tendered the said balance, so due, to said Sunshine Park, Inc. and demanded a deed for the said lands. The tender of said balance due has been refused and a deed denied complainant—, while one Boone, an officer of said Sunshine Park, Inc. informed complainant that a deed would be delivered for said lands only if complainant should get rid of his wife. Complainant has always 40

been ready and willing to pay the balance due on said lands, and still is.

4. Pursuant to the execution of the said contract, schedule A, complainant entered upon said lands and erected a dwelling-house thereon, at great costs to complainant; and complainant continued to reside there for a long time. Said dwelling is presently occupied by one James Grant upon and under a contract with complainant, at a rental of $12.50 per month.

5. About February 9, 1943 complainant was served with a summons and complaint in an action at law—in ejectment,—issued out of the Supreme Court of New Jersey, wherein Sunshine Park, Inc. is plaintiff and the complainant herein is named defendant; and therein the Sunshine Park Inc. claims the right to possession of the premises described in said schedule A, including the lands and the buildings thereon erected by complainant, at his cost. Said suit in ejectment is still pending.

6. Said the Sunshine Park Inc. has also instituted in the Atlantic County Court of Common Pleas a suit in ejectment, wherein one James Grant is named as defendant, involving the same lands and premises as described in the ejectment suit filed against complainant; and that action too is pending. Said Grant is in possession of said lands and premises under a lease from complainant and ejectment of him would be in defeat of complainant's rights in said lands and premises.

7. The total sum of $187.85 was paid by complainant to said Sunshine Park Inc. in sundry payments at times outside and later than the times wherein said contract of sale called for same, so that the contract was not adhered to on either side; but all such payments were accepted by Sunshine Park Inc. when so tardily made; and the latter never notified complainant

that the balance of $20.65 remaining due on said contract would not be accepted if not made according to contract or at any other specified time or times.

8. Ever since the making of said contract of sale (schedule A) complainant and his lessees have always been in possession of the lands and premises aforesaid.

9. Complainant is now in custody of the State of New York upon a charge of having broken parole some years ago. 10

Complainant is without adequate remedy in the courts of law either to defend in said ejectment suits, protect his rights,—or to obtain the perfection of his title to said lands, and prays:

1. That said Sunshine Park, Inc., which is the defendant to this suit may answer this bill of complaint, without oath, and each statement therein made;

2. That said defendant, by its proper officers, may be decreed to execute and deliver to complainant, his heirs and assigns, a good and sufficient conveyance in law, by general warranty deed, the lands described in said contract (schedule A), upon payment of said balance of the purchase money due thereon; 20

3. That said defendant be injoined by this court from further prosecuting its said ejectment suits against both this complainant and said James Grant until the further order of this court;

4. That complainant have such further and other relief as may be in accord with equity and good conscience; and 30

5. That a writ of subpœna issue out of this court commanding said defendant to answer this bill of complaint and abide by such decree as the court may make in the premises.

ELWOOD C. WEEKS,
Solicitor and of Counsel with Complainant. 40

SCHEDULE A.

Contract of Membership.

New York City, June 19, 1936. Sunshine Park, Inc., agrees to sell to Ward T. Gulvin address 1016 West Madison St, Chicago, Ill. and has received from the purchaser as a first payment on such sale the sum of $5.00. And the said purchaser has bought of Sunshine Park, Inc. for the sum of $208.50 lots Nos. 1, 2, 3 Block 11, as shown on the Map of Sunshine Park, Inc., Hamilton Township, NJ, and filed in the office of the County Clerk at May's Landing, N. J.

Terms

Balance of $203.50 to be paid upon signing and delivering of agreement of sale The balance to be paid in monthly installments of $8 , beginning on the 19th day of July, 1936

(Written over the face) "For I.N.C. Members Only"

Subject to the Corporations Approval

This sale is upon regular terms and conditions established by owner of said property and contingent upon the purchaser's membership in the American Sunshine Association (or the I.N.C.) and is to be covered by the owner's regular form of agreement, which is to be executed by both parties. In case the purchaser does not sign this agreement when presented or within five days from date hereof, then at option of the seller, this contract may be concelled and all moneys on same may be retained by the seller as liquidated damages and the seller shall not be liable to the purchaser for any part of same. In case this sale is rejected by owner, all moneys are to be returned to the purchaser within seven days after said rejection. Upon

full payment property will be conveyed by full warranty deed.

Sunshine Park, Inc.,

by Lawrence Germain

Ward T. Gulvin, purchaser.

Russell B. Abbott

Witness

10

No verbal agreement or written alterations recognized

IN CHANCERY OF NEW JERSEY.

STATE OF NEW YORK }
COUNTY OF CHEMUNG } SS

WARD T. GULVIN, of full age, being first duly sworn, upon his oath, deposes and says that: 20

1. I am presently incarcerated in the jail in the city of Elmira, State of New York upon the charge of having broken parole.

2. I am the defendant in a suit in ejectment pending in the New Jersey Supreme Court, wherein Sunshine Park, Inc. a corporation of New Jersey is plaintiff.

3. I have a good defense to said action in ejectment and have filed an answer therein, but such defense is of an equitable nature, based upon the following facts: 30

(a) On or about June 19th, 1936 I entered an agreement in writing with said Sunshine Park, Inc., a copy of which is as follows:

"New York City, June 19, 1935

Sunshine Park, Inc. agrees to sell to Ward T. Gulvin, and has received from the purchaser as a first payment on such sale the sum of $5.00. And 40

said purchaser has bought of Sunshine Park, Inc. for the sum of $208.50 lots 1, 2 and 3 block 11 as shown on the map of Sunshine Park, Inc. Hamilton Township, N.J. and filed in the office of the County Clerk at May's Landing, NJ.

TERMS: Balance of $203.50. to be paid upon signing and delivery of agreement of sale the balance to be paid in monthly installments of $8.00 beginning on the 19th day of July, 1936.

Subject to corporations' approval. This sale is upon the regular terms and conditions established by owner of said property and contingent upon the purchaser's membership in the American Sunbathing Association (or the INC) and is to be covered by the owners regular form of agreement which is to be executed by both parties. In case the purchaser does not sign this agreement when presented or within five days from date hereof, then at the option of the seller this contract may be cancelled and all moneys on same may be retained by the seller as liquidated damages and the seller shall not be liable to the purchaser for any part of same. In case this sale is rejected by owner, all monies are to be returned to the purchaser within seven days after said rejection. Upon full payment property will be conveyed by full warranty deed.

Sunshine Park, Inc.

by Lawrence Germain

Ward T. Gulvin, purchaser.

Russell B. Abbott,

Witness

No verbal agreement or written alterations recognized''

(b) The suit in ejectment involves the premises described in said agreement, together with another lot for which I have a deed (not involved in the sale by said agreement).

(c) No other agreement was entered into touching the sale to me of the said lots, but I have paid and Sunshine Park, Inc., has received, the sum of $187.85 under said agreement towards the purchase of said lots. Said sum of $187.85 was paid by me over a course of years extending up to 1940. No demand has been made upon me for the balance. I have on July of 1940, on Dec., 1940 and about July, 1941 tendered the balance of $20.65 and same has been refused with the statement from one Mr. Boon, who has always been in charge of affairs of said corporation, that I might not remain in the premises unless I should get rid of my wife. This I refused to do. I have always been ready and willing to pay said balance upon said lots, but without avail. I am still so ready and willing.

I have erected a building upon said lots at great expense and the same is rented and occupied by one James Grant at a rental of $12.50 per month.

4. I am ready to prove all of the above facts as this court may direct.

5. I resided upon the property above referred to from about June 20, 1936 to October 15 (about) 1941.

6. I have instituted, or am about to institute, suit in the Court of Chancery of New Jersey for specific performance of said agreement. My residence is at said premises.

WARD T. GULVIN.

Sworn and subscribed before me this March 22, 1943.

C. E. CALLEAR,
Notary Public of
New York State.

Attach seal and County Clerk's Certificate.

IN CHANCERY OF NEW JERSEY.

ON BILL, ETC.

Between:

WARD T. GULVIN,
Complainant.

10 AND

SUNSHINE PARK, INC.,
Defendant.

ORDER WITH RESTRAINT.

(Filed May 5, 1943.)

Upon reading and filing the bill of complaint presented in this cause, with affidavits attached.

It is on this Fifth day of May, 1943 ORDERED that the defendant Sunshine Park, Inc. do show cause be-
20 fore the Chancellor at chambers in Atlantic City, on Tuesday, the eleventh day of May, 1943 why it should not be restrained from the further prosecution of two certain suits in ejectment now pending,—

> the one brought by it in the Supreme Court of New Jersey wherein Ward T. Gulvin is named as complainant; and the other brought by it in the Common Pleas Court of Atlantic County, wherein one James Grant is named as defendant

30 —until the further order of this court.

And it is further ordered that a copy of said bill of complaint, with affidavits attached which may be certified by solicitor of complainant be served upon the said Sunshine Park, Inc., or its solicitor at least five days before the return day of this order.

LUTHER A. CAMPBELL,
C.

Respectfully advised.

W. F. SOOY,
40 *V. C.*

IN CHANCERY OF NEW JERSEY.

On Bill etc.

Between:

Ward T. Gulvin,
Complainant, 10

and

Sunshine Park, Inc.,
Defendant.

NOTICE OF MOTION TO STRIKE OUT BILL OF COMPLAINT.

(Filed May 7, 1943.)

To the Complainant Ward T. Gulvin and to Elwood C. Weeks, Solicitor and of Counsel with the Complainant: 20

TAKE NOTICE that on Tuesday, May 11, 1943, at the hour of ten o'clock in the forenoon, Eastern War Time, or as soon thereafter as counsel can be heard, at the Chancery Chambers, in the City of Atlantic City, New Jersey, I shall apply to the Chancellor for an order striking out the bill of complaint filed by you in the above entitled cause, for the following reasons: 30

1. The said bill of complaint discloses no cause of action in that

(a) Said bill of complaint does not allege that the Complainant has performed the contract sought to be enforced nor does Complainant allege in said bill that he is ready, able and desirous to perform said contract in accordance with its terms.

(b) The contract set forth in the bill of complaint and sought to be enforced by the Complainant against 40

this defendant cannot mutually be enforced by the defendant against the Complainant.

2. The Complainant's delay in filing said bill of complaint as appears from said bill, bars and estops him from the equitable relief sought therein.

LEON LEONARD,
Solicitor and of Counsel with the Defendant, Sunshine Park, Inc.

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Endorsement:

Due and legal service of the within Notice of Motion is hereby acknowledged this 7th day of May, 1943.

WEEKS,
Solicitor for and of Counsel with the Complainant.

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IN CHANCERY OF NEW JERSEY.

On Bill etc.

Between:

Ward T. Gulvin,
Complainant, 10

and

Sunshine Park, Inc.,
Defendant.

ORDER OF CONTINUANCE.

(Filed May 18, 1943.)

It appearing that complainant filed his bill of complaint and thereupon an Order to Show Cause was signed by the Chancellor requiring defendant to show cause why it should not be restrained from prosecuting certain suits in ejectment pending—the one in the Supreme Court of New Jersey wherein Sunshine Park, Inc., is plaintiff and said Gulvin is defendant and the other being in the Common Pleas Court of Atlantic County, brought by said Sunshine Park, Inc., against one James Grant, which Order to Show Cause was dated May 5, 1943 and returnable May 11, 1943; and

It also appearing that counsel for the defendant did on the eleventh day of May 1943 move, upon notice, to dismiss the said bill of complaint for certain reasons advanced; and

The court having considered the said bill and heard the arguments of the respective counsel;

IT IS on this 18 day of May, 1943, ORDERED that:

1. The motion to dismiss the bill of complaint and also the said Order to Show Cause are hereby con-

tinued until Tuesday, the 1st day of June, 1943, at ten o'clock in the forenoon;

2. Leave is hereby granted to the complainant to amend his bill of complaint in such way and manner as he may see fit, with supporting affidavits if deemed advisable; and that a copy of such bill as amended, with supporting affidavits, if any—which may be certified by the solicitor of the complainant, be served upon said Sunshine Park, Inc., or its solicitor at least five days before June 1st, 1943.

10

LUTHER A. CAMPBELL, *C.*

Respectfully advised,

W. F. SOOY, *V. C.*

20

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40

IN CHANCERY OF NEW JERSEY.

On Bill etc.

Between:

Ward T. Gulvin,
Complainant, 10

and

Sunshine Park, Inc.,
Defendant.

AMENDMENT TO BILL OF COMPLAINT.

(Filed May 28, 1943.)

Leave having been obtained by order of May 18th, 1943, the complainant hereby amends his bill of complaint filed in this cause by adding the following thereto after paragraph 7, page 2, to wit: 20

7-a. Complainant became a member of the American Sunbathing Association on or about June 19, 1936 upon signing said contract of that date and he continued so to be by reason of payments made by him under said contract, and his willingness to pay the balance due thereunder; and complainant is ready and able to prove such facts as this court may require. 30

7-b. The tender of the balance due upon said contract of June 19, 1936 was made by complainant and refused by defendant, as referred to in paragraph 3 of the bill, in the Summers of 1940 and 1941.

7-c. The defendant never presented to complainant any form of agreement other than that of June 19, 1936; and complainant never was requested by defendant to sign any other agreement. 40

7-d. Complainant has complied with all terms and conditions, established by said contract, or otherwise, except as to time of payments under said contract; and complainant has often, prior to the Summer of 1941, requested a copy of rules and regulations of the secretary of defendant and it was always denied that any existed; and complainant believes and alleges that there were none in fact created until in July, 1941.

Respectfully,

ELWOOD C. WEEKS,
Solicitor and of Counsel with Complainant.

STATE OF NEW YORK,
COUNTY OF CHEMUNG, } *ss.:*

Ward T. Gulvin, of full age, being first duly sworn, upon his oath, deposes and says that:

1. I have read the bill of complaint filed in my behalf and the amendment hereto attached; and all allegations thereof are true.

2. Upon signing the agreement for the sale of lots 1, 2 and 3 in block 11 in Sunshine Park, dated June 19, 1936, I became a member of American Sunbathing Association, referred to therein; and under and by virtue of the payments made to Sunshine Park, Inc., by me under said agreement, and my willingness and ability to pay the balance due thereunder I have continued to be such member from the date of said agreement to the present time. On signing said agreement I was informed by one A. M. Flynn, secretary of said Sunshine Park, Inc., that those who were owners of lands of Sunshine Park, Inc., or purchasing any thereof were, and continued automatically to be, members of

said American Sunbathing Association. That was the practice in all cases and was the significance of the words "Contract of Membership" in said contract of June 19, 1936. From June 19, 1936 I enjoyed all rights and privilgees of American Sunbathing Association and particularly in what is known as Sunshine Park—wherein lies the lots described in said contract, without demand or payment of moneys other than those paid pursuant to said contract. 10

3. Defendant Sunshine Park, Inc., and its agents never presented to me any form of agreement other than that of June 19, 1936, aforesaid; and I never was requested by any of them to sign any other agreement, but all moneys paid by me to said Sunshine Park, Inc., were under and pursuant to said lone contract and so accepted by it; and there was no question ever raised by Sunshine Park, Inc., or its officers or agents or their willingness to accept same until sometime in the Summer of 1940. 20

4. I have complied with all terms and conditions established by Sunshine Park, Inc., except as to times for making the payments which became due under said contract; and with all payments as made and my conduct as a member of Sunshine Park, Inc., and American Sunbathing Association the Sunshine Park, Inc., always acquiesced until the Summer of 1940, when without good cause it, Sunshine Park, Inc., refused to accept payment of further moneys upon said contract. 30

5. I have on numerous occasions, prior to the Summer of 1940, requested a copy of the rules and regulations governing said Sunshine Park, Inc., and its members, particularly from one A. W. Flynn, Secretary thereof and Ilsley Boone, its superintendent; and I was always told that there were none; and the said Boone, on one occasion, told me not to worry; and yet, some 40

time about July, 1941, after I had purchased a lot from one Rubin Clark, I received by registered mail purported to be rules and regulations of Sunshine Park, Inc. I am advised, believe and therefore assert that the same were passed in the Summer of 1941 and not before. They were subsequently placed of record in the Clerk's Office of Atlantic County. The receipt
10 of the said registered parcel was the first that I had ever known about there being any written rules and regulations for members, owners, purchasers or anyone else about the grounds of Sunshine Park, Inc., except that I understood that all persons going thereabout were required to go in the nude and not become intoxicated. In the Summer of 1939 Ilsley Boone and Mr. A. W. Flynn both publicly represented at a meeting of members that there were no written rules and regulations and that they were made up to suit the oc-
20 casion to throw out any black cats.

WARD T. GULVIN.

Sworn and subscribed before me this 26 day of May, 1943.

C. E. CALLEAR,
Notary Public of New York State.

(Seal)

A true copy of amendment to bill and affidavits.

30 *Solicitor for Complainant.*

Endorsement:

Service of a copy of within amendment and affidavits is acknowledged the 27th day of May, 1943.

LEON LEONARD,
Solicitor for Defendant.

40

IN CHANCERY OF NEW JERSEY.

ON BILL, ETC.

Between

Ward T. Gulvin,
Complainant, 10

and

Sunshine Park, Inc.,
Defendant.

ANSWERING AFFIDAVIT.

Filed June 1, 1943.

ILSLEY BOONE, of full age, being duly sworn, according to law on his oath deposes and says that: 20

1. I am the Assistant Secretary of Sunshine Park, Inc., a corporation of the State of New Jersey, Defendant herein, and I am duly authorized to make this affidavit for said corporation and I am personally familiar with the facts hereinafter stated.

2. I admit that the Defendant entered into a contract with the Complainant, a copy of which is attached to the Bill and marked Schedule A.

3. There is presently pending in the New Jersey Supreme Court, Atlantic City, an action at law in ejectment brought by the defendant herein against Ward T. Gulvin, the Complainant herein. There is likewise presently pending in the Atlantic County Common Pleas Court, an action in ejectment brought by the Defendant herein against James Grant. Both of these actions are filed for the recovery of possession for the same lands and premises. However, each of these said actions involve two separate and distinct parcels of land. The one parcel is known as lots numbered 1, 2 30 40

and 3, Block numbered 11 as shown on the map of Sunshine Park, Inc., Hamilton Township, Atlantic County, New Jersey, and filed in the office of the County Clerk at Mays Landing and located in Sunshine Park, Hamilton Township, Atlantic County, New Jersey, and the other lot of land is described as lot numbered 1 in Block numbered 6 on a certain map entitled "Plan of Sunshine Park" made by J. M. Adams, Civil Engineer and Land Surveyor and filed July 9, 1936, as map of River View Park, being map No. 1000 in the office of the Clerk of Atlantic County, at Mays Landing, N. J., and located in Sunshine Park, Hamilton Township, Atlantic County, New Jersey.

4. The contract upon which this bill of complaint is founded merely effects the tract of land described as lots numbered 1, 2 and 3 in Block numbered 11, etc., and does not affect the tract of land known as lot numbered 1 in Block numbered 6, etc. As a matter of fact this Complainant holds a deed for the tract known as lot numbered 1 in Block numbered 6.

5. I admit the Complainant paid $187.85 and that there is a balance due of $20.65, except I state as a fact that the Complainant did not make the payments in accordance with the terms of said contract and part of said payments were made at the request of the Complainant by the rendering of services.

6. I admit that on one or two occasions the Complainant tendered to me in behalf of the Defendant the balance due and requested a deed. I further admit that I refused said tender and refused to deliver him a deed. However, I deny that I stated that I would deliver him a deed only if he should get rid of his wife, but I allege that I refused to deliver him said deed for the reason and under the conditions hereinafter set forth.

7. I admit that pursuant to the execution of the contract that the Complainant entered upon the lands

and premises and erected a log cabin thereon, but deny that the same was at great cost and expense to the Complainant. To the contrary, I state that said dwelling house was merely a Log Cabin and that the Complainant received and took most of the materials for the building of the same without costs from the lands and premises from the Defendant and other persons living near or contiguous to the premises whereon he erected said dwelling. 10

8. The defendant corporation operates a membership community known as Sunshine Park, Mays Landing, N. J., consisting of owner-members who are limited to members in good standing of the American Sunbathing Association, Inc. (Internations Nudist Conference) which is an affiliate Association of the Defendant herein and only sells lots to members in good standing of said Association, which fact is established by schedule A, the contract involved herein. 20

9. The defendant corporation in the development of Sunshine Park has therefore always held unto itself the right to decide who shall be members, the right to set up rules and regulations governing the conduct of said members, the right to expel members and has always taken all possible precautions to prevent undesirable persons from becoming members. This has been a part of its policy in establishing a communal project in Sunshine Park, which would always be mutually enjoyable to all of its members and that no reproach would be brought against any of said members. 30

10. At the time the contract involved herein was executed, Complainant represented himself to be a Chicago architect and a member of the Sunbathing Association. Unknown to the Defendant at that time, he was as a matter of fact a criminal parole violator from the State of New York. This fact is admitted by the Complainant in paragraph 1 of the supporting affi- 40

davit attached to the complaint filed herein. He was also at that same time under suspended sentence of an Illinois Court.

11. The Complainant upon his arrival at Sunshine Park conducted himself in a respectable manner for a period of approximately one year. He then brought a woman named Nellie into the Park, to live with him, whom he held out as his wife.

12. The Complainant and his said alleged wife resided in said Park from that period on. During the second season of said residence the Complainant and Nellie frequently and regularly engaged in loud and boisterous altercations, fights and public disorders, to the disturbance of other members thereof.

13. The conduct of this Complainant and his said wife in the year of 1939 became considerably worse and was more and more offensive and disturbing to members in said Park. In addition, at or about that time the Complainant sold tickets in the form of pieces of paper signed by himself to non-members and strangers for 50 cents giving these non-members and strangers the alleged right to enter and gain admission into the Park. This was in violation of the spirit and rules of the Defendant, said rules being promulgated for the purpose of restricting entrance to the Park solely to members. These rules were known to the Complainant. In spite of many warnings from the Defendant to the Complainant, said Complainant and Nellie persisted in conducting themselves in the same manner.

14. As a result, on or about September 1, 1939, I in my official capacity for said Defendant and under the authority vested in me by said Defendant devoked and cancelled the Complainant's membership and ordered him and his wife to immediately leave the Park, and further, pursuant to the corporate action of the

Defendant, from that day forth refused to accept any further payments from the Complainant.

15. At that time I in behalf of the Defendant offered to return the Complainant all monies paid by him on account of the contract and also offered to make a financial adjustment with him of his equities therein. This the Defendant was then ready and willing to do, has always been ready to do, and is still ready to do. 10

16. It was at this time that the Complainant stated to me that he was personally angered by the immoral conduct of his wife and that by reason of her immoral conduct he was going to institute proceedings for divorce against her. He further stated that when he did he desired to come back to the Park and promised that if he was allowed back without her, he would conduct himself in accordance with all of the rules and regulations of the Defendant corporation. I told him 20 that if he did so come back without her I would take up with the corporation the question of the reinstatement of his membership. At no time did I state that when he would get rid of or divorce his wife that I would give him a deed. To the contrary, as herein stated, the Complainant himself was the one who stated and brought forth the discussion about divorcing his wife.

17. At that time I further told the Complainant that the Defendant did not desire to cause him any 30 financial loss and that I would recommend to the Defendant corporation that the time during which he had to make his payments under his contract would be extended so that he would have an opportunity to come back and mend his ways and in the meantime said contract would not be in default. This I further gave to him in writing. I have no copy of said writing, but the Complainant has the original.

18. Complainant and his wife then left the Park and allegedly went to his home in the South. 40

19. The next season the Complainant returned to the Park and at that time represented to me and other officials of the Defendant that he did not have his wife with him. Relying on this representation, Defendant allowed him to return and reside in said Park. After a short time it became apparent that his said wife Nellie was with him and that he was attempting to conceal her presence from me and other members of the Defendant corporation. The Complainant and his wife resumed their same conduct, practices and carrying on as they did heretofore.

20. Defendant notified the Complainant at that time that because of this conduct he could not be reinstated as a member and demanded that he leave the premises immediately. At that time the Defendant again reiterated his offer to return all monies and adjust the equities as hereinbefore stated. The Complainant refused to leave the premises and refused to discuss any refund or adjustment.

21. In addition the Complainant at that time commenced renting his Cabin for short periods of time to other persons who were non-members. Some of these persons being mixed couples, all of which was against the rules and regulations of the Defendant, which rules and regulations were known to the Complainant and all of which tended to embarrass, degrade and otherwise lower the standard of the Park and the other members of Defendant corporation residing therein.

22. During the year of 1939 or 1940, the Complainant asked me for permission to lease or allow one James Grant to transfer his home to the lots above mentioned. I, in my official capacity for the Defendant herein advised the Complainant that because of Grant's domestic situation I would not give such permission, and further, since Grant was no longer a member of the Penn-Jersey group and not an owner by deed or purchase agreement, he had no legal status in the premises.

23. In spite of this refusal, the Complainant, on or about November or December of 1940 allowed said Grant to occupy his the Complainant's Cabin against the expressed injunctions and refusal of the Defendant herein.

24. By reason of the occupancy of said Grant with one other person in said Cabin and because he was not a member of said Penn-Jersey Group, a property owner by deed or purchase agreement, his possession and occupancy in said Cabin was unlawful. 10

25. On or about June 3, 1941, defendant caused to be written to said Grant and the Complainant, a letter, demanding that said Grant remove from said premises, a copy of which letter is hereto annexed and made a part hereof.

26. On June 8, 1941, practically all of the members and occupants of Sunshine Park served upon said Grant a further demand that he remove from said premises, a copy of which is likewise annexed hereto and made a part hereof. 20

27. The Complainant and said Grant were advised by the Defendant herein before any alleged lease was consummated that in accordance with the rules and regulations of the Defendant, it would be illegal for the said Grant to enter into any lease with the Complainant herein because the said Grant was not a member or a property owner and because there was no written consent to said lease by the defendant herein. 30

28. Defendant corporation at a meeting of its Board of Directors held on August 12, 1936, passed a set of rules and regulations governing the sale, development, transfer and lease of lots at Sunshine Park, a copy of which rules and regulations are attached hereto and made a part hereof.

29. Prior to said lease, said Complainant had actual knowledge of these rules and regulations and in 40

spite of the prohibition contained therein, executed and entered into said lease as aforementioned.

30. Said Complainant was not at that time and is not at present the owner of said premises and had no legal authority to enter into said lease.

31. Defendant and I therefore allege that by reason of said lease that the Complainant has forfeited any and all interest he held in said lands and premises and has likewise forfeited his right to possession thereof.

32. Complainant has not paid his dues as a member of the Defendant corporation or the American Sunbathing Association, nor has he at any time offered to pay the same nor is he eligible to said membership by reason of his original misrepresentation upon which this Defendant relied and by reason of his subsequent conduct.

ILSLEY BOONE

Sworn and subscribed to before me this 10th day of May, 1943.

EMILY LATIMER,
Notary Public of New Jersey.
My Commission expires November 20th, 1947.
(Seal)

Endorsed:

"FILED JUNE 1, 1943
W. F. SOOY
V. C."

RULES AND REGULATIONS GOVERNING THE SALE AND DEVELOPMENT OF LOTS AT SUNSHINE PARK.

(Excerpt from the Minutes of the Directors' Meeting, August 12, 1936.)

1. All sales of property within the Park shall be to single individuals, to family heads, or to bona fide nudist groups. All such individuals and family heads shall be Cooperative Members of the American Sunbathing Association or any successor nudist organization; and all such groups shall be affiliates of the American Sunbathing Association. All property owners in Sunshine Park shall be known as owner-members.

2. No property shall be sold to any person who is not a Cooperative Member of the American Sunbathing Association and each owner-member in Sunshine Park shall annually renew his or her membership in the American Sunbathing Association, or its successor nudist organization. Failure to maintain such membership shall be actionable, subject to cancellation of all owner-membership privileges and the recapture clause of the deed issued to said owner-member.

3. Disciplinary expulsion of an owner-member from membership in the American Sunbathing Association or its successor, organization or assigns, shall constitute sufficient grounds for the expulsion of said person or persons from Sunshine Park, cancellation of all privileges pertaining thereto, and the exercise by Sunshine Park, Inc., of its rights of recapture.

4. In the event of the exercise of its rights by Sunshine Park, Inc., under the recapture clause in any of its deed, it shall be distinctly understood that all right, title and interest of the owner member

is forfeited thereby and any settlement in equity between the owner-member and Sunshine Park, Inc., shall be by consent and courtesy on the part of Sunshine Park, Inc.

5. In the event of failure to fulfill and complete any contract of purchase on the part of the buyer, in accordance with all the terms and conditions of said contract, any partial payments made thereunder shall be forfeited.

6. No property transfers, sales, leases, sub-leases, or rentals shall be made by any owner-member to any non-owner-member without the written consent of the Park management after formal consideration at a meeting of the Directors.

7. No owner-member shall operate a boarding house, a nudist club, a health center, a solarium, or any other type of business or organization whereby non-owner-members shall have access to the Park. Sunshine Park, under the owner-membership plan, is designed for owner-members only and their immediate families. The preservation of this status is of paramount importance to every owner-member. Members in good standing of owner-groups will enjoy the status of owner-members for the purpose of these regulations.

8. In accordance with the foregoing rule, guests and guest privileges of owner-members shall be limited in such manner as the Directors may from time to time elect. For the time being, and until changed by the Directors, the following Guest Rules shall prevail:

No owner-member shall entertain more than ten guests during any season, nor any one guest for more than a two weeks' visit, nor more than five guests on any week day, nor more than two guests on any Sunday or over any week-end. Ex-

tension of guest privileges beyond the foregoing may be obtained by application to the Park management in writing and subject to their approval. The above outlined limitations are not to be construed as defining rights of owner-members, and any abuse of the above guest privileges will result in their curtailment at the option of the Park management. 10

9. All guests, as well as members, shall be expected in Park areas such as the sports-field, the swimming-beach, the club-house and dock, to adopt our nudist practices. Bathing costumes and conventional dress shall not be worn in these areas. Those who do not care to conform to this regulation will be requested to leave the indicated areas. Modification of this rule to meet changing weather conditions or physiological requirements, will be at the option of the management. 20

10. All guests will be charged for at one half the prevailing ground fees and this charge shall be made against the host. All guests shall register upon entrance giving their own names as well as the name of their host. If the guests make use of the Park facilities, the full prevailing ground fees shall be levied against them.

11. No owner-member shall have any right to keep chickens, dogs, hogs, horses, cows, goats, rabbits, ducks, cats, or other non-human animals, or to raise, buy, sell or house the same within the Park. This rule, however, shall not serve as a prohibition of these acts so long as no complaint is filed by any owner-member. 30

12. No owner-member shall erect a cabin, cottage, home, domicile, out-house, garage, barn, shop or other structure without first having submitted the plans, dimensions, sketches, to the Park manage- 40

ment and having secured the latter's approval and a building permit before starting construction. Failure of the Park management to respond within ten days from the date of receipt of such owner-member's application for approval and permit, may be construed by the owner-member as tacit consent to proceed with the contemplated structure.

13. No charge shall be made by the Park management for such approval and permit, and architectural services will be afforded owner-members without charge.

14. The personal conduct of owner-members within the Park and to a limited extent outside the Park shall be subject to scrutiny at all times and behavior at complete variance from and violative of nudist standards and principles shall be deemed adequate and sufficient reason for the cancellation of owner-membership privileges and the exercise of the recapture clause in the deed issued to the owner-member.

15. The use of and/or the presence of alcoholic beverages, wine, beer, and ale included, within the Park is strictly prohibited and violation of this rule will subject the offender to being barred from further entry to the Park.

The above is a true excerpt from the Corporation minutes.

ATTEST: AL. W. FLYNN,
Secretary.

IN CHANCERY OF NEW JERSEY.

On Bill, etc.

Between:

Ward T. Gulvin,
Complainant,
and
Sunshine Park, Inc.,
Defendant. 10

RESTRAINING ORDER.

(Filed June 7, 1943.)

This cause having come on to be heard on the first day of June, 1943, in the presence of the respective counsel upon the defendant's motion to dismiss the bill of complaint and the complainant's application for injunctive relief as prayed for in the said bill.

It is on this 7th day of June, 1943, ordered that the said motion to dismiss the bill of complaint be 20 denied; without costs to either party and

It is further ordered that defendant Sunshine Park, Inc., be, and it is, hereby restrained from further prosecuting that certain ejectment suit instituted by it against Ward T. Gulvin in the New Jersey Supreme Court, in so far as the same affects or relates to the lands and premises designated as lots 1, 2 and 3 in Block 11 as shown on the map of Sunshine Park, Inc., Hamilton Township, and filed in the office of the county clerk at May's Landing, N. J., until the further 30 order of this court.

LUTHER A. CAMPBELL,
C.

Respectfully advised,
W. F. SOOY
V. C.

I consent to the form of the above order.

LEON LEONARD,
Solicitor for Sunshine Park, Inc. 40

IN CHANCERY OF NEW JERSEY.

On Bill, etc.

Between

Ward T. Gulvin,
Complainant,

10

and

Sunshine Park, Inc.,
Defendant.

ANSWER TO AMENDED BILL OF COMPLAINT.

(Filed June 1, 1944.)

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The answer of Defendant, Sunshine Park, Inc., a corporation.

The Defendant, Sunshine Park, Inc., a corporation, answering the amended bill of complaint, says that:

1. Paragraphs 1 and 2 are admitted.

2. Paragraphs 3 and 4 are denied.

3. Paragraph 5 is admitted.

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4. Pargraph 6 is admitted, excepting the last sentence thereof. Defendant has no knowledge or information sufficient to form a belief as to the said statement and leaves Complainant to his proof thereof.

5. Paragraphs 7, 7b, 7c, 7d, are denied.

6. Defendant has no knowledge or information sufficient to form a belief as to the statements of paragraphs 8 and 9 and leaves Complainant to his proof thereof.

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SEPARATE DEFENSES.

By way of further defenses, Defendant says:

First Separate Defense.

1. The contract set forth in the bill of complaint and sought to be enforced by the Complainant against the Defendant cannot mutually be enforced by the Defendant against the Complainant and hence lacks mutuality. This lack of mutuality bars the Complainant from specifically enforcing the contract. 10

Second Separate Defense.

1. Complainant delayed filing his bill of complaint for a period of three years, from July, 1940, to May, 1943.

Third Separate Defense.

1. Complainant is in laches and therefore, barred from maintaining said action for specific performance. 20

2. This delay bars and estops Complainant from obtaining equitable relief.

Fourth Separate Defense.

1. Complainant was not a member of the American Sunshine Association (or I. N. C.) and could not secure the rights and privileges of a member of said Association which was a prerequisite to obtaining the relief prayed for herein. 30

Fifth Separate Defense.

1. Complainant did not perform said contract sought to be enforced nor was he ready, able and willing to perform the same.

Sixth Separate Defense.

1. Complainant elected his rights by filing an answer to an ejectment suit for the same lands in both 40

the Atlantic County Circuit Court and the Atlantic County Common Pleas Court and thereby relied on his legal rights and abandoned his equitable remedy.

SEVENTH SPEARATE DEFENSE.

1. Complainant has an adequate remedy at law.

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EIGHTH SEPARATE DEFENSE.

1. The lease executed by the Complainant to one James Grant in 1940 was a violation of the rules and regulations of Defendant, governing the sale, development transfer and lease of the lots in Sunshine Park.

2. Complainant thereby forfeited any and all interest he held in said lands and forfeited his right to possession thereof.

NINTH SEPARATE DEFENSE.

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1. Complainant by his conduct is estopped from maintaining this action.

LEON LEONARD,
Solicitor for and of Counsel with Defendant.

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IN CHANCERY OF NEW JERSEY.

149/489.

On Bill etc.

Between: 10

Ward T. Gulvin,
Complainant,
and
Sunshine Park, Inc.,
Defendant.

REPLICATION.

(Filed June 7, 1944.) 20

The complainant joins issue upon the answer.

ELWOOD C. WEEKS,
Solicitor for Complainant.

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IN CHANCERY OF NEW JERSEY.

149/489.

On Bill, etc.

10

Between

Ward T. Gulvin,
Complainant,

and

Sunshine Park, Inc., a Corporation, etc.
Defendant.

FINAL DECREE.

20 (Filed November 15, 1944.)

This cause having come on to be heard in the presence of Elwood C. Weeks, solicitor for the complainant and Leon Leonard, solicitor for the defendant; and the court having examined the pleadings and taken proofs; and the court having heard and considered the arguments of counsel and being satisfied that the defendant, Sunshine Park, Inc., did on the nineteenth day of June, 1936, agree in writing to convey
30 to the complainant for the sum of $208.50 certain lands and premises hereinafter referred to; that, in pursuance of said agreement the said complainant Ward T. Gulvin entered upon said lands, took possession thereof, and has expended moneys in the erection of certain buildings thereon; that the said complainant has paid to the said defendant all of the purchase money required to be paid under the terms of said agreement, except the sum of $20.65, and that the last mentioned sum was tendered by complainant to the
40 defendant on various occasions; that payment of said

sum was wrongfully refused by the defendant; that the said defendant refused upon and after such tender of payment to deliver to complainant a deed for said lands and premises; but that said defendant has instituted an action at law in the Supreme Court of New Jersey against the said complainant therein and thereby seeking to eject said complainant from said lands and premises, which suit at law is still pending; and 10

The court being of the opinion that said complainant is entitled to specific performance of said contract of June 19, 1936, and other relief prayed for;

It is on this 31st day of October, 1944, Ordered, Adjudged and Decreed that said defendant Sunshine Park Inc. do within thirty days after the payment of said sum of $20.65, or the tender thereof, to defendant or its solicitor and the service upon the defendant or its solicitor of a true but uncertified copy of this decree, execute and acknowledge by and through its proper 20 officers, in due form of law, and deliver to said complainant Ward T. Gulvin, a good and sufficient deed in law and in equity conveying thereby to said Ward T. Gulvin, his heirs and assigns, the lands and premises known and designated as lots Nos. 1, 2 and 3 in Block 11 as shown on map of Sunshine Park, Inc., in Hamilton Township, Atlantic County, State of New Jersey, free and clear of any and all encumbrances, except such as may have been placed or incurred by said complainant; and 30

It is further ordered that said defendant, Sunshine Park, Inc., its agents and servants be and they are hereby enjoined and commanded henceforth and forever to desist and refrain from prosecuting the said action in ejectment against said complainant, now pending in the Supreme Court of New Jersey, only so far, however, as the same pertains to lots 1, 2 and 3 in block 11, aforesaid; provided, however, that said complainant shall duly tender to said defendant the said sum of $20.65, as aforesaid; and 40

It is further ordered that said defendant, Sunshine Park, Inc., pay to said complainant, or his solicitor, the costs of this suit to be taxed, including in the costs to be taxed a counsel fee of one hundred and fifty dollars, which is hereby allowed; and that in default of payment of such costs within thirty days after the service upon defendant or its solicitor of a copy of this decree and of the taxed costs—and the payment, or due tender, of said sum of $20.65, execution issue against the goods and chattels, lands, tenements, hereditaments and real estate of the defendant Sunshine Park, Inc., to make said costs according to the practice of this court.

LUTHER A. CAMPBELL,
C.

Respectfully advised

W. F. SOOY
V. C.

(Indorsed)

Received in Office
Nov. 15, 1944

I. GRANT SCOTT,
Clerk.

IN CHANCERY OF NEW JERSEY.

149/489.

On Bill, etc.

Between

Ward T. Gulvin,
Complainant,

and

Sunshine Park, Inc., a Corporation, etc.
Defendant.

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PETITION TO OPEN DECREE, ETC.

(Filed December 16, 1944.)

To the Honorable Luther A. Campbell, Chancellor of the State of New Jersey:

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The Petition of Sunshine Park, Inc., a corporation of the State of New Jersey, with a location at Mays Landing, Hamilton Township, Atlantic County, New Jersey, respectfully shows that:

1. Petitioner is the defendant to the bill of complaint filed herein.

2. Said bill was filed to compel specific performance of an alleged contract to convey certain lands and premises located within the area of Sunshine Park, Hamilton Township, Atlantic County, New Jersey, aforesaid, and to restrain a certain suit in ejectment pending in the New Jersey Supreme Court.

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3. Issue was joined and the cause came on for final hearing before Honorable W. Frank Sooy, Vice Chancellor, to whom the same was duly referred, and a final decree was advised by him and filed October 31, 1944, directing defendant to execute and deliver a deed

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to said complainant for the lands and premises therein specified, and restraining the prosecution of said suit in ejectment to the extent therein stated.

4. Said decree provided that the deed should be delivered within thirty days after service thereof upon defendant or its solicitor, and the same was served on said solicitor on November 17, 1944.

5. Upon the final hearing of said cause the Vice Chancellor ruled that the paper writing upon which the complainant relied (Exhibit C-1) was an absolute contract to convey said lands and premises by full warranty deed, and refused to permit the introduction of evidence to show that it was not to become effective until after the performance of certain conditions precedent and subsequent, which said conditions had not been performed, as will more specifically appear by reference to the Transcript of the proceedings at said final hearing, which is submitted herewith, together with the Exhibits and documentary evidence in the cause, and incorporated herein by reference thereto, with like effect as if here set forth in detail.

6. Petitioner respectfully submits that said rulings were erroneous, and by reason thereof and of the said final decree based thereon Petitioner is greatly prejudiced and injured, in that no opportunity was afforded it to present its factual and legal and equitable defense to said bill in this respect.

7. Your Petitioner also respectfully submits that said paper writing (Exhibit C-1) is not a contract to convey the lands and premises in question by full warranty deed, but is merely a tentative undertaking to execute an agreement to convey upon certain terms and conditions, of which complainant was apprised and had full knowledge and by which he agreed to be bound, and which said later agreement has not, from thence hitherto, been executed and entered into be-

tween the parties, no date for the consummation of the same being therein specified nor time limit stated.

8. In the meantime, Petitioner avers that complainant wilfully and flagrantly disregarded and violated said conditions and terms, with full knowledge of the same, and thus estopped and precluded himself from asserting or claiming any right or rights which may have accrued to him by reason of said paper writing. 10

9. Upon said final hearing complainant failed to produce proofs sufficient to establish, even *prima facie,* any legal or equitable right to the specific performance of an alleged contract to convey, and had in equity and good conscience performed said terms and conditions precedent and subsequent, or to show that he came into Equity with clean hands, or to do equity while claiming equity. 20

10. Your Petitioner also respectfully submits that all purchasers of lands and premises within Sunshine Park area, as aforesaid, take the same upon the same terms and conditions, and upon like reciprocal covenants, as those involved and imposed in relation to the said purported contract with complainant, of which complainant had full information and knowledge, and they have legal and equitable rights to insist upon like performance by complainant, and should be accorded the opportunity to intervene in this cause to protect and enforce those rights, and leave for that opportunity is hereby prayed. 30

11. Petitioner also respectfully submits that if the said purported paper writing (Exhibit C-1) does not permit of a construction or interpretation conforming to the mutual intendment and understanding of the parties thereto, as above set forth, it may and should be reformed in equity so as to conform to the mutual intendment and understanding of the parties, and evi- 40

dence to that effect should have been received upon final hearing, and, if necessary, the pleadings should be appropriately amended in order to set up and establish the right of reformation.

12. Petitioner also respectfully submits that the said purported paper writing (Exhibit C-1) lacks mutuality of obligation and remedy, and that, under the settled rule in Equity, specific performance should be denied.

Your Petitioner therefore prays that said final decree may be opened, set aside, vacated and for nothing holden, and a rehearing of the cause granted, to the end that it may be thereby permitted to set up and establish its defense to said bill of complaint, in fact and in law and equity; that an Order to Show Cause, directed to said complainant, may be granted Petitioner, directing said complainant to show cause why the prayer of said petition should not be granted; that in the meantime and until the further order of the Court all proceedings under said final decree be stayed, including the recording of said decree in the County Clerk's office of Atlantic County, aforesaid, or otherwise using the same as a muniment of title; and that leave be granted Petitioner thereunder to take proofs before a Master or an Examiner of this Court, pursuant to the Rules and practice pertaining thereto, in support of this petition and to be read upon the return of the Order to Show Cause.

And your Petitioner will ever pray, &c.

LEON LEONARD,
Solicitor and Of Counsel with Petitioner-Defendant.

HERVEY S. MOORE
and
JOHN A. HARTPENCE,
Of Counsel.

State of New Jersey,
County of Mercer, } *ss.:*

Ilsley Boone, of full age, being duly sworn according to law, upon his oath deposes and says that:

1. I am the Resident Director of Sunshine Park, Inc., a corporation of the State of New Jersey, the Petitioner named in the foregoing Petition, and the matters and things therein set forth are true, to the best of my knowledge and information and as I verily believe.

2. Said Petitioner is the defendant, in the foregoing entitled cause, to the bill of complaint filed therein. It is deponent's understanding, and he has been so informed by counsel in the cause, that said bill was filed for the purpose of compelling said defendant to specifically perform an alleged contract to convey certain lands and premises located within the area of Sunshine Park, Inc., in Hamilton Township, Atlantic County, New Jersey, and to restrain a certain suit in ejectment pending in the New Jersey Supreme Court instituted by said defendant against said complainant respecting the lands and premises in question and others. The cause came on for final hearing before Honorable W. Frank Sooy, Vice Chancellor, and a final decree was advised by him in favor of complainant and against defendant on October 31, 1944, directing defendant to execute and deliver a deed to said complainant for the lands and premises so specified therein, and restraining the prosecution of said suit in ejectment to the extent therein stated. I was present throughout said final hearing. Said decree provided that the deed should be delivered within thirty days after service thereof upon defendant or its solicitor, and I have been informed by counsel that the same was served on defendant's solicitor on November 17, 1944. On said final hearing the Vice Chancellor ruled, according to my understanding and information, that the paper

writing upon which the complainant relied (Exhibit C-1) was an absolute contract to convey said lands and premises by full warranty deed, and refused to permit the introduction of evidence to show that it was not to become effective until after the performance of certain conditions precedent and subsequent, which said conditions had not been performed, more fully set forth in
10 the Transcript of the proceedings before the Vice Chancellor. Deponent respectfully submits that said rulings were erroneous and that defendant is greatly prejudiced thereby. Said paper writing (Exhibit C-1) is merely a tentative undertaking to execute later a more formal contract upon certain terms and conditions and covenants, with which complainant was fully informed and conversant and by which he knew he was to be bound. The later formal contract to convey has not been executed. In the meantime complainant dis-
20 regarded and violated said terms and conditions in ways that indicated wilfulness on his part and in disregard of warnings to desist therefrom. I am informed by counsel that the proofs produced by complainant on the final hearing were insufficient to constitute a *prima facie* case in his favor, and that his suit should in equity have been dismissed. Complainant should conform to the regulations and conditions of the grant which he seeks to compel, in like manner as all other purchasers of properties within the area of Sunshine Park, Inc.,
30 and his failure to do so renders impracticable and objectionable the enforcing of those terms and conditions on others and in favor of others, who are thereby injured and prejudiced and who should be afforded the opportunity to intervene in the suit to protect their rights. If the paper writing (C-1) does not correctly set forth the real undertaking between the parties, it should be reformed as mutually understood. If it cannot be enforced specifically against complainant, deponent feels that it should not be enforced
40 against defendant.

Deponent also feels that the defendant should have the opportunity to present proofs by witnesses and otherwise of the facts involved in the foregoing Petition and in support thereof upon its hearing.

ILLSLEY BOONE.

Sworn to and subscribed before me this 14th day of December, A. D. 1944. 10

CHARLES S. CHEVRIER,
Master in Chancery of New Jersey.

(Indorsed)

Filed 12/16/44

W. F. S.
V. C.

Received in Office
Feb. 28, 1945 20

I. GRANT SCOTT
Clerk.

30

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IN CHANCERY OF NEW JERSEY.

Order denied
12/16/44
W. F. S.
V. C.

149/489.

ON BILL, ETC.

ON PETITION TO OPEN DECREE, ETC.

10

Between

Ward T. Gulvin,
Complainant,

and

Sunshine Park, Inc., a Corporation, etc.,
Defendant.

ORDER TO SHOW CAUSE.

20 (Filed December 16, 1944.)

Upon reading and filing the duly verified Petition presented herewith by Sunshine Park, Inc., the defendant in the above-entitled cause, praying, for the reasons therein set forth, that the final decree heretofore entered in the cause be opened, set aside, vacated and for nothing holden, and a re-hearing of the cause be granted, and for further relief,—

It is, on this day of December, nineteen
30 hundred and forty-four, ORDERED that Ward T. Gulvin, the above-named complainant, show cause before the Court on the day of January, nineteen hundred and forty-five, at the Chancery Chambers, in the Schwehm Building, in the City of Atlantic City, New Jersey, at the hour of o'clock in the afternoon, (Eastern War Time), or as soon thereafter as counsel may be heard, why the final decree of this Court made in this cause on October 31, 1944, should not be opened, set aside, vacated and for nothing holden, and
40 a rehearing of the cause be granted, pursuant to the

prayer of said Petition, and that in the meantime and until the further order of the Court all proceedings under said final decree be and the same hereby are stayed, including the recording or filing of the same in the County Clerk's office of the County of Atlantic, New Jersey, or otherwise using the same as a muniment of title;

And it is further ordered that proofs may be taken before a Master or an Examiner of this Court, pursuant to the Rules and practice of the Court, in support of said Petition, to be read upon the argument of this Order, with leave to any and all other parties claiming interest in the suit to intervene in the cause as they may be advised;

And it is further ordered that true copies (which may be certified as such by the Solicitor for Petitioner herein) of this Order and of the Petition and Affidavit whereon it is founded, be served on Elwood C. Weeks, Solicitor of record for the complainant, either personally or by leaving same at his designated office, in the Guarantee Trust Building, Atlantic City, New Jersey, within six days after the date hereof.

Respectfully advised,

....

V. C. *C.*

(Indorsed)

Filed 12/16/44

W. F. S.
V. C.

Received in Office
Feb. 28, 1945

I. Grant Scott
Clerk.

IN CHANCERY OF NEW JERSEY.

149-489.

On Bill, etc.

Between

10 *Ward T. Gulvin,*
Complainant,

and

Sunshine Park, Inc., a Corporation, etc.,
Defendant.

NOTICE OF APPEAL.

(Filed December 20, 1944.)

20 The defendant, Sunshine Park, Inc., a corporation, hereby appeals from the final decree made in the above entitled cause on October 31, 1944 (as advised by Hon. W. F. Sooy, Vice Chancellor), and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated, December 20, 1944.

LEON LEONARD,
Solicitor for and of Counsel with Defendant, Sunshine Park, Inc., a
30 *Corporation, etc.*

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

HERVEY S. MOORE,
and
JOHN A. HARTPENCE,
Of Counsel with Defendant, Sunshine Park, Inc., a Corporation, etc.

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NEW JERSEY COURT OF ERRORS AND APPEALS.

On Bill, etc.

On Appeal from the Court of Chancery.

Between

Ward T. Gulvin,
Complainant-Respondent,

and

Sunshine Park, Inc., a Corporation, etc.,
Defendant-Appellant.

PETITION OF APPEAL.

(Filed January 8, 1945.)

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

The petition of Sunshine Park, Inc., a corporation, the appellant in the above entitled cause, respectfully shows that your petitioner finds itself aggrieved by a final decree made in the Court of Chancery by his Honor Luther A. Campbell, Chancellor of the State of New Jersey (as advised by his Honor W. F. Sooy, Vice Chancellor), bearing date the 31st day of October, in the year nineteen hundred and forty-four, wherein the said Ward T. Gulvin was complainant, and the said Sunshine Park, Inc., a corporation, was defendant, in this respect, to wit: That the said decree adjudges that: said defendant Sunshine Park, Inc., do within thirty days after the payment of said sum of $20.65, or the tender thereof, to defendant or its solicitor and the service upon the defendant or its solicitor of a true but uncertified copy of this decree, execute and acknowledge by and through its proper officers, in due form of law, and deliver to said com-

plainant Ward T. Gulvin, a good and sufficient deed in law and in equity conveying thereby to said Ward T. Gulvin, his heirs and assigns, the lands and premises known and designated as lots Nos. 1, 2 and 3 in Block 11 as shown on map of Sunshine Park, Inc., in Hamilton Township, Atlantic County, State of New Jersey, free and clear of any and all encumbrances, except
10 such as may have been placed or incurred by said complainant; and

It is further ordered that said defendant, Sunshine Park, Inc., its agents and servants be and they are hereby enjoined and commanded henceforth and forever to desist and refrain from prosecuting the said action in ejectment against said complainant, now pending in the Supreme Court of New Jersey, only so far, however, as the same pertains to lots 1, 2 and 3 in Block 11, aforesaid; provided, however, that said com-
20 plainant shall duly tender to said defendant the said sum of $20.65, as aforesaid; and

It is further ordered that said defendant, Sunshine Park, Inc., pay to said complainant, or his solicitor, the costs of this suit to be taxed, including in the costs to be taxed a counsel fee of one hundred and fifty dollars, which is hereby allowed; and that in default of payment of such costs within thirty days after the service upon defendant or its solicitor of a copy of this decree and of the taxed costs—and the
30 payment, or due tender, of said sum of $20.65, execution issue against the goods and chattels, lands, tenements, hereditaments and real estate of the defendant Sunshine Park, Inc., to make said costs according to the practice of this court.

And your petitioner humbly appeals from said decree of the Chancellor which orders, adjudges and decrees as aforesaid, upon the ground that the same is erroneous, for that:

1. Upon the final hearing of said cause the Vice
40 Chancellor ruled that the paper writing upon which

the complainant relied (Exhibit C-1) was an absolute contract to convey said lands and premises by full warranty deed, and refused to permit the introduction of evidence to show that it was not to become effective until, after the performance of certain conditions precedent and subsequent, which said conditions had not been performed, as will more specifically appear by reference to the Transcript of the proceedings at said final hearing, together with the Exhibits and documentary evidence in the cause. 10

3. Petitioner respectfully submits that said rulings were erroneous, and by reason thereof and of the said final decree based thereon petitioner was greatly prejudiced and injured, in that no opportunity was afforded it to present its factual and legal and equitable defense to said bill in this respect.

4. Your petitioner also respectfully submits that 20 said paper writing (Exhibit C-1) is not a contract to convey the lands and premises in question by full warranty deed, but is merely a tentative undertaking to execute an agreement to convey upon certain terms and conditions, of which complainant was apprised and had full knowledge and by which he agreed to be bound, and which said later agreement has not, from thence hithereto, been executed and entered into between the parties, no date for the consummation of the same being therein specified nor time limit stated. 30

5. In the meantime, petitioner avers that complainant wilfully and flagrantly disregarded and violated said conditions and terms, with full knowledge of the same, and thus estopped and precluded himself from asserting or claiming any right or rights which may have accrued to him by reason of said paper writing.

6. Upon said final hearing complainant failed to produce proofs sufficient to establish, even *prima facie,* 40

any legal or equitable right to the specific performance of an alleged contract to convey, or had in equity and good conscience performed said terms and conditions precedent and subsequent, or to show that he came into equity with clean hands, or to do equity while claiming equity.

10 7. Your petitioner also respectfully submits that all purchasers of lands and premises within Sunshine Park area, as aforesaid, take the same upon the same terms and conditions, and upon like reciprocal covenants, as those involved and imposed in relation to the said purported contract with complainant, of which complainant had full information and knowledge, and they have legal and equitable rights to insist upon like performance by complainants, and should have been accorded the opportunity to testify in this cause to 20 protect and enforce those rights.

8. Petitioner also respectfully submits that if the said purported paper writing (Exhibit C-1) does not permit of a construction or interpretation conforming to the mutual intendment and understanding of the parties thereto, as above set forth, it may and should be reformed in equity so as to conform to the mutual intendment and understanding of the parties, and evidence to that effect should have been received upon 30 final hearing, and, if necessary, the pleadings should be appropriately amended in order to set up and establish the right of reformation.

9. Petitioner also respectfully submits that the said purported paper writing (Exhibit C-1) lacks mutuality of obligation and remedy, and that, under the settled rule in Equity, specific performance should be denied.

Your petitioner therefore prays that the said de- 40 cree of the said Chancellor may be, in the particulars

aforesaid, reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

LEON LEONARD,
Solicitor of Appellant.

HERVEY S. MOORE,
JOHN A. HARTPENCE,
Of Counsel with Appellant. 10

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IN CHANCERY OF NEW JERSEY.

149-489.

On Bill, &c.

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Between

Ward T. Gulvin,

Complainant,

and

Sunshine Park, Inc.,

Defendant.

CONCLUSIONS.

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(Filed January 9, 1945.)

(Not for publication in any Report.)

MR. ELWOOD C. WEEKS, *Solicitor for Complainant.*
MR. LEON LEONARD, *Solicitor for Defendant.*
SOOY, *V. C.*

Complainant has a final decree for specific performance of a contract in writing under which defendant agreed to sell and convey certain lots in Hamilton Township, Atlantic County. The decree is dated October 31, 1944. Defendant has appealed.

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The following is a copy of the agreement of sale as taken from the bill of complaint:

"CONTRACT OF MEMBERSHIP.

New York City, June 19, 1936. Sunshine Park, Inc., agrees to sell to Ward T. Gulvin address 1016 West Madison St., Chicago, Ill. and has received from the purchaser as a first payment on

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such sale the sum of $5.00. And the said purchaser has bought of Sunshine Park, Inc. for the sum of $208.50 lots Nos. 1, 2, 3, Block 11, as shown on the Map of Sunshine Park, Inc., Hamilton Township, N. J., and filed in the office of the County Clerk at May's Landing, N. J.

TERMS

Balance of $203.50 to be paid upon signing and delivering of agreement of sale. The balance to be paid in monthly installments of $8. beginning on the 19th day of July, 1936.

(Written over the face) 'FOR I. N. C. MEMBERS ONLY'

SUBJECT TO THE CORPORATIONS APPROVAL

This sale is upon regular terms and conditions established by owner of said property and contingent upon the purchaser's membership in the American Sunshine Association (or the I. N. C.) and is to be covered by the owner's regular form of agreement, which is to be executed by both parties. In case the purchaser does not sign this agreement when presented or within five days from the date hereof, then at option of the seller, this contract may be cancelled and all moneys on same may be retained by the seller as liquidated damages and the seller shall not be liable to the purchaser for any part of same. In case this sale is rejected by owner, all moneys are to be returned to the purchaser within seven days after said rejection. Upon full payment property will be conveyed by full warranty deed.

Russell B. Abbott
Witness

Sunshine Park, Inc.
By Lawrence Germain
Ward T. Gulvin, Purchaser."

Defendant admits the execution of the contract aforesaid and that complainant has paid $187.85 of the purchase price of the lots in question, leaving a balance due at the time of the filing of the bill of $20.65. The evidence at the final hearing disclosed that the defendant has refused to accept payment of this balance and has also refused to deliver a deed for the property, and further disclosed that complainant has erected on the lots small dwelling buildings which were being occupied by tenants of complainant at a monthly rental of $12.50. The value of these properties is somewhat over $1200.00.

In defense of defendant's refusal to convey it was contended that complainant had been expelled from membership in the Association for non-payment of dues (see letter of June 1941) and that his continued membership was a condition precedent to his right to a conveyance. It was further intimated at the final hearing that complainant had been expelled for an infraction of the alleged rules and regulations governing the conduct of members. It was conceded that complainant had never been presented with charges of violation of the rules and regulations nor had he ever been afforded an opportunity to be heard on any such charges, and that he knew nothing of his alleged expulsion from membership until after he had tendered the balance of the purchase price and demanded conveyance.

This Court held that defendant could not avoid conveyance by any expulsion from membership so attempted to be accomplished without notice and an opportunity to be heard, and that the Defendant Association was bound by the terms of the June 1936 written agreement. However, counsel for defendant was, at the time of final hearing, afforded an opportunity to file a brief in the event that he desired so to do, in order that he might present further argument on the points raised at the time of the colloquy between the

Court and counsel at the final hearing. No such brief was ever filed, but other counsel, after the entry of the final decree, petitioned that the decree be reopened. The prayer of the petition was denied, it appearing to the Court that that which petitioner was attempting to do was to open the decree in order that the defendant might try the case on a different theory than that proposed at the final hearing. 10

The contract of June 1936 aforesaid was the only agreement between complainant and defendant and while it, by its terms, contemplated a subsequent contract was to be offered by the defendant to complainant, such a document was never prepared or offered by it. It was this contract of June 1936 which complainant had a right to enforce and defendant may not defend on terms not embodied in that contract, and especially not on a contract the terms of which had never been submitted to complainant. 20

There is no doubt but that defendant became dissatisfied with complainant as an owner of property in Sunshine Park and possibly this dissatisfaction was the fault of complainant, but even so, defendant could not accept and retain complainant's purchase money and escape conveyance by reason of non-membership in the Association unless defendant had legally deprived complainant of that membership.

It is contended that defendant having reserved by the June 1936 contract the right to submit "a regular form of agreement" to be executed by both parties, had a right as a condition of the delivery of the deed to complainant to impose its rules and regulations at any time after the execution of the informal agreement, and even to impose these conditions in the deed to be delivered. The answer to this is that the agreement called for a "full warranty deed" and in addition to this, the basis of defendant's refusal to deliver any deed was non-membership of complainant by reason of his expulsion in June of 1941, and that expulsion was 30 40

solely for the non-payment of dues, as appears by the letter aforesaid.

Determined: January 3, 1945.

Endorsed:

"Filed Jan. 9, 1945

10 I. Grant Scott
Clerk"

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IN CHANCERY OF NEW JERSEY.

149-489.

On Bill, etc.

Between

Ward T. Gulvin,
Complainant, 10

and

Sunshine Park, Inc., a Corporation, etc.,
Defendant.

NOTICE OF APPEAL.

(Filed January 6, 1945.)

The defendant, Sunshine Park, Inc., a corporation, hereby appeals from the Order of the Chancellor, denying defendant's application to open the Final Decree and grant a rehearing made in the above entitled cause as of December 16, 1944 (as advised by Hon. W. F. Sooy, Vice Chancellor), and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes. 20

Dated January 5th, 1945.

LEON LEONARD,
Solicitor for and of Counsel with Defendant, Sunshine Park, Inc., a Corporation, etc. 30

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

HERVEY S. MOORE,
and
JOHN A. HARTPENCE,
Of Counsel with Defendant, Sunshine Park, Inc., a Corporation, etc. 40

NEW JERSEY COURT OF ERRORS AND APPEALS.

On Bill, etc.

Between

Ward T. Gulvin,
Complainant-Respondent,

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and

Sunshine Park, Inc. a Corporation, etc.,
Defendant-Appellant.

On Appeal from the Court of Chancery.

PETITION OF APPEAL.

(Filed January 16, 1945.)

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

The petition of Sunshine Park, Inc., a corporation, the appellant in the above entitled cause, respectfully shows that your petitioner finds itself aggrieved by an order or determination made in the Court of Chancery by his Honor Luther A. Campbell, Chancellor of the State of New Jersey (as advised by his Honor W. F. Sooy, Vice Chancellor), bearing date the 16th day of December, 1944, in a cause wherein the said Ward T. Gulvin was complainant, and the said Sunshine Park, Inc., a corporation, was defendant, in this respect, to wit: that said order or determination denied the defendant's petition that the final decree in the cause be opened, set aside, vacated and for nothing holden, and a rehearing of the cause granted, to the end that it might thereby be permitted to set up and establish its defense to said bill of complaint, in fact and in law and equity; that an Order to Show Cause, directed to

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said complainant might be granted petitioner, directing said complainant to show cause why the prayer of said petition should not be granted; that in the meantime and until the further order of the Court all proceedings under said final decree be stayed, including the recording of said decree in the County Clerk's office of Atlantic County, or otherwise using the same as a muniment of title; and that leave be granted petitioner thereunder to take proofs before a Master or an Examiner of this Court, pursuant to the Rules and practice pertaining thereto, in support of its petition and to be read upon the return of the Order to Show Cause; and for further relief, &c.

And your petitioner humbly appeals from said order or determination of the Chancellor upon the ground that the same is erroneous, for that:

1. The said petition should have been granted for the reasons set forth therein. Said bill was filed to compel specific performance of an alleged contract to convey certain lands and premises located within the area of Sunshine Park, Hamilton Township, Atlantic County, New Jersey, and to restrain a certain suit in ejectment pending in the New Jersey Supreme Court. Issue was joined and the cause came on for final hearing before Honorable W. F. Sooy, Vice Chancellor, to whom the same was duly referred, and a final decree was advised by him and filed October 31, 1944 directing defendant to execute and deliver a deed to said complainant for the lands and premises therein specified, and restraining the prosecution of said suit in ejectment to the extent therein stated. Said decree provided that the deed should be delivered within thirty days after service thereof upon defendant or its solicitor, and the same was served on said solicitor on November 17, 1944.

2. Upon the final hearing of said cause the Vice Chancellor ruled that the paper writing upon which

the complainant relied (Exhibit C-1) was an absolute contract to convey said lands and premises by full warranty deed, and refused to permit the introduction of evidence to show that it was not to become effective until after the performance of certain conditions precedent and subsequent, which said conditions had not been performed, as will more specifically appear by reference to the Transcript of the proceedings at said final hearing, together with the Exhibits and documentary evidence in the cause.

3. Petitioner respectfully submits that said rulings were erroneous, and by reason thereof and of the said final decree based thereon petitioner was greatly prejudiced and injured, in that no opportunity was afforded it to present its factual and legal and equitable defense to said bill in this respect.

4. Your petitioner also respectfully submits that said paper writing (Exhibit C-1) is not a contract to convey the lands and premises in question by full warranty deed, but is merely a tentative undertaking to execute an agreement to convey upon certain terms and conditions, of which complainant was apprised and had full knowledge and by which he agreed to be bound, and which said later agreement has not, from thence hitherto, been executed and entered into between the parties, no date for the consummation of the same being therein specified nor time limit stated.

5. In the meantime, petitioner avers that complainant wilfully and flagrantly disregarded and violated said conditions and terms, with full knowledge of the same, and thus estopped and precluded himself from asserting or claiming any right or rights which may have accrued to him by reason of said paper writing.

6. Upon said final hearing complainant failed to produce proofs sufficient to establish, even *prima*

facie, any legal or equitable right to the specific performance of an alleged contract to convey, or had in equity and good conscience performed said terms and conditions precedent and subsequent, or to show that he came into equity with clean hands, or to do equity while claiming equity.

7. Your petitioner also respectfully submits that all purchasers of lands and premises within Sunshine Park area, as aforesaid, take the same upon the same terms and conditions, and upon like reciprocal covenants, as those involved and imposed in relation to the said purported contract with complainant, of which complainant had full information and knowledge, and they have legal and equitable rights to insist upon like performance by complainant, and should have been accorded the opportunity to testify in this cause to protect and enforce those rights.

8. Petitioner also respectfully submits that if the said purported paper writing (Exhibit C-1) does not permit of a construction or interpretation conforming to the mutual intendment and understanding of the parties thereto, as above set forth, it may and should be reformed in equity so as to conform to the mutual intendment of the parties, and evidence to that effect should have been received upon final hearing, and if necessary, the pleadings should have been appropriately amended in order to set up and establish the right of reformation.

9. Petitioner also respectfully submits that the said purported paper writing (C-1) lacks mutuality of obligation and remedy, and that, under the settled rule in equity, specific performance should be denied.

Your petitioner therefore prays that the said order or determination of the Chancellor may be, in the particulars aforesaid, reversed, set aside, and for nothing holden, and that your petitioner may have

such relief in the premises as to this Honorable Court shall seem meet.

LEON LEONARD,
Solicitor of Appellant.

HERVEY S. MOORE,
JOHN A. HARTPENCE,
Of Counsel with Appellant.

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IN CHANCERY OF NEW JERSEY.

On Bill, &c.

Between

Ward T. Gulvin,
Complainant, 10

and

Sunshine Park, Inc.,
Defendant.

Final Hearing.

Atlantic City, N. J., October 4, 1944.

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TESTIMONY.

Before HON. W. F. SOOY, *Vice Chancellor.*

Appearances:

For Complainant, ELWOOD C. WEEKS, ESQ.
For Defendant, LEON LEONARD, ESQ.

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WARD T. GULVIN, sworn.

DIRECT EXAMINATION.

By MR. WEEKS:

Q. Mr. Gulvin, you are the complainant in this case?

A. Yes.

Q. And you entered into a contract with the Sunshine Park, Inc., for the purchase of lots, did you?

A. Yes.

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Q. Is that the contract?
A. That is a copy, photostatic copy of it.
Q. It is a copy of the contract?
A. Yes.

Mr. Weeks: By consent it is admitted in evidence as a copy of the contract.

10 (Copy marked Exhibit C-1.)

Q. Pursuant to that contract was there ever any other contract offered or tendered to you to be signed by or in behalf of the Sunshine, Park, Inc.?
A. Not in regards to my property, no.
Q. Nothing about these lots?
A. No.
Q. Were you ever asked to sign anything else in regard to the lots?
A. Not that I know of.
20 Q. Pursuant to the contract did you make payments upon the lots referred to in the contract?
A. I didn't understand you.

(Question repeated.)

A. Pursuant? Does that mean after I signed the contract or before?
Q. Yes.
A. Afterwards, yes.
Q. Do you have the receipts for the payments
30 made?
A. Yes.

Mr. Weeks: They are admitted, if your Honor please, but the time, I think, is important.

A. You want the receipts?
Q. Yes, let me have the receipts for the payments?

(Receipts produced.)

The Court: You offer in evidence a batch of
40 receipts? Why not mark them as one?

MR. WEEKS: I would like to do that.

THE COURT: You have no objection?

MR. LEONARD: I have no objection. I would like to have an opportunity to look at them, but I have no objection.

THE COURT: I think it is admitted that they were paid; the entire consideration minus $20.65. 10

MR. LEONARD: That is not an issue in the case and no use taking time on it.

(Receipts admitted and marked Exhibit C-2.)

Q. Did you ever receive any notice or demand from the Sunshine Park Company requiring you to make any payments different than you made them?

A. I skipped some payments, if that is what you mean?

Q. I know you skipped payments; did they ever serve any notice or demand that you make payments according to the contract? 20

A. No.

Q. What was said by any officer of the company, if there was anything said, respecting the matter of payments?

MR. LEONARD: Of course, if your Honor please, I think if he is going to answer that we should know who said it rather than any officer. 30

THE COURT: Did any officer ever make an objection to the manner in which you were making your payments? Yes or no to that.

A. No, not that I know of.

Q. How much was the balance left after you got credit for the receipts?

THE COURT: $20.65 is agreed.

Q. Did you ever at any time tender the payment of the $20.65 balance? 40

A. Yes.

Q. Tell us when and to whom?

A. July 1940 to Lawrence Germain.

Q. What officer, if any, was he?

A. He was president, as far as I knew of the Sunshine Park.

Q. Had he been receiving payments from you?

10 A. Yes.

Q. He signed some of the receipts that are in evidence here?

A. Yes.

Q. What did he say?

A. He referred me to Mr. Boone, said I had to get my deed from him.

Q. What else did you do then?

A. I went to Mr. Boone and he wouldn't accept the balance. He said I had to get rid of my wife before

20 he would give me a deed.

Q. Did he say why you had to get rid of your wife?

A. Well, objected to her being there, as far as I know. I don't know the real reason altogether.

Q. Did he give you any reasons?

A. I don't recall.

Q. Was that the only reason that he gave for his not accepting your payment?

A. He said he had nothing against me; all the ob-

30 jection was her, that is all I can remember right now.

Q. When was this?

A. 1940, July.

Q. July 1940, after you had been to Mr. Germain?

A. After I wrote him.

Q. Did you ever subsequently make a tender—at that time did you have the money, the $20.65?

A. Yes. He gave me a written agreement extending the payment for another year so I could get rid of my wife in that time.

40 Q. At that time?

A. Yes, at that time, Mr. Boone gave me.

THE COURT: Have you got that written extension?

A. Yes, my lawyer has it.

Q. Did he give you that written extension at that time?

A. Yes, 1940, July. 10

Q. Is this the paper you refer to?

A. Yes.

(Paper offered, received in evidence and marked Exhibit C 3.)

Q. I call your attention in that letter to a statement, "In order to give you an extension of time in the matter of carrying out certain agreements made with the undersigned"—without specifying what they were; do you know what he referred to by that "certain 20 agreements"?

A. In his affidavit here to strike out my answer and complaint, number seventeen, he refers to what that is he gave me——

Q. What did you understand it was?

A. It was to give me time to get rid of my wife. I hadn't legal grounds then to get a divorce, rumors; I wasn't certain as to rumors.

Q. You did have some rumors?

A. Yes, I wasn't certain about that, but they 30 turned out to be false and I couldn't get the divorce on legal grounds.

Q. That is what that agreement between the two of you that he refers to has to do with him, is that right?

A. Yes, but she left me before that agreement expired anyway, she got rid of me instead of me getting rid of her before that agreement expired.

Q. When subsequently to July 1940 did you make any tender of this balance of $20.65? 40

A. December, to Lawrence Germain again in December 1940, to Lawrence Germain again.

Q. Was that made in person or by letter?

A. By letter, by check sent through the mail.

Q. Will you look through these and say if you find the one you refer to?

A. Right here.

10 Q. And that was sent to?

A. Lawrence Germain.

Q. Letter dated—this is a letter signed by Lawrence Germain, bears no date, the check included, attached to the letter is dated December 18, 1940.

A. I don't have the letter I sent to him but that is his reply.

Q. This is his reply to what you sent?

A. Yes. I don't know whether that would be sufficient or not.

20 Q. The stamp on the envelope, is this the envelope which came with the return of the check?

A. Yes.

Q. Bears date December 21, 1940.

(Letter received in evidence and marked Exhibit C 4.)

Q. I notice that the check is for fifty cents, $20.50?

A. There was a mistake. Later check was 65¢, 15¢ is all the difference.

30 Q. What was the amount that you tendered when you were there in cash to Mr. Boone at that time?

A. Whatever the amount was, I had more than $20.65 or fifty cents, fifteen cents is all the difference, I had that much to cover it.

Q. When next did you tender, if ever, the payment of that balance of purchase money?

A. Well, I sent a letter to Mr. Stone, I found out he was the president of the Sunshine Park, I sent a check to him to try to get my deed from him.

40 THE COURT: When?

A. I believe it was in May or June 1941.

Q. I show you a paper and ask you if that is what you refer to?

A. Yes.

THE COURT: What date is that?

A. That is June 12, 1941.

Q. That again is a letter coming back to you from Mr. Boone? 10

A. Mr. Boone referring to Mr. Stone told him to——

Q. To return it?

A. Yes.

(Letter offered, received in evidence and marked Exhibit C 5.)

Q. Did you also make a further offer to Mr. Boone direct?

A. After that year's extension expired I sent him a registered letter with check for the balance because that written extension for a year time expired and my wife had done left the place and I had practically fulfilled the agreement because she wasn't there any more and he should have been satisfied as to that part. 20

Q. Was this letter that offer that you refer to the evidence of that?

A. Yes, I sent that with the payment. They didn't open the letter. They returned it to me, opened the registered part but didn't open the—— 30

THE COURT: What date?

MR. WEEKS: That bears no date.

Q. Did the registered letter come with it?

A. One of those letters is mine, one of them is what I sent to him.

MR. WEEKS: Registry return is August second that went back to Mr. Ward Gulvin 1941.

A. One of those letters is the letter I sent—— 40

Q. The letter attached which went to Mr. Boone he also returned that, it is attached here, that bears a stamp July 25, 1941.

A. That is when I sent the payment.

Q. This came back to you attached here, did it?

A. Yes, that letter, they didn't open it.

(Letter offered, received in evidence and marked Exhibit C 6.)

Q. Now did you make any further—was that the last offer that you made to make the final payment on these lots?

A. Yes.

Q. Were you always on all of these occasions able, ready and willing to pay this balance on the lots?

A. Yes.

Q. Did you on those occasions ask for a deed, on any of those occasions?

A. Yes, that is what I was after was the deed.

Q. Who did you ask?

A. Mr. Boone and Mr. Germain and Mr. Stone.

Q. What did Mr. Boone say was the reason he wouldn't give you a deed?

A. Still claimed to get rid of my wife up until that last letter there. He didn't even open that. I didn't have no answer then why he wouldn't give it to me.

Q. Do you know what he had against your wife?

THE COURT: I don't care what he had.

Q. Were you a member of the American Sunshine Bathing Association, called and referred to in the contract in this case as A. S. A.?

A. That was included with the purchase of the lots according to what they said when I bought.

Q. Who said and who said what?

A. Mr. A. W. Flynn, secretary of Sunshine Park, who was in charge there the first year or three years selling lots, he sold with that saying that the membership of the American Sun Bathers——

MR. LEONARD: May I interrupt, Vice Chancellor, to ask this witness—I notice he is referring to some notes there.

THE COURT: You may ask what they are.

By MR. LEONARD:

Q. What are those notes you have in your hands?
A. They are just receipts. 10
Q. You are not referring to those?
A. No.
Q. I beg your pardon. I thought you were.

By THE COURT:

Q. Mr. Flynn said membership went with the agreement, is that what I understand?

A. Membership was included with the purchase of the lots, became one member, heading says "contract for membership" and that was for membership in the American Sun Bathers, went on further to state buying lots in Sunshine Park—— 20

By MR. WEEKS:

Q. Where was all that?

A. It was on top of the contract, says "Contract for Membership, purchase of lots" and that was included with the purchase of the lots.

Q. Through all the years that you were making these payments was there ever any demand for anything else in the way of membership dues? 30

A. I heard later on——

THE COURT: Was there ever any demand made on you?

A. No demand and I heard you were supposed to and I offered to pay them.

Q. You have answered the question. Do you have any other evidence of the times which you were considered paid up in the A. S. A.?

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A. Yes, I have a receipt all paid up to 1940, in August, I mean, June, July, I don't know which it is now, 1940. Here it says June 1940 expires.

(Letter offered, received in evidence and marked Exhibit C-7.)

Q. Then did you about that time or subsequently, no, subsequently to that did you receive some notice from Mr. Boone that you had been expelled for non-payment of dues?

A. June third, 1941.

Q. Is this the notice that you received in that connection?

A. Yes.

Q. Up to the receipt of this letter had you known that anybody contended that you owed dues in the A. S. A.?

A. I attempted to pay them to Mr. Boone several times there even when I went to pay for the deed, if that is what you mean.

(Notice offered, received in evidence and marked Exhibit C-8.)

Q. Did you ever offer to pay dues to the A. S. A. after Mr. Boone refused to accept the final balance on the lots?

A. Yes, he said he would have his, Ray Pendergast, the manager, to look after the date expired. I saw him after that, he said he wasn't going to let me be a member any longer and he wouldn't take my dues and there was about six months afterwards I got this letter.

By The Court:

Q. Did you ever sign a membership application?

A. Not that I know of.

By Mr. Weeks:

Q. Did you ever have any notice from the A. S. A., Mr. Boone or anybody else in that connection about owing dues?

A. No.

Q. Did you ever have any notice of any charge against you for that reason or any other?

A. No.

Q. Did you ever have any copies of any charges for that reason or any other presented to you?

A. No.

Q. Did you ever have any hearing or notice thereof before the A. S. A.? 10

A. No.

Q. Now after you had made tender of your $20.65 to Mr. Boone in person as well as to offer to pay on any other occasion, on what specific occasions, if you can say, did you offer to pay the dues to the A. S. A.?

A. Well, at the time I went to pay the balance for the deed.

Q. When?

A. That was in June, July, 1940, that was the first. 20

Q. All right, what did Mr. Boone say about the dues then?

A. Well, he said he would have his manager there, Ray Pendergast, look them up to see what date they expired.

Q. Did you subsequently talk with Mr. Boone about whether he had done that?

A. Yes.

Q. What did he say? 30

A. He said he wasn't going to let me be a member any longer until—unless I got rid of my wife.

Q. When was that—how long after he had said he would have Mr. Pendergast look them up, look the dues up?

A. A month or two, something in there; I can't recall. It was 1940.

Q. It was in 1940? Now this occasion that you speak about—was there any other occasion when you made an offer to pay dues, to pay dues to the A. S. A.? 40

A. December Mr. Boone called me down to the place about my wife being there and I offered to pay then.

Q. December what year?

A. 1940.

Q. All right, tell us what was said?

A. He wanted me not to have my wife there and
10 I said I wasn't going to take her out. I wanted to pay my dues, to get my deed and he said he wasn't going to let me, make it mean for me, if I knew what was best for my interest I would get rid of my wife.

Q. Was there any other time that you did have any conversation or try to pay the dues?

A. Not that I remember.

Q. Do you know who—do you know what position Mr. Boone held in the A. S. A.?

A. He was executive secretary.

20 Q. Now your contract speaks of terms and conditions imposed by the owner; did you ever ask for what the terms and conditions were?

A. Yes.

Q. Who did you ask?

A. I asked Mr. Flynn and Mr. Boone.

Q. When, for instance, did you ask Mr. Boone what about them?

A. I wanted to know what they were, wanted a written copy of them and everything and he said there
30 wasn't any written copies, they made them up so nobody could get around them, to suit the occasion.

Q. When did he tell you there were none?

Mr. Leonard: He didn't say there were none. He said there were no written copies of them, he said.

A. I knew orally you had to go nude, you couldn't drink liquor there on the grounds or have liquor there, become intoxicated, something to that effect.

40 Q. I say when did he tell you about this?

A. I think it was 1938 somewheres.

Q. Did he tell you verbally, if you didn't get anything in writing, what the terms and conditions were?

A. No, he didn't, not verbally, he said "just so long as you behave yourself around there you don't have to worry."

Q. Did you ever know of any terms and conditions or rules, whatever it might be called, by the Park Company? 10

A. I never could find out until 1941, June 10, I think the letter was, they sent me a registered letter with them——

THE COURT: With what?

A. With the written rules and regulations.

THE COURT: In June, 1941, you were advised that you were expelled? 20

A. Yes. Seven days afterwards they sent me the rules and regulations, what they were.

Q. Seven days after you got the letter and notice you were expelled then you received what purported to be the rules and regulations?

A. That was in demand to my letter to what they were and there is their letter telling.

Q. Is this the paper to which you refer?

A. Yes.

(Letter offered, received in evidence and marked Exhibit C-9.) 30

Q. Up until the receipt of that C-9 did you ever have anything indicating what the terms and conditions or rules and regulations were?

A. I didn't have any idea except just orally one or two things about you couldn't have liquor there and supposed to go nude in certain areas.

Q. Did you know when you purchased your property in Sunshine Park that the executive committee 40

of the American Sunshine Bathing Association could eject you out of the association and cancel your right to your property in Sunshine Park?

A. No, I had received this literature from them before I bought which states in here that there are no associations, no bather bylaws to tell you what to do or what not to do. You have the freedom of your own home.

10

THE COURT: You got that before you purchased?

A. Yes, I came down from Chicago, got this when I was in Chicago and I came down there and bought.

Q. Is this the letter you received——

A. That was sent to me by Mr. Lawrence Germain, also gives other information in there about a sample, how the place was going to be run, he said in his letter to me and that was an example of the way they were going to——

20

MR. LEONARD: I must object, if your Honor please. This pamphlet, which your Honor will see, does not in any way pertain to the defendant, refer to the defendant corporation or have any connection with it.

A. The map is of the same grounds where the Sunshine Park, Mr. Germain ought to know what, he sent it——

30

THE COURT: Wait a minute. This you say was sent to you by Mr. Germain who at that time had what office with the Sunshine Park?

A. President of the Sunshine Park.

THE COURT: That is the place over near May's Landing?

A. Yes.

THE COURT: I will permit it.

40

(Letter received and marked Exhibit C-10.)

Q. How did you happen to get that from Mr. Germain, that prospectus?

A. There was an advertisement in a nudist magazine I bought up in Chicago, on the back cover it had an advertisement referring to this development community where they were going to sell lots to people who would have their own home there and go nude and I wrote Mr. Germain and wanted to know about it and he sent me that and this letter. 10

Q. This prospectus he sent you in the letter?

A. Yes.

Q. Did you after signing the contract for the purchase of the three lots erect buildings on the lots?

A. Yes.

Q. Will you—do you have a photograph of some of the buildings you put up there?

A. Yes, right here.

Q. Do these photographs correctly represent the buildings which you put on the lots named in this contract? 20

A. Yes.

Mr. Leonard: How many buildings is that supposed to be, two or three, Mr. Weeks?

Q. How many have you there in that lot?

A. I have four buildings but there are only two buildings pictures there of.

Mr. Leonard: Three pictures exhibits two buildings, is that it? 30

(Three photographs offered, received in evidence and marked Exhibits C 11, 12 and 13.)

Q. How much were the buildings worth?

A. About thirty-five hundred.

Mr. Leonard: I don't know whether he is in position——

The Court: I don't know either. Who built the buildings?

A. I did. 40

By The Court:

Q. You bought the lumber?

A. Yes.

Q. All the materials went in the building?

A. Except the log cabin, those logs were given me free when I first came there to encourage me to build, in order to encourage people to build, they said they could cut down trees around there to build cabins with. That is in that picture too.

Q. You erected how many log cabins?

A. I erected one log cabin.

Q. What other buildings?

A. I erected a small cabin, one room cabin, and then another one room cabin, and I erected, nearly finished, a good sized, what you would call, maybe, two room cabin.

Q. That is three?

A. I said two little rooms, one room cabins.

Q. How much did the log cabin cost you?

A. I didn't keep track of the expenses because I done my own work. Of course the trees, I had to get them out of the swamp, was more work getting them out of the swamp than anything really cost so much, everything hard.

Q. Can you tell how much you spent outside of your own labor, just approximately; if you can't, you can't, of course?

A. I could have only an idea because I bought a lot of my lumber at auctions but I had a lot of time running back and forth hauling lumber home and going after and paying for gas in my car and truck.

Q. You a carpenter by trade?

A. Well, I learned architectural drafting and learned building with tools, working at it.

Q. Can you tell approximately how much you spent on the whole four buildings, approximately? You don't have to be down to the penny?

A. Outside of my labor I would say around $1200, something like that for money part but, of course, my labor was a big item.

Q. You spent about $1200 plus your labor?

A. Yes.

Q. How long did it take you to erect each one of the places?

A. Well, I worked off and on because I was out around selling, working for other people, building and drawing blueprints for Mr. Boone and I had to work at my buildings in between. I know I was up until 1941, I was working all the time off and on. I imagine took me about two years to my log cabin, to complete it.

Q. Can you tell about how many days that would have represented of continuous work?

A. Was a lot of work fitting the logs, making it look nice, putting plaster between them, so I judge I couldn't, would have to take quite a little while to figure that out because I——

Q. Did you do all the work on the other buildings yourself?

A. Yes.

THE COURT: Got spent $1200 plus his labor.

By MR. WEEKS:

Q. Mr. Gulvin, when the buildings were done who occupied them?

A. I and my wife did.

Q. Which one did you occupy?

A. First we occupied the small cabin and then we moved into the log cabin when I got it done.

Q. The log cabin that was the larger one?

A. Yes.

Q. How many rooms does that have?

A. Has two big rooms. Of course upstairs we could use, but the front room could have been divided off but left all one big room, twenty-four feet long,

fourteen feet wide, and the kitchen part was ten by fourteen, on the back.

Q. Did you later lease that building?

A. Yes. Well, Mr. Grant moved in while I was down to Florida, I and my wife was, when I came back here he said he wanted to rent it of me, he had already moved in and moved my stuff out in my other cabins, so I let him stay there and he paid rent.

10

THE COURT: Rented to Grant at $12.50 a month?

A. Yes.

Q. Before you had any lease or rented it had he already moved in?

A. Yes.

Q. Then he asked you for the lease, is that right?

A. About five months after that, I mean——

20

MR. LEONARD: I don't know what materiality that is to this particular issue.

THE COURT: Nothing excepting shows the occupancy of the property is all and shows to some extent the value of the property.

MR. LEONARD: I am not objecting to the lease; this testimony about Grant moving in.

30

THE COURT: I don't care anything about his moving in.

MR. WEEKS: I offer in evidence lease dated December 24, 1940 made between Ward Gulvin and James A. Grant.

(Lease admitted and marked Exhibit C 14.)

Q. I ask you if that lease is for the larger of these houses?

A. Yes.

40

Q. Who is occupying the property now?

MR. LEONARD: I object to that. I don't think that is material at this point.

THE COURT: I will admit it.

A. So far as I know my tenant. He said he was in court.

MR. LEONARD: I object to that.

THE COURT: Strike that out. 10

Q. At any time you and your tenants have always had possession, have you not, since the buildings were up?

A. Yes.

Q. When you made the lease to Mr. Grant, which is now offered in evidence, did you know of any prohibition, ruling or regulation which prevented you from making the lease to him?

A. No, I didn't receive them until 1941, couldn't get them before. 20

Q. You made the lease after you got the rules and regulations—I mean you made the lease before you got the rules and regulations which you testified about?

A. Yes, made the lease in 1940.

THE COURT: I don't see there is any controversy about the lease in so far as this suit is concerned.

MR. WEEKS: My only purpose in that is that there is some suggestion of violation of rules and regulations in leasing this property. 30

THE COURT: The only thing he is charged with, as I understand it, is that he did not pay his dues. That is the only thing that appears.

MR. WEEKS: I think that is really all there is in the issue. Affidavit is not part of the issue anyway, I suppose that is true.

THE COURT: All affirmative action taken by the Sunshine Park people was he was expelled for non-payment of dues. 40

Q. Mr. Gulvin, will you tell the court why you delayed in bringing this suit after you had made these tenders and refusals, and particularly after Mr. Boone had written this extension letter?

A. Well, I saw some attorneys according to these receipts and I saw Mr. Brubaker right in Mr. Boone's house August 13, 1940, he signed the receipts here, and that was just about, that was the next month after he had refused to take my balance, then again in September I was talking with him and I have some of his letters where he gave me information about the case what to do.

Q. Who is Brubaker?

A. He is an attorney comes there to the Sunshine Park place, belongs to the nudist movement.

THE COURT: Anything Mr.——

MR. LEONARD: Wouldn't be material.

A. He advised me of course——

MR. LEONARD: I object to that.

Q. After the letter of extension, so-called, in this case which extended from one year, for one year, from July 1940, as I understand, why did you not bring your suit then in July 1941?

A. After that year's extension?

Q. Yes.

A. I did. I consulted, according to those receipts here, I got one from Robert O'Neill, one from you, Elwood Weeks, the date when I saw you was August fifth and the one O'Neill——

Q. August fifth what year?

A. 1941.

Q. When did you consult Mr. O'Neill? Is that Robert O'Neill?

A. Yes, well, Mr. Reuben Clark and I were together——

THE COURT: When did you consult him?

A. In September.

THE COURT: 1941?

A. Yes.

Q. 1941?

A. Yes.

Q. And were you then waiting upon these attorneys to institute suit? 10

A. Yes.

Q. How long did Mr. O'Neill, the attorney, keep you waiting before he gave you any decision?

A. Well, right then——

THE COURT: Mr. Weeks, you are not going into your own case at all but you are anticipating a defense and that is not a part of your case. The mere fact of this plea you are guilty of laches don't mean anything at all unless they prove you are guilty of laches and that laches has caused them some injury. 20

MR. WEEKS: Very well. I suppose that is proper in rebuttal, if anything.

A. I couldn't do anything at that time——

THE COURT: Never mind.

CROSS-EXAMINATION.

By MR. LEONARD:

Q. Mr. Gulvin, at the time that you entered into this written agreement June 19, 1936, you were familiar, were you not, with the workings of the American Sun Bathers Association? 30

A. No, I couldn't find out anything except on the contract there, what Mr. Flynn told me include, your membership was included with the purchase of the lots.

Q. Had you ever at any time prior to that attempted to make an application to the American Sun Bathers Association? 40

A. Not that I know of.

Q. Weren't you, as a matter of fact, affiliated with some affiliate groups of the American Sun Bathers Association prior to that?

Mr. Weeks: I object to that.

The Court: I will permit it. It is cross-examination.

10

A. I belonged to some of it in Chicago, some camps. I don't know whether they belonged to American Sun Bathers or not. I belonged to a camp up there.

Q. You were a nudist, were you not?

A. Yes.

Q. You were a part and parcel of the movement, nudist movement?

A. Yes.

Q. Did you know of the American Sun Bathers Association as a nudist——

20

A. I heard of the International Nudist Camp, Inc., whatever you call it, up there in Chicago.

Q. The International was the name of the American Sun Bathers Association prior to it being changed to American Sun Bathers Association, was it not?

A. I didn't know that until after I came down and got to purchase these lots.

Q. All right, you were familiar with the I. N. C.?

A. I had heard of it.

30

Q. Didn't you make an application in it?

A. Not that I ever knew of.

Q. Were you at any time known as Edward Allen?

A. Yes.

Q. Didn't you make an application in the I. N. C. under the name of Edward Allen?

A. I don't know of any time I did.

Q. Were you ever rejected by the I. N. C. under the name of Edward Allen?

A. I don't ever remember anything about anything along that line. I don't know anything along that line.

40

Q. Were you ever rejected from any affiliate group of the I. N. C. under the name of Edward Allen?

A. Well, I don't know whether I was rejected or not. I just didn't go there any more was all I know about it.

Q. Why?

A. I came down here 1936.

Q. You did, prior to this contract, attend nudist camps in different places, did you not? 10

A. Yes, down in Florida.

Q. Do you know whether they were affiliates of the I. N. C.?

A. No, I don't know.

Q. Were you in one in Indiana, Valparaiso?

A. No, not Valparaiso.

Q. As a nudist do you not know or did you not know prior to the execution of this contract, all of these nudist affiliations were all a part of the I. N. C.? 20

A. I knew some of them, I heard about some of them belonging but they had different sections, western and different localities out there another group.

Q. What did the initials I. N. C. mean?

A. I don't know. International Nudist Concern, I imagine, but I don't know for sure.

Q. You know it meant that?

A. I knew it before but I didn't know it then. I don't know as I knew it then. I might have.

Q. At the time you were negotiating for the purchase of these lots which culminated in this contract June 19, 1936, did you have any conversation with Mr. Abbott, Russell B. Abbott? 30

A. He was the one that witnessed the contract. Mr. Flynn called him over. I didn't have no conversation with him. He just called him over to witness the contract.

Q. Did he or did he not talk to you about this purchase of lots by you prior to you signing the contract?

A. Not that I know of. 40

Mr. Weeks: I object to that, if your Honor please, the contract would take the place of any conversation.

The Court: I will permit the question.

A. Not that I know of. I don't remember talking with him at all.

10 Q. Did you have any conversation with Mr. Abbott prior to the contract concerning the application or membership in the American Sun Bathers Association?

A. Not that I know of. I didn't hardly know the man. Wouldn't know him if I saw him. Mr. Flynn called him over to witness that, that is all I know about it.

Q. Did you at the time you signed this agreement have any conversation with anyone concerning membership in the American Sun Bathers Association?

20 Mr. Weeks: I object to that as not being material. The contract speaks for itself.

The Court: I will permit it, cross-examination.

(Question repeated.)

A. At the time I was there have any conversation with anyone? I don't remember who I talked with as to anything like that, only ones I talked with Mr. Flynn and he is the one had charge, he is the only one I would 30 take any notice of.

Q. Your understanding was that by signing this contract you became automatically a member of the American Sun Bathers Association?

A. Yes.

Q. Without any application or any payments whatsoever?

A. There was none told to me about it at the time; Mr. Flynn didn't explain anything on that line.

Q. You say you inquired of the terms and condi- 40 tions established by the owner?

A. I didn't know of any established. I could never find out what any conditions were established, I mean to cause the forfeiture of any property or anything or rights.

Q. When did you find out about the regulations concerning liquor?

A. That was by word of mouth, heard it around there, generally heard that several times about that. 10

Q. Did you hear of rules and regulations concerning the conduct of persons in and about the park?

A. Not any specific conduct, as to any specific conduct no.

Q. Did you know of the existence of a rule and regulation that would prohibit unmarried couples from residing in the same cabin?

Mr. Weeks: If your Honor please, I object to that as not being within the issues. There is nothing within the issues about morals or anything 20 else.

The Court: I don't see where we are getting. It isn't claimed by the defense that the complainant was ever deprived of membership by reason of anything he did or didn't do other than the payment of dues.

Mr. Leonard: That is not so, if your Honor please.

The Court: I will see. Probably it is here 30 and I have overlooked it. Answer to amended bill of complaint——

Mr. Weeks: I don't think the pleadings raise the question.

The Court: You say he wasn't a member.

Mr. Leonard: Of the American Sun Bathers Association, couldn't secure the rights to obtain the relief prayed for himself. Our theory of that naturally is that he was a member of the Associa- 40

tion and the membership was forfeited at the time of bringing this action.

THE COURT: You can't claim that this membership was forfeited because he did something that was contrary to rules when you say you expelled him by reason of the breach of those rules. You are going to prove that you suspended him by breach of something else rather than non-payment of dues?

MR. LEONARD: Yes, first because we plead in this defense that he was not a member and I think within the limits of that we are entitled to bring in any evidence which would show he was not a member.

MR. WEEKS: May I be heard?

THE COURT: Just one second. Your defense then is that, by reason of the fact that he was not a member of the Association and didn't become a member in July 1936 that, therefore, he is not entitled to conveyance?

MR. LEONARD: Our defense to this action is that he was not a member at the time that he asked for a deed and, therefore, was not entitled to the deed of the property.

THE COURT: How do you substantiate that defense? The suit is one for specific performance of the terms of the contract dated nineteenth day of July, 1936, and that is the only agreement unless there is another—that is the only agreement upon which he can base his right for relief unless it is going to be developed by you that subsequently you tendered to him a regular form of agreement, as you call it in this contract of July 1936 which he refused to sign. I don't understand that your contention is that you ever tendered him any other

form of agreement for the purchase of these lots than the one annexed to the bill of complaint?

MR. LEONARD: That is correct, if your Honor please.

THE COURT: Then how are you going to say, as a matter of defense, that he was not a member in 1941, when he made his tender, or 1940 when he made his tender, and, therefore, he is not entitled to recover? 10

MR. LEONARD: Our contention is that, if your Honor please, that subject to this agreement and the approval he became a member, not automatically. We can show that he did become a member and how. That there were rules and regulations which governed the membership of which he was familiar. That there was a breach of those rules and regulations by his conduct in a part of the premises; that that finally culminated in a revocation of his membership. That is one—— 20

THE COURT: Right there, what is there in this agreement that would give you a right to, on the termination of his membership, to refuse a conveyance? There don't seem to be anything in the agreement that would so give you a right and I am wondering where you claim that right?

MR. LEONARD: Subject to the terms and conditions established by the owner of said property. That was one of the terms and conditions. 30

THE COURT: What was the question?

(Question repeated.)

THE COURT: I will permit it.

A. No, I didn't know of any rule like that. I knew the law would be against it, of course.

Q. Now in 1940 when you went to Mr. Boone to make your first tender I think you said it was in July 40

1940 that you were referred by Mr. Germain to Mr. Boone?

A. Yes.

Q. Did you have a conversation with him about this tender?

A. With who?

Q. Mr. Boone?

10 A. Yes.

Q. What was that conversation?

A. I wanted to pay the balance due and get my deed and he says that he wouldn't do it until I got rid of my wife, had to get a divorce, and he wouldn't, everything depended upon that about my getting rid of her. He said he had nothing against me.

Q. Now prior to that date of July 1940 had there ever been lodged with you an objection by Mr. Boone, as an officer of the Park there, to your correctness of

20 conduct in and about the park?

A. Not mine.

Q. Had there been any complaint lodged by him with you as to the correctness of conduct of you and your wife about the park?

A. Not me and my wife, no.

Q. Well, had there been any complaints concerning you about the park by Mr. Boone?

Mr. Weeks: If your Honor please, I object to it, nothing in the contract.

30

The Court: I am going to sustain the objection. This is an affirmative defense. If you have a defense, it is an affirmative defense. This witness has simply testified as to his views, &c., and there isn't anything in the case so far that tends to justify the thought that the mere fact he had been censured by Mr. Boone or what not justified a refusal of the conveyance. You can develop on your defense that affirmative defense that you say

40

you have, but you can't prove your case by this witness.

Q. Did you bring up to Mr. Boone the question of you getting rid of your wife, as you say, or did he bring it up to you?

A. Well, I had made a mistake before that as to what she done. She said he had one thing and I found out later she stayed with a girl friend, but I didn't know at the time she had went with Mr. Boone though I told Mr. Flynn, I just went to him about it. 10

Q. At the time you made the tender who brought up the question of getting a divorce from your wife or getting rid of your wife, you or Mr. Boone?

A. Mr. Boone.

Q. And you didn't open that conversation?

A. I was wanting to get my deed. That is what I was wanting to do, pay the balance and get my deed.

Q. Who opened the conversation concerning your wife? Who started to talk about your wife and the issue of getting a divorce and getting rid of her? 20

A. Mr. Boone did.

Q. And you knew, did you not, that in August second, 1941, that you had no chance of getting a deed?

A. Had been refused me is all I know, no chance.

Q. You had had several refusals before that, did you not?

A. Yes.

Q. The last one was August 2, 1941? 30

A. They returned my letter, registered letter, where I offered the payment, yes.

Q. And you made no further tender since that time?

A. Of course only through my attorney when starting action. I don't know whether you call that a tender or saying we are willing to pay in our pleadings, ready and willing.

Q. That was in 1943 in this case, was it not, May, 1943, I believe? 40

THE COURT: That was when you filed your complaint? Yes, he testifies that there has been no formal tender since August, 1941.

Q. Prior to that you had been served with a suit in ejectment, prior to filing this suit, do you know that?

A. While I was in the reformatory, yes.

Q. You were served with a suit in ejectment?

10 A. Yes.

Q. You had filed an answer, authorized your lawyer to file an answer to that suit, did you not?

A. Yes.

THE COURT: An answer was filed to that suit?

A. Yes.

THE COURT: And that is on an order to show cause, on return of order to show cause further prosecution of the ejectment suit was restrained

20 as I remember it.

A. Yes, injunction.

MR. LEONARD: It was in a status of motion to strike the answer when the rule was issued.

Q. These rules and regulations that you say were sent to you four days or five days after you were finally expelled, you wrote for those rules and regulations, did you not?

A. Yes.

30 Q. And that was in reply to a letter?

THE COURT: Was in reply to your letter asking for them?

A. Yes.

Q. These cabins that you built, how many cabins did you say there were?

A. Four.

Q. You say they represented $1200 worth of material, approximately?

40 A. Yes.

THE COURT: I don't think he said $1200 worth of material, $1200 worth of expense, money outlay you better put it.

Q. What did that represent, $1200, what was that expended for?

A. I had to buy the lumber at the auction, had to buy gas to go there to buy, to haul it home, and I had to keep repairs on the truck to haul the stuff and I had to buy nails, roofing shingles, all kinds of material to build a house, screens, doors and locks, electric pump, hardwood floors.

Q. You were using the truck and buying materials for all the jobs that you had also, weren't you?

A. No, only on my own, other people bought their own lumber I worked on.

Q. How about the truck, you used that to get the lumber for other people, didn't you?

A. No, I didn't use that to haul for other people.

Q. Did you complete all of the houses? When you rented, was the house that you rented to Grant complete when you rented it to him?

A. Not quite. It was all enclosed but screens, I didn't have screens on the windows.

Q. Did it have a back wall on it, back of the house?

A. Yes, one he used for garage wasn't quite finished on the back wall, half finished on the back wall, but the log cabin was all finished. He moved into that when I was down to Florida and moved my stuff out.

Q. And you received income from him when he is in that cabin?

A. Yes.

Q. Did Mr. Boone or any one at the Park ever raise any objection to you about leasing to Grant?

THE COURT: I don't care anything about that leasing, whether they objected or not.

MR. LEONARD: That is all.

Mr. Weeks: If your Honor please, I may misapprehend my position, but it seems to me the questions on cross-examination may be something said on which my opponent might base the contention of laches because he went into the question of what he did previously to bringing the suit. I think——

10 The Court: I will give you any opportunity that might be necessary, after their case is in, to explain any laches that they may desire to take advantage of.

Mr. Weeks: Thank you, sir. If your Honor please, if counsel will agree, and I have just mentioned it to Mr. Leonard, I have a map covering the tract in question produced by the county clerk may now go in evidence, if it is agreeable to your

20 Honor.

Mr. Leonard: I have no objection. I don't see what the map will show over and above the plotting. We agree on the tract, if your Honor please.

Mr. Weeks: I don't want an uncertainty as to the property in question.

Mr. Leonard: Could designate the three lots in block——

30 The Court: Three lots in block so and so.

Mr. Weeks: May I offer it in evidence?

(Map admitted as Exhibit C-15 but not marked.)

MRS. DORIS H. JONES, sworn.

Direct Examination.

By Mr. Weeks:

Q. Mrs. Jones, you are rather deaf, are you?

40 A. Hard of hearing.

Q. Can you hear me well?

A. Yes.

Q. Did you purchase lots from the Sunshine Park, Inc.?

A. Yes.

THE COURT: Sustain the objection. I don't see that makes a bit of difference.

10

Q. Are you a member of the American Sunshine Bathing Association?

A. Yes, sir.

MR. LEONARD: I don't know what the purpose.

THE COURT: I don't know what the purpose is. She says yes.

Q. How long have you been such a member?

THE COURT: Sustain the objection. I don't see it makes a bit of difference.

20

Q. Have you resided in the Sunshine Park for a number of years?

A. 1936.

Q. Since 1936?

A. Yes, sir, when Mr. Jones took sick.

Q. Do you know of any written terms and conditions——

MR. LEONARD: I object to that.

THE COURT: Sustain the objection. Question is whether your client ever had the written conditions, etc.

30

Q. Were there ever any terms and conditions, rules and regulations established for the park?

MR. LEONARD: I object.

THE COURT: Sustain the objection. Mr. Weeks, it seems to me that you have affirmatively proved the allegation of your bill, to wit, that you entered into an agreement, that you paid five dol-

40

lars on account and after that time you paid all the balance with the exception of $20.65, whatever it was; that thereafter you tendered your balance of payment. That your deed was refused and that you are entitled to a conveyance, if there is no defense. Now why encumber the record by bringing in these outside matters which don't at the present time help your case a bit? I mean don't strengthen it a bit.

10

Mr. Weeks: I wish to propound, if your Honor please, one more question. I didn't know what your Honor's attitude is.

Q. Mrs. Jones, was it the practice that upon payment on account of purchase of lots in Sunshine Park the purchaser became a member of the A. S. A.?

A. I don't understand that question.

20

(Question repeated.)

A. When we first bought our deed, I mean signed the contract, that contract gave you a year's membership.

Q. And without paying any dues to the A. S. A.?

A. If we pay any dues?

Mr. Leonard: I don't know whether this woman is paying dues or not is going to help.

30

The Court: I don't think it is going to help us a bit.

(Another witness called.)

The Court: Is that on the same line?

Mr. Weeks: I want to show the practice was payment for the lot meant also payment of dues.

The Court: I will sustain the objection at the present time.

40

(Complainant rests.)

DEFENDANT'S TESTIMONY.

RUSSELL B. ABBOTT, sworn.

DIRECT EXAMINATION.

By MR. LEONARD:

Q. Mr. Abbott, where do you reside? 10

A. Cleveland.

Q. In June of 1936 what position did you hold with the American Sun Bathers Association?

A. I was on the Board of Directors and the President.

Q. What was Sunshine Park with relation to the American Sun Bathers Association?

A. It was a subsidiary to the National, to be developed as the National headquarters.

Q. What was the company in charge of development of the Sunshine Park? 20

A. Sunshine Park, Inc.

Q. That was a corporation?

A. That was a corporation.

Q. Was the American Sun Bathers Association a corporation?

A. Yes.

Q. There has been some reference to the I. N. C., will you explain to the court the connection between the I. N. C. and the American Sun Bathers Association? 30

A. This movement was originally incorporated under the name of International Nudist Conference. It was changed at or about 1936 to the American Sun Bathing Association, the same incorporation, the same being merely a change in title.

Q. Did you in your capacity of president of the American Sun Bathers Association have any interest in the sale and development of lots at Sunshine Park?

MR. WEEKS: I object to that. 40

THE COURT: I will permit it.

A. Very much so.

Q. Did you actively assist in some of the sales?

A. Yes.

Q. Do you know Ward Gulvin?

A. Yes.

10 Q. Did you know him in June, 1936, or did you meet him in June, 1936?

A. I met him in June, 1936, yes.

Q. Where did you meet him?

A. At Sunshine Park.

Q. I show you what purports to be a copy of agreement of sale marked Exhibit C-1 and ask you whether that is your signature as witness?

A. Yes, it is.

Q. Did you actually witness the signature of Mr. Gulvin?

20 A. Yes.

Q. Now in addition to actually witnessing the signature did you take any part in the consummation of that agreement?

A. Yes, I did.

Q. Were there any discussions between you and Mr. Gulvin prior to the signing of that agreement concerning his purchase?

A. Yes.

30 MR. WEEKS: I object to it, if your Honor please.

THE COURT: Perfectly all right. Just say yes.

Q. Was there any conversation between you and Mr. Gulvin concerning the membership of him in the American Sun Bathers Association?

MR. WEEKS: I object to that, if your Honor please. The agreement speaks for itself and surmounts anything that might have been said

40 orally.

THE COURT: Let me see something. I will sustain the objection. The agreement entitled "Contract of Membership" embraces all of its terms, the lots to be purchased, the price to be paid, when to be paid, how to be paid, &c. and says that the sale is upon regular terms and conditions established by owner of said property and contingent upon membership in American Sunshine, Inc., would be covered by the owners regular form of agreement. Now then if there was another form of agreement subsequently submitted containing the terms and regulations, then that is perfectly proper that should be admitted and it could change the terms of this contract, or not change them but supplement them, but no verbal conversation can supplement the terms of this contract the conversation having occurred prior to the signing of it.

MR. LEONARD: Except, if your Honor please, this contract says it is upon the regular terms and conditions established by the owner and contingent upon his membership.

THE COURT: The sale is upon the regular terms and conditions established by the owner of said property and contingent upon the purchaser's membership in the association, and is to be covered by the owner's regular form of argument which is to be executed by both parties and in case the purchaser does not sign this agreement when presented then the deal goes off.

MR. LEONARD: Yes, but I didn't consider that paragraph involves that, says that the terms and conditions of the membership are the points that must be traced in the subsequent agreement, must be set forth, says to be set forth in subsequent agreement as to the terms of sale.

THE COURT: No, sale is upon regular terms and conditions established by owner of said property and contingent upon the purchaser's membership in the American Sunshine Association and is to be covered by the owner's regular form of agreement which is to be executed by both parties. You have entered into an agreement. You have stated his contract to buy and you have said the terms may be further supplemented by an agreement, but that is all you have said, as I understand it. There isn't any further agreement that was ever tendered to Mr. Gulvin at all.

MR. LEONARD: I think that can be admitted as a fact.

THE COURT: If that is so, then I am, it seems to me, bound by the terms of that agreement as written and the agreement is that they sell to him unconditionally upon the payment of five dollars and the carrying out of the terms of that contract these three lots of land.

Q. Did this contract of sale automatically make Mr. Gulvin a member of the American Sun Bathers Association?

A. No.

THE COURT: I will sustain the objection to that, Mr. Leonard. The evidence is that you entered into this agreement and the evidence is that you took from Mr. Gulvin these payments from the time of the agreement up until the time you expelled him from membership. Now you would be estopped at this time of saying he was not a member by the payment of that $5.00 and he, therefore, had no rights under this contract. You can't carry water on both shoulders.

MR. LEONARD: Not attempting to do that, if your Honor please. I am attempting, if I may

state my position, to show that the signing of this contract, upon acceptance, not automatically, of it by the American Sun Bathers Association establishes membership by the American Sun Bathers Association.

THE COURT: Supposing it don't?

MR. LEONARD: Then the deal wouldn't have been consummated or wouldn't have accepted any payment—I am pressing the point he was not accepted at the beginning. 10

THE COURT: If he was not accepted what difference does it make?

MR. LEONARD: Except I want to show by that the American Sun Bathers Association consider the right of membership.

THE COURT: Suppose they do consider the right of membership, still they acknowledged him as a member to the extent they agreed to sell him these lots and took his money. 20

MR. LEONARD: No question about that up to the date when the difficulty arose to expel him from membership.

THE COURT: Then they say they expelled him for non-payment of dues.

MR. LEONARD: I don't agree on the non-payment of dues. 30

THE COURT: What does the letter say?

MR. LEONARD: This letter that has been produced by the complainant—I don't know whether was the same letter—says non-payment of dues.

THE COURT: "This is to advise you that your membership in the association having lapsed for non-payment of dues, you are no longer a member of the association," &c. I don't see that his initial 40

membership makes one bit of difference in this case. Whether or not you considered him a member when he bought the lots don't make a bit of difference.

Q. Did the American Sun Bathers Association retain control over the membership of owner-purchasers of land in Sunshine Park?

10 A. Yes.

Q. And did they have the right to expel members from Sunshine Park?

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

The Court: Sustain the objection. That is a conclusion on his part.

Q. At the time that you entered into this or witnessed this agreement, during these negotiations, what

20 did Mr. Gulvin represent himself to be by occupation and standing?

Mr. Weeks: I object to that as being immaterial; the contract speaks for itself. There is no charge against character in the case.

The Court: I sustain the objection on the ground it isn't any defense set up that Mr. Gulvin made any misrepresentation or that this agreement was procured by fraud on his part.

30 Mr. Leonard: If your Honor please, I think part of our defense will be the attempt, at least the attempt to prove that the revocation of membership was caused by two things, first a misconduct which caused it and, secondly, that a representation at the time as to what he was and later ascertaining that wasn't true that caused a suspension of the membership. It is based on four separate defenses, that he was not a member. We are not pressing the point, if I may, that it was

40 an actual fraud in the inducement of the contract,

but was a reason why we could discharge him as a member.

THE COURT: All right, then that comes up to a separate and distinct situation that depends upon proof as to what you did when you expelled him and whether or not you gave him notice, whether or not you had a right to expel him.

MR. LEONARD: I do want to ask this man preliminarily as to his statement because he was the one who negotiated, as to what he remembered at that time.

THE COURT: I will sustain the objection.

(No cross-examination.)

ILSLEY BOONE, sworn.

DIRECT EXAMINATION.

By MR. LEONARD:

Q. Mr. Boone, what is your position with the Sunshine Park, Incorporated?

A. I am the resident director of Sunshine Park, Incorporated.

Q. Did you hold any office with the American Sun Bathing Association?

A. I am the Executive Secretary of the American Sun Bathing Association.

Q. Do you hold any other office in the Park for the American Sun Bathing Association?

A. Yes, I am on a special committee of the Association impressed to see that the affairs of the park are properly administered.

Q. By affairs of the park, what do you particularly mean?

A. That involves——

MR. WEEKS: I object to going into a lot about his office. He is an officer. He said that.

THE COURT: I will permit it. I don't just see it, but I will permit it.

A. I exercise general supervision over the care of the Park and the character of the people who come into the Park. I also look after the care of the business details such as paying taxes.

10 Q. How long have you been associated with the Park in your official capacity?

A. Since its inception.

Q. Do you know Ward Gulvin?

A. I do.

Q. When did you first meet Ward Gulvin?

A. In 1936.

Q. Did he live at the Park then?

A. He did.

Q. With whom did he live?

MR. WEEKS: Objected to as immaterial.

20 A. Nobody.

THE COURT: I will permit it.

Q. Now calling your attention to the year 1939 did there arise any difficulty between you, in your capacity with the park, and Mr. Gulvin?

MR. WEEKS: I object to that as not being specified in the pleadings.

THE COURT: I will permit it to show what it

30 leads to.

A. There did.

Q. What was that difficulty?

A. Mr. Gulvin, for instance, invited people to come into the Park——

THE COURT: Let's see——

A. —who were non-members.

THE COURT: I don't see that it can possibly make any difference what Mr. Gulvin did in 1939 relevant

40 to the violation of the rules of the Park and alterca-

tions he may have had with Mr. Boone unless you are going to show that Gulvin at that time was discharged from membership and after a hearing and I assume that you are not? I assume what you may be going to do, although I don't know it, is to show that prior to the letter of June 1941 you had some kind of a meeting or took some action with reference to something Mr. Gulvin had done or had not done which you considered a violation of the terms of membership. That is far as I can see you can go and I don't see what happened back in 1939 with reference to Mr. Gulvin makes a bit of difference.

Mr. Leonard: If your Honor please, maybe if I just briefly, without going into the specific facts, state the entire position of the defense we may save a lot of time. Through this witness and other witnesses we attempt to show the following facts:

First, without enumerating, as I say, through a course of conduct, let me say, Mr. Gulvin's conduct had become objectionable and in violation of what we say were definite rules and regulations of which he had knowledge; that as a result of that Mr. Boone, in his official capacity, told him that he was expelled as a member of the Park and as a member of the American Sun Bathers Association and offered to adjust the financial differences with him which was refused; that subsequent to that that his action was reported to the Board of Directors of the American Sun Bathers Association and he was given carte blank, so to speak, authority to handle the situation, expel him or do whatever he desired to do in the matter and then there was a time when there was an opportunity to, another opportunity to make good under other terms and conditions, as he says, but under different terms and conditions, which are not material at this particular moment, and Mr. Boone gave him that opportunity and that after that opportunity again the same acts and conditions arose and he again said to

him that this is final, in 1940, and said "You are through from the park, expelled," and the tenders to the deed were made and from there on they were not accepted. That briefly——

THE COURT: Have you anything that would show that there was any written rules, any written terms and conditions at the time of the signing of the contract 19th of July, 1936?

MR. LEONARD: Your Honor please, I must state frankly at 1936, the time this contract, June 12, 1936, that these rules and regulations, though in existence and known to everyone, including this particular defendant, were not in writing and that the same were not reduced to writing and became part of the official minutes of the meeting of the corporation which is, I believe, August 3, 1936, some two months following the execution of this agreement.

THE COURT: I can't for the life of me see how the Association can defend a specific performance of this suit by a reliance on some rules and regulations which had never been established by action of the Board, a competent board, I suppose a board of directors, you would call it, never been adopted by a board of directors at all that would vary the written terms of the contract which provided for the conveyance upon payment of a certain amount of money. Particularly is that so, it seems to me, in view of the fact that it seems to have been contemplated by the parties that the Sunshine Park, Incorporated, would present a written form of agreement to the complainant, in which there would be incorporated certain rules and regulations and other things which are not covered by the original contract and if Mr. Gulvin refused to sign that contract then the thing would be terminated. It is admitted that no such further contract was ever submitted and, therefore, it seems to me that the only thing before this court and which the court can take into consideration

in passing upon the equities in this case is the terms of the written contract as entered into.

MR. LEONARD: Except that by the terms of the first paragraph that they were subject to terms and conditions that were established. Now they were not adopted in writing but they were in existence.

THE COURT: I know, but how are you going to vary the terms of this contract by some verbal understanding that existed between members of the association with reference to these lots that you did not incorporate into the written agreement or you did not incorporate into any subsequent agreement. 10

MR. LEONARD: I don't think, if your Honor please, we are varying the terms, we are explaining the terms that are in there which are not explained in there.

THE COURT: No, you had a contract absolute on its face but you said that that contract might be varied in details as to certain regulations, &c. by a subsequent written contract which was to be entered into between the parties, but you never executed any subsequent written contract at all. Certainly you can't vary the terms of the contract as executed by verbal statements that were made afterwards or at the time of the execution of the contract and not incorporated into the contract. 20

MR. LEONARD: May I take an argumentative position by answering your Honor again? 30

THE COURT: Yes.

MR. LEONARD: We have—assuming for one moment these are proven before the court which were adopted by the corporation in August of 1936. Now assume for the moment we come to the court and state that this is proved as a fact that these were adopted in May 1936, predating instead of antedating the contract and that he is then in that position to attempt to explain or, to use your phraseology, if I may, vary 40

these terms by showing that they were tied into a part or these rather were a part of these rules and regulations?

THE COURT: I would say you couldn't do it because any variation of the original contract, that you signed, was to be covered by the owners regular form of agreement which is to be executed by both parties. Now if there wasn't any form of agreement executed by both parties by reason of your failure to have tendered such an agreement, then you are bound by the written contract which was entered into as of the nineteenth day of July 1936.

MR. LEONARD: I asked that question for this reason, then do I understand your Honor's argument, you don't trace as the point that these were not in writing as such at the time but merely whether they were or were not in writing they can in no way affect this agreement?

THE COURT: That is the idea exactly, whether they were in writing, whether they were verbal or what they were, they were a mere understanding between members that had never been adopted by the regular meeting of the Board of Directors, but even if it had been, still that says to be subject to an entirely new contract or supplemental contract, which to that extent shall vary the terms of the contract provided it was submitted by your people. Your people concededly did not submit it and they are certainly now estopped from saying the original contract is not the contract which we signed but that contract should be supplemented by something that we did afterwards and which we never incorporated into a written agreement. I don't see how it is possible.

MR. LEONARD: I understand your Honor's point. I was going to argue again it made no difference whether they were in writing or no but long as that is

eliminated, I then contend, as I did originally, that the first paragraph of this contract is not being varied but a deficiency in it is being supplied.

THE COURT: All right, we will say that you are going to supply—and I will concede that under the contract of membership C 1 in this case it appears that certain terms and conditions were to be incorporated in the contract itself as signed on that day by a further written contract which was to be executed but you never presented such a contract, thereafter and it was your own fault that you never tendered such a contract. You accepted dues under this contract as originally written, I mean accepted payments up until a certain time and then you say he isn't entitled to his conveyance because he didn't have a membership and there isn't any provision in the contract for membership at all.

MR. LEONARD: Yes, there is "and contingent upon the purchaser's membership" and that is the crux of our entire case.

THE COURT: Well, you admit that he was a member from the time of the signing of the contract up until the time you expelled him or, if you don't admit it, you are estopped from denying it because you took all the payments.

MR. LEONARD: I would say we admit from the time he was accepted on the signing of this contract until we expelled him he was a member.

THE COURT: All right, haven't you waived, as it were, any defect in this original contract which may have existed at the signing thereof by reason of his non-membership? You recognized his membership up until the time that you discharged him, as you claim, by reason of certain infractions? Now then, if you recognize his membership, you must recognize it from

the time he signed his contract up until the time you discharged him.

MR. LEONARD: We do. There is no question..

THE COURT: Then what are we arguing about?

MR. LEONARD: The right we have to prove, as I outlined in the defense, by reason of a course of conduct after he became a member, granted that he became a member, paid his dues, paid his money under the contract, subsequent by a course of conduct which amounted to a violation of the rules and regulations his membership was revoked.

THE COURT: I don't see it. You drew this contract. You didn't, but your Sunshine Society drew the contract and you took his five dollars, which didn't amount to a whole lot of money, maybe, but you took his five dollars and you said you would convey him the property and you said it was conditioned upon the purchaser's membership in the American Sunshine Association. Now you didn't say it was conditioned upon the purchaser's proven membership and his continuance of membership throughout the years thereafter. In no form did you say that. Now you come in and say it was not only conditioned upon his membership at the time but it was conditioned on his membership throughout the entire life of the ownership of the property. That is incorporating something that is not in the agreement at all, as I see it.

MR. LEONARD: It was conditioned upon his membership, which I contend this agreement could wholly take care of up to and including the time of a deed because the deed, if given, would contain in it such conditions that would further limit, or not further, would carry on from the date of the deed on, a requisite of membership and have a defeasance clause in it.

THE COURT: Where did I read that you were to convey by deed of general warranty?

MR. WEEKS: Right at the end of the defeasance clause.

THE COURT: "Upon full payment the property will be conveyed by full warranty deed." This don't contemplate a deed that would restrict the full ownership of the property if he was not a member of the association.

MR. LEONARD: It may not and I am not prepared to argue that today, that is it may or it may not obligate a deed with conditions in it.

THE COURT: I don't see how you are going to give a full warranty deed with conditions in it and I don't see how you could justify a refusal because he wouldn't accept a deed that wasn't a full warranty deed and refuse to convey.

MR. LEONARD: If your Honor please, I think by this time at least one point you and I agree in, we understand the theory of the attempted defense of the defendant and it is not my purpose to stand before the court with a parade of witnesses and take a lot of time when we come to the issue involved and we understand exactly what is involved in the case.

THE COURT: That is the way I feel.

MR. LEONARD: I want to say this: I want to do this, if I may—merely suggesting it—with the understanding of the case, of course I believe I understand your Honor's disposition, assuming all of the testimony, I say, we would produce would be produced, rather than to take that time at this time, I would like to leave it in this posture, an opportunity to submit a brief to your Honor, with the thought in mind, however, that if you do feel after the submission of the brief that the theory of the case is sound I may have an opportunity to present witnesses to substantiate; if, on the other hand, you don't there is no use, as I see,

taking the court's time and every one else's time to put them on the stand.

THE COURT: Let me go further, even assuming that I could hold—as I can't—that your contract or I mean that your obligation to deliver the deed was predicated upon a continuation of membership on the part of the complainant at the time the right to the conveyance came due, still I could never justify the Sunshine Park Association, whatever it is, whatever its proper title is, in depriving Gulvin of membership by reason of infraction of rules unless he was given notice of that action on the part of the association and a right to defend against the disciplinary action.

MR. LEONARD: I think the basis of our case we could prove that he was given warning that a continued action of that type would cause that result.

THE COURT: I don't care about that. There is no law in the land that will allow you to take away this fellow's property rights by expelling from membership unless he had notice with the right to appear and defend.

MR. LEONARD: You mean formal hearing before some part of the corporation?

THE COURT: Yes. I don't see there is any question about that, so, even if we went so far as to incorporate in your original contract the provision that his membership must be continuous throughout the period, still there has not been any disruption of that membership by reason of an alleged action taken of which Gulvin received full notice with the right to defend. That seems to me to be so plainly evident that it sort of irritates me to think we would have to go through all the proof as to what they did when they frankly confess, of course, that they did not give any notice. Let me say this: I am not condemning at all the action of the Sunshine Park Association. They

formed an association over there which they want to run in accordance with their own ideas as to how it should be run and they had a perfect right to do that. On the other hand they were laymen, evidently, and some of the legal requisites to carry out their intention, unfortunately for them, appear not to have been carried out. Now then they get Mr. Gulvin there—and I have no brief for Mr. Gulvin at all—he became obnoxious to them and they wanted to get rid of him but, unfortunately for them, they didn't have a lawyer, didn't have you, Mr. Leonard, advising them how they had to do it, and I would suggest that they better stick close to a lawyer hereafter when they are going to do this thing.

MR. LEONARD: You mean to be cautious in drawing the contract.

THE COURT: I am not condemning the Sunshine Park at all in this thing, but I am simply saying on the strict legal aspect I can't see how it is possible for them to prevent the conveyance asked for.

MR. LEONARD: As I said before, I like to be practical in these things and if that is your Honor's opinion, it would be imposing on the Court and every one else, if your Honor please, to just parade witnesses on the stand. Often times in an attempt to be practical you give away something you shouldn't, but I am satisfied, as I said a moment ago, your Honor, to leave it in that posture and I have an opportunity to submit my thoughts on it and if it should develop your Honor changes your position, we then be given an opportunity to present the witnesses to substantiate that part of the case.

THE COURT: There is another thought if, after you have thought this over very carefully and discussed it with your clients you make up your mind the position I have taken is right, don't bother to write a brief, just let me know.

Mr. Leonard: I just want to say this before concluding, I had felt we did have a legal defense. In other words I made a motion to strike the bill and it was amended and I still feel that there are legal deficiencies, assuming everything has been proven, we have a good defense on their case and I would, in the normal course of events, after the conclusion of that testimony, advance those arguments. I would like to have an opportunity, if I am going to submit a brief on the question of whether we can proceed with this testimony, that in addition I can submit my legal thoughts on it. On the other hand, if I come to the conclusion that your Honor is right, and still feel myself on the legal position I take, even assuming all is true, they are not properly in court and entitled to relief.

The Court: That is all right, but don't try to argue laches because the position of the Sunshine Park Association has not changed at all by reason of the fact he did not bring this suit. Laches has got to consist of more than mere delay. It has got to be accompanied by damage to the other side that is of an irreparable nature and here there can be no particular damage to them as I see it.

Mr. Leonard: That is one of the legal arguments. There may be others. There is one; it wouldn't be necessary to go into them all at this time, but I will have that opportunity either to file a brief on my contention and if we decide not to file it on the legal points or just file it on the entire matter, I may.

Mr. Weeks: If your Honor please, that we may have a clear understanding, I have no objection to any legal question being raised and briefed except the one which we are now precluding the matter of laches.

The Court: I am not precluding it.

Mr. Weeks: I don't want to be in the position and I don't think it is fair we should be in position to call witnesses and take further testimony.

The Court: The testimony stands as it is.

Mr. Weeks: My adversary has suggested if you change your mind, to take testimony.

The Court: If I change my mind I have got to open the whole case, got to let them put in the whole defense, if I change my mind.

Mr. Weeks: Then I have to get my witnesses again, which has been some job.

The Court: I don't know, but I have got to have my mind changed first. That will be the order, you have two weeks and Mr. Weeks will have two weeks to reply.

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C-7—Receipt of Ilsley Boone to Ward Gulvin of 9/30/39 for $5.00, written thereon "for A. S. A. Cooperating Member begin July 39—expire June 1940" 127

C-8—Letter said Boone to said Gulvin, dated 6/3/41, letter stating, inter alia, "This is to advise that, your membership in the Association having lapsed for non-payment of dues, you are no longer a member of the Association," etc. 128

C-9—Letter of Boone to Gulvin, dated 6/10/41, as follows: "I have just received from Mr. Stone a request that I hand you a copy of the Rules and Regulations governing the sale and development of lots at Sunshine Park. In compliance therewith, I take pleasure in enclosing such copy" 129

C-10—A booklet entitled "The Pines" on cover, printed with photographs 130

MAYS LANDING, N.J. Dec. 18 1940 No. 1

THE FIRST NATIONAL BANK 55-413
OF MAYS LANDING, N.J.

PAY TO THE ORDER OF Sunshine Park, Inc. $20.50/100

Twenty and 50/100 DOLLARS

To pay ballance due on lots at Sunshine Park, no. 1, 2, 3, block 11 in receipt of deed to same.

Ward Gulvin

Brown, Lent & Pett New York

1819 Broadway
New York City, N. Y.
December 21, 1940.

Mr. Ward Gulvin
Box 446
Mays Landing, N. J.

Dear Sir:

This will acknowledge receipt of your letter dated December 18, 1940, enclosing check in the sum of $20.50 made payable to the order of Sunshine Park, Inc.

I return to you herewith your check. I cannot accept the same because I am no longer an officer or a stockholder of Sunshine Park, Inc.

I have noted the contents of your letter. You are mistaken in many of the statements you make in the letter. You are undoubtedly aware of the fact that the right to own property at Sunshine Park is contingent upon good character and the maintenance of proper standards of conduct. Without going into futher details, I am sure that you will know what I am referring to.

The only thing I can do at this time is to refer you to Dr. Ilsley Boone who I believe is at the present time in charge of the affairs of Sunshine Park, Inc. I know that Dr. Boone is a fair andan honorable man and I am sure that both he and the corporation intend to make a fair adjustment of any claims that you may have.

Yours very truly,

Lawrence Germain

Lawrence Germain

LG:JL
Registered
Enc.

IRVING A. GERMAIN
ATTORNEY AT LAW
1819 BROADWAY
NEW YORK

TELEPHONE COLUMBUS 5-5563

Oct. 11, 1937
Received from Wand.
~~Hoffman~~ Bulwin
Five Dollars on apply on
fees (Temporary receipt)

SUNSHINE BOOK CO.

SUNSHINE PARK, MAYS LANDING, N. J.

July 22, 1940.

Mr. Ward T. Gulwin,
Sunshine Park,
Mays Landing, N.J.

My dear Mr. Gulvin:

In order to give you an extension of time in the matter of carrying out certain agreementw made with the undersigned, the undersigned agrees not to foreclose any mortgage by reason of any unpaid balance thereon, within the period of twelve months from date hereof.

If matters referred to in the foregoing paragraph are not adequately settled within the time above specified, steps will be taken in the direction of properly preserving and protecting the interests of Sunshine Park, Inc., in accordance with the terms of the original agreement.

Very truly yours,

Ilsley Boone

Ilsley Boone.

Accepted:

Ward Gulvin

COMPLAINANT'S EXHIBIT P-1
(Referred to in Record as "C-1")

SUNSHINE PARK, Inc.
1819 BROADWAY
(COLUMBUS CIRCLE)
Suite 2015-2016
NEW YORK CITY
COlumbus 5-5563-5568

CONTRACT OF MEMBERSHIP

NEW YORK CITY, June 19th 1936

SUNSHINE PARK, INC., AGREES TO SELL TO Ward T. Gulvin

ADDRESS 1016 West Madison Street CITY Chicago, Ill.

AND HAS RECEIVED FROM THE PURCHASER AS A FIRST PAYMENT ON SUCH SALE THE SUM OF Five DOLLARS ($ 5.00), AND THE SAID PURCHASER HAS BOUGHT OF SUNSHINE PARK, INC. FOR THE SUM OF Two Hundred and Eight and Fifty Cents DOLLARS ($ 208.50), LOTS NO. 1-2-3 BLOCK 11, AS SHOWN ON THE MAP OF SUNSHINE PARK, INC. HAMILTON TOWNSHIP, N. J. AND FILED IN THE OFFICE OF THE COUNTY CLERK AT MAY'S LANDING, N. J.

TERMS

BALANCE OF Two Hundred and Three Dollars and Fifty Cent DOLLARS ($ 203.50) TO BE PAID UPON SIGNING AND DELIVERING OF AGREEMENT OF SALE THE BALANCE TO BE PAID IN MONTHLY INSTALLMENTS OF Eight DOLLARS ($ 8.00) BEGINNING ON THE 19th DAY OF July 1936

SUBJECT TO THE CORPORATION'S APPROVAL

This sale is upon the regular terms and conditions established by owner of said property and contingent upon the purchaser's membership in the American Sunbathing Association (or the I. N. C.) and is to be covered by the owner's regular form of agreement, which is to be executed by both parties. In case the purchaser does not sign this agreement when presented or within five days from date hereof, then at the option of the seller, this contract may be cancelled and all monies on same may be retained by the seller as liquidated damages and the seller shall not be liable to the purchaser for any part of the same. In case this sale is rejected by owner, all monies are to be returned to the purchaser within seven days after said rejection. Upon full payment property will be conveyed by full warranty deed.

SUNSHINE PARK, INC.
By Lawrence Germain
By ews

Purchaser
Witness to Purchaser's Signature

Ward T. Gulvin
Purchaser

NO VERBAL AGREEMENT OR WRITTEN ALTERATIONS RECOGNIZED

MAYS LANDING, N.J. June 12 1941 No. 3

THE FIRST NATIONAL BANK 55-413
OF MAYS LANDING, N.J.

PAY TO THE ORDER OF Sunshine Park, Inc. $20.50

Twenty and 50/100 DOLLARS

To pay balance due on Lots No. 1-2-3, Block 11, map of Sunshine Park, Ocean City, N.J.

Ward Irwin

Brown, Lent & Pett New York

OUTDOOR PUBLISHING CO.
SUNSHINE PARK, MAYS LANDING, N. J.

June 25, 1941.

Mr. Ward Gulvin,
Mays Landing, N.J.

Dear sir:

Mr. Stone wishes me to acknowledge his receipt of your recent communication and has directed me to return your check to you since the matter is now in the hands of our attorneys.

Very truly yours,
SUNSHINE PARK, Inc.,

By Ilsley Boone.

COMPLAINANT'S EXHIBIT C-5

Mr. Ward Gulvin:

Upon attorney's advice the enclosed is herewith returned to you as having been neither duly received by me, opened by me, nor are the contents thereof known to me.

Ilsley Boone.

307 BAR PRESS, INC., 47 WEST ST., NEW YORK. BO. 9—0157 - 8

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark 5, N. J.
(6252)

(5102)
ADAMS PRESS, 786 Broad Street, Newark, N. J. MItchell 2-1839

From
Ward Gulvin
Mays Landing, N.J.

Mr. Ilsley Boone
Sunshine Park
Mays Landing
N.J.

60

MAYS LANDING, N.J. July 24 1971 No. 4

THE FIRST NATIONAL BANK 55-413
OF MAYS LANDING, N.J.

PAY TO THE ORDER OF Sunshine Park, Inc. $20.65

Twenty and 65/100 DOLLARS

To pay balance due on lots No. 1-2-3, Block 11, map of Sunshine Park, Mays Landing, N.J.

Ward Gulvin

Brown, Lent & Pett New York

Box 446
Mays Landing, N.J.
July 24, ~~19~~ 1941

Mr. Ilsley Boone

As the written agreement you gave me extending payment expired on July 22, I am enclosing balance due on lots No. 1,2,3, Block 11, Sunshine Park for which I am demanding a full warranty deed as my contract calls for. Enclosed is check for $20.65 which is balance due, as contract calls for a total of $208.50 and my receipts show a total of $187.85.

Sincerely,

Ward Gulvin

Ward Gulvin

COMPLAINANT'S EXHIBIT C-6

Sept. 30 1939

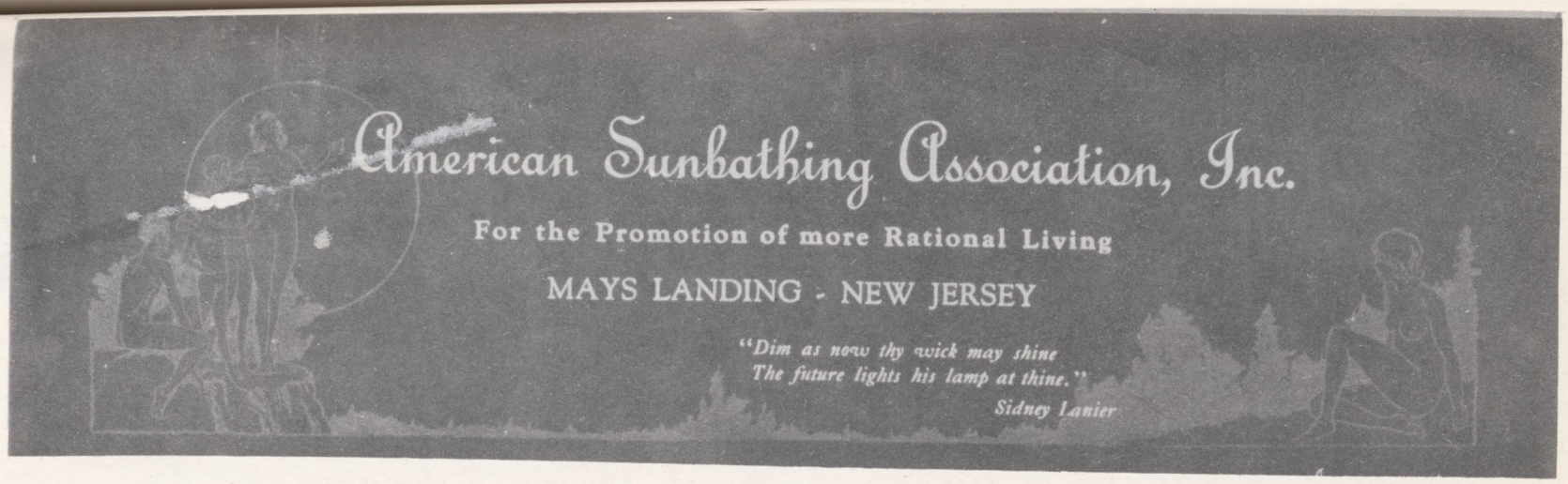
Received from Ward Gulom

Five & 00/100 Dollars

for A. S. A. Cooperative Member
begin July 39 - Expire June 1940

$5.00

Ilsley Boone



June 3, 1941.

Mr. Ward T. Gulvin,
Mays Landing, N.J.

Dear sir:

This is to advise that, your membership in the Association having lapsed for non-payment of dues, you are no longer a member of the Association. The Executive Committee at this time further invokes the clause in your original membership application which reads:

> "I agree also, that should the Executive Committee deem it for the best interests of the organization that my membership be cancelled for cause, I shall abide by their decision without question and without appeal."

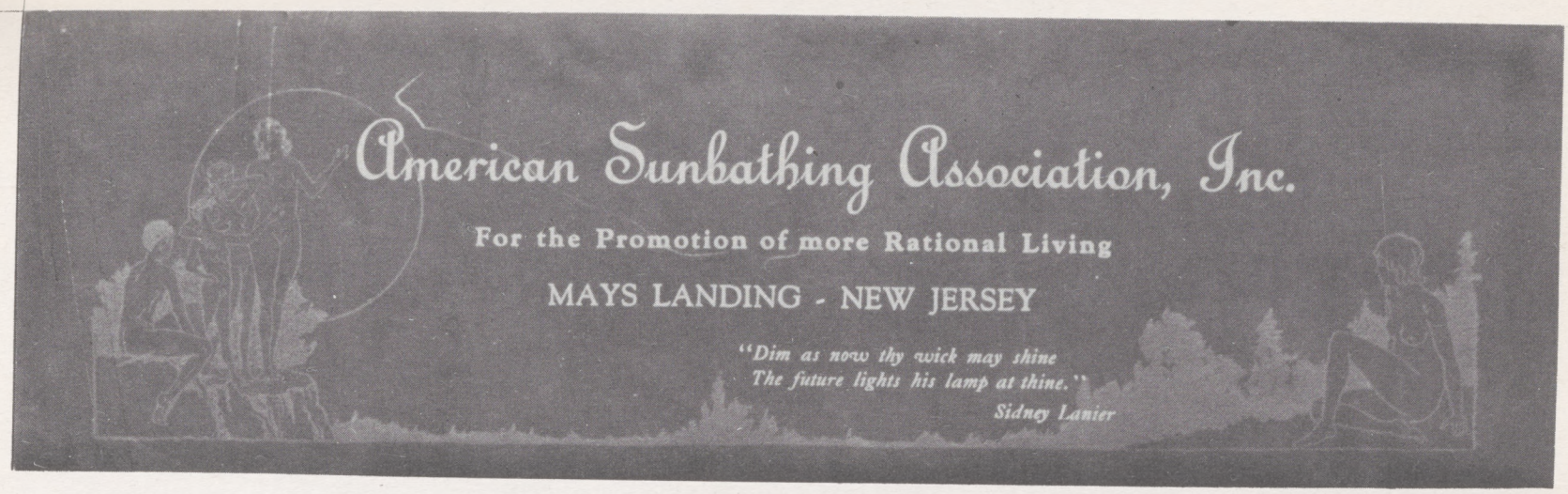
In the light of the foregoing it becomes my duty to advise you that you are no longer a member of the Association, that you have not been such since August 1, 1940, and that no continuation of your membership will be allowed.

We demand therefore, that, without jeopardy to any legal equity you may have, you forthwith vacate any and all parcels of ground in Sunshine Park to which you have taken entry.

Very truly yours,

Ilsley Boone

Ilsley Boone, Mgr.,
for American Sunbathing Association,
and Sunshine Park, Inc.



June 10, 1941.

Mr. Ward Gulvin,
Mays Landing, N.J.

Dear sir:

I have just received from Mr. Stone a request that I hand to you a copy of the Rules and Regulations governing the sale and development of lots at Sunshine Park.

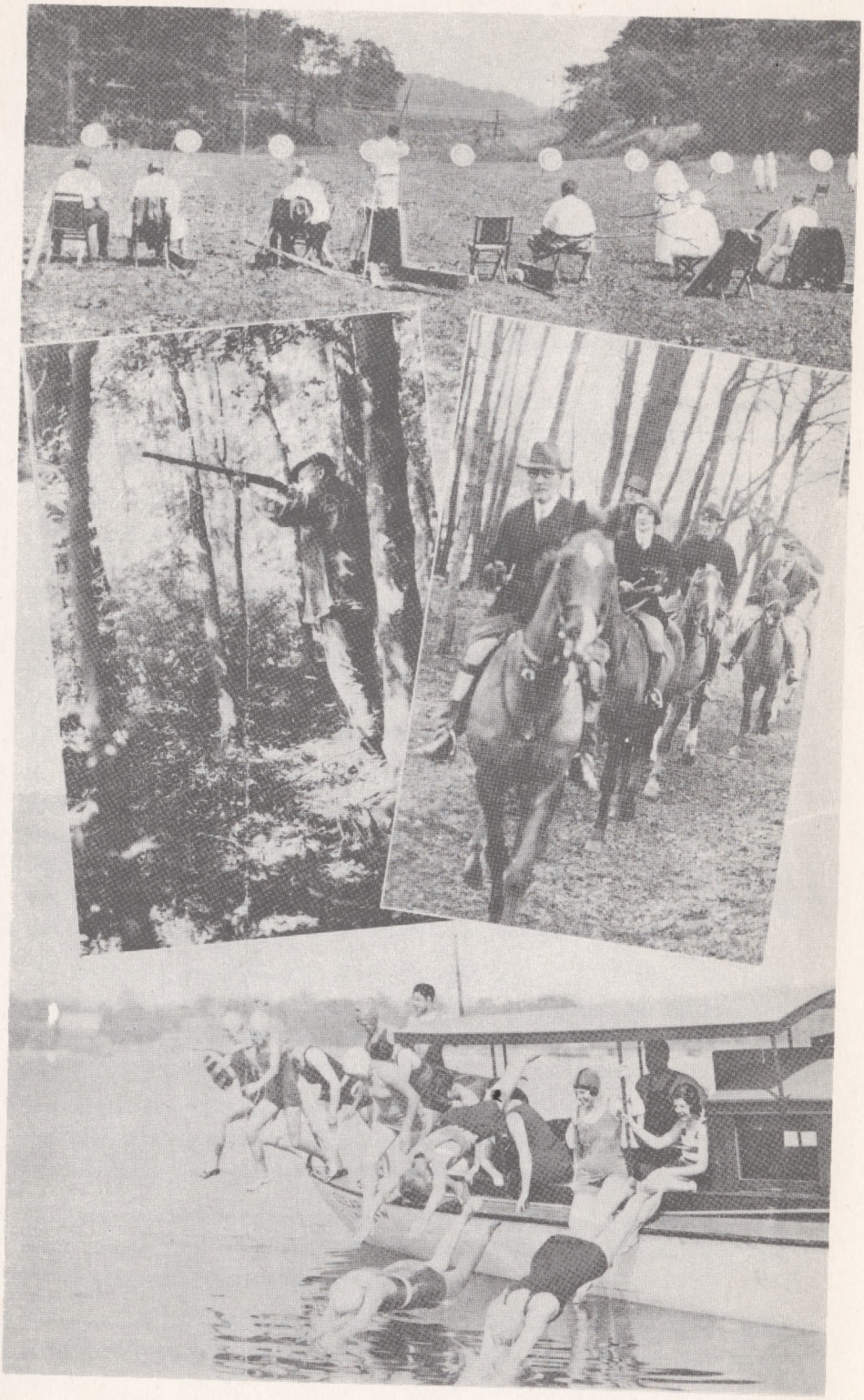
In compliance therewith, I take pleasure in enclosing such copy.

Very truly yours,

Ilsley Boone

Ilsley Boone.

THE PINES



THE PINES

A 2,000 Acre Playground . . .

Yours to Use

FOR ONLY $30.

ALTHOUGH your income may be less this year, your need for a vacation and rest may be greater than ever. Here is a perfect solution for a shrunken income—a plan that will provide healthy outdoor rest and enjoyment at a cost that amounts to almost nothing at all—not only for this year, but for always!

A public-spirited man whose hobbies are people and health, wants to help others preserve their physical stamina in these hard, nerve-wracking and distressing times. He offers to share with you all the healthful advantages of his beautiful two thousand acre estate.

His plan is to give you the run of his entire estate, with its private beach, miles and miles of bridle paths, excellent facilities for hunting and fishing and practically every other form of sport and exercise. All this becomes yours to use—as if it were your very own.

A part really does become yours. You will be given FREE—actually receive deed and title to a generous size camp site. This is your very own. On this ground you can erect—at practically no cost—a log cabin, hunting lodge, or such other abode as you may desire. You can have all the logs you need right off the immense woods on the grounds. Building will be fun! There will be men to show you how and to help you.

The small sum you pay—$30—is for the privilege of using all the facilities of this vast estate. This amount could never really PAY for all you get. It is not really payment, because this money is used for the upkeep of the estate and the cost of operating this plan.

The whole two thousand acre estate becomes yours to use at any time of the year or all year round if you wish, and still the cost—only $30—is far less than even the most inexpensive two-week vacation away from home.

The only additional expense is the payment of $3 per year, which combined amount will be used for the payment of taxes, additional improvements and new facilities for your benefit.

This man's generosity in the present economic crisis becomes your good fortune. There will probably NEVER AGAIN be another opportunity like it.

Nature's Way to Health

PONCE DE LEON spent his entire life searching for the Fountain of Youth—that mythical spring whose waters would keep one young forever. We know that no such fountain exists, yet aren't we all Ponce de Leons—seeking those things that will promote a joyous, healthy, vigorous life.

Often for the sake of health you will deny yourself certain foods that you care for most. You will spend weeks at expensive health resorts. You will do many things that are costly and often not even pleasant. Simply because you are doing what Ponce de Leon was doing—seeking the means to retain health and youth as long as possible.

The Fountain of Youth is now yours, at THE PINES. Here you may come for a day, a week, a season, or as long as you like. Here you will regain lost health, or if you are young, well and healthy now—you will be able to stay so for many more years to come. And the delightful part of it all is that you need deny yourself nothing; everything you will do you will enjoy. It will be play! Folks come to THE PINES not because they are ill, but because they want to remain well and fit.

2,000 Acres to Play In

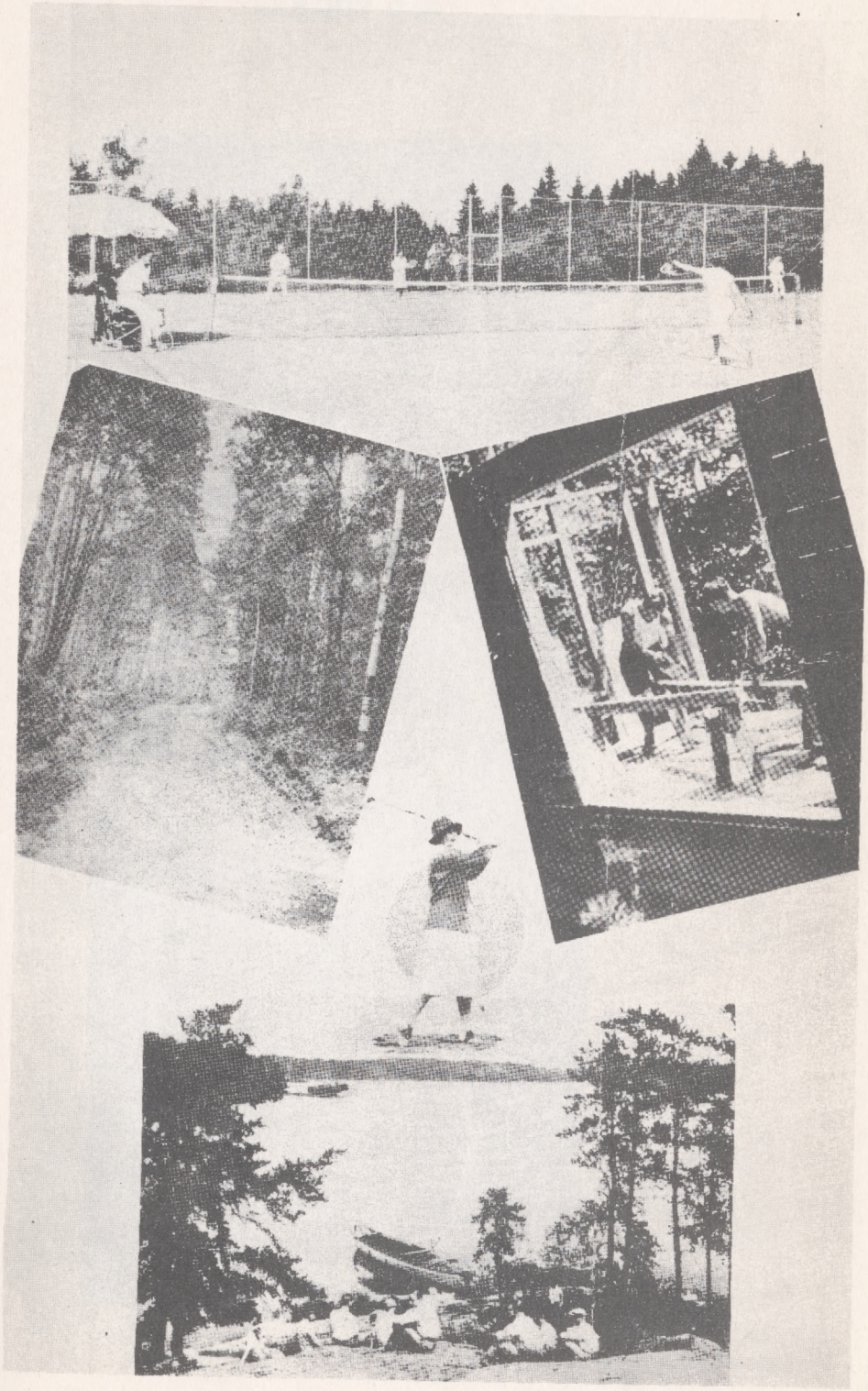
At THE PINES you have the use of a two thousand acre estate, where you may hunt, fish, swim, ride, canoe, play tennis and take part in any number of other enjoyable sports and health-building activities. You will have the assistance of competent coaches and physical instructors who will give you the benefit of their professional knowledge in your sports and exercises.

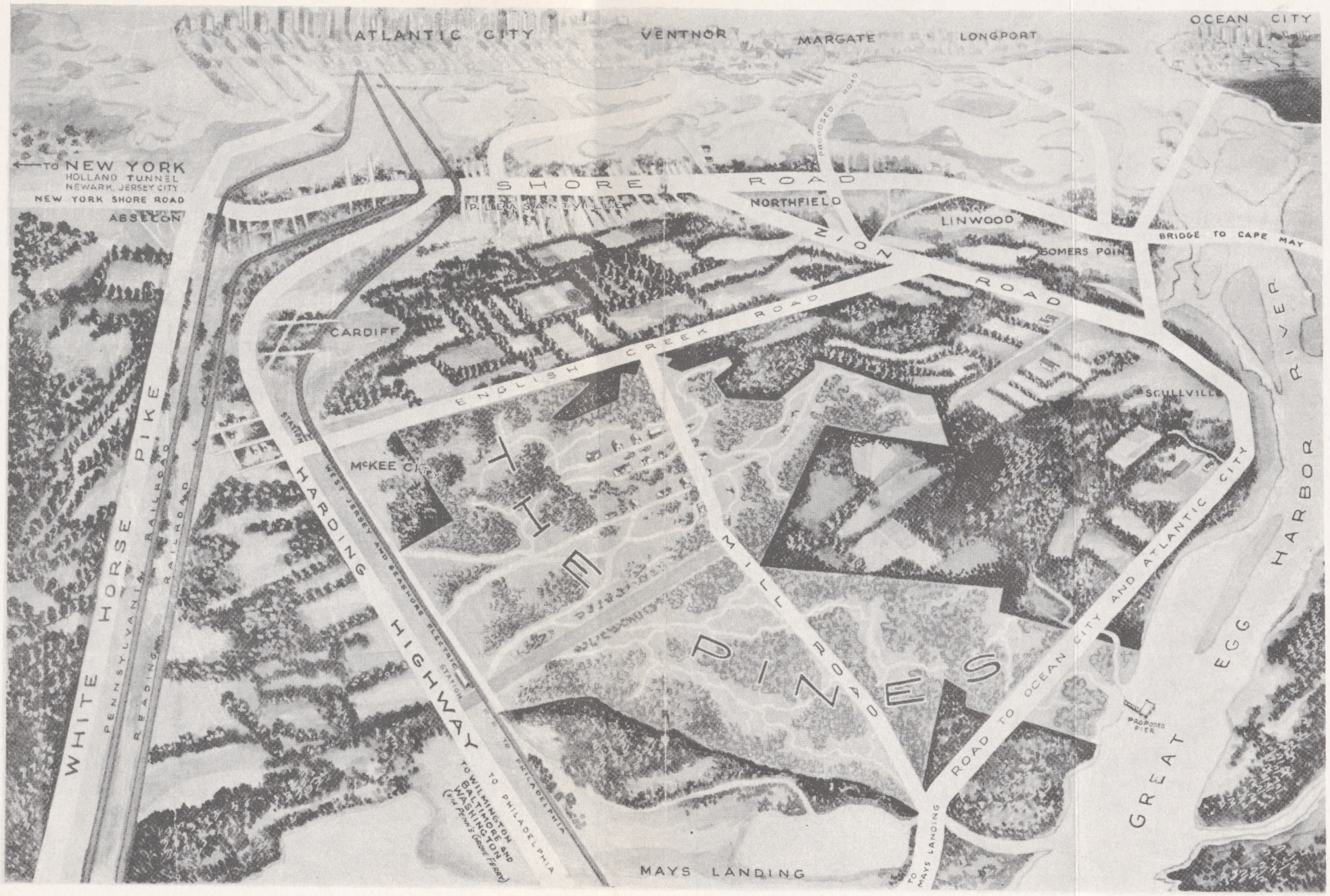
Your Own Camp Site

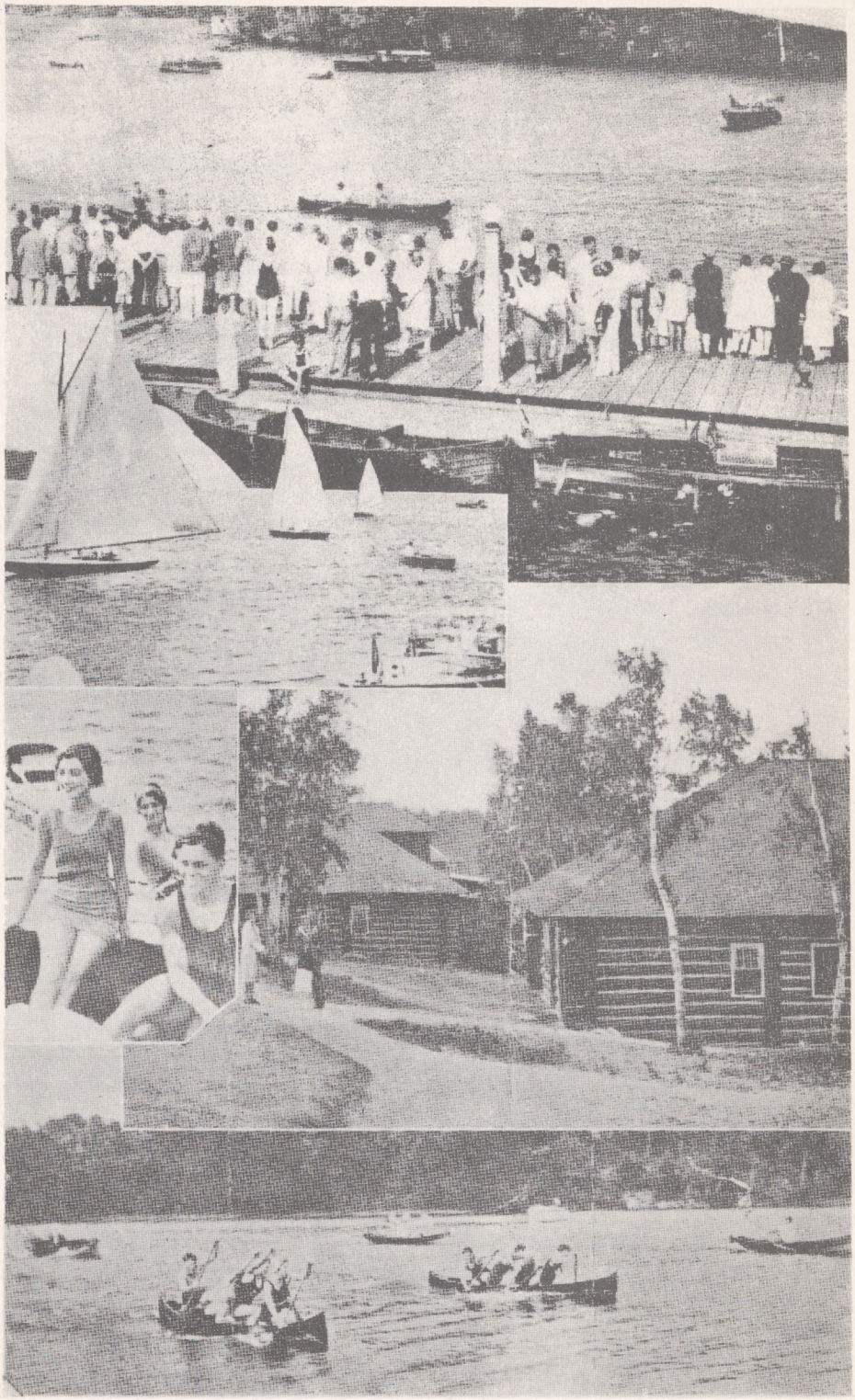
All this costs you nothing, and neither does the camp site that you will be given upon which to erect a place of your own—with two thousand acres as your back yard.

Build it yourself if you wish, with the aid of the instructors. Help yourself to all the logs you need. There is enough timber on the estate for hundreds of cabins without destroying the beautiful woods.

You'll have a perfect little hideaway to come to for week-ends, vacations, a rest from the city, or permanently if you desire. And it's yours not for just a season. It's there for your enjoyment all year round—winter and summer—year in and year out! Mild in winter—cool in summer—the California of the East!




ATLANTIC CITY
VENTNOR
MARGATE
LONGPORT
OCEAN CITY
TO NEW YORK
HOLLAND TUNNEL
NEWARK, JERSEY CITY
NEW YORK SHORE ROAD
ABSECON
SHORE ROAD
PROPOSED ROAD
NORTHFIELD
LINWOOD
SOMERS POINT
BRIDGE TO CAPE MAY
ZION ROAD
CARDIFF
ENGLISH CREEK ROAD
SCULLVILLE
McKEE CITY
WHITE HORSE PIKE
PENNSYLVANIA RAILROAD
READING RAILROAD
HARDING HIGHWAY
WEST JERSEY AND SEASHORE ELECTRIC STATION
TO PHILADELPHIA
TO WILMINGTON AND BALTIMORE
WASHINGTON
(via Pennsgrove Ferry)
MILL ROAD
ROAD TO OCEAN CITY AND ATLANTIC CITY
PROPOSED PIER
GREAT EGG HARBOR
MAYS LANDING
TO MAYS LANDING



Complete Freedom

Don't misunderstand. This is not a club. There are no assessments; neither are there by-laws nor a board of governors to tell you what to do or what not to do. You have the freedom of your own home.

This plan should appeal to everyone. Men who like to get away by themselves; girls who usually take cabins or bungalows; young married couples; and particularly the man with a family whose vacation usually costs a small fortune. An ideal country place for the children. There's none of the expense of hotels and fancy clothes and liberal spending. Here you get rest and good air, sports, healthful exercise of all kinds—and loads of fun for everyone.

Clear Sea Air

You'll be close by the sea, feel the invigorating tang of it in the air. Yet THE PINES is high and dry and clear, like the mountains. There are immense woods of fragrant cedar and pine trees, from which the estate gets its name. Beautiful Egg Harbor River, bounding the estate on one side, completes the view.

A Sportsman's Paradise

The woods abound in game, small and large. Rabbits, pheasants, duck—even deer. Men will like to come and rough it here. Hunt and fish to your heart's content. The waters provide good fishing and angling. Come back with your catch—fry your fish—cook your game—enjoy REAL outdoor life. The place is so big that no one can interfere with your privacy. Yet if you want companionship, you are sure to find many congenial friends.

You owe it to yourself and family—FOR HEALTH'S SAKE—to take advantage of this marvelous and unusual opportunity. A few years ago only a millionaire could afford what you are now receiving for a mere $30—the use of a two thousand acre playground. It is open only to applicants with the proper references.

CONVENIENCES

FOOD: A number of stores, including chain-stores, are close by. Deliveries are made to your door if you wish. Fresh vegetables, eggs, milk and other commodities can be purchased at the local farms on the estate.

LIGHT: Electric power lines run through THE PINES, supplying electricity for lighting and other uses.

WATER: There are many artesian wells which supply cold, crystal-clear drinking water.

CLOTHING: Life at THE PINES is very informal. Clothes consist of knickers, beach pajamas, riding habit, bathing suit, or any other informal apparel. Here you discard your excessive clothes as well as your worrisome cares.

TRANSPORTATION: THE PINES is easily reached by RAIL, AUTO, or BUS, as shown on the map on the last page of this booklet.

NEAR-BY AMUSEMENTS: Ocean-bathing at Atlantic City or Ocean City is only fifteen minutes away. Or if you feel like a jaunt into town, Atlantic City's famous boardwalk and theatres are easily and quickly reached by auto, rail or bus.

GOLF COURSE: Close by is a splendid golf course. Special arrangements have been made for the accommodation of our resident-guests.

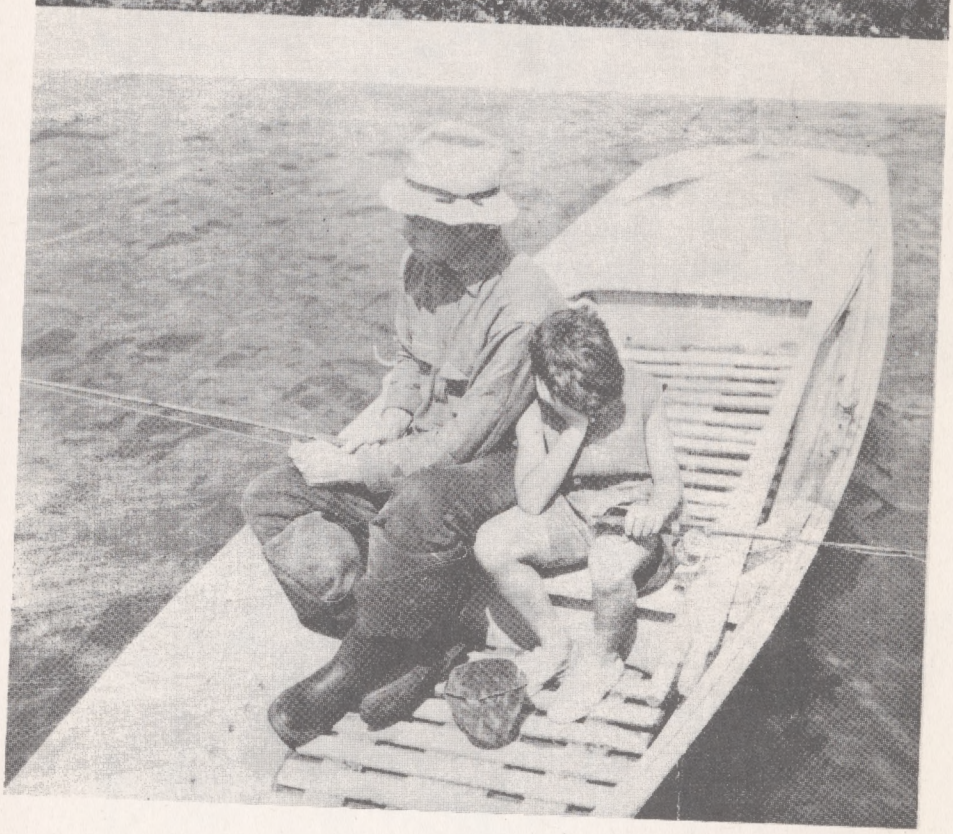
HORSES: A large stable will provide horses and grooms for the beginner, as well as the proficient rider, out for a fast, spirited run.

SOCIAL HALL: A spacious hall is to be erected for the joint amusement and entertainment of resident-guests, and will be under the auspices of a social director.

PHYSICAL CULTURE: Physical culture and calisthenic classes will be included in the daily routine of life at THE PINES—under the expert direction of skilled, well-trained instructors. This studied and systematic training will help you limber up—make your body strong and vigorous.

BOAT HOUSE AND LANDING: There will be a snug, modern shelter for boats of all kinds—from canoes to sailboats. Also a landing pier and basin where water sports will be conducted.

THE PINES combines Nature's loveliness with every convenience you could wish for—for health-building—for fun—and for comfort. And all for less than the cost of an average vacation. Don't neglect to write in for complete details so you can arrange to spend Spring week-ends and Summer vacation on this lovely spot



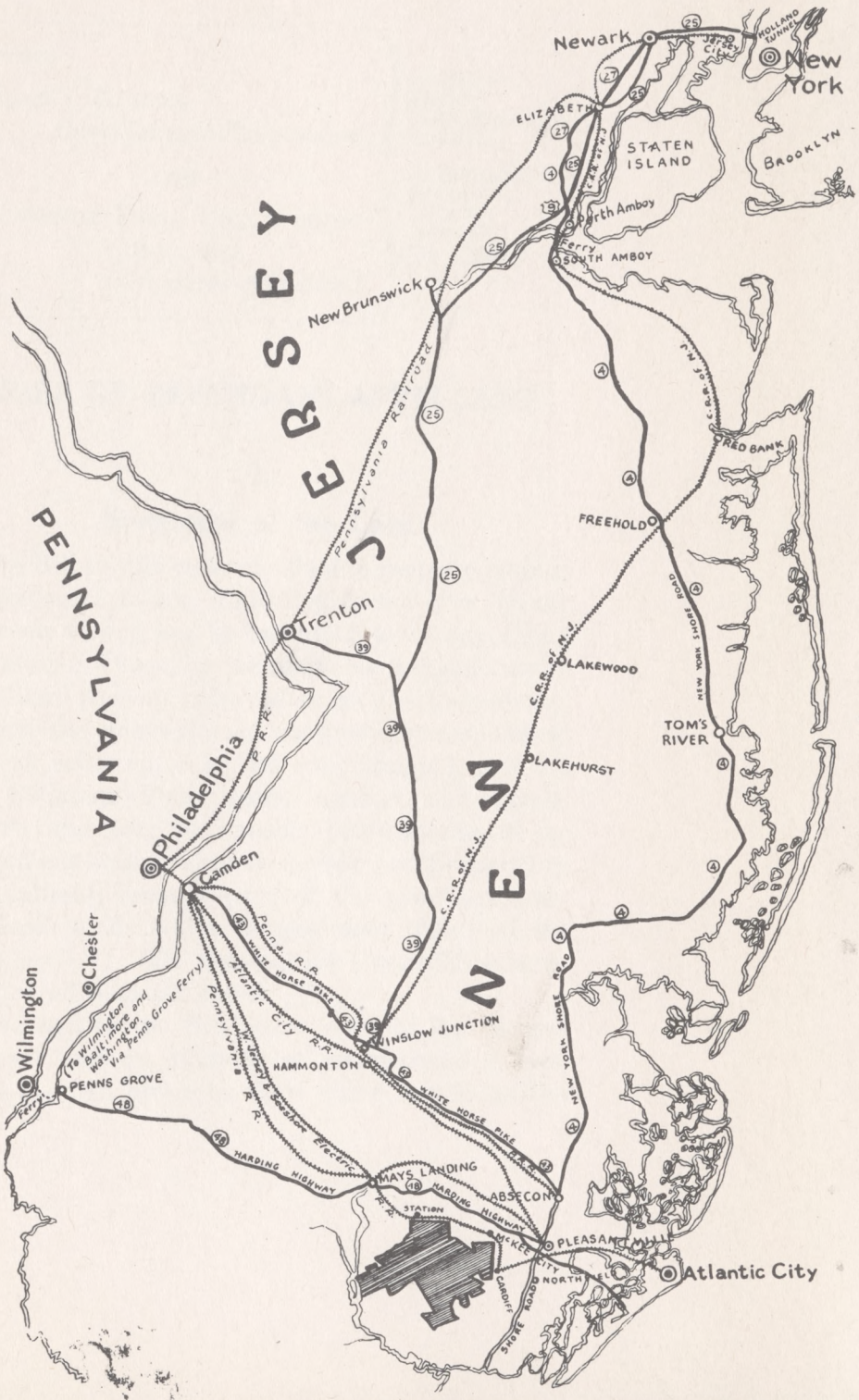
NEW YORK OFFICE

THE PINES

1819 Broadway - - New York City

COlumbus 5-5563

Pictures in this booklet are used through the courtesy of Underwood & Underwood, and International Newsreel.


NEW JERSEY
PENNSYLVANIA
Newark
New York
ELIZABETH
STATEN ISLAND
BROOKLYN
North Amboy
Ferry
SOUTH AMBOY
New Brunswick
Pennsylvania Railroad
RED BANK
FREEHOLD
Trenton
LAKEWOOD
TOM'S RIVER
LAKEHURST
Philadelphia
Camden
Chester
Wilmington
PENNS GROVE
(To Wilmington Baltimore and Washington Via Penns Grove Ferry)
WINSLOW JUNCTION
HAMMONTON
HAYS LANDING
ABSECON
PLEASANTVILLE
Atlantic City
HARDING HIGHWAY
WHITE HORSE PIKE
NEW YORK SHORE ROAD
C.R.R. of N.J.
Pennsylvania R.R.
Atlantic City R.R.
Pennsylvania R.R.
Pennsylvania R.R.
Camden & Atlantic Electric R.R.
STATION
McKEE CITY
NORTH BEACH
CARDIFF
SHORE ROAD
ROLLAND TUNNEL
Jersey City

New Jersey Court of Errors and Appeals

Between WARD T. GULVIN, *Complainant-Respondent,* *and* SUNSHINE PARK, INC., a corporation, etc., *Defendant-Appellant.*	On Bill for Specific Performance and Injunction. On Appeal from the Court of Chancery. (149/489) (W. F. SOOY, V. C.)

BRIEF OF DEFENDANT-APPELLANT.

I.

Statement of the Case.

The Bill in this case was filed to restrain actions in ejectment at law, instituted in the New Jersey Supreme Court, and in the Atlantic County Court of Common Pleas, by the above-named defendant-appellant (herein referred to as the defendant), against the above-named complainant-respondent (herein referred to as the complainant), and (in the Common Pleas case) against one James Grant; and for the specific performance of an alleged contract to convey certain real property to complainant, being a part of the same property involved in the action in ejectment (State of the Case, pp. 1-7). The State of the Case will be herein referred to as the Case.

Attached to the Bill was a copy of the alleged contract and an affidavit of complainant (Case, pp. 4-7). An order to show cause issued on the

filing of the Bill (Case, p. 8), which was followed by a motion to strike the Bill (Case, p. 9). An order of continuance of the order to show cause was allowed, which contained a provision permitting complainant to file an amended Bill (Case, pp. 11-12). The amended Bill was filed (Case, p. 13), and a further affidavit of complainant accompanied it (Case, p. 14). Thereupon defendant interposed an answering affidavit, made by Ilsley Boone, Assistant Secretary of defendant corporation (Case, pp. 17-28), and the cause came on for hearing, resulting in a denial of defendant's motion to dismiss the Bill, and restraining the action in ejectment in the Supreme Court, to the extent designated in the Court's order (Case, p. 29), until the further order of the Court. Answer and Replication followed (Case, pp. 30-33), and the cause came on for final hearing before Vice Chancellor W. F. Sooy, who advised a decree for specific performance, and restraint in part of the action in ejectment in the Supreme Court. The final decree is dated October 31st, 1944, and was filed in the Clerk's office on November 15, 1944 (Case, pp. 34-36). It was served on defendant on November 16, 1944, and became effective, by the terms of the decree, within thirty days thereafter (Case, p. 35, line 16).

Prior to the effective date of the decree, counsel applied to the Vice Chancellor for leave to file a petition for re-hearing, with a stay, and for a rule to show cause why the final decree should not be opened. The petition and a draft of order to show cause were submitted promptly by mail, the Vice Chancellor having stated to counsel that it would not be necessary to go again to Atlantic City for that purpose. The application was denied December 16, 1944, and the petition and draft of order

to show cause were marked filed that date by the Vice Chancellor (Case, pp. 43-45), but received in the office of the Clerk February 28, 1945.

Meantime, defendant appealed to this Court from both the final decree and the denial of the Vice Chancellor of a re-hearing (Case, pp. 46-51, 57-62). The Vice Chancellor's conclusions were filed January 9, 1945 (Case, pp. 52-56).

As both appeals are so closely inter-related and involve the same basic situation, they are presented and argued on the same record.

The State of the Case is in two volumes,—one containing the pleadings and testimony, the other containing the exhibits.

II.

Brief Statement of Facts.

Defendant developed a tract of land located in Hamilton Township, Atlantic County, New Jersey, known as Sunshine Park. Lots were sold to members only, subject to terms, conditions, regulations, and obligations, with the right in the grantor to expel members, with a forfeiture of the grants, upon failure to conform thereto.

On June 19th, 1936, a conditional contract of conveyance and membership was executed by complainant and defendant, which provided for the execution by both parties of a subsequent agreement containing the terms and conditions to be therein stated, subject to cancellation upon the purchaser's failure to agree thereto within the time therein limited, subject to forfeiture of moneys paid if the purchaser failed to agree, and subject to the return of moneys paid if the vendor failed to agree.

Disagreements having arisen between the parties, the subsequent agreement was not executed; the vendee was directed to vacate the premises; and moneys paid on account were tendered back to him by the vendor (Case, p. 21, line 3; and p. 22, line 18). Vendee refusing to vacate, ejectment suits were instituted at law in the New Jersey Supreme Court and in the Atlantic County Common Pleas affecting, *inter alia,* the particular parcels covered by the contract C-1. Issue was joined therein, but subsequently the vendee (defendant in ejectment) filed the present Bill in the Court of Chancery to restrain the ejectment suits and for specific performance of the contract C-1, asserting it to be an absolute contract to convey.

Upon application of complainant for preliminary restraint, *ad interim,* affidavits were submitted by both parties. The facts set forth therein show the reasons why the vendor would not grant a conveyance of the property to vendee, but upon final hearing the Court took the position that the contract C-1 was an absolute contract to convey by full warranty deed, regardless of its express conditions and terms as a mere contract to execute a contract, and practically excluded all proffered proofs which defendant desired to present to show the conditions precedent to its becoming so effective, and to show complainant's failure to perform those conditions on his part, and his flagrant violations of the spirit and letter of the vendor's purposes, regulations, standards, and philosophy, and the rights of other vendees and members, and decreed that defendant must convey to complainant the property covered by that contract C-1. Application was made by defendant for a re-hearing, which was denied. Appeals were thereupon taken to this Court.

III.

Grounds of Appeal.

The grounds upon which defendant bases its appeals are stated in the respective Petitions of Appeal, and are considered and discussed in the Argument, *infra*. (Case, pp. 48-51, 59-62.)

IV.

Questions Involved.

(a) The alleged contract C-1 (inadvertently marked P-1), is a mere conditional contract, or a contract to execute an agreement, and is not specifically enforceable as a contract to convey. Complainant did not aver or prove performance of conditions precedent to its becoming operative.

(b) The contract C-1 lacks mutuality.

(c) Complainant has an adequate remedy at law, and the pending actions at law in ejectment should not be restrained.

(d) Defendant was entitled to prove the circumstances surrounding the situation involved, and the Court below erred in refusing to permit it to do so, and in ruling that the contract C-1 was absolute in its terms to compel defendant to convey.

(e) The covenants, terms and conditions upon which conveyance would be made were common to all vendees in defendant's lands, and were mutually enforceable by them against complainant. They should have been afforded an opportunity to testify accordingly.

(f) The maxims in Equity were violated, viz: "He who comes into Equity must do so with clean hands;" and "He who seeks Equity should do Equity."

(g) The contract C-1 should be reformed to express the real intention and agreement of the parties, if it does not do so.

(h) The Court below should have granted defendant a re-hearing on its petition therefor, to the end that the real equities of the parties might be fully presented and considered.

V.

Argument.

(a)

The alleged contract which complainant seeks to have specifically performed is set forth in the Bill of Complaint and the affidavit annexed thereto (Case, pp. 4, 5), and in the Vice Chancellor's Conclusions (Case, p. 52). It is also reproduced in the Book of Exhibits (Case, p. 120). It was received in evidence as Exhibit C-1 (Case, p. 64, line 10), and has been referred to throughout by that designation. It appears, however, to have been inadvertently marked as "Exhibit P-1" (Case, p. 120). All references herein will be designated "C-1".

It is obvious by its very terms that it is not a contract to convey, as was held by the Vice Chancellor (Case, pp. 54, line 30; 55, line 16; 113, line 20), and as embodied in the final decree (Case, p. 35, line 10). It is simply a contract to execute an agreement upon terms and conditions to be stated

therein. There is no time fixed within which such agreement should be executed, nor does the record show that complainant ever demanded its execution or offered to execute it on his part. The Vice Chancellor, it is respectfully submitted, erred in holding it to be a binding contract to convey unequivocally by full warranty deed. There were conditions to be performed before it could become binding to convey. Defendant contended that they had not been performed, and that complainant had violated the rules and regulations of the Association, with which he was entirely familiar. This is clearly shown in the affidavit of Ilsley Boone in opposition to the preliminary restraint, but proof of which the Vice Chancellor would not permit on the final hearing (Case, pp. 17-24; 87-94; 98-115).

Illustrative of the situation here involved, is the case of *Raisler Sprinkler Co.* v. *Automatic &c. Co.,* 171 Atl. Rep. (Del.) 214, at 222, where the Court stated:

> "* * * but where it is clear, as here, that the parties have not contracted, but have only suggested the possibility of a future contract, Courts may not twist an expression of conditional willingness to agree into an actual enforceable contract."

And so it is stated in *13 C. J.,* title "Contracts," at *page 246:*

> "Conditional Contracts. A conditional contract is an executory contract, the performance of which depends on a condition. It is not simply an executory contract, since the latter may be an absolute agreement to do, or not to do, something, but it is a contract whose very existence and performance depends on a contingency and condition."

Citing,

Nashville &c. R. Co. v. *Jones,* 2 Coldw. (Tenn.) 574, 594, quot. Story Contr. Sec. 201;

French v. *Osmer,* 67 Vt. 427, 431, 32 Atl. 254, 255,

where the Supreme Court of Vermont stated that—

> "In law, the contract is, as Mr. Justice Bradley puts it, in *Harkness* v. *Russell,* 118 U. S. 666, 7 Sup. Ct. 51, a mere agreement to sell on a condition to be performed, and not an absolute sale with the reservation of a lien or mortgage to secure the purchase money. In *Ballard* v. *Burgett,* 40 N. Y. 314, Grover, J., styles such an agreement an executory contract that the title shall pass on the happening of the stipulated event, namely, payment of the price. Mr. Story distinguishes it from a purely executory contract in this: that an executory contract is absolutely to sell at a future time, while a conditional contract is conditionally to sell. In the one case, he says, the performance of the contract is suspended and deferred to a future time; in the other the very existence and performance of the contract depends on the contingency. Story Cont. Sec. 246."

Here, the contract was merely to enter into a subsequent agreement, upon terms and conditions to be agreed upon, and subject to certain requirements and regulations. That is the contract the parties made, and the Court is without power to force another upon them. As was said by Mr. Justice Perskie, in *Whittle* v. *Associated Indemnity Corp.,* 130 N. J. Law, 576, speaking for this Court at page 581:

> "The 'construction and effect of a written instrument is a matter of law to be determined by the court and not by the trier of the fact.' And in the absence of an infirmity in a contract (none is here alleged) our 'function' is to 'enforce a contract as written.' And if the 'insured can not bring himself within the condition of the policy, he is not entitled to recover for the loss.' * * * In short, the law does not make a better contract for the parties than they choose to make for themselves."

And as stated by Judge WOLFSKEIL, speaking for this Court, in *Lippincott* v. *Content,* 123 N. J. Law 277, at 279:

> "Persons, however, are free to insert their own limitations in the contracts they make, subject only to legality of the purpose, and the consideration of public policy. Contractees are necessarily bound by the express conditions they themselves choose to incorporate in a contract. When construction becomes an issue, the significance ascribed by the parties to the mooted language, or plainly to be inferred from their conduct, is strongly influential in determining the meaning which was intended between them, and that course is usually adopted by the court to be binding on the parties, since of their own accord they have made it obligatory on themselves."

And as stated by Judge WELLS, speaking for this Court, in *Dikowski* v. *Metropolitan Life Insurance Company,* 128 N. J. Law 124, at 128:

> "If a condition of a contract is a condition precedent, its performance must precede a suit for enforcement. *Board of Education* v. *Richmond Construction Co.,* 92 N. J. L. 496; 105 Atl. Rep. 220."

Here, there was no obligation to convey, enforceable in Equity, until an agreement to do so had been entered into subject to certain terms and conditions, which had not been done. Until that had been done, and the terms and conditions fixed, and performance pursuant thereto refused, there was no right to specific performance to convey, and the Court erred in decreeing that there was a right thereto. The authorities, in addition to those cited *supra,* are numerous.

> *Introcaso* v. *Orrok,* 124 N. J. Law 4;
> *Leslie* v. *Casey,* 59 N. J. Law 6;
> *Herman* v. *Zazzarino,* 108 N. J. Eq. 451;
> *Long* v. *Hartwell,* 34 N. J. Law 116,

where Mr. Justice Van Syckel, speaking for the Supreme Court, at *page 127,* said:

> "By the terms of the contract, the vendee was to execute a mortgage on both lots, to secure the balance of the purchase money, and no evidence was produced to show that he tendered himself ready to do so.
>
> "It is the settled rule in this state, that if either the vendor or vendee wishes to enforce the contract against the other, he immediately makes his part of the agreement precedent.
>
> "On the one hand, the purchaser's right of action for non-delivery of the deed does not accrue until he tenders performance on his part; and, on the other hand, the vendor's action must be preceded by execution and offer of the conveyance. *Shinn* v. *Roberts, Spencer 444, and cases there cited.*
>
> "In this case, therefore, no suit would lie until vendee tendered himself ready to execute a mortgage on both parcels."

So, likewise, until complainant here tendered himself ready to enter into the agreement pro-

vided for, subject to the rules, regulations, terms, and conditions specified, he had no right of action against defendant, and his Bill should have been dismissed. There is no evidence in the case to show that complainant did so.

Bruen v. *Ogden,* 18 N. J. Law 124,

where Mr. Justice Ford, speaking for the then Supreme Court (1840), at *page 126,* said:

> "A conditional agreement creates no liability, till the event happens on which it is to be performed. Here is an agreement to purchase and pay six thousand dollars for said grant (of 4800 acres of land), *if* the government of Texas should prevent a location and passing of the title; and to make out any cause of action, it must be averred and shown, that said government did prevent said location &c.; in the words of the condition, or according to their legal effect; with a venue in such proper form, that if the defendant please, he may traverse the matter and have the truth of it tried by the country. The want of such an averment being fatal to the first count, the consideration of the other objections to it, is unnecessary, as judgment on it must be for the defendant."

So, in the present instance, until complainant *averred and proved* performance on his part by the execution of the agreement referred to in the contract C-1, and a compliance with all the terms and conditions precedent, or an offer to do so in good faith, he had no standing in a Court of Equity to call upon defendant to perform. This he also failed to do. Such failure was fatal to his Bill, and it should have been dismissed.

(b)

It is also obvious that, under the express terms of the Contract C-1, defendant could not compel specific performance in the absence of the agreement therein required. Lack of mutuality would therefore defeat complainant's right to specific performance. That defense was specifically interposed in the motion to strike the Bill (Case, p. 9, line 39), and in the Answer (Case, p. 31, line 7).

> *Ten Eyck* v. *Manning,* 52 N. J. Eq. 47;
> *Degheri* v. *Carobine,* 102 N. J. Eq. 264;
> *Pub. Serv. Corp.* v. *Hackensack Meadows Co.,* 72 N. J. Eq. 285;
> *Fiedler, Inc.* v. *Coast Finance Co.,* 129 N. J. Eq. 161.

In *Ten Eyck* v. *Manning,* 52 N. J. Eq. 47, at page 49, Van Fleet, V. C., says:

> "* * * The remedy by specific performance is not a matter of strict right, but of sound judicial discretion, and will be granted or denied as the justice and right of the particular case shall seem to the court, on full consideration of the rights and equities of the parties, to require. The enforcement or denial of this remedy is regulated by certain well-established principles, one of which is that it will not be granted, as a general rule, in cases where mutuality of obligation and remedy does not exist; or, stated in another form, mutuality of remedy is essential to the maintenance of a suit for specific performance."

This rule was recognized by this Court, in an opinion by Judge Kays, in *Degheri* v. *Carobine,*

102 N. J. Eq. 264, on page 268, and also on page 269, where he quoted from an opinion by LEAMING, V. C. in *Public Service Corporation* v. *Hackensack Meadows Co.,* 72 N. J. Eq. 285.

The rule is also recognized and applied in the recent case of *Fiedler Inc.* v. *Coast Finance Co., Inc.,* 129 N. J. Eq. 161, wherein Chief Justice BROGAN, in the opinion of this Court, said, at page 166:

> "The general rule is that specific performance is decreed only where there is mutuality. * * * The test seems to be whether the remedy is mutual as well as the obligation. *Ten Eyck* v. *Manning, supra.* If the enforcement of the obligation may not be granted to both contracting parties, it should not be enforced against one party."

(c)

Complainant has an adequate remedy at law. This defense was also interposed *in limine* (Case, pp. 31, line 38; 32, line 8). The ejectment suits at law were at issue, and defendant (plaintiff in ejectment) was entitled to go to the jury for a determination of its legal rights. The record indicates several disputes of facts. Equity could not take jurisdiction through the device of a bill for specific performance and defeat defendant's legal right to a trial by jury, especially with respect to an alleged contract which did not confer upon complainant (defendant in ejectment) a clear, unequivocal, definite right to exact performance.

Mead v. *Canfield,* 11 N. J. Eq. 38;
Miller v. *English,* 6 N. J. Eq. 304;
Smith v. *Morrow,* 84 N. J. Eq. 395;
Thropp v. *Pub. Serv. Elec. Co.,* 84 N. J. Eq. 144;

Pridmore v. *Steneck,* 122 N. J. Eq. 35, 37;
Welsh v. *Hour,* 100 N. J. Eq. 417, 420;
Uppercu Cadillac Corp. v. *536 Broad St. Corp.,* 106 N. J. Eq. 529;
Paterson v. *Currier,* 98 N. J. Eq. 48;
Hoe v. *Hoe,* 84 N. J. Eq. 401.

(d)

Defendant had the right to show the circumstances leading to a refusal to convey to complainant. They were before the Court to some extent on the hearing for preliminary restraint, in the Affidavit of Ilsley Boone (Case, pp. 17-28); but the Vice Chancellor on the final hearing excluded proof of these circumstances, although defendant had many witnesses present to prove them, and took the position that the alleged Contract C-1 was an absolute contract to convey by full warranty deed and that the proffered proofs were incompetent (Case, pp. 87-94, 98-115). But, as pointed out by Judge Wolfskeil in *Lippincott* v. *Content,* 123 N. J. Law 277, at 279, *supra,* the surrounding circumstances are or may become the guide to the intent of the parties and the ultimate solution.

See, also:

Original N. Y. Furriers v. *Williams,* 133 N. J. Eq. 524;
Bullowa v. *Thermoid Co.,* 114 N. J. Law 205;
Moran v. *Fifteenth Ward B. & L. Assn.,* 131 N. J. Eq. 361, 364, where Vice Chancellor Bigelow stated that:

"For the purpose of ascertaining the meaning of a contract, the court must consider the situation of the parties and the accompanying circumstances." (Cases cited.)

(e)

The rights of other members of the Association and property owners were also involved, and should be protected. The restrictions inured to the benefit of all.

Henderson v. *Champion,* 83 N. J. Eq. 554; *Palmer* v. *Circle Amusement Co.,* 130 N. J. Eq. 356.

(f)

"He who comes into Equity must do so with clean hands"; and "He who seeks Equity should do Equity".

If the proffered proofs were admitted, it is clear that both of the above maxims in Equity were violated by complainant. The affidavits on the preliminary hearing for restraint demonstrate it.

The circumstances shown indicate clearly complainant's untenable position in this respect, and defendant's justifiable attitude toward it. If complainant seeks to force in Equity a deed for the property he claims, he should certainly be required to conform to and abide by the terms and conditions, and rules and regulations, which were to accompany it. His demands come with ill grace in the face of his own indefensible conduct.

(g)

If the alleged contract C-1 does not correctly state the real agreement between the parties, reformation should be permitted.

Parrette v. *Citizens' &c. Co.,* 128 N. J. Eq. 206.

This rule is so well settled that extended citation of authorities would seem unwarranted.

(h)

Upon the rendering of the final decree, counsel considered the propriety of an application for a re-hearing, and appeared before the Vice Chancellor accordingly. Permission to present a petition was granted, and counsel were instructed by the Court to forward it by mail with a draft of an order to show cause with stay and leave to take proofs, and that attendance in person would not be required, his decision to await the argument of the order.

That course was followed but the Vice Chancellor thereupon denied the application (Case, pp. 37-45). His conclusions are at pages 52-56 of the State of the Case.

It is respectfully submitted that the Vice Chancellor, in the exercise of his judicial discretion, should have granted the application for a re-hearing. The Cause is in Equity, and the circumstances warrant a full hearing on the merits, in the light of which the Court's action might well be influenced adversely to granting specific performance and favorably to the leaving of the parties to their remedies at law. The very spirit of Equity is here involved.

VI.

It is respectfully submitted, therefore, that the final decree appealed from should be in all things reversed, set aside, and for nothing holden, and complainant's Bill dismissed, with costs; or that, in the alternative, the decree should be opened,

and a re-hearing of the cause directed, in accordance with the prayer of defendant.

Respectfully submitted,

LEON LEONARD,
Solicitor for and of Counsel with Defendant-Appellant.

HERVEY S. MOORE,
JOHN A. HARTPENCE,
of Counsel.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
WARD T. GULVIN,
Complainant-Respondent,
and
SUNSHINE PARK, INC.,
Defendant-Appellant.

ON BILL FOR SPECIFIC PERFORMANCE AND INJUNCTION.

W. F. SOOY, V. C.

BRIEF OF COMPLAINANT-RESPONDENT.

The respondent herein will be referred to as complainant and the appellant will be termed the defendant.

FACTS.

The following matters present no controversy.

1. The contract C-1 (Exh. Bk. p. 120) was executed June 19, 1936.

2. No other contract was executed, or presented. (Case 100, l. 14.)

3. Pursuant to C-1,—but not in accord with the terms thereof—the complainant paid defendant the sum of $187.85 on account of the purchase price of lots referred to in the contract. (See answering affidavit—Case, p. 18, l. 24.)

4. The balance of the purchase money was tendered by complainant on several occasions and refused by defendant. (Case, p. 65, l. 40; p. 66, l. 18; p. 68, l. 1.)

5. No notice was given by defendant that payments would not be accepted unless made according to the contract.

6. Pursuant to the execution of the contract C-1 the complainant erected certain cottages upon the lands in question, with the acquiescence of defendant. (Case, p. 77, l. 14.)

7. Defendant refused to convey the lots but instituted ejectment.

A BRIEF STATEMENT OF COMPLAINANT'S CASE.

The complainant's case was that under the written contract and the facts, as above stated, he was entitled to a "full warranty deed" for the lots in question upon payment of the purchase money therefor. It made no difference to complainant's rights that

he had not made the payments in manner prescribed by the contract.

Story's Equity No. 776, 1025a;

"Complainant was at least entitled to notice from defendant of a change of attitude on his part or a notice that his rights would be terminated unless he should promptly make payment of the then small final balance due."

Brown vs. Ely, 113 Atl. 698 (Leaming, V. C.);

And see *Gregg vs. Landis,* 21 N. J. Eq. 494;

And *Baltimore & N. Y. RR Co. vs. Bouvier,* 62 Atl. Rep. 876.

ARGUMENT.

The arguments advanced by defendant are herein answered using the same identifications for divisions of subject as are used in the brief of the defendant, and in the same order.

There is no issue between counsel as to the law; but the disputes will be found to be as to whether or not the law as suggested by the defendant is applicable to the facts of the case.

(a)

WAS THE CONTRACT CONDITIONAL? The defendant agreed to sell certain lots and complainant agreed to purchase, with the complainant becoming a member of American Sunbathing Association.

The contract, however, referred to another contract to be made, without specifying any terms

thereof, to be "presented" by the defendant (Exh. C-1, p. 120). The defendant contends that a condition precedent was incorporated in the contract, and that some sort of regulations were thereby imposed —none of which were specified in the contract; and none had been established. Subsequent to the execution of the contract it appears that the defendant did undertake to impose some regulations through its directors at some meeting on August 12, 1936 (Case, p. 25). Whatever was done was without notice to the complainant and other stockholders. No covenants or restrictions had been adopted or established to run with these lands. The defendant might have shown that written regulations were already established at the time of the execution of the contract, but, of course, there were none. The learned Vice Chancellor well said that oral testimony could not be offered to vary the written contract (Case, p. 107).

The defendant refers to the opinion by Judge Wolfskeil written in *Lippincott vs. Content,* 123 N.J.L. 277, to support its theory, but it is not applicable. There the suit was by a broker for commissions, based upon a contract which provided that the commissions should become "due and payable upon closing title". This court held that such provision not only fixed the time when payment of the commission should be made but that the payment depended upon the closing of the title as a condition precedent.

Complainant became a member of the association aforesaid and paid the purchase money for the lots. If any further contract was contemplated it was to be *presented* by the defendant. The complainant had nothing prescribed in that connection unless and until the defendant should present the suggested contract to him. Clearly the defendant abandoned

its job, if any, of presenting any further contract. It is difficult to see how the provision set up any condition precedent to be performed by complainant.

The defendant cites the case of *Raisler Sprinkler Co. v. Automatic &c. Co.,* 171 Atl. Rep. 214. One gets a much clearer understanding of the opinion by reading more than the meager quotation made by defendant, for it is said:

The ultimate question "is whether a contract is enforceable which is silent as to the sum, price, fee or compensation to be paid by one party as a consideration for performance by the other, and where no measure or rule of calculation is given in the contract itself" (p. 219). The trouble about enforcing the contract in that case was therefore that the price for services remained undetermined; and, as defendant states in its brief, page 9—

> "The law does not make a better contract for the parties than they choose to make for themselves."

In *Long v. Hartwell,* 34 N.J.L. 116, cited by defendant, the complainant was required by the contract of sale to submit a purchase money mortgage covering two tracts of land; and this was clearly a condition precedent to be performed before he could have a deed.

The learned Vice Chancellor considered this alleged condition very thoroughly. (Case, p. 108, l. 22, &c.)

However, the basis for refusing to deliver a deed was that complainant had been expelled as a member—as is said—for non-payment of dues. (Case, p. 101; l. 30; Exh. C-5, p. 128.) That, in fact, was the theory of the defense. (Case, p. 88, l. 26.)

(Some other reason for the alleged expulsion was suggested (Case, p. 112, l. 17); but that could have no force, since there had been no opportunity afforded complainant to defend against any charges.)

At any rate, the defendant was without right to impose any conditions whatever—by way of a further contract of some sort—because the contract, C-1, provided—

> "Upon full payment property will be conveyed by *full warranty deed.*"

WAIVER. The conduct of the defendant is quite significant. Both parties evidently considered the provision about any further contract as abandoned. Complainant was a member a long time (Case, p. 101, l. 20), paid the installments of purchase money for years and defendant accepted the same. Complainant went ahead and erected cottages upon the locus in quo and the defendant acquiesced therein. Defendant never "presented" any other form of contract whatever. Was defendant just playing with the complainant until he erected his buildings with the idea of squeezing him at the advantageous time?

There is such a thing known as the law of estoppel.

(b)

LACK OF MUTUALITY. There was none. Defendant cites *Ten Eyck vs. Maning,* 52 N. J. Eq. 47, among others. In that case the complainant had contracted to exchange property, the title to which was in his wife; and since he could not be compelled to carry out such an undertaking on his part the

remedy of specific performance was denied to the complainant. There was, of course, a lack of mutuality as to remedy.

It is not clear as to what particular portion of the contract the defendant would bring under the doctrine here sought to be applied. Perhaps it is suggested in the colloquy between the Vice Chancellor and counsel (Case, p. 110), in which counsel contended that the contract required complainant to continue his membership in the American Sunbathing Association indefinitely,—as for life. However, the contract merely required that complainant become a member, as the learned Vice Chancellor pointed out. (Case, p. 110, l. 23.)

Complainant was a member, as required. (Exh. C-8, p. 128.) That went with the purchase of the lots (Case, p. 71, l. 18). The two requirements of the complainant had been met, viz: that of becoming a member and the other which was the payment of the purchase price for the lots. In the *Ten Eyck* case, supra, Van Fleet, V. C., (at p. 49) says:

> "In every case that I can find where specific performance has been ordered a mutual remedy existed upon the contract *at the time of rendering the decree.*"

(c)

ADEQUATE REMEDY AT LAW. Complainant had no title; but he did have a contract, under which the purchase money had been paid—but out of time and without notice, however, that the vendor would cut him off unless he complied with the terms of the contract by some specified time.

"Equity abhors a penalty," more than the court of law. Complainant was without adequate defense

to the ejectment suit; but he was entitled to relief in the court of equity.

(d)

DEFENDANT SOUGHT TO PROVE "CIRCUMSTANCES". It would like to try to vary the terms of the written contract years after it was executed and performed on the part of the complainant (Defts. Brief, p. 5). The defendant had witnesses in court but propounded few questions. It decided, rather, to abandon its proofs. However, Vice Chancellor Sooy offered liberally an opportunity to defendant's counsel to file a brief as to his contentions. (Case, p. 54, l. 37; p. 114, l. 10.) Defendant's theory was too faulty. Could the complainant be bound by some verbal understanding of "circumstances" or any other verbal testimony; or could he be bound by some so called regulations which defendant had attempted to set up subsequent to the contract? These questions would have to be answered in the affirmative before the learned Vice Chancellor could be reversed; and he was correct in his conclusions. (Case, p. 55, l. 15.)

(e)

OTHER VENDEES AND MEMBERS HAD AN INTEREST. However, it is to be noticed that none of them sought to be made parties to the suit. No covenants were incorporated in any instrument to run with the lands, nor recorded; and, in fact, nothing was ever written in the way of regulations until after the contract was made; and then it is alleged to have been done among the directors, without notice to complainant or other members.

(f)

CLEAN HANDS. Under this head the defendant points out nothing specific as having been proffered as proofs and denied by the Vice Chancellor. As indicated above, the theory of the defendant was denied. Vague reference is made to affidavits used upon the preliminary hearing; but defendant points to nothing in particular to afford an opportunity for the Court to consider whether or not it could have any effective bearing upon the issues, assuming it had been proffered as defendant's proofs and overruled.

(g)

REFORMATION. It seems late to urge a claim for reformation of the contract when such idea appears nowhere in the pleadings; and even now it is not made very clear in what respect the contract should be remolded.

(h)

APPLICATION FOR A REHEARING. The application was to the discretion of the Court. The Vice Chancellor denied the application as being an effort to reopen the case for trial upon a new theory. (Case, p. 55, l. 9.)

It is urged that the final decree should not be disturbed.

Respectfully,
ELWOOD C. WEEKS,
Solicitor and of Counsel for the Complainant-Appellee.