INDEX

BILL.

(Filed April 14, 1926.)

IN CHANCERY OF NEW JERSEY.

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

The complainants, Jesse Lynn Mahaffey and Alice W. Fogg Mahaffey, his wife, of the Borough of Haddonfield, in the County of Camden, State of New Jersey, and R. Elmer Schall and Nellie A. Schall, his wife, of the City and County of Camden, State of New Jersey, respectfully show that:

FIRST CAUSE OF ACTION.

1. On September 23, 1925, complainants Jesse Lynn Mahaffey and R. Elmer Schall were seized in fee simple of all those certain tracts or parcels of land and premises in the City of Camden, in the County of Camden and State of New Jersey, bounded and described as follows:

No. 1. BEGINNING at the Southeast corner of Fifth and Linden Streets, and extending thence Eastwardly along the Southerly line of Linden Street forty feet to the middle line of party wall between Nos. 500 and 502 Linden Street, by Southwardly between the Easterly line of Fifth Street and a line parallel therewith and through the middle line of said party wall between Nos 500 and 502 Linden Street, one hundred and thirty feet to a ten feet wide alley.

TOGETHER with the free use, in common with others bordering thereon, of aforesaid alley.

No. 2. BEGINNING on the South side of Linden Street, (widened to one hundred feet) at the distance of forty feet Eastward from the East side of Fifth Street, thence Eastward on said Linden Street twenty (20) feet and extending in length or depth of that width between parallel lines at right angles to said Linden Street, Southward, one hundred and thirty feet to the North side of a certain ten feet wide alley or passageway running from Fifth to Sixth Street.

TOGETHER with and subject to the free and common use and privilege forever of said ten feet wide alley or passageway.

Being known as No. 502 Linden Street.

2. On the date last mentioned complainants entered into a certain agreement in writing with Morris A. Sarshik wherein and whereby complainants agreed to convey the said lands and premises by deed of warranty on or before March 23, 1926, to the said Morris A. Sarshik for the price or sum of $175,000 and the said Sarshik agreed to pay to complainants said purchase price of $25,000 in cash in installments as therein set forth on or before the date of settlement and the execution by said Sarshik to complainants of a first purchase money mortgage on said lands and premises in the sum of $150,000 to secure a bond of that amount payable within 5 years from the date of settlement with interest at 6 per cent. payable semi-annually, the mortgage to contain the usual terms and conditions. A true copy of said written agreement is hereunto annexed and made a part hereof.

3. At the time of the execution of the agreement the premises consisted of a hospital filled with pa-

tients and it was the expressed desire of the buyer to keep it as a going concern. The ambiguity in connection with the word "possession" was thereupon discussed, as to whether it should be a constructive possession or a possession by the buyer personally, and it was mutually agreed that the word "possession" should be interpreted as constructive possession, the sellers to have a reasonable time after settlement to vacate for which time they should be tenants of the buyer to be charged by the buyer a reasonable rent.

4. The said Sarshik has paid to the complainants in all the sum of $7500 on account of said agreement.

5. At the request of the buyer the date for settlement was extended to April 7, 1926.

6. On April 7, 1926, the complainants and defendant met at the office of Carl Kisselman in Camden and complainants tendered to said Sarshik a warwanty deed duly executed and acknowledged by complainants conveying to said Sarshik the land and premises above referred to, upon the payment by the said Sarshik of $17,500 in cash and the execution of the purchase money mortgage mentioned in the agreement and offered to turn over possession immediately and permit said Sarshik to collect from the patients for the time they were in there any occupation charges or if said Sarshik so preferred the sellers would remain and pay rent for the time necessary to get the patients out. Said Sarshik, however refused either to pay said $17,500, or to execute said mortgage or to take possession in any manner.

7. Complainants have always been ready and willing and now tender themselves ready and willing to perform their part of the said agreement, and, on being paid the remainder of said purchase money with interest and the execution and delivery of said bond and mortgage, to convey the said lands and premises to the said Sarshik by a warranty deed duly executed by complainants.

Complainants are without adequate remedy in the courts of law and therefore pray:

1. That Morris A. Sarshik who is the defendant to this suit, may answer this bill of complaint and each statement therein made.

2. That the said Morris A. Sarshik may be compelled by the decree of this Court specifically to perform the said agreement with complainants, and to pay to complainants the remainder of said purchase money with interest from the time said purchase money ought to have been paid and to deliver to complainants the bond and mortgage as in said agreement provided.

3. That in case the said defendant, Morris A. Sarshik should, within the time limited by this Court for such performance of said contract, fail and neglect, upon the tender of said deed, to pay the said remainder of said purchase money and deliver the bond and mortgage as aforesaid, that then and in that event the said sum of $167,500 together with interest and costs, may be and become a lien upon the said lands and premises in favor of the complainants, and that the said lands and premises may be sold under the direction of this Court for the satis-

faction of such lien so impressed on said lands and premises; and in case a deficiency should arise upon said sale, that the said defendant may be ordered by this Court to pay said deficiency, together with interest and costs to these complainants.

4. That a writ of subpoena may issue, commanding said defendant to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

SECOND CAUSE OF ACTION.

1. In lieu of repetition paragraphs 1, 2, 3 and 4 of the first cause of action are hereby referred to and made part hereof.

2. The parties subsequently mutually agreed that the date for settlement should be extended to April 7, 1926, and that the possession to be delivered should be a constructive possession the patients to remain until they should be properly removable, said Sarshik to collect from the patients the occupation charges or if he preferred the sellers to remain and pay a reasonable rent for the time necessary to get the patients out.

3. In lieu of repetition paragraph 6 of the first cause of action is hereby referred to and made part hereof.

Complainants are without adequate remedy in the courts of law and therefore pray:

1. That Morris A. Sarshik who is the defendant to this suit may answer the bill of complaint and each statement therein made.

2. That the said agreement may be reformed by changing the date of settlement to April 7, 1926, and by stating that the possession to be delivered should be a constructive possession, the patients to remain until they should be properly removable and said Sarshik to collect from the patients the occupation charges or if he prefers the complainants to remain and pay a reasonable rent for the time necessary to get the patients out.

3. That a writ of subpoena may issue commanding the defendant to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

FRENCH & RICHARDS,
Solicitors for and of Counsel with Complainants.

THIS AGREEMENT, made this 23rd day of September, A. D., 1925 between J. Lynn Mahaffey and Alice, his wife, and R. Elmer Schall and Nellie, his wife, parties of the first part, hereinafter called the Sellers, and Morris Sarshik of the City and County of Philadelphia and State of Pennsylvania of the second part, hereinafter called the Buyer.

Witnesseth, That the Sellers agree to sell and convey and the Buyer agrees to buy all those certain lots, tracts, or parcels of land situate in the City of Camden, County of Camden and State of New Jersey, more particularly known as 500 and 502 Linden Street, Camden, New Jersey, which land is warranted to have a frontage on Fifth Street of 130 ft. and a frontage on Linden St. of 60 ft. more or less.

The price of said premises is One Hundred Seventy-five Thousand ($175,000.) Dollars to be paid as follows:

A first payment of $2000. is to be paid at or before the execution of this Agreement, receipt of which is hereby acknowledged by the Sellers; and additional payment of $2000. is to be made within thirty days from the date hereof, at the office of Carl Kisselman, 541 Market Street, Camden, N. J., on account of the purchase price; a further additional payment of $1000. is to be made within 60 days at the same place on account of the purchase price; a further additional deposit of $2500. is to be made within 150 days at the above place on account of the purchase price.

A first purchase money mortgage of $150,000. to secure a bond of that amount, payable within 5 years from the date of settlement with interest at 6 per cent payable semi-annually; said mortgage to contain the usual terms and conditions is to be accepted by the Sellers.

The balance shall be paid in cash at the time of final settlement, which shall be made at the offices of Carl Kisselman, 541 Market Street, Camden, N. J., on or before March 23, A. D., 1926 or the deposit made herewith shall be forfeited as liquidated damages to the Seller, and not as a penalty, provided that the necessary title searches can be obtained from any first-class New Jersey title company by that date. Should there be any delay, not the fault of the buyer in procuring such searches, the time for final settlement shall extend until such searches can be obtained.

The title to the premises shall be free and clear of all restrictions and incumbrances, including municipal liens and assessments, and shall be a market-

able title, and the Sellers shall tender a general warranty deed conveying such title at the time of the final settlement, or in the event that such title cannot be as above, then this deposit shall be returned to the Buyer.

All adjustments shall be made as of the date of settlement and possession shall be given the buyer on that date.

The Buyer shall pay for searches and all other expenses excepting the preparation of the deed and the necessary revenue stamps attached thereto, which shall be paid for by the Sellers.

This Agreement shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto; and the deed hereinbefore mentioned shall name as Grantee such person or persons as may be nominated or designated by the Buyer herein and such grantee shall also execute the mortgage hereinbefore referred to.

This contract includes all fixtures and appurtenances permanently attached to the building or buildings on the land herein described, as is at signing of this agreement.

IN amplification of the fifth paragraph, first page of the within agreement, the mortgage is to contain a clause guarantying the payment by a first class bond Company in the event of the premises described in said agreement are torn down or the security impaired by material alteration affecting security of said mortgage. Said bond to be made payable to the mortgagees as named in said mortgage. Insurance in favor of the mortgagees to be carried in the amount of $75,000.

In the event that the Sellers shall be unable to deliver such title as above set forth then they shall

reimburse the Buyer to any and all extent for searches, title insurance, surveying and any other expenses incident to the purchase of the premises herein.

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

Signed, sealed and delivered
in the presence of

J. Lynn Mahaffey (LS)
Alice W. Fogg Mahaffey (LS)
R. Elmer Schall (LS)
Nellie A. Schall (LS)
Morris A. Sarshik (LS)

ANSWER.

(Filed June 20, 1926.)

IN CHANCERY OF NEW JERSEY.

Between
JESSE LYNN MAHAFFEY and ALICE W. FOGG MAHAFFEY, his wife, and R. ELMER SCHALL and NELLIE A. SCHALL, his wife,
Complainants,
and
MORRIS A. SARSHIK,
Defendant.

On Bill, &c.
Answer.

Defendant, answering the bill of complaint of complainants, says that:

DEFENSE TO FIRST CAUSE OF ACTION.

1. Paragraph one is admitted.

2. This defendant admits that he entered into a written agreement, a true copy of which is annexed to the bill of complaint.

3. This defendant admits that the premises were

used as a hospital and contained patients but denies, that he, as the buyer, expressed any desire that it be kept as a going concern. He denies that there was any ambiguity of the word "possession" or that there was any discussion relating to the meaning thereof or whether it should be a constructive or actual possession. He denies that the sellers were to have any time after the day named for settlement to vacate the premises.

4. Paragraph four is admitted.

5. Paragraph five is admitted.

6. Defendant admits that he met with complainant at the office of Carl Kisselman in Camden and that a deed was executed; he admits that he refused to take over possession of the hospital unless the same were free of patients, and admits that he refused, upon the failure of the complainants to deliver or tender possession of the premises free and clear of all encumbrances, either to pay said sum of $17,500 or to execute any mortgage.

7. Defendant denies that complainants have ever been ready and willing to tender possession in accordance with the terms of the agreement; on the contrary, defendant says that on the 7th day of April, 1926, he was ready, able and willing to perform his obligations under the agreement and offered to execute the said mortgage and to pay said sum of $17,500 provided complainants would deliver to him possession of the said premises free and clear of all liens and encumbrances.

DEFENSE TO SECOND CAUSE OF ACTION.

1. In lieu of repetition answers 1, 2, 3 and 4 of the first cause of action are hereby referred to and made a part hereof.

2. This defendant admits that it was mutually agreed between him and complainants that settlement should be extended to April 7th, 1926, but denies that there was any arrangement or agreement whereby possession to be delivered to defendant should be a constructive possession or that the patients were to remain in or upon the premises after the date of settlement.

3. In lieu of repetition the answer made to paragraph 6 of the first cause of action is hereby referred to and made a part hereof.

By way of counter-claim against complainants, defendant, Morris A. Sarshik, says that:

1. On September 23, 1925, complainants Jesse Lynn Mahaffey and R. Elmer Schall were seized in fee simple of ALL those certain tracts or parcels of land and premises in the City of Camden, in the County of Camden and State of New Jersey, bounded and described as follows:

No. 1. BEGINNING at the Southeast corner of Fifth and Linden Streets, and extending thence Eastwardly along the Southerly line of Linden Street forty feet to the middle line of party wall between Nos. 500 and 502 Linden Street, by Southwardly between the Easterly line of Fifth Street and a line parallel therewith and through the middle

line of said party wall between Nos. 500 and 502 Linden Street, one hundred and thirty feet to a ten feet wide alley.

TOGETHER with the free use, in common with others bordering thereon, of aforesaid alley.

No. 2. BEGINNING on the South side of Linden Street, (widened to one hundred feet) at the distance of forty feet Eastward from the East side of Fifth Street, thence Eastward on said Linden Street twenty (20) feet and extending in length or depth of that width between parallel lines at right angles to said Linden Street, Southward, one hundred and thirty feet to the North side of a certain ten feet wide alley or passageway running from Fifth to Sixth Street.

TOGETHER with and subject to the free and common use and privilege forever of said ten feet wide alley or passageway.

Being known as No. 502 Linden Street.

2. On the date last mentioned complainants and defendant entered into a certain agreement in writing a true copy of which is hereto annexed and made a part hereof, whereby complainants agreed to convey said land and premises to defendant upon the terms and conditions set forth in said agreement.

3. By mutual agreement the date for settlement was extended to April 7, 1926, at which time complainants and defendant met at the office of Carl Kisselman in Camden for settlement. At said time and place complainants failed, neglected and refused to deliver possession of said premises free and clear of all encumbrances although defendant at that time was ready, able and willing to perform all his obligations under said agreement.

4. At the time of the execution on September 23, 1925, of said agreement, defendant paid to defendant the sum of $2000; thereafter on the 23rd day of October, 1925, defendant paid to complainants an additional sum of $2000; on the 23rd day of November, 1925, defendant paid to complainants an additional sum of $1000; on the 23rd day of February, 1926, defendant paid to complainants a further sum of $2500.

Defendant therefore prays:

1. That complainants may answer this counterclaim and each statement herein made.

2. That complainants may be decreed to pay this defendant the said sums totalling $7500, together with interest thereon from the dates of their payments to complainants.

CARL KISSELMAN,
Solicitor of Defendant.

THIS AGREEMENT, made this 23rd day of September, A. D., 1925 between J. Lynn Mahaffey and Alice, his wife, and R. Elmer Schall and Nellie, his wife, parties of the first part, hereinafter called the Sellers, and Morris Sarshik of the City and County of Philadelphia and State of Pennsylvania of the second part, hereinafter called the Buyer.

Witnesseth, That the Sellers agree to sell and convey and the Buyer agrees to buy all those certain lots, tracts, or parcels of land situate in the City of Camden, County of Camden and State of New Jersey, more particularly known as 500 and

502 Linden Street, Camden, New Jersey, which land is warranted to have a frontage on Fifth Street of 130 ft. and a frontage on Linden St. of 60 ft. more or less.

The price of said premises is One Hundred Seventy-five Thousand ($175,000.) Dollars to be paid as follows:

A first payment of $2000. is to be paid at or before the execution of this Agreement, receipt of which is hereby acknowledged by the Sellers; and additional payment of $2000. is to be made within thirty days from the date hereof, at the office of Carl Kisselman, 541 Market Street, Camden, N. J., on account of the purchase price; a further additional payment of $1000. is to be made within 60 days at the same place on account of the purchase price; a further additional deposit of $2500. is to be made within 150 days at the above place on account of the purchase price.

A first purchase money mortgage of $150,000. to secure a bond of that amount, payable within 5 years from the date of settlement with interest at 6 per cent payable semi-annually; said mortgage to contain the usual terms and conditions is to be accepted by the Sellers.

The balance shall be paid in cash at the time of final settlement, which shall be made at the offices of Carl Kisselman, 541 Market Street, Camden, N. J., on or before March 23, A. D., 1926 or the deposit made herewith shall be forfeited as liquidated damages to the Seller, and not as a penalty, provided that the necessary title searches can be obtained from any first-class New Jersey title company by that date. Should there be any delay, not the fault of the buyer in procuring such searches, the time for final settlement shall extend until such searches can be obtained.

The title to the premises shall be free and clear of all restrictions and incumbrances, including municipal liens and assessments, and shall be a marketable title, and the Sellers shall tender a general warranty deed conveying such title at the time of the final settlement, or in the event that such title cannot be as above, then this deposit shall be returned to the Buyer.

All adjustments shall be made as of the date of settlement and possession shall be given the buyer on that date.

The Buyer shall pay for searches and all other expenses excepting the preparation of the deed and the necessary revenue stamps attached thereto, which shall be paid for by the Sellers.

This Agreement shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto; and the deed hereinbefore mentioned shall name as Grantee such person or persons as may be nominated or designated by the Buyer herein and such grantee shall also execute the mortgage hereinbefore referred to.

This contract includes all fixtures and appurtenances permanently attached to the building or buildings on the land herein described, as is at signing of this agreement.

IN amplification of the fifth paragraph, first page of the within agreement, the mortgage is to contain a clause guarantying the payment by a first class bond Company in the event of the premises described in said agreement are torn down or the security impaired by material alteration affecting security of said mortgage. Said bond to be made payable to the mortgagees as named in said mort-

gage. Insurance in favor of the mortgagees to be carried in the amount of $75,000.

In the event that the Sellers shall be unable to deliver such title as above set forth then they shall reimburse the Buyer to any and all extent for searches, title insurance, surveying and any other expenses incident to the purchase of the premises herein.

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

Signed, sealed and delivered
in the presence of
Carl Kisselman.

J. Lynn Mahaffey (LS)
Alice W. Fogg Mahaffey (LS)
R. Elmer Schall (LS)
Nellie A. Schall (LS)
Morris A. Sarshik (LS)

REPLICATION.

(Filed August 18, 1926.)
60-496

IN CHANCERY OF NEW JERSEY.

Between
JESSE LYNN MAHAFFEY, *et al.*,
Complainants,
and
MORRIS A. SARSHIK,
Defendant.

On Bill, &c.
Replication.

The complainants join issue on the answer of the defendant.

As to the counter-claim contained in said answer complainants say:

1. Paragraph 1 is admitted.

2. Paragraph 2 is admitted.

3. The first sentence in paragraph 3 is admitted and the rest of the paragraph is denied.

4. Paragraph 4 is admitted.

FRENCH & RICHARDS,
Solicitors of Complainants.

ORDER REFERENCE TO VICE-CHANCELLOR.

(Filed August 31, 1926.)

IN CHANCERY OF NEW JERSEY.

Between JESSE LYNN MAHAFFEY, *et al.*, *Complainants,* and MORRIS A. SARSHIK, *Defendant.*	Order Reference to Vice-Chancellor.

It is on this 31st day of August nineteen hundred and twenty-six on motion of French & Richards, of counsel with the complainants, ordered that the above-stated cause be referred to E. B. Leaming, one of the Vice Chancellors of this Court, to hear the same for the Chancellor, and to report thereon to him, and advise what order or decree should be made therein.

E. R. WALKER,
C.

I consent to the above order.

CARL KISSELMAN,
Solicitor for Defendant

NOTICE OF APPLICATION FOR DESIGNATION.

(Filed September 13, 1926.)

IN CHANCERY OF NEW JERSEY.

Between JESSE LYNN MAHAFFEY, *et al.*, *Complainants,* and MORRIS A. SARSHIK, *Defendant.*	On Bill, &c. Notice of Application for Designation.

To Carl Kisselman, Esq., Solicitor for Defendant:

Take notice that on the thirteenth day of September, 1926, at 10 o'clock in the forenoon, daylight saving time, or as soon thereafter as counsel can be heard thereon, before Hon. Edmund B. Leaming, the Vice-Chancellor, to whom the above-stated cause has been referred, we shall make application to have a time and place fixed for the final hearing of the above-stated cause.

FRENCH & RICHARDS,
Solicitors for Complainants.

[ENDORSED]

Service Acknowledged September 8, 1926.

Carl Kisselman,
Solicitor for Defendant.

NOTICE OF HEARING.

(Filed September 22, 1926.)
60-496

IN CHANCERY OF NEW JERSEY.

Between
JESSE LYNN MAHAFFEY,
et al.,
Complainants,
and
MORRIS A. SARSHIK,
Defendant.

On Bill, &c.
Notice of Hearing.

Sir:

Take notice of the final hearing of the above-stated cause before Hon. Edmund B. Leaming, the Vice-Chancellor, to whom the same has been referred, at the Chancery Chambers in Camden, New Jersey, on the 21st day of September, 1926, at 10 o'clock in the forenoon, daylight saving time, or as soon thereafter as counsel can be heard thereon.

FRENCH & RICHARDS,
Solicitors for Complainants.

To Carl Kisselman, Esq.,
Solicitor for Defendant.

[ENDORSED]

Service acknowledged.
Carl Kisselman,
Solicitor for Defendant.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between
JESSE LYNN MAHAFFEY, *et al.*,
Complainants,
and
MORRIS A. SARSHIK,
Defendant.

On Bill, etc.
Testimony.

September 21, 1926.

LEAMING, V. C.

APPEARANCES:
FRENCH & RICHARDS, ESQS., for complainants.
PATRICK H. HARDING, ESQ., CARL KISSELMAN, ESQ., for defendant.

Mr. Kisselman: I would like to amend the counter-claim, if the Court please, by adding this paragraph. "Defendant avers that said agreement by its conditions does not give to the complainant

the right of specific performance, it being provided therein that 'The balance shall be paid in cash at the time of final settlement, which shall be made at the offices of Carl Kisselman, 541 Market Street, Camden, N. J., on or before March 23, A. D. 1926, or the deposit made herewith shall be forfeited as liquidated damages to the seller and not as a penalty.' Said provision giving the defendant at his option privilege of either forfeiting the deposit paid under said agreement or making settlement under the terms of said agreement."

The Court: That you wish inserted as a fifth paragraph to your cross-petition. Any objection?

Mr. Richards: No objection, if the Court please. I assume our original replication needs no amendment in view of that.

The Court: Proceed.

WILBER J. MCALLISTER, sworn.

By Mr. Richards:

Q. Mr. McAllister, you have been sworn?
A. I have, sir.
Q. Were you present on September 23, 1925, at the office of J. R. Tucker in Camden?
A. I was.
Q. It has been admitted in the pleadings that an agreement, a copy of which is attached to the bill, was signed at that time. Will you tell us what happened immediately after the signing?

Mr. Kisselman: I object, if the Court please.

Mr. Richards: We want to show waiver and estoppel by subsequent actions. I think the cases are numerous to the effect that anything can be waived, a man can waive his constitutional rights, waive his statutory rights, contract rights——

The Court: I will let you introduce the testimony subject to the objection and see what it is. If it is anything in the nature of a waiver we will treat it as such and pass upon its admissibility. If it is a new agreement, or something explanatory of the agreement, or supplemented to it, then we will——

Mr. Richards: We don't claim a supplemental agreement. If I were reframing the pleadings I should put it clearly waiver and estoppel rather than supplemental agreement, but I will ask Mr. McAllister now to tell us what happened after——

The Court: I don't recall anything in your bill that partakes of that nature.

Mr. Richards: Well, we have in the second cause of action set forth in our bill set forth the facts and have prayed for a reformation. My thought is now it needs no reformation, that those facts show a clear case of waiver and estoppel and the facts are not admitted and I think we ought to be permitted to prove them.

The Court: Where does your bill set out anything in the nature of an estoppel or waiver?

Mr. Richards: The third paragraph of the first count.

The Court: The second?

Mr. Richards: The third paragraph of the first count.

The Court: That relates to the time of the execution of the agreement, not to any subsequent waiver.

Mr. Richards: "It was thereupon"—that was after the execution of the agreement. If there is any doubt about what the word "thereupon" means I would like to change it to the word "afterward."

The Court: Your paragraph reads, "At the time of the execution of the agreement the premises consisted of a hospital with patients, and it was the expressed desire of the buyer to keep it as a going concern." Now, that was at the time of the execution of the agreement. "The ambiguity of the word 'possession' was thereupon discussed"—that was at the time of the execution of the agreement.

Mr. Richards: I would like to change that to "immediately afterwards" if there is any doubt about it.

The Court: think that is the meat of the cocoanut. If you meant thereafter discussed surely you should say so.

Mr. Richards: There has been no doubt about it, because in the testimony that has been taken and everything that has happened the fact that it was afterwards was clearly discussed. There can't be any surprise to counsel if we change the word "Thereupon" to "immediately thereafter."

The Court: Have you any objection to that modification?

Mr Kisselman: No, sir.

Mr. Richards: (To the stenographer.) Now, repeat the question, Mr. Stenographer.

Mr. Kisselman: I renew my objection.

The Court: The testimony will be received subject to your objection and its effect passed upon later.

The Witness: Dr. Mahaffey asked Mr. Sarshik what he wanted to do about the possession of the property.

The Court: Wait a moment. Mahaffey is the complainant?

Mr. Richards: One of the complainants, yes, sir.

The Witness: That he had patients in the hospital and he wanted to know what he wanted him to do with them, whether he was to arrange to get them out, and they spoke about the fixtures, beds, and all the apparatus to operate a hospital, and he wanted to know what to do. Mr. Sarshik wasn't much of a talker but he did say that he wanted him to continue on, it would be all right, he would have a length of time, and a rental could be arranged that would be satisfactory between the parties. Dr. Mahaffey then spoke at length further, and I remember at the time I had the impression that it had been discussed before, and I was anxious to get away—I had an en-

gagement that was long past due—and they repeated again the substance of the remarks after the agreement was signed.

The Court: I wish you would state that over again in your own language about what you said about the rental. It didn't appeal to me as very definite. Can you make it any clearer then you have already stated?

The Witness: There wasn't any definite rental at any time spoken about.

The Court: What was said about rental? Confine yourself to what was said after the agreement was signed.

The Witness: That is all I can say that was said after the agreement was signed.

The Court: What was that?

The Witness: Dr. Mahaffey asked Mr. Sarshik what he could rely on as to the possession of the property, whether he was to continue to operate it or whether Mr. Sarshik was to continue to operate it, and Mr. Sarshik said, "Continue on, you will have time to get out, and then a rental can be determined on."

The Court: "Time to get out." What did he mean by that?

The Witness: After the settlement.

Q. Was anything more definitely said, Mr. McAllister, as to the length of time that the parties would have to vacate after the settlement?

A. I want to qualify that in this way, that the same thing that was discussed after the agreement was signed and we were all together was the same thing that had been discussed and talked about prior to it.

The Court: We don't want anything prior.

Q. We want to know what was stated afterwards, the time they were to have after settlement to vacate?

A. There was a question of months discussed—at the moment I don't recall just how long that period was—but there was a matter of months. I can't say anything unless I say something about what happened prior to it.

Q. You can't tell that. But it was a matter of months?

A. It was a matter of months.

Q. Do you recall whether 30, 60 or 90 days was mentioned?

Mr. Kisselman: It seems to me that is rather leading.

The Witness: I think it was more of months, one or two months, something like that was said rather than days.

The Court: Do I understand the defendant said that the complainant need not have the property vacated at time of settlement? Was that distinctly said?

The Witness: That was distinctly said, yes, sir.

Q. Were you also present, Mr. McAllister, on April 7, 1926, at the office of Carl Kisselman?

A. I was.

Q. Who else were there?

A. Mr. Kisselman, Dr. Mahaffey, Mrs. Mahaffey, Dr. Schall, Mrs. Schall, Mr. Brown came in and out of the room— he was in Mr. Kisselman's office, Mr. Sarshik came in later, and myself.

Q. Will you tell us what happened?

A. We had the deed there ready to have it signed and delivered, it wasn't dated, and I don't think the consideration was named in it, but it was all drawn ready for execution and delivery, and we waited some time and Mr. Sarshik finally came in and we said we were ready for settlement—in fact, some of the figures had been arranged, and Mr. Sarshik came in and Mr. Sarshik asked whether or not the property was vacated, and we told him no it was not vacated, there were patients in there, and he said he had a purchaser for the property the next day to make settlement if he could give actual possession and we told him we would give him possession and let him collect the rents from the patients from the time we made settlement and make an adjustment on that basis, and he asked how long it would take to get them out and Dr. Mahaffey said he couldn't get them out in a day and he asked him if he was ready for settlement and he said he would if he could have the property vacated by the next day and we told him that was impossible and there had been no request to vacate the property up to that time even though the extension of the time of settlement had been granted. We said there was nothing else to do but to tender the deed, and the deed was then filled out as to date and executed by all the parties, Dr. Mahaffey and his wife, and Dr. Schall and his

wife, and tendered to Mr. Sarshik, and Mr. Kisselman then carried out the tender and asked Mr. Sarshik whether he had the money and he produced the money and that was the end.

The Court: Did he make that as his only reason for not accepting the deed, that the property was not vacated?

The Witness: Yes, that was his only reason. Mr. Kisselman had asked him whether it was because he hadn't the money and Mr. Sarshik brought a roll of notes out, an indication that he had the money.

Q. I don't know whether you have covered it or not. Was an offer made to deposit the deed with the title company to be held by them while the property was being vacated?

Mr. Kisselman: If the Court please, that seems to me to be objectionable, whether an offer was made to deposit the money with the title company.

The Court: I think it may be shown what occurred.

The Witness: Yes, that was my suggestion. I suggested to Mr. Kisselman that they might deposit the money at the title company—I suggested the West Jersey Title Company—and we would leave the deed there and so soon as Dr. Mahaffey and Dr. Schall were able to give actual possession, minus the patients or tenants in the property, that then the deed could be delivered to them and the money turned over to Drs. Mahaffey and Schall.

Q. What reply did Mr. Kisselman and Mr. Sarshik make to that?

A. No, that they wanted to take possession of the property to make delivery for the settlement expected to be had the next day.

Q. Was there attention called to the fact that Mr. Sarshik had previously said he wouldn't require possession at that time?

A. That was discussed. Dr. Mahaffey and Mrs. Mahaffey spoke about that.

Q. In Mr. Sarshik's presence?

The Court: What did they say, how was that spoken about? What did they say?

The Witness: Dr. Mahaffey and Mrs. Mahaffey reminded Mr. Sarshik that there was no understanding at any time he wanted actual possession. He wanted him to continue on in possession of the property and run it as a hospital.

Q. What did Mr. Sarshik say?

A. He said no he hadn't said anything about that.

By the Court:

Q. Did anybody else at the time chip in on the subject?

A. Dr. Schall did a little talking, but I don't know that it was much. Dr. Mahaffey and Mrs. Mahaffey did the discussing of the question the same as they had done previous to the signing of the agreement.

Q. What was your position in the matter at the time, who did you represent?

A. I represented Dr. Mahaffey and Dr. Schall in passing on the agreement of sale.

By Mr. Richards:

Q. The agreement of sale was prepared by Mr. Kisselman, wasn't it?

A. Yes.

By the Court:

Q. Didn't you say anything when Dr. Mahaffey made that statement and it was denied by the defendant?

A. At this last meeting?

Q. Yes.

A. I don't recall that I did.

Cross-examination.

By Mr. Kisselman:

Q. Mr. McAllister, what is your business?

A. Conveyancer.

Q. You represented Dr. Mahaffey and Dr. Schall in this transaction, didn't you?

A. I did.

Q. While the agreement was prepared in my office you approved it and made certain changes, didn't you?

A. I did.

Q. Do you have a copy of the agreement, do you have Dr. Mahaffey's copy of the agreement?

A. I don't have to, no.

Mr. Kisselman: Do you have it, Mr. Richards?

Mr. Richards: Haven't you a copy of it there?

Q. Yes, I will use mine. That is the original agreement, isn't it? (Showing witness paper.)

A. It is.

Mr. Kisselman: I ask that it be marked for identification.

(Said paper marked D1 for identification.)

Q. Now, Mr. McAllister, what changes did you make in that agreement after it was drawn?
A. I suggested several changes.
Q. They were made, weren't they?
A. They were made, yes.
Q. What were the changes which you made?
A. "More or less."
Q. "More or less" what did that refer to?
A. As to the size of the property, the size of the lot.
Q. In other words, not being certain the dimensions mentioned in the agreement were absolutely correct you had inserted after the paragraph the words "more or less" so there would be no question about it?
A. That is right.
Q. What else?
A. Then at the bottom of the second page, next to the last paragraph, as to the fixtures, inserting the following, "As is at signing of this agreement."
Q. What was the purpose of that change?
A. Because there had been a discussion as to the question of taking over the equipment of the hospital itself and that wasn't to be included in the sales price.
Q. In other words, Dr. Mahaffey and Dr. Schall were to take with them when they vacated the property the hospital equipment?
A. Right.

Q. Were there any other changes?

A. The paragraph following that. The last paragraph on page 2 was inserted entirely.

Q. What condition was that clause to cover?

A. In case property was to be torn down or materially altered there would be a bond given to the mortgagees, which were to be Dr. Mahaffey and Dr. Schall, guaranteeing the replacement of the building.

Q. In other words, that was to protect them as mortgagees because the mortgages formed part of the purchase price, is that right?

A. Yes.

Q. In other words, you went over that agreement very carefully to protect their interests?

A. Not as carefully as I would like to have done. I asked for the agreement several days before that that I might have it properly digested.

Q. You had the agreement, didn't you?

A. Not days before, no.

Q. You made those changes?

A. I only saw them at the time, that afternoon at the office.

Q. You went over the agreement?

A. Yes.

Q. And that was your purpose there?

A. Exactly.

Q. Whatever you thought ought to be changed was changed?

A. Yes, sir.

Q. Anything that was questionable in your mind was changed so as to be made certain?

A. No.

Q. You were there representing them, weren't you?

A. I was.

Q. As a matter of fact, that is what you were being paid for, I assume?

A. Exactly.

Q. Did you suggest any changes in there that weren't made?

A. The question about this very thing that we are talking about, possession, was a matter that was discussed at some length as to what was to be done, what was the intention of the parties.

Q. Before the signing of the agreement?

A. Before the signing of the agreement.

Q. Why didn't you change it?

A. Because there was so many references there that would lead anyone to believe that it was a matter of good faith that it would be continued on that I let it go.

Q. What about the other changes you made, the size of the property, the question as to the demolition clause, and the clause relating to the equipment in the hospital, why didn't you take them as a matter of good faith?

A. You wouldn't take those things as a matter of good faith.

Q. Why not?

A. Because there was no discussion as to those, that they didn't want to take those as an ambiguous situation.

Q. Was there any ambiguity about which property Mr. Sarshik was buying?

A. No, but there was a question as to the size of the lot.

Q. And there was some discussion about it?

A. There was.

Q. Was the matter of possession of this hospital very important to either party?

A. Apparently it was not.

Q. It was not important?

A. No.

Q. Why not?

A. Because it was a going proposition and Mr. Mahaffey was willing to sell it either as a going proposition or he was willing to close it, and Mr. Sarshik was willing to take it as a going proposition, seemed to be more willing than not.

Q. As a matter of fact, the discussion which you had related to possession, didn't it?

A. Exactly.

Q. And therefore was important, wasn't it?

A. What I might term occupational possession, which I had suggested at the time, said I had put that in agreements and had put it in agreements where there was a question of wanting and taking actual physical possession of the property without anybody in it, I had been in the habit of putting occupational possession in there and that was waived aside for the reason that Mr. Sarshik had said he might sell the property to someone who would run it as a hospital and therefore it would be important it be going as a hospital when he took possession.

Q. Then, of course, you knew there was some question as to what Mr. Sarshik was going to do with the property?

A. Only as implied by that statement.

Q. You knew he was a speculator?

A. Yes, sir.

Q. And you knew he bought the property as a matter of speculation?

A. Yes.

Q. And that he might buy it one day and sell it the next, depending on the market?

A. Yes, sir.

Q. That was understood among all the parties?

A. Yes.

Q. You knew he might keep it, rebuild it, or do almost anything so he could make money out of it?

A. Yes.

Q. All these negotiations were taking place and the agreement was signed during what we called the boom period, the real estate boom?

A. Yes, that is true.

Q. Did they discuss the matter of rental?

A. They did, and there was no determination.

The Court: As to amount, you mean?

The Witness: As to amount.

Q. Now, as a matter of fact, this was quite a long term settlement, wasn't it?

A. Yes.

Q. And the reason for that was so that Dr. Mahaffey could vacate the hospital, wasn't that so?

A. No.

Q. Well, when they spoke about possession you said that Dr. Mahaffey said he would have to have some time to get out, is that true?

A. Yes, he would want to know plenty of time ahead.

Q. He was given six months, wasn't he, in this settlement?

A. No, the purchaser asked for six months.

The Court: What?

The Witness: The purchaser asked for six months.

Q. Isn't it true that the only question involved was whether or not there might be some chronic trouble,

some patient suffering from a chronic trouble, that might prevent him from getting out?

A. It wasn't discussed then, it was in your office.

Q. I am speaking at the time of settlement?

A. No, it wasn't then.

Q. What arrangements were made for the removal of the equipment?

A. No arrangements as I recall.

Q. Do you know anything about the value of the equipment?

A. I do not.

Q. Was Mr. Sarshik to have the use of the equipment in the hospital in case it was taken over as a going concern?

A. There was a discussion about he might buy it if he sold it to someone who would run it as a hospital. That would be a separate transaction.

Q. Within what time would that take place?

A. So soon as Mr. Sarshik would notify Dr. Mahaffey.

Q. Did he actually say that in so many words?

A. He said he would notify Dr. Mahaffey when he had made sale of the property. That was at the time of the signing of the agreement.

Q. Did he say anything about buying the equipment?

A. He said he wasn't interested in buying it because he wasn't interested in running a hospital.

By Mr. Richards:

Q. Mr. McAllister, was the time for settlement, March 23, 1926, in the agreement when it came to you from Mr. Kisselman?

A. It was to be a six months agreement.

Q. That is the original typing of the agreement as it came to you?

A. Yes.

Q. Do you know whether or not Dr. Mahaffey wanted an earlier time than that?

A. They discussed—no, not so much about time, an earlier time, that I recall.

DR. J. LYNN MAHAFFEY, sworn.

By Mr. Richards:

Q. Doctor, you are one of the complainants in this case?

A. I am.

Q. Were you present at the office of J. R. Tucker in Camden on September 23, 1925?

A. I was.

Q. Who else was present?

A. Dr. Schall, his wife, my wife, Mr. McAllister, Mr. Myers——

Q. Are you sure about Mr. Schall's wife being present?

A. No, she was present at Mr. Kisselman's office, not present originally. Mr. Myers, and Mr. Marple.

Q. Was Mr. Marple there all the time?

A. In and out, not continually. Mr. Tubas was there, in and out, he wasn't there the whole time.

Q. It is admitted in the pleadings in this case that at that time and place an agreement, a copy of which is attached to the bill, was executed.

A. Mr. Sarshik was there, he was in and out.

Q. Was it your request or Sarshik's that six months intervene between the signing of the contract and settlement?

A. I had nothing to do with the writing of the

contract or agreement, that was brought to me by Mr. Myers. I complained very much about the down payment and also complained about the length of time the affair was to run from the time of the first payment until the final payment, but Myers told me that was the agreement and Sarshik would do that or nothing.

The Court: I think I would go into nothing prior to the execution of the agreement. That speaks for itself. Any modification of that afterwards by parol you may introduce subject to the objection of the defense.

Q. Doctor, after the agreement was signed how long did the parties remain in Tucker's office?

A. Oh, a very few minutes until someone got in touch with Mr. Sarshik and had him come back into the room.

Q. And in that time after the agreement was executed what conversation did you have with Mr. Sarshik about vacating the property?

A. I went to Dr. Schall and to Mr. McAllister and said we couldn't give possession at the time of settlement because the character of the business made it so we would simply have to sell out or junk the place pending a settlement and it didn't seem fair to me we ought to give possession on the day of settlement because we didn't know whether he would settle or not.

Q. What conversation did you have with Sarshik about it?

A. I told him that and he said that was all right, he had nothing definite to do with the place, he bought it purely on speculation and that some amicable agreement could be made about leasing the place to us.

Q. Did he mention any time you should have to vacate?

A. He spoke about 30, 60 or 90 days would be given to us to vacate in case he had a purchaser for it.

Q. After that time did he notify you of any change in his plans or any desire on his part to have the patients removed or the premises vacated before settlement?

A. None whatever.

Q. How did it happen you all met for settlement on April 7, 1926, instead of March 23rd?

A. Mr. Sarshik's office 'phoned me, or someone from his office 'phoned me and said the time didn't suit him and wanted to know if he could have ten day's extension from March 23rd, and someone, either from his office——

Q. First, did you over the telephone say that would be all right?

A. I thought that would be all right and told him so over the 'phone.

Q. Go ahead.

A. A ten-day extension was granted, and I got a second call deferring the time to April 7th, and I agreed to that.

Q. This was all oral?

A. Yes.

Q. On April 7th where did you meet?

A. Mr. Kisselman's office.

Q. Who else was present?

A. Dr. Schall and his wife, my wife, Mr. McAllister, I don't know whether Mr. Myers was there that day or not, I don't remember it.

Q. Mr. Kisselman?

A. Yes, of course, and Mr. Sarshik was there.

Q. Generally, what was said and done?

A. Well, of course, we came for settlement and expected to have settlement made but Mr. Sarshik said, "Doctor, your place is not vacated," and I said, "No," and he said, "That is a surprise to me, I expected the place to be free of patients today," and I said, "No, we had an agreement that we would have a reasonable time to vacate and at the time you said you were humane and would allow us a reasonable time to get our patients out."

Q. What did he say?

A. He said he didn't understand it that way at all, he felt as though he had to have possession of it because the day following he had a resale of the place at a handsome profit and he must have possession of it so he could give possession to the new purchaser the day following.

Q. What else happened; tell us the whole thing.

A. I don't know anything about tendering a deed, but I know Mr. McAllister had whatever was necessary to complete the sale, and he went through the formalities they do in cases of that kind.

Q. Was any offer made to turn over the hospital, patients and all?

A. I said, "We are not in the position under the circumstances to get rid of the patients,"—I thought there was some legal phase of the matter that we couldn't get rid of them in such short notice, quite some patients were quite sick, couldn't be removed immediately, and Mr. McAllister suggested we deposit the deed at some title company in town and later on the deed be delivered to the purchaser.

Q. Were either of those propositions accepted by Mr. Sarshik?

A. Neither one accepted, no.

Q. Do you recall anything else of moment that happened at that meeting?

A. Mr. Kisselman asked Mr. Sarshik if he had the money and he promptly went in his pocket and pulled out a roll of something, I don't know whether it was money or not, he didn't expose it very long, and he simply said he had the money there and put it back in his pocket again. It may not have been money at all for all I know.

Cross-examination.

By Mr. Kisselman:

Q. Dr. Mahaffey, did you sign an extension agreement, you and Dr. Schall?
A. We may have, I don't know.
Q. Did you or didn't you sign that?
A. Yes, I signed that.

Mr. Kisselman: I ask that that be marked.

(Said paper marked Exhibit D-2 for identification.)

The Court: What is it, an extension?

Mr. Kisselman: Yes, that is the extension agreement.

Q. As I understand you, Dr. Mahaffey, between the time of the execution of the agreement and the time of the extension agreement there had been discussions or questions relating to the possession of the hospital?
A. None except just before.

The Court: Just before what?

The Witness: Just before I guess you call it final settlement.

The Court: That is, at the meeting for final settlement?

The Witness: Yes.

Q. You say there wasn't a discussion between the time of the signing of the agreement and the time the extension agreement was signed?

A. We began a discussion, Dr. Schall and I, at the time of the meeting at Mr. Tucker's office.

Q. You didn't ask them anything relating to its being put in the extension agreement, did you?

A. In the extension agreement?

Q. Yes.

A. No, I didn't know anything about that.

Q. You had discussed the matter before the extension was signed, hadn't you?

A. No, I didn't notice anything about possession until the time of settlement.

Q. There was some discussion of it immediately after the signing of the agreement, wasn't there?

A. I guess I have got the settlement agreement mixed——

Q. I mean the first paper that was signed in Mr. Tucker's office. Do I understand you to say that immediately following the signing of that first agreement there was some discussion relating to the possession of the property?

A. Yes, that is what I mean to say.

Q. There was some discussion then?

A. Yes.

Q. Then you got this extension, that was the next paper that was signed?

A. I signed that, yes, sir.

Q. There was nothing put in there to change the original agreement, was there?

A. Not that I know of.

Q. You had read the first agreement, hadn't you?

A. I had.

Q. And fairly familiar with the terms of it?

A. Fairly familiar.

Q. You knew that Mr. Sarshik was a real estate man and had bought the place for speculation, didn't you?

A. I suppose so.

Q. You thought so?

A. I did think so.

Q. And you were selling it as a speculation, because according to your testimony you didn't know whether settlement was going to be made or not?

A. That is correct.

Q. You knew it was a very active market, didn't you?

A. Yes.

Q. As a matter of fact, you were already engaged in speculating a little bit, weren't you?

A. If I must confess, I was.

Q. It was what we call a boom, wasn't it?

A. Yes.

Q. Prices fluctuating every day?

A. Yes, they didn't stay the same every day.

Q. Properties would be sold for 100 per cent. profit the day after they were bought?

A. True.

Q. This conversation which you say you had with Mr. Sarshik immediately following the signing of the first agreement was the only discussion you ever had relating to possession, is that right?

A. That is the only discussion I remember about this.

Q. You never subsequently to the signing of that agreement go to Mr. Sarshik and say, "Let's agree on the rental," or anything of that sort?

A. No.

Q. Never wrote him?

A. No.

Q. Never called him on the 'phone about it?

A. No.

Q. Never sent anybody to him to make an amicable arrangement about leasing the place?

A. No.

Q. Doctor, did you ever stop accepting patients in the hospital?

A. We did not.

Q. You were in no better position, so far as patients were concerned, on the day of settlement than you were on the day the first agreement was signed?

A. Miss Burke was told——

Q. What?

A. I told her she had to be extremely careful taking in patients; beyond 90 days past this settlement date, she ought not to take any patients.

Q. You are still in possession of the hospital?

A. Yes, sir.

Q. Accepting patients every day?

A. Every day.

Q. And at the time the settlement was had at my office isn't it true you said you didn't know how long it would take to vacate the hospital?

A. I didn't mean to say that. I think I could arrange to have the hospital vacated in a reasonable time.

Q. You said that, didn't you, when Mr. McAllister suggested that the money be deposited with the title company and the question was raised as to how long it would take?

A. I couldn't fix a certain date.
Q. And you couldn't fix it within 60 days?
A. Yes, I could do that, yes.
Q. Now, who are operating the hospital there?
A. Dr. Schall and myself.
Q. Were all the patients in there your patients?
A. No.
Q. Whose patients were they?
A. Practically every doctor in town has had patients there.
Q. They were there under their care?
A. Yes.
Q. And the length of time that the patients remained in the hospital depended on the opinion of the doctor who was attending as to how long they ought to remain there, isn't that so, who had the patient under his surveillance or charge and when he regarded the patient cured or thought they ought to go home they went home?
A. Yes.
Q. What control did you have over the patients, if any?
A. You mean relative to nursing?
Q. Regarding your occupation of the hospital how far did your jurisdiction go to seeing whether they had to come in or go out?
A. The doctors themselves, as I said before, determined when their patients should go, but by giving notice to them we could have patients who were not extremely ill removed or even chronics could be removed in time if given a reasonable time.
Q. No patient there had any definite time for remaining there when he went in?
A. No, I don't think so.
Q. Do I understand it you told Mr. Sarshik you couldn't get out on the day of settlement at the dis-

cussion you had the first time you signed the agreement?

A. The main thing I had in mind was the fact Mr. Sarshik may not settle and the hospital would be vacant and it might not be possible to rebuild the business. In other words, we would simply vacate the hospital or junk it pending the settlement, and it didn't seem fair to me.

Q. You had $7500 of his money?

A. Not at that time.

Q. I mean before settlement?

A. Yes.

Q. Now, Doctor, do you remember when I examined you before Mr. Berry at my office?

A. I remember the examination, yes.

Q. Do you remember me asking you this question: "Now, regardless of the reason, what did you mean when you said you would be unable to deliver possession? A. As I stated before, we could not simply vacate the place pending settlement." Do you recall that?

A. I don't recall it but that is the sense of the whole thing.

Q. You won't say you didn't say that?

A. No.

Q. Do you recall this: "That is what you meant by possession, didn't you? A. Yes, I suppose possession meant he would take full charge at a certain time; that is my version of possession." Isn't that right, Doctor?

A. That is right. By possession I thought it meant ownership, to own the building.

Q. Doctor, about the question of an amicable arrangement for leasing the place, at the time you talked with Mr. Sarshik at the meeting in Mr. Tucker's office was there any definite arrangement

made as to how the rent was to be arrived at or was that left hanging in the air?

A. Left hanging in the air.

Q. And before any arrangement could be made the wishes of the patients in the hospital and the doctors in charge of them would have to be consulted?

A. There would have to be some thought given to them, surely.

Q. If Mr. Sarshik had taken over the hospital at the time of settlement, as you suggest he might, with whom would he have had to arrange for rent?

A. What?

Q. With whom would he have had to arrange for rent, who would pay him rent?

A. I presume the rent would come from the people who occupied the hospital.

Q. In other words, he would have to go to each individual who occupied the hospital?

A. That is my thought. I don't know where he would get the income from.

Q. Doctor, you have never vacated this hospital at all at any time since the signing of the first agreement?

A. No, sir.

DR. ELMER SCHALL, sworn.

By Mr. Richards:

Q. Dr. Schall, you are one of the complainants in this case?

A. Yes, sir.

Q. Were you present at Tucker's office on September 23, 1925?

A. Yes, sir.

Q. After the agreement was executed what conversation was had with Mr. Sarshik about the kind of possession he wanted?

A. The question was brought up by Dr. Mahaffey whether he could run the hospital for some time after the actual settlement and he said he might; he said he had no use for the hospital, he bought it for speculation, and the matter was brought up as to how much time we could have and he said it didn't matter to him we could have 30, 60 or 90 days.

The Court: After settlement?

The Witness: After settlement.

Q. Were you also present at Mr. Kisselman's office on April 7, 1926?

A. Yes, sir.

Q. Generally what was said and done there?

A. Well, we went there to complete the settlement and Mr. Sarshik wasn't there at the time so we waited quite a while and finally Mr. Sarshik came and Mr. McAllister had the deed and Mr. Sarshik asked if the hospital was empty and we told him it was not, and then they talked a while, and he said he didn't want it unless it was vacated and I asked him if he was a man of his word and he said he was, and I said, "Didn't you promise you would give us 30, 60 or 90 days after the settlement to vacate?" and he said he didn't remember that. Then Mr. McAllister put the deed on the table and told him that the deed was there for delivery and then we couldn't agree on that—that is, Mr. Sarshik wouldn't accept it.

Q. Wouldn't accept it; you mean patients and all?

A. Yes.

Q. Was anything said about the deposit of the deed and the money with the title company?

A. Yes, sir, Mr. McAllister suggested that but Mr. Sarshik wouldn't hear to that.

Cross-examination.

By Mr. Kisselman:

Q. In other words, by that you mean, Dr. Schall, Mr. Sarshik would pay out the money into the hands of the title company, the mortgage would be executed and the interest on the $150,000 worth of mortgages continue to run to your credit and he would have to wait until you were able to get the patients out before he would get possession?

A. It was agreed he should have a rental for the time while we used the hospital.

Q. What rental was arranged?

A. No price fixed, it was an open question.

Q. Do you remember signing an affidavit in the suit in the New Jersey Supreme Court arising out of this same transaction?

A. Beg pardon.

Q. Do you remember signing an affidavit, I assume it was signed at the office of French & Richards, before Joseph L. Thomas, a master in Chancery, in the case which was in the New Jersey Supreme Court arising out of this same transaction, do you recall signing such an affidavit?

A. I don't know.

Mr. Richards: Perhaps it will refresh the Doctor's mind if I tell him it was on a proposed application for summary judgment in the Supreme Court.

Q. Do you remember in this affidavit: "The rental for this additional time needed to vacate, as I understood it, was to be arrived at, if possible, by agreement with Mr. Sarshik, but if we could not agree it would be what a court and jury would say was a reasonable rental or charge for use and occupation, having in mind business conditions and rentals in general." Did you sign that?

A. Yes.

Q. In other words, if it became necessary to fix a rental you would go to court for it?

A. Well, I am not versed in legal matters, I don't know.

Q. In other words, there had been no definite arrangements made?

A. There was no definite arrangement for the price of the rental.

Q. In other words, it was your idea if you couldn't get together you would have to go to court?

A. No, if we couldn't get together we would have to leave it for adjustment to a third party.

Q. There was no arrangement to submit it to arbitration?

A. No.

Q. That was something you simply assumed?

A. I am no lawyer.

Q. Doctor, do you remember being examined by me before Mr. Berry, a Supreme Court Commissioner

A. Yes, sir.

Q. Do you remember these questions: "On the settlement day named in the agreement, March 23, 1926, you were in no position to deliver the hospital free of patients, were you? A. No."

A. Yes, sir.

Q. As a matter of fact, you never intended to until

you were sure that the settlement was going through, did you? A. No." Is that true?

A. That is true.

Q. Now, Doctor, if you had commenced to rid the hospital of its patients immediately after the signing of the agreement you would have had ample time before settlement?

A. Yes.

Q. There would have been no trouble about that, would there?

A. I think not.

Q. As I gather it you simply kept accepting patients from time to time right from the time of the signing of the agreement until today?

A. No, we gave our superintendent instructions not to book patients that would be admitted 90 days after day of settlement.

Q. After they got in there your jurisdiction over them ended, didn't it?

A. So far as I would say, yes.

Q. In other words, the doctors who had charge of the patients were the ones who were to say how long they were to stay?

A. We never made any request from those doctors.

Q. The doctors who had charge of the various patients were the ones who controlled as to whether they should come in or out of the hospital, isn't that true?

A. Yes, sir.

Q. Was Miss Burkey to remain at the hospital?

A. What do you mean?

Q. In the event that an amicable arrangement was arranged about rental what would happen to Miss Burkey?

A. We never made any arrangements with her in regard to that. As long as we ran the hospital and

she proved satisfactory I suppose she would have remained.

Q. You say you gave her orders not to admit patients who would be obliged to continue in the hospital for over 90 days. Suppose they did, who would have charge of them? Suppose the patient had a chronic trouble which required treatment for longer than 90 days?

A. If we had gotten patients of that kind I suppose we would have had to made some adjustments.

Q. But in that case you would have had no longer any connection with the matter, would you?

A. What do you mean?

Q. You were to give up possession at the end of 90 days, weren't you?

A. Yes.

Q. At the end of 90 days if there was a patient in the hospital——

A. We accepted all patients from that time on as to closing 90 days after the date of settlement.

Q. Doctor, suppose a patient had to stay there, suppose a patient was seriously ill, couldn't be removed—you do have patients like that once in a while?

A. Sometimes.

Q. Had you decided on any arrangement in that event?

A. We gave her instructions——

Q. I asked you what you would do if that were the situation?

A. Well, we would have to meet it like any other situation that came up, I suppose.

Q. Doctor, how many patients are there in the hospital today?

A. I don't know.

Q. Can you approximate it?

A. I judge about twenty, but I don't know. They vary from day to day.

Q. Your interest in the hospital is one-half interest, isn't it?

A. One-half interest.

Q. And you sold it just the same as Dr. Mahaffey did, as a speculation?

A. Yes.

Q. Like Dr. Mahaffey and some of the others you engaged in some speculation yourself, haven't you?

A. A little.

Q. And the reason you wouldn't vacate the hospital before settlement was because you wanted to make sure settlement was going through, is that the reason?

A. Yes, sir.

Q. And in the event settlement didn't go through it was your idea the amount of deposit paid would act as liquidated damages and that would close the picture, is that right?

Mr. Richards: If the Court please, I don't think it makes any difference.

The Court: I think that is proper cross-examination, Mr. Richards. I think it goes to the testimony that is given.

Q. Answer that please.

A. I would say that we had no other recourse.

Q. Now, Doctor, if you were relying on the certainty of that settlement going through before you would vacate the hospital you assumed there would be no other recourse, didn't you?

A. No, I didn't assume anything.

Q. If you assumed there was some other recourse

you could have vacated the hospital and had that recourse without staying there, couldn't you?

A. There are circumstances that alter cases.

Q. I didn't ask that, Doctor. (To the stenographer.) Repeat that question, please.

(Question repeated.)

A. Yes.

Q. And the situation boils itself down to this: You were gambling whether that settlement was going through or not and if you won you won $7500., isn't that the situation exactly?

A. No.

Q. Doctor, the agreement was he would either make settlement or pay you $7500., wasn't it?

A. No, that wasn't the agreement.

Mr. Richards: The agreement speaks for itself, if the Court pleases, and I object to counsel asking for an interpretation of it.

Q. That was your understanding of it?

Mr. Richards: I object.

The Court: I think it is proper cross-examination; I think it goes to the whole testimony.

The Witness: That question again.

(Question repeated.)

A. Now, that $7500 was to be a payment.

Q. Doctor, listen while I read from the agreement. "The balance shall be paid in cash at the time of final settlement, which shall be made at the

office of Carl Kisselman, 541 Market Street, Camden, N. J., on or before March 23, 1926, or the deposit made herewith shall be forfeited as liquidated damages to the seller." When you say you didn't intend to vacate the hospital until you were sure that settlement was going through you meant in case the settlement wouldn't go through you would have the hospital and have the $7500., and that would end the situation as far as you were concerned, isn't that true?

Mr. Richards: I don't think it is fair to ask this witness who signed that agreement——

The Court: I guess he will have to answer the question, I think it is proper cross-examination.

Q. Answer the question.

A. Yes.

Q. Doctor, further on in my cross-examination before trial, in my office, before Mr. Berry, do you remember the following questions and answers: "You still own and operate the hospital, Doctor? A. Yes."

A. Yes, sir.

Q. "Are there patients in there now? A. Yes." Is that correct?

A. Yes.

Q. "Is the hospital filled? A. Pretty well filled up. How long would it take you to empty the hospital of its patients now? A. I couldn't tell you." Is that correct?

A. Correct.

Q. "Approximately? A. Well, that is a pretty hard thing to say. It might be thirty days, it might be longer." Is that correct?

A. Correct.

Q. Now, at the time of the settlement in my office, Dr. Schall, Mr. Sarshik requested the return of his money, didn't he?

A. I don't know, Mr. Kisselman.

Q. Did he intimate at all he would ask for it at that time?

A. He didn't that I heard.

Q. Is it not true that the object of this suit was to forestall the suit which Mr. Sarshik started in the New Jersey Supreme Court for the recovery of the $7500. he had paid to you?

A. No, I wouldn't say it was.

Q. You anticipated that suit, didn't you?

A. We had papers in reference to it.

By Mr. Richards:

Q. Doctor, you hadn't any knowledge that when you authorized this suit for specific performance that a subsequent suit would be brought by Mr. Sarshik against you, had you?

A. No.

Mr. Kisselman: If the Court please, that is leading. This is Mr. Richards' witness.

The Court: I think it is pretty suggestive. As a matter of fact, was the specific performance suit before the damage suit.

Mr. Richards: Yes, it was started, and we asked Mr. Kisselman to acknowledge service and he replied with a refusal and immediately the next day

The Court: I don't think it makes any difference, though.

Q. The patients in this hospital are largely confinement cases, aren't they?

Mr. Kisselman: If the Court please, that is leading again.

The Court: I think it is rebuttal to what you were inquiring into, as to how long it would take to vacate.

The Witness: A great number of them.

Q. Such a case takes about two weeks, doesn't it?
A. Yes, sir.
Q. You haven't any doubt but what the Cooper Hospital, or some other hospital, would come to your relief in case there were cases that couldn't be kept there?
A. No, I have not.

By Mr. Kisselman:

Q. Doctor, it is true, isn't it, you don't know what half the patients are in there for?
A. Well, I wouldn't say; I don't know what they are in for.
Q. You have only personal knowledge of those cases which are your own?
A. Just my own cases.
Q. What proportion of the patients in the hospital are yours?
A. Well, I can't give the proportion.

Q. How many patients have you of your own in the hospital now?

A. I don't think any at the present time. I beg pardon, I believe I have two that were admitted yesterday.

Q. As a matter of fact, the hospital has about how many patients altogether in there?

A. We run from twenty to twenty-eight. I don't know how many are in today.

Q. Doctor, you accept there at your hospital any kind of a proper case that any other physician sees fit to bring to the hospital, isn't that true?

A. Any outside of contagious diseases.

Q. Doctor, as a matter of fact, there are a great many different kinds of ailments outside of contagious diseases which are of long duration and need confinement in a hospital for a long period of time?

A. It depends on what you call a long period.

Q. Of two or three months?

A. No.

Q. What about an accident case where a man has a broken clavicle, broken femur and broken tibia?

A. That would be ten weeks with no complications.

Q. What about a man with a severe concussion of the brain, a man with any kind of brain trouble, which isn't contagious, it might take any amount of time, wouldn't it?

A. I can't answer that question.

J. Lynn Mahaffey, recalled.

By Mr. Richards:

Q. Doctor, the fact has been mentioned that a greater part of the patients in the hospital are confinement cases and are quickly out of the hospital. Do you happen to know whether or not you could get any other patients in at the Cooper Hospital?

A. Oh, I could, yes.

Q. What official position have you at the Cooper?

A. I have been chief of the medical department there, I think, for fifteen or sixteen years.

Cross-examination.

By Mr. Kisselman:

Q. Doctor, your right to that opinion would depend on the doctor in charge?

A. Practically all cases could be removed.

Q. The question of whether you would have a right to remove them would be whether the doctor in charge of the patient would want them moved?

A. I think if the sale had been made and I knew

——

Q. I didn't ask that. You can tell me whether your right to move a patient depends on whether the physician in charge of that particular patient wants him moved? Assume for a moment you had a physician who had a patient in the hospital who didn't want him moved to the Cooper, what would be the situation then?

A. The situation is this, any physician in the town if he knew the place had been sold——

Q. I am assuming as a matter of fact that the physician doesn't want that patient moved?

A. The legal phase I don't know anything about. I don't know how, legally, we could get him to move. There would be no reason why he couldn't be moved.

Q. Suppose the patient is in a comatic state?

A. He would be either well inside of——

Q. Let us assume he was in a comatic state and the doctor doesn't want him moved?

A. The coma itself ends in a short time or the man doesn't get well. A man in a coma would be able to be moved in a week or ten days after the coma period or he would be dead. The very minute he is in coma it would be risky to move him.

Q. You wouldn't move him if the doctor didn't want him moved? You say it is risky; you wouldn't take the chance of moving the man?

A. No, not in coma, of course.

ALICE MAHAFFEY, sworn.

By Mr. Richards:

Q. Mrs. Mahaffey, were you present on September 23, 1925, at Tucker's office in Camden when the agreement was signed with Morris Sarshik for this property?

A. I was.

Q. Now, immediately after the settlement will you tell us what discussion took place concerning the kind of possession which Mr. Sarshik required?

A. Well, as soon as they signed Dr. Mahaffey said, "It is impossible to close a proposition like

this without giving us some time to close, we can't close this business down in a day," and Mr. Sarshik said he understood that and he said, "Suppose we have some very ill patient, someone it is impossible to move," and Mr. Sarshik made the remark he was humane and wouldn't require anyone to be removed that wasn't able to be. Then they discussed how they might—if they could move them in any reasonable time, and Dr. Mahaffey said he was on the staff at the Cooper and he was friends with most of the men there and he felt sure they could be moved in a shorter time than 30, 60 or 90 days, but that he would like to have that time in order to get everything settled up and straightened and turn it over without any patients but if Mr. Sarshik wanted to purchase with the patients that was all right with Dr. Mahaffey but if he didn't why, Dr. Mahaffey wanted that length of time, and he said——

Q. By "he" you mean?

A. Mr. Sarshik said he was absolutely willing for Dr. Mahaffey to continue 30, 60 or 90 days, and he said, "Do you think you can move the patients in that time?" and Dr. Mahaffey said, "I am connected with the Cooper Hospital and I don't think there will be any question about the patients being removed."

Q. Were you present on April 7, 1926, at Mr. Kisselman's office?

A. I was.

Q. Tell us generally in a few words what happened.

A. Well, Mr. Schall, Dr. Mahaffey, Dr. Schall, Mr. Myers and myself went there and Mr. Kisselman was there and Mr. Sarshik hadn't arrived, he was a little bit late, but finally he appeared and he talked with Mr. Kisselman for a few minutes and

then they came in and they said to Dr. Mahaffey, "Are you ready to give possession over immediately, can you give us possession immediately," and they were very much surprised, they said no they couldn't give them immediate possession, and he said, "Your agreement calls for immediate possession," and he said, "We talked about this as soon as we signed and we told you we couldn't give you immediate possession," and Mr. McAllister, he was with us, too, and he said, "Yes, we told you we couldn't give immediate possession and you said that was all right," and Mr. Sarshik said he didn't want the property then, he wanted immediate possession, and Mr. Kisselman asked him if he had the money and he said yes he had the money, but I didn't see the money, I didn't see any money at all. He made no offer to give us the money but we did give the deed.

Q. The executed deed?

A. Yes, the executed deed.

Q. Was there an offer made to turn over to Mr. Sarshik the hospital, patients and all?

A. Yes, we said to him, "Well, you can have possession there now, patients and everything," and he said he didn't want that.

Q. Was anything said about depositing the deed or the money with the title company while the property was vacated?

A. Yes, and he wouldn't accept that proposition, either.

Cross-examination.

By Mr. Kisselman:

Q. You said in this conversation which took place at Mr. Tucker's office, took place immediately after the agreement was signed, is that right?

A. Mr. Kisselman, we talked about it before, at the time, and right after, the whole time. That is where the whole discussion was about the possession of this property.

Q. It all took place practically the same time?

A. Yes, that is really why we took so much time to talk so much about it. Mr. Sarshik was in and out constantly and he would come back——

Q. In and out of the room?

A. Yes, he would go in the building and come back to this room where we were and that was practically the whole discussion.

Q. As I understand it, in your conversation you said at the time of settlement there might be some cases in there which couldn't be moved, and in that case you would require a longer period of time to vacate the hospital than the date of settlement, is that right?

A. We felt, in fact knew, that inside of 30, 60 or 90 days every patient in there could be moved because of Dr. Mahaffey's connection with the Cooper Hospital. We knew they could be taken there and Mr. Sarshik made the remark he was a humane person and wouldn't demand any patient to be moved that was in a critical condition.

Q. In other words, when the time of settlement came along and a patient in there was in a critical condition he would give any time to move that patient up to 30, 60 or 90 days?

A. When he said he was humane, I suppose that is what he meant.

EDGAR MYERS, sworn.

By Mr. Richards:

Q. Mr. Myers, you are now in the automobile business?

A. I am.

Q. Were you formerly connected with the real estate office of J. R. Tucker?

A. I was.

Q. Did you negotiate the sale for 500, 502 Linden Street from Drs. Mahaffey and Schall to Morris Sarshik?

A. Yes.

Q. Were you present on September 23, 1925, at the office of Mr. Tucker when the parties signed the agreement?

A. I was.

Q. Immediately after the signing of that agreement, tell us what took place.

A. There was a discussion—it happened I was one of the parties in and out, everything was up in the air down there, and I would come in and out—but there was a discussion there as to the length of time, not the exact length of time, that Mr. Sarshik would give Dr. Mahaffey to vacate the property, and before the agreement was signed——

Q. Never mind that.

A. There was some discussion. I don't know word for word what it was, but it was along the line of vacating the property.

Q. Confine yourself to after the agreement. You know there was a discussion of the length of time that Dr. Mahaffey and Dr. Schall would have to vacate after settlement?

A. I don't know the exact length of time.

Q. But you know a time was discussed?

A. They talked about it.

Q. Do you recall what Mr. Sarshik said in connection with it?

A. Mr. Sarshik didn't have a lot to say there. Mr. Sarshik was in and out, but he did say as Mrs. Mahaffey testified that he was human about this thing.

Q. You mean humane?

A. Humane about the removal of the patients, but I don't know the particular time.

Q. But you know they were to have a time?

A. There was a discussion about a time.

Q. In which Mr. Sarshik acquiesced?

A. I am not positive of that. He seemed agreeable.

Cross-examination.

By Mr. Kisselman:

Q. You can't say he did agree to give any extension of time?

A. It was discussed there.

Q. You can't say he did agree to give any extension of time?

A. No, other than as I testified before.

Q. That he would be humane. The discussion revolved about the possibility of a patient being in a critical condition, is that it?

A. I don't recall that. All I recall is there was quite a long discussion after the agreement was signed with reference to an extension of time, and as I say, I was in and out at times, but apparently Mr. Sarshik was agreeable on it.

Q. You didn't know that any agreement was made?

A. I didn't know that any definite agreement was made.

By Mr. Richards:

Q. Did you hear 30, 60 or 90 days mentioned?

A. I did not, Mr. Richards.

Q. Did you hear months mentioned?

A. There might have been months mentioned.

RAYMOND MARPLE, sworn.

By Mr. Richards:

Q. Mr. Marple, were you formerly connected with Tucker's office?

A. I was.

Q. Were you present all or part of the time on September 23, 1925, at Tucker's office after the agreement of sale was signed for the Bellevue Hospital?

A. Just part of the time.

Q. In that time you were in and out, were you?

A. In and out.

Q. Did you hear any discussion between the parties as to the length of time the sellers should have to vacate the property after the date of settlement?

A. There was a discussion about it, yes.

Q. Can you recall what you heard of that discussion?

A. I don't recall just the exact time specified, but I knew there was some time brought out, and I understood there was to be some sort of a rental paid for that time.

Q. A reasonable time and a reasonable rental?
A. A reasonable time and a reasonable rental.

The Court: You had better let the witness testify, Mr. Richards.

Mr. Richards: Apparently, that is already covered. Cross-examine.

Cross-examination.

By Mr. Kisselman:

Q. Did you hear the word "humane" mentioned?
A. Yes.
Q. Was that occasioned by the fact that Dr. Mahaffey or somebody there spoke about the possibility of a patient being there in a critical condition and couldn't be moved on the day of settlement?
A. Yes, Mr. Sarshik said he had considerable experience himself and he wanted to be humane.
Q. Experience in having been a patient in the hospital?
A. Yes.

FLORENCE N. BURKEY, sworn.

By Mr. Richards:

Q. Miss Burkey, you are the superintendent of the Bellevue Hospital?
A. Yes, Mr. Richards.
Q. You learned, did you not, that there had been an agreement of sale for the Bellevue Hospital made

in September, 1925?

A. Yes, Mr. Richards.

Q. Now, after that time, did you have occasion to consult Mr. Sarshik, the purchaser, as to what your duties would be or what your rights would be after settlement?

A. As an individual I went to Mr. Sarshik as the next owner of the property to see whether I might rent it from him and run the hospital myself. Dr. Mahaffey and Dr. Schall didn't know I went to see Mr. Sarshik.

The Court: Didn't know what?

The Witness: I went to see Mr. Sarshik. I went as an individual.

Q. You didn't tell them beforehand?

A. No, sir, because it was my own business. Mr. Sarshik was the new owner and I went to see him in that capacity and Mr. Sarshik told me he would be very decent with me——

Mr. Kisselman: There is no question pending.

The Court: You may ask what he told her.

Q. I intended to. Will you state what the conversation was?

A. Mr. Sarshik asked me what rent I could afford to pay and I said I thought the question was up to him, and he said at least $10,000, and I said I couldn't consider it, and he asked me to think it over and I did, but I never went back. My idea was to rent the building, not the equipment, which I understood still belonged to Dr. Mahaffey and Dr. Schall.

Q. You told him also——

The Court: Let the witness testify, it sounds a great deal better.

Q. Did you or didn't you tell him you were then the present superintendent of the hospital?

A. I think Mr. Sarshik understood that. I made the appointment on the telephone and said that I was.

Q. What conversation, if any, did you have with him as to what you should do in the taking on or off the patients?

A. I didn't consult Mr. Sarshik about that, that wasn't my business. We simply talked about things in general and Mr. Sarshik said he would do all he could for me but so far as taking patients were concerned Mr. Sarshik had nothing whatever to do with it.

Q. Did you discuss with him the meaning of the word "possession?"

A. I did say, "I wonder what it means," and he said, "Possession means immediately," but again he used that word, only he said, "I am not inhumane," I remember that. It is a double negative but I remember it.

Q. Do you recall, Miss Burkey, about what time it was you had this conversation with Mr. Sarshik?

A. I don't know exactly, but I think it was the end of February, because it was after the supposedly final payment was made.

Q. The latter part of February, 1926?

A. I think so; I am not certain about that.

Q. You couldn't be far wrong in that, a week or two either way?

A. I know Mr. Sarshik was leaving for Atlantic City if that will fix the date.

Cross-examination.

By Mr. Kisselman:

Q. Miss Burkey, how long have you been superintendent at the hospital?

A. Since March, 1921.

Q. 1921?

A. Yes.

Q. You are employed by who?

A. Dr. Mahaffey and Dr. Schall.

Q. When did you first learn the hospital had been sold?

A. The end of last September.

Q. How did you find out, who told you?

A. I just heard it.

Q. Who did you hear it through?

A. As it happened I was in Atlantic City when the first agreement was made and when I came back some of the nurses told me.

Q. Did you ever see the agreement?

A. No, it was none of my business.

Q. Had you any idea what provisions it contained?

A. Nothing, except all during the winter I kept saying, "How long may we take patients?" because our work is mostly maternity and women register anywhere from three to six months in advance, and my idea was to be honorable with the patients and not take them in if we couldn't carry on.

Q. Is that how you came to discuss possession with Mr. Sarshik?

A. I felt I would like to carry on the hospital myself if it were going out of business. It is a good business and I wanted to try it.

Q. Why did you ask him what possession meant?

A. Nobody seemed to give me any answer about it. I kept taking in patients and I didn't feel it was right.

Q. Did you ask Dr. Mahaffey or Dr. Schall?

A. Yes, and they both said, "That is all arranged for, Mr. Sarshik said that will be all right."

Q. When you talked to Mr. Sarshik, I understand he said it meant immediate possession?

A. He said, "In the law it means immediately."

Q. As I understand from your conversation, Dr. Mahaffey and Dr. Schall didn't know the meaning of possession according to their statement to you?

A. They did know, but they said that was all arranged; it was all sort of casual.

Q. Why did you ask Mr. Sarshik about it if you thought it had been arranged?

A. I thought he would know.

Q. Did you report back to Dr. Mahaffey and Dr. Schall what he said?

A. I don't know that I reported that conversation.

Q. You told him possession meant immediately and he said it?

A. No.

Q. Might have?

A. It is likely and just as likely I didn't.

Q. If it was definite in Dr. Schall's and Dr. Mahaffey's mind that the question of possession wasn't material or it had been determined, why did you ask Mr. Sarshik about it?

A. I think I answered you. I desired his opinion about it as well as the others. I was asking everybody.

Q. Why were you so anxious about it, Miss Burkey?

A. It would mean I would have to be in a position to take it over and begin to pay the rent of

$10,000 a year, but I couldn't afford the $10,000. I knew the income and I knew I couldn't pay $10,000.

Q. It was definitely fixed in your mind that possession meant immediately?

A. Well, no, he said that but he also said the other.

Q. What did you have in your mind as a fair rental in case you took it?

A. I don't believe I had thought about it. Everything was up in the air.

Q. Had you talked it over with Dr. Mahaffey and Dr. Schall?

A. No, I hadn't at all.

Q. It was entirely separate?

A. They were absolutely certain the deal was going through.

Q. They were certain?

A. Yes, at least, that was my impression.

Q. Did they say so to you?

A. No, they are not in the habit of discussing their personal matters with me.

Q. You, in no way, represented them in your visit to Mr. Sarshik?

A. Absolutely no.

Q. Did you know they were interested in getting an extension beyond the day of settlement?

A. Nothing, except I had to ask questions, I had to refuse patients. I was constantly refusing patients and answering questions from various physicians, "How long are you going to be here?" and I didn't know.

Q. In other words, there was nothing definite at all?

A. No, except the 30 or 60 days beyond the final settlement.

Q. When did you first tell Dr. Mahaffey and Dr. Schall that you had spoken with Mr. Sarshik?

A. The first time I saw them, probably, after I came back.

Q. When was that, if you recall?

A. I don't know, because it depends whether or not they have patients in the hospital when they came in, it may have been the next day or week.

Q. Do you know whether it was before the date of settlement or not?

A. No, I do not.

Q. Wasn't there any connection in your own mind about Mr. Sarshik saying that possession meant immediate possession at the time of settlement and the statement made by Dr. Schall, that a definite arrangement had been made?

A. I thought it was a joint agreement, which doesn't go in the law, of course.

Q. Didn't it clash in your mind at all?

A. No, not at all. I was just interested, myself.

Q. Did you know of any arrangement whereby Drs. Schall and Mahaffey were to continue to run the hospital under a lease arrangement with Mr. Sarshik subsequent to the time of settlement?

A. That was my impression, this arrangement could be made and they could rent it long enough to enable them to close out the business as a hospital.

Q. Is that the reason you went there, to try to arrange for that settlement for yourself?

A. After that was all completed my idea was, if I could afford it, to rent the building from Mr. Sarshik and the equipment from the owners and carry on the business.

Q. Mr. Sarshik had told you he wasn't the owner?

A. I mean Mr. Sarshik when I say the owner.

Q. In your direct examination you said something

to the effect he would see what he could do for you?

A. Mr. Sarshik, he wasn't alone in this, but he had a good deal of influence.

Mr. Richards: If the Court please, our only other witness was not present at the first meeting but was at the last. I think there has been enough cumulative testimony, probably, on what happened at the last meeting, unless your Honor thinks we ought to call her.

The Court: I haven't any thoughts on the subject, it is up to you.

Mr. Richards: We rest.

COMPLAINANTS REST.

The Court: Make your defense.

THE CASE FOR THE DEFENDANT.

MORRIS A. SARSHIK, sworn.

By Mr. Kisselman:

Q. Mr. Sarshik, you are the defendant in this case?

A. I am.

Q. And the person who executed the agreement which has been marked for identification?

A. Yes, sir.

Q. Now, you have heard the testimony here this morning as to a conversation which is alleged to have taken place immediately following the execution of the agreement in Mr. Tucker's office—do you recall the signing of that agreement?

A. Yes, I do.

Q. At that time, did you say to Dr. Mahaffey, Dr. Schall or Mrs. Mahaffey, that you would give them 30, 60 or 90 days after settlement in which to vacate the property and that an amicable rental could be agreed upon?

A. No.

Q. Did you have any conversation relating to possession at all?

A. No, it was an understood fact that possession would be required.

Q. Was there something in your conversation relating to a patient who might not be able to be removed, or something of that sort?

A. The only subject of conversation was the question that in case there was a patient with a chronic disease or an illness that took an unreasonable length of time and they couldn't remove that patient in time for the final settlement whether that would be all right if they kept him there for a week or two weeks, or something, as would be required, and I told each I was humane and I wasn't going to stand in the way of anybody suffering unreasonably.

Q. Was that at the time the agreement was signed, immediately before, or immediately after, or about the same time, or when was that?

A. All the conversation took place right about the time the agreement took place.

Q. The parties were all there at the same time?

A. Yes.

Q. Was there ever any question as to the meaning of possession in the agreement?

A. No.

Q. Always an understood fact as far as you were concerned?

A. Yes.

Q. Did you insist on immediate possession at the time of the settlement in my office?

A. Yes, because I had resold the building to a syndicate and I had given them the same terms and conditions I had in my agreement and one of those terms was that possession was required on the day of settlement, and they had told me they either wanted it that day or not at all.

Q. At that time, you bought this property as a speculation?

A. Yes.

Q. What was the condition of the real estate market in Camden at that time, active or inactive?

A. There was a very inflated and active market at that time.

Q. Was time an important feature in real estate transactions at that time?

A. Absolutely.

Q. At the time of settlement, were you in position to go through had possession been tendered you in accordance with the terms of the agreement?

A. I was in position to go through in as far as the money end was concerned. I asked for possession and it couldn't be granted to me.

Q. Did anyone get in touch with you regarding possession at any time, subsequent to the signing of the agreement?

A. No.

Q. No attempt to arrange rentals or things of that kind?

A. No.

Q. Did you know any of the doctors who were in charge of the patients in the hospital?

A. No.

Q. Did you know any of the patients?

A. No.

Q. Did you keep any watch or check-up on the office at the hospital?

A. No.

Q. Was there any agreement on your part or any statement on your part, that they were to continue in possession of the hospital and make an amicable arrangement with you for rental after that?

A. No.

Q. At the time of settlement, did they tender possession to you, actual possession?

A. No possession was offered to me.

Q. Did they discuss anything with you after the signing of the agreement as to the hospital equipment?

A. It was mentioned in the agreement and it was an understood fact that since they were dispensing with the hospital business that all the equipment pertaining to the operation of the hospital was to belong to them.

Q. You had nothing to do with that?

A. No.

Q. Do you know anything about operating a hospital?

A. No.

Q. Had you any interest in operating a hospital?

A. No.

Q. Had you any clients or persons who were interested in running a hospital?

A. No.

Q. Now, this is the agreement that was signed by you, isn't it?

A. Yes.

Q. And these corrections which are in a darker colored ink than the rest of the agreement, were made after the agreement was originally drawn?

A. Yes.

Q. Do you know on whose request they were made?

A. Mr. McAllister's.

Q. Representing who?

A. The sellers.

Mr. Kisselman: I offer that in evidence.

(Said paper marked Exhibit D1.)

Cross-examination.

By Mr. Richards:

Q. Mr. Sarshik, you remember being examined as a witness before trial before Mr. Berry, a Supreme Court Commissioner?

A. Yes.

Q. Do you remember me asking you this question: "Then you never told Miss Burkey to go ahead and book the patients? A. No, I don't remember having made such a statement." Do you remember that question and answer?

A. Yes, sir.

Q. Do you remember the next: "You might, mightn't you? A. I don't remember?"

A. Yes, sir.

Q. Next: "I didn't ask you that; you might have

made that statement, mightn't you? A. I may have, yes?"

A. Yes, sir.

Q. Mr. Sarshik, you say you discussed with these folks after the agreement was made, the matter of getting rid of a chronic patient when settlement came and that you told them that you were humane. How were you going to give possession to these people you say were going to buy if there happened to be chronic patients in there

A. I had mentioned before my understanding with my purchasers was the same as I had myself.

Q. You mean that they were to be humane?

A. No, they were to buy the property under the same terms and conditions I bought it.

Q. That is, they were to be humane and there was to be a reasonable time to get the patients out?

A. No, not to get the patients out, but in case that was required.

Q. It would be humane?

A. Yes.

Q. They tendered you a deed at the time of settlement, didn't they?

A. Yes.

Q. And so far as you know, you had no objection to that?

A. No.

Q. They tendered you the hospital, patients and all, didn't they?

A. Yes.

Q. Did you accept it?

A. No.

Q. Did they offer to deposit the deed and you deposit the money with the title company while they vacated the property?

A. Yes, I believe they did?

Q. Did you accept that offer?
A. No.
Q. Are you willing and able to now, Mr. Sarshik, to carry out your agreement
A. No. Pardon me, I thought you had finished.
Q. Upon their delivering to you possession of the property empty of its patients?

Mr. Kisselman: I object, if the Court please. There is no requirement of the defendant to do that.

The Court: I don't think it is material whether he is able to. He certainly isn't willing. I don't think it makes any difference whether he is able to. I think that is immaterial, and the fact he is defending the suit shows he isn't willing.

Q. You are unwilling, as a matter of fact, to take the hospital, patients and all, or take it vacant, aren't you, Mr. Sarshik?

Mr. Kisselman: If the Court please——

The Court: He may ask it in that form.

A. I am unwilling.
Q. Either way?
A. Yes.

By the Court:

Q. I wanted to ask you, how long was it before the day for final settlement that you had found a purchaser to whom you could sell the property, how long had it been?
A. About four months. As a matter of fact, it

was announced in the Camden papers that the building had been resold, and so forth.

Q. Now, did you ever tell either Dr. Mahaffey or Dr. Schall you had found a purchaser who would require possession?

A. They had known it.

Q. Did you advise them of it?

A. No, it was mentioned in the papers the building was going to be torn down and a great improvement was going to take place and so forth.

Mr. Kisselman: We rest.

The Court: Any rebuttal, Mr. Richards?

Mr. Richards: We rest.

BOTH SIDES REST.

The Court: I will hear counsel.

ARGUMENTS.

CONCLUSION.

(Filed Sept. 29, 1926.)

IN CHANCERY OF NEW JERSEY.

Between
JESSE LYNN MAHAFFEY,
Complainant,
and
MORRIS A. SARSHIK,
Defendant.

On Bill, etc.

FRENCH & RICHARDS, ESQS., for complainant.
PATRICK H. HARDING, ESQ., CARL KISSELMAN, ESQ., for defendant.

LEAMING, V. C.

I am unable to see how a decree of specific performance can be refused on any view that may be taken of the case. The defendant agreed absolutely to purchase this property for the specified amount and it is the duty of a court of equity to enforce that agreement unless there is some reason why it should not be enforced. Of course, no testimony can be admitted of an agreement between the parties other than the written agreement, that is perfectly well known by everybody, but there is no

doubt of the right of any party to a written contract to so demean himself as to deny himself the privilege of objecting to a condition that his own conduct has brought about. If it be true, as is claimed, that the purchaser of this property after the agreement had been executed, led the sellers to believe that it wouldn't be necessary on the day of settlement for them to deliver complete physical possession of this property but that if defendant then did not want the hospital as a going concern, the sellers could have a reasonable time, referred to as 60 or 90 days, to remove the patients after the time for settlement; if it be true, I say, that the purchaser led the sellers to believe that, obviously he couldn't refuse to take the property because the patients were still in the property at the time agreed upon to settle. It isn't a question of making a new agreement or a question of enforcing a new agreement, or a question of the modification of the written agreement; it is simply a question of equitable estoppel. If one leads me to believe that I shall be privileged to do a certain thing he can't afterwards equitably object that I did it, or if he leads me to believe that I need not do a certain thing he can't object that I didn't do it. So if it be true that the purchaser of this property led the sellers to believe that it wouldn't be necessary for them to close down the hospital business and remove the patients from the building before the day for settlement he can't equitably come before the Court at this time and justify his refusal to take property on the ground that they didn't do what he had told them it wouldn't be necessary for them to do.

Now, what is the evidence touching that fact? The defendant herein, the purchaser of the property, says, that he didn't make that sort of an

agreement, that he didn't tell his vendors that they could have 60 or 90 days in which to remove the patients after the time fixed for settlement. But on the other hand, the testimony is overwhelming to the contrary. Now, the defendant may be ever so sincere and ever so honest in his recollection of what he told them, he may at this time believe that what he told them was confined to the possibility of some patient being in the hospital who couldn't be promptly removed. I say, he may be ever so sincere and honest in his recollection of that fact, but the testimony before this Court by the mouths of several other witnesses is overwhelming to the contrary. Several of those witnesses unite in the uniform statement that he said that possession need not be delivered, so far as the patients were concerned, at the time of settlement, that he said that he didn't know what sort of purchaser he might find, whether he would find a purchaser who would wish a going concern in the nature of a hospital or whether he might find a purchaser who would like an early possession, and that they could go ahead with their hospital business and that they could have what was a reasonable time thereafter to remove the patients, which reasonable time was understood in the discussion to be 60 or 90 days. Now, with this overwhelming amount of affirmative testimony to that effect, it is impossible for me to find, or for any jury to find, as a fact, that that is not true. It is, under all the rules of evidence, an established fact in this case, that the defendant did lead the owners of this property to believe that they wouldn't be required to vacate the property of its patients at the time of settlement and could have a reasonable time, which was estimated to be 60 or 90 days after that time, for that purpose. The matter of

adjustment, or the method of adjustment in the meantime for the delay and delivering possession wasn't definitely fixed or determined upon, according to the testimony, but it was understood that the property would be taken over as a going concern, with the patients in it, or it would be equitably determined between the parties what a proper and appropriate rent would be for whatever time was necessary after the day of settlement to rid the hospital of its patients. Now, those are the facts of the case as the testimony overwhelmingly establishes them, and under the circumstances it is not in the power of defendant, by reason of the well-known rule of equitable estoppel, to come here and make as a defense for non-performance, the claim that his vendors failed to do the very thing he led them to believe they need not do.

But there is to my mind even a broader view to be taken of this case, which necessarily leads to a decree for specific performance. It is well established that where time is not the essence of a contract for the sale of real estate the mere circumstance that the seller may not be able to deliver possession on the day fixed for settlement, or may not be able to make a perfect title on that day, will not deny the seller the right to enforce his contract if within a reasonable time he can do so, that is complete his title or complete his delivery of possession. A purchaser is bound to submit to a reasonable delay. He can, if the contract is not performed by the seller on the very day, make time the essence of the contract by the process of notice, but, in the absence of that, time will not be deemed the essence of the contract. Again the purchaser may not have the money on the day fixed for its payment, but the law does not close down on him and deny him all rights be-

cause by some misfortune he doesn't have the money to pay for the property at the time agreed upon. The law will allow him a reasonable time to get his money to pay for the property after the time named in the contract, and will permit him to enforce the contract against the seller, if he wishes to do so, and compel delivery of the deed by raising the money at a subsequent time. I cannot accept the suggestion of defendant's counsel that the extension of time for the performance of this contract made time its essence. I know of no such doctrine recognized in this State. This extension of time was made at the request of the defendant and was no more than a postponement, and measurably shows that on the day of settlement there should have been a further postponement of settlement, given by the defendant, and giving to the sellers an appropriate time to vacate the hospital of its patients and equipment. Indeed, when the postponement of the contractural time for settlement was made at the request of defendant the hospital was being regularly operated as theretofore, and no suggestion was made by defendant indicating his disapproval of that or in any way suggesting that on the postponed day he would prefer to have the building vacated. So I can see no theory on which there can be based a successful defense to this suit. The defendant agreed to buy the property and to pay for it. It was his solemn engagement to do so and now it is the duty of the Court to compel him to live up to the agreement. The mere inability of the complainants to deliver possession on the day specified isn't a defense. They were entitled to a reasonable time afterward, without any agreement, to remove the patients. It might have embarrassed the defendant because he had found another purchaser, but if he had a valid agreement with that

purchaser, a properly drawn agreement, he could have held the parties with whom he had made the contract for the resale. It is significant that no agreement for sale by defendant to another person has been produced.

I will advise a decree for specific performance pursuant to the prayer of the bill.

Mr. Richards: There is a side branch to this matter. Yesterday a week ago we had served a petition and a notice upon counsel for an application here before your Honor to restrain an action at law to recover the purchase money in this matter, and I assume that can go as part of the same decree.

The Court: It cannot, of course, be refused now, it has got to go, and I don't see why it shouldn't be made a part of the decree. When the decree is prepared if counsel for the defense wishes to be heard touching its form I will hear him.

Mr. Kisselman: Will your Honor fix a time when possession is to be delivered; we are certainly entitled to possession.

The Court: It can be done in the decree, as far as that goes. Counsel can confer together touching that and I will make the decree accordingly. If no adjustment is made between counsel I can fix the time.

Mr. Kisselman: I should like to have it done immediately.

The Court: The same time as the testimony, 60 or 90 days.

Mr. Richards: Shall we make it 60?

The Court: Make it 90 days for the maximum and 60 days ——

Mr. Richards: We would prefer 90.

The Court: Ninety days, then.

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(Heard and determined September 21, 1926.)

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DECREE FOR SPECIFIC PERFORMANCE.

(Filed September 24, 1926.)

IN CHANCERY OF NEW JERSEY.

Between JESSE LYNN MAHAFFEY, *et al.*, *Complainant*, and MORRIS A. SARSHIK, *Defendant*.	On Bill, &c. Decree for Specific Performance.

This cause coming on to be heard in the presence of French & Richards, solicitors of the complainants, and Carl Kisselman and Patrick H. Harding, solicitors of the defendant, and the Court having examined the pleadings and having taken proofs orally and in open court and heard and considered the arguments of counsel thereon; and it appearing to the satisfaction of the Court that the complainants Jesse Lynn Mahaffey and R. Elmer Schall were, on the twenty-third day of September, 1925, seized in fee simple of ALL those certain tracts or parcels of land and premises in the City of Camden, in the County of Camden and State of New Jersey, bounded and described as follows:

No. 1. BEGINNING at the Southeast corner of Fifth and Linden Streets, and extending thence

Eastwardly along the Southerly line of Linden Street forty feet to the middle line of party wall between Nos. 500 and 502 Linden Street, by Southwardly between the Easterly line of Fifth Street and a line parallel therewith and through the middle line of said party wall between Nos. 500 and 502 Linden Street, one hundred and thirty feet to a ten feet wide alley.

TOGETHER with the free use, in common with others bordering thereon, of aforesaid alley.

No. 2. BEGINNING on the South side of Linden Street, (widened to one hundred feet) at the distance of forty feet Eastward from the East side of Fifty Street, thence Eastward on said Linden Street twenty (20) feet and extending in length or depth of that width between parallel lines at right angles to said Linden Street, Southward, one hundred and thirty feet to the North side of a certain ten feet wide alley or passageway running from Fifth to Sixth Street.

TOGETHER with and subject to the free and common use and privilege forever of said ten feet wide alley or passageway.

Being known as No. 502 Linden Street, that on the said twenty-third day of September, 1925, the said complainants Jesse Lynn Mahaffey and R. Elmer Schall and their wives entered into an agreement in writing with the defendant, Morris A. Sarshik, wherein and whereby the complainants agreed to convey the said lands and premises, by deed of warranty, on or before the twenty-third day of March, 1926, to the said Morris A. Sarshik, and the said Morris A. Sarshik agreed to buy and pay for said land and premises the sum of $175,000, by the payment of $2000 at or before the execution of the agreement, $2000 within 30 days thereafter, $1000 within

60 days and $2500 within 150 days and by the execution of a purchase money bond and mortgage in the sum of $150,000 with provision for a first-class bond company bond concerning tearing down or altering the premises and insurance as in the agreement set forth, and the payment of the remainder of the purchase price in cash, the title to be passed on the twenty-third day of March, 1926;

And it further appearing to the satisfaction of the Court that the defendant did not perform the agreement on March 23, 1926, and has refused and failed to perform the said agreement at any other time, and that the said complainants have always been and still are ready and willing in all things to comply with the terms of the said agreement on their part;

And the Court being of the opinion that the said complainants are entitled to the specific performance of the aforesaid agreement as prayed for by them in their bill of complaint filed herein;

And it further appearing by verified petition of the complainants duly served and filed herein and the arguments of the respective counsel thereon that the complainants are entitled to an order restraining the defendant, Morris A. Sarshik, his counsel, solicitors and agents, from proceeding further against complainants in an action at law commenced against complainants in the New Jersey Supreme Court and now pending for the recovery of deposit money, interest thereon and damages;

It is, on this 22nd day of September, 1926, ordered, adjudged and decreed that the said agreement be in all things specifically performed by the said defendant or his nominee on the 20th day of November, 1926, at the hour of ten o'clock in the forenoon, at the office of Lewis Starr, Esq., a Master in Chan-

cery of New Jersey, in Camden, New Jersey, under the supervision of said Master, and that the defendant at that time and place pay to the complainants the sum of $17,500, together with the costs of this suit as hereinafter allowed, and, at the same time, make, execute and acknowledge in due form of law and deliver to the said complainants, Jesse Lynn Mahaffey and R. Elmer Schall, his bond or that of his nominee in the penal sum of $300,000, for the payment of $150,000 in 5 years from the 20th day of November, 1926, with interest at the rate of 6 per centum per annum and containing the usual terms and conditions and at the same time make, or cause to be made, execute and acknowledge in due form of law and deliver to the said complainants a purchase money first mortgage on said land and premises, securing the payment of said bond and all moneys due and payable thereunder, and containing a provision for a first-class bond company bond concerning tearing down or altering the premises and insurance as in the agreement set forth, upon the delivery at the same time and place by said complainants to said defendant, Morris A. Sarshik, or his nominee, of a warranty deed, duly executed and acknowledged by complainants conveying to the said Morris A. Sarshik or his nominee the said land and premises, in fee, free of all incumbrance except said purchase money mortgage and together with a delivery of the possession of the land and premises free and clear of all tenants and occupants.

It is further ordered, adjudged and decreed that if at the time and place hereinbefore mentioned, the said defendant should fail or neglect to pay the said sum of $17,500, together with said taxed costs as hereinbefore mentioned, and to deliver the bond and mortgage hereinbefore described, duly executed and

acknowledged upon the tender of said deed and possession, the aforesaid sums of $17,500 and $150,000 being a total of $167,500, together with the taxed costs of this suit as hereinbefore mentioned, shall be and become and are hereby impressed as a lien upon the said land and premises in favor of the said complainants, to the end that said land and premises may be sold, pursuant to law, to raise said amount with interest from November 20, 1926, and that in case a deficiency should arise upon such sale, the said defendant may be ordered by this Court to pay such deficiency.

It is further ordered that the defendant, Morris A. Sarshik, his counsel, solicitors and agents are hereby restrained from proceeding further against complainants in an action at law commenced against complainants in the New Jersey Supreme Court and now pending for the recovery of deposit money, interest thereon and damages.

It is further ordered that the said defendant pay to the said complainants the costs of this suit to be taxed, including a counsel fee of one hundred dollars, which is hereby allowed to said complainants.

It is further ordered that true, but uncertified copies of this decree and of said taxed costs be served on the solicitor of said defendant within ten days after the date hereof.

E. R. Walker,
C.

Respectfully advised,

E. B. Leaming,
V. C.

NOTICE OF APPEAL.

(Filed September 28, 1926.)

IN CHANCERY OF NEW JERSEY.

Between JESSE LYNN MAHAFFEY, *et al.*, *Complainant*, and MORRIS A. SARSHIK, *Defendant*.	On Bill, &c. Notice of Appeal.

The defendant, Morris A. Sarshik, hereby appeals from the final decree made in the above entitled cause on the 22nd day of September, 1926, and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes. Dated September 27, 1926.

CARL KISSELMAN,
Solicitor for and of Counsel with Defendant, Morris A. Sarshik.

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

CARL KISSELMAN,
Of Counsel with Defendant, Morris A. Sarshik.

[ENDORSED]

Service of a copy hereof is hereby acknowledged this 27th day of September, 1926.

French & Richards,
Solicitors for Complainants.

AMENDED NOTICE OF APPEAL.

(Filed October 4, 1926.)

IN CHANCERY OF NEW JERSEY.

Between JESSE LYNN MAHAFFEY, *et al.*, *Complainant*, and MORRIS A. SARSHIK, *Defendant*.	On Bill, &c. Amended Notice of Appeal.

The defendant, Morris A. Sarshik, hereby appeals from the final decree made in the above entitled cause on the 22nd day of September, 1926, by the

Chancellor on the advice of Edmund B. Leaming, 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 October 1st, 1926.

CARL KISSELMAN,
Solicitor for and of Counsel with Defendant, Morris A. Sarshik.

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

CARL KISSELMAN,
Of Counsel with Defendant, Morris A. Sarshik.

[ENDORSED]

Service of a copy hereof is hereby acknowledged this 27th day of September, 1926.

French & Richards,
Solicitors for Complainants.

PETITION OF APPEAL.

(Filed Oct. 2, 1926.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

JESSE LYNN MAHAFFEY, *et al.*, *Complainants-Appellees,* v. MORRIS A. SARSHIK, *Defendant-Appellant.*	On Appeal from the Court of Chancery. Petition of Appeal.

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

The petition of Morris A. Sarshik, the appellant in the above entitled cause, respectfully shows that:

1. Petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date September 22nd, 1926, in a certain cause in said Court of Chancery, wherein the said Jesse Lynn Mahaffey and R. Elmer Schall were complainants and the said Morris A. Sarshik was defendant, in this respect, to wit, that the said decree adjudges that defendant or his nominee specifically perform a certain agreement on the 20th

day of November, 1926, and that the said Morris A. Sarshik, his counsel, solicitors and agents be restrained from proceeding further against the complainants in an action at law commenced against the complainants in the New Jersey Supreme Court and now pending for the recovery of deposit money, interest thereon and damages.

And petitioner appeals from the decree of the Chancellor, which decrees as aforesaid, upon the grounds that the same is erroneous in that said decree orders that said agreement be in all things specifically performed on the 20th day of December, 1926, and that the defendant at that time pay to the complainants the sum of $17,500 together with the costs of the suit herein; in that said decree orders to cause to be made and executed a certain mortgage and bond to secure the payment of $150,000 in five years from the 20th day of November, 1926, and deliver the same to the complainants; and in that said decree orders that if said defendant should fail or neglect to pay the said sum of $17,500 together with taxed costs and to deliver the bond and mortgage aforesaid, the said sums of $17,500 and $150,000, being a total of $167,500 shall be and become and were by said decree impressed as a lien upon the said land and premises in favor of the said complainants, to the end that said land and premises might be sold, pursuant to law, to raise said amount with interest from November 20, 1926, and that in case a deficiency should arise upon such sale, the said defendant may be ordered to pay such deficiency; and in that said decree orders that Morris A. Sarshik, his counsel, solicitors and agents be restrained from proceeding further against complainants in an action at law commenced against complainants in the New Jersey Supreme Court and

now pending for the recovery of deposit money, interest thereon and damages; and that the proofs in the case did not warrant the entry of said decree;

Your petitioner therefore prays that said decree of the said Chancellor may be in the particulars aforesaid reversed, set aside and for nothing holden; and your petitioner shall have such relief from the premises as to this Honorable Court shall seem meet.

CARL KISSELMAN,
Solicitor for and of Counsel with Appellant

ANSWER TO PETITION OF APPEAL.

(Filed October 2, 1926.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between JESSE LYNN MAHAFFEY, *et al.*, *Complainants-Respondents*, and MORRIS A. SARSHIK, *Defendant-Appellant*.	On Appeal from Chancery. Answer to Petition of Appeal.

The answer of Jesse Lynn Mahaffey and Alice W. Fogg Mahaffey, his wife, and R. Elmer Schall and Nellie A. Schall, his wife, the respondents to the petition of appeal of Morris A. Sarshik, the above-named appellant.

These respondents, not admitting the truth of all or any of the matters in said petition of appeal contained, for answer thereto nevertheless admit that a decree was on the 22nd day of September, 1926, made and entered in the Court of Chancery of New Jersey in the above-stated cause, but as to the substance and form of the decree, these respondents pray to refer thereto when the same shall be produced. These respondents are advised

and believe that the said decree is agreeable to equity and they pray that the same may be affirmed with costs to be adjudged to these respondents.

FRENCH & RICHARDS,
Solicitors for and of Counsel with Respondents.

EXHIBIT D1.

THIS AGREEMENT, made this 23rd day of September, A. D., 1925 between J. Lynn Mahaffey and Alice, his wife, and R. Elmer Schall and Nellie, his wife, parties of the first part, hereinafter called the Sellers, and Morris Sarshik of the City and County of Philadelphia and State of Pennsylvania of the second part, hereinafter called the Buyer.

Witnesseth, That the Sellers agree to sell and convey and the Buyer agrees to buy all those certain lots, tracts, or parcels of land situate in the City of Camden, County of Camden and State of New Jersey, more particularly known as 500 and 502 Linden Street, Camden, New Jersey, which land is warranted to have a frontage on Fifth Street of 130 ft. and a frontage on Linden St. of 60 ft. more or less.

The price of said premises is One Hundred Seventy-five Thousand ($175,000.) Dollars to be paid as follows:

A first payment of $2000. is to be paid at or before the execution of this Agreement, receipt of which is hereby acknowledged by the Sellers; and additional payment of $2000. is to be made within

thirty days from the date hereof, at the office of Carl Kisselman, 541 Market Street, Camden, N. J., on account of the purchase price; a further additional payment of $1000. is to be made within 60 days at the same place on account of the purchase price; a further additional deposit of $2500. is to be made within 150 days at the above place on account of the purchase price.

A first purchase money mortgage of $150,000. to secure a bond of that amount, payable within 5 years from the date of settlement with interest at 6 per cent payable semi-annually; said mortgage to contain the usual terms and conditions is to be accepted by the Sellers.

The balance shall be paid in cash at the time of final settlement, which shall be made at the offices of Carl Kisselman, 541 Market Street, Camden, N. J., on or before March 23, A. D., 1926 or the deposit made herewith shall be forfeited as liquidated damages to the Seller, and not as a penalty, provided that the necessary title searches can be obtained from any first-class New Jersey title company by that date. Should there be any delay, not the fault of the buyer in procuring such searches, the time for final settlement shall extend until such searches can be obtained.

The title to the premises shall be free and clear of all restrictions and incumbrances, including municipal liens and assessments, and shall be a marketable title, and the Sellers shall tender a general warranty deed conveying such title at the time of the final settlement, or in the event that such title cannot be as above, then this deposit shall be returned to the Buyer.

All adjustments shall be made as of the date of settlement and possession shall be given the buyer on that date.

The Buyer shall pay for searches and all other expenses excepting the preparation of the deed and the necessary revenue stamps attachd thereto, which shall be paid for by the Sellers.

This Agreement shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties hereto; and the deed hereinbefore mentioned shall name as Grantee such person or persons as may be nominated or designated by the Buyer herein and such grantee shall also execute the mortgage hereinbefore referred to.

This contract includes all fixtures and appurtenances permanently attached to the building or buildings on the land herein described, as is at signing of this agreement.

In amplification of the fifth paragraph, first page of the within agreement, the mortgage is to contain a clause guarantying the payment by a first class bond Company in the event of the premises described in said agreement are torn down or the security impaired by material alteration affecting security of said mortgage. Said bond to be made payable to the mortgagees as named in said mortgage. Insurance in favor of the mortgagees to be carried in the amount of $75,000.

In the event that the Sellers shall be unable to deliver such title as above set forth then they shall reimburse the Buyer to any and all extent for searches, title insurance, surveying and any other expenses incident to the purchase of the premises herein.

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

Signed, sealed and delivered
in the presence of
Carl Kisselman.

J. Lynn Mahaffey (LS
Alice W. Fogg Mahaffey (LS
R. Elmer Schall (LS
Nellie A. Schall (LS
Morris A. Sarshik (LS

State of New Jersey } SS
Camden County }

Be it remembered, That on this 23rd day of September in the years of our Lord one thousand nine hundred and twenty-five before me, the undersigned authority, personally appeared J. Lynn Mahaffey and Alic Mahaffey, his wife, and R. Elmer Schall and Nellie Schall, his wife, who I am satisfied are the grantors mentioned in the above deed or conveyance, and I having first made known to them the contents thereof they acknowledge that they signed, sealed and delivered the same as their voluntary act and deed. All of which is hereby certified.

Carl Kisselman
MCC of N J.

EXHIBIT D2.

THIS AGREEMENT made this 23rd day of March, 1926, between J. Lynn Mahaffey and Alice, his wife, and R. Elmer Schall and Nellie, his wife, parties of the first part and Morris Sarshik party of the second part, Witnesseth

WHEREAS on the 23rd day of September 1925 the said parties entered into a written agreement of purchase and sale respecting premises known as Nos. 500-502 Linden Street, Camden, N. J. as in said agreement described; and

WHEREAS the said agreement the final settlement was to be made on or before March 23, 1926, and whereas the parties hereto have mutually agreed to extend the time for said settlement;

NOW THEREFORE, it is hereby agreed that settlement for said premises shall be made on or before April 7th, 1926, under the same terms and conditions as in said agreement contained.

IN WITNESS WHEREOF the said parties have hereunto set their hands and seals this day of March, 1926.

	J. Lynn Mahaffey	(SEAL)
	Alice Fogg Mahaffey	(SEAL)
Joseph P. Tulis	R. Elmer Schall	(SEAL)
	Nellie A. Schall	(SEAL)
	Morris A. Sarshik	(SEAL)

NEW JERSEY COURT OF ERRORS AND APPEALS

JESSE LYNN MAHAFFEY, *et al.*,
Complainants-Respondents,
v.
MORRIS A. SARSHIK,
Defendant-Appellant.

ON BILL, &c.

ON APPEAL FROM COURT OF CHANCERY.

BRIEF OF DEFENDANT-APPELLANT.

FACTS.

The pertinent admitted facts are as follows:

On September 23rd, 1925, complainants were the owners of certain premises known as Nos. 500 and 502 Linden Street, Camden, New Jersey. The premises at that time were used by the complainants in the operation of a private hospital. The patients of the hospital were treated by various doctors, by whom they were brought to the hospital. Although the complainants were themselves physicians and

cared for some of the patients in the hospital, most of the patients were treated by other physicians who simply rented the rooms and use of the operating facilities from the complainants.

On the said day of September 23rd, 1925, complainants and defendant entered into a written agreement (Exhibit D1) whereby defendant agreed to purchase and complainants agreed to sell premises in question. The price was $175,000 of which $2000 was paid at the time of the execution of the agreement as a down payment or deposit. It was further provided in the agreement that defendant pay to complainants additional installments between the time of the execution of the agreement and the day set for final settlement; which additional payments and deposit together totalled $7500. These sums were paid by the defendant and received by complainants. At settlement $17,500 was to be paid in cash and a purchase money bond and mortgage executed for the remainder of $150,000 or the deposit should be forfeited as liquidated damages.

The agreement provided that possession of the premises were to be given the defendant buyer on the day of settlement. Prior to the day of settlement it was by written agreement (Exhibit D2) mutually agreed between the parties that the day for the final settlement be extended to April 7th, 1926. The parties met together at the appointed time and place for final settlement.

It then appeared that complainants were unable to deliver possession of the property free from patients; complainants had made no effort, prior to the time of settlement, to empty the hospital of its patients and there were a great number still in the hospital. Page 46, line 12 and Page 53, line 3.

Complainants tendered a deed and demanded the execution of the purchase money mortgage and bond for $150,000 provided for in the agreement and the payment of the remainder of the purchase money, to wit, $17,500 in cash. Page 29, line 33.

Defendant refused to make settlement unless the property was delivered to him free and clear of encumbrances and empty of its patients. Complainants failed to do this.

A bill was thereupon filed by the complainants seeking to require the defendant to execute the bond and mortgage and to pay over the balance of the purchase price.

A decree was awarded the complainants (Page 91) requiring the defendant or his nominee to appear before an appointed master within sixty days (which time was given the defendants to vacate the property) and there make settlement by paying $17,500 in cash and execute or cause his nominee to execute a purchase money bond and mortgage for the balance of $150,000.

The decree provides that upon his failure so to do the land should be sold to raise the principal sum of the mortgage, $150,000, plus the unpaid balance of $17,500 or a total of $167,500 and if a deficiency should arise upon the sale, that the defendant might be required to pay the same.

This appeal is to review the action of the Court below in awarding complainants relief.

LAW AND ARGUMENT.

I

COMPLAINANTS' RIGHTS UNDER THE CONTRACT WERE LIMITED TO THE FORFEITURE, AS LIQUIDATED DAMAGES, OF THE MONEY PAID ON ACCOUNT OF THE PURCHASE PRICE.

It has been consistently held in this state that, where the contract is an alternative one, providing for liquidated damages in the event of the failure of one of the parties to perform, such a provision for liquidated damages is the exclusive remedy under the contract.

Brown v. Norcross, 59 N. J. Eq. 427;
Porter v. Williams, 114 Atl. 790; 93 Eq. 88;
Rittenhouse v. Swiecicki, 118 Atl. 261; 94 Eq. 36.

The contention of the defendant is that this situation existed in the case under consideration.

The contract provides as follows (P. 104, line 15 to 20) "The balance shall be paid in cash at the time of final settlement, which shall be made at the offices of Carl Kisselman, 541 Market Street, Camden, N. J., on or before March 23, A. D. 1926 or the deposit made herewith shall be forfeited as liquidated damages to the seller, and not as a penalty * * * "

In reading this provision the word "either" should be read into the wording at the beginning of the paragraph as co-related to the word "or" so that reading this provision according to its true intent it should provide as follows:

"Either the balance shall be paid * * * or the deposit shall be forfeited * * * "

It seems to us that the very wording itself should amply justify the conclusion that the stipulation contained in the contract was alternative in its nature.

Any possible doubt, however, should be dispelled by the admission of Dr. Elmer Schall, one of the complainants, who testified under cross-examination as follows: (P. 55, line 17):

"Q. And in the event settlement didn't go through it was your idea the amount of deposit paid would act as liquidated damages and that would close the picture, is that right?

Mr. Richards: If the Court please, I don't think it makes any difference.

The Court: I think that is proper cross-examination, Mr. Richards, I think it goes to the testimony that is given.

Q. Answer that please.

A. I would say that we had no other recourse.

Q. Now, Doctor, if you were relying on the certainty of that settlement going through before you would vacate the hospital you assumed there would be no other recourse, didn't you?

A. No, I didn't assume anything.

Q. If you assumed there was some other recourse you would have vacated the hospital and had that recourse without staying there, couldn't you?

A. There are circumstances that alter cases.

Q. I didn't ask that, Doctor. (To the stenographer.) Repeat that question, please.

(Question repeated.)

A. Yes.

And then again on Page 56, line 34.

Q. Doctor, listen while I read from the agree-

ment. "The balance shall be paid in cash at the time of final settlement, which shall be made at the office of Carl Kisselman, 541 Market Street, Camden, N. J., on or before March 23, 1926, or the deposit made herewith shall be forfeited as liquidated damages to the seller." When you say you didn't intend to vacate the hospital until you were sure that settlement was going through you meant in case the settlement wouldn't go through you would have the hospital and have the $7500 and that would end the situation as far as you were concerned, isn't that true?

Mr. Richards: I don't think it is fair to ask this witness who signed that agreement——

The Court: I guess he will have to answer the question, I think it is proper cross-examination.

Q. Answer the question.
A. Yes.

It would naturally follow that if the defendant's contention in this respect is to be sustained, that the action of the Court in awarding complainants relief was erroneous and the judgment of the Court of Chancery should be reversed.

II

THE ALLEGED ORAL AGREEMENT OF THE DEFENDANT BY WHICH THE PRIOR WRITTEN AGREEMENT WAS CHANGED OR ALTERED SO AS NOT TO REQUIRE POSSESSION OF THE PREMISES AT THE TIME OF SETTLEMENT, WHICH ORAL AGREEMENT WAS RELIED UPON BY THE COURT IN ITS DECREE, WAS WITHIN THE PURVIEW OF THE FIFTH SECTION OF THE STATUTE OF FRAUDS AND PERJURIES (C. S. 2612) AND THEREFORE INSUFFICIENT TO SUPPORT THE RELIEF GRANTED.

While the bill filed by the complainants and the testimony submitted by them at the time of the final hearing are at variance in that the third paragraph of the bill (P. 2, line 34) alleges: the failure to deliver possession at the time of settlement was caused by an agrement to interpret the word "possession" used in the agreement and the testimony sets up a subsequent oral agreement, it is nevertheless admitted that in either case any transaction varying the written terms of the agreement was by parole.

In the case of *Kerzner v. Chanin*, Supreme Court, 1922, 98 N. J. L. 38, Justice Swayze, speaking for the Supreme Court, said:

> "It, (the present case) counts on a substituted oral contract, substituted because both parties either agreed to abrogate or, as the plaintiff says, to change material particulars affecting the time of payment and the security to be given; oral because no part of it was in writing except the original contract. The case of contracts coming within the statute of

> frauds is expressly excepted by Williston (Contracts, Sec. 598, 1828) from the rule allowing merely written contracts to be varied by subsequent oral agreements.''

It seems to us that the case at bar cannot be distinguished from the cited case. Both revolve about agreements required by the statute of frauds to be in writing. In both cases changes altering the material terms were made by parole.

Even if the alleged parole agreement or parole modification of the written agreement were to be enforced, it is so indefinite that any attempt so to do would be impossible. There was admittedly no attempt to arrange for rental; and no exact time when the defendant should be entitled to possession.

This is indicated in the testimony of Wilber J. McAllister (Page 27, line 4 to 11) and the testimony of Dr. Schall (Page 52, line 14 to 26).

Indeed, according to the testimony of Mrs. Mahaffey, Page 65, line 29),

> '' * * * Mr. Sarshik made the remark he was a humane person and wouldn't demand any patient to be moved that was in a critical condition.
>
> Q. In other words, when the time of settlement came along and a patient in there was in a critical condition he would give any time to move that patient up to 30, 60 or 90 days?
>
> A. When he said he was humane, I suppose that is what he meant.''

it seems doubtful that there was any definite thought ever in the minds of the complainants that any change was to be made relative to the possession of the premises.

The complaint of the complainants is addressed to the extraordinary jurisdiction of the Court of Chancery and the remedy of specific performance, being an extraordinary one, it is our contention that the Court of Chancery was not warranted under these facts in allowing the complainants the relief they sought.

The Court of Chancery in awarding the complainants the decree has in effect required defendant to specifically perform a parole agrement which, under the statute of frauds, to be effective was required to be in writing.

This we contend was error and if so the judgment of the Court of Chancery should be reversed.

III

GRANTING RELIEF TO COMPLAINANTS CANNOT BE SUPPORTED ON THE THEORY THAT TIME NOT BEING MADE THE ESSENCE OF THE CONTRACT THEY WERE ENTITLED TO PERFORMANCE WITHIN A REASONABLE TIME THEREAFTER BECAUSE:

1. Time was the essence of the agreement.

2. The only tender made by complainants was at the time of settlement and no request was made for an extension of time, and complainants by their tender deprived themselves of any right to an extension of time for settlement.

Even though time is not stipulated to be of the essence of the contract by the terms thereof, if the circumstances are persuasive that time is of the essence, prompt performance is essential.

Orange Soc. of New Jerusalem v. Konski, 94 N. J. Eq. 632.

It seems clear from the testimony of Wilber J. McAllister, the conveyancer representing the complainants, who testified at the time of the trial for the complainants, that all the parties dealt with full knowledge of the speculative nature of the transaction and the "boom" market that existed at the time the negotiations took place. Mr. McAllister's testimony appears as follows: (Page 36, line 24 to Page 37, line 7):

"Q. Then, of course, you knew there was some question as to what Mr. Sarshik was going to do with the property?

A. Only as implied by that statement.

Q. You knew he was a speculator?

A. Yes, sir.

Q. And you knew he bought the property as a matter of speculation?

A. Yes.

Q. And that he might buy it one day and sell it the next, depending on the market?

A. Yes, sir.

Q. That was understood among all the parties?

A. Yes.

Q. You knew he might keep it, rebuild it, or do almost anything so he could make money out of it?

A. Yes.

Q. All these negotiations were taking place and the agreement was signed during what we called the boom period, the real estate boom?

A. Yes, that is true."

This view is further supported by the testimony of Dr. J. Lynn Mahaffey, one of the complainants, (Page 45, line 7 to 29) and by the testimony of Dr.

Elmer Schall, another of the complainants, (Page 55, line 6 to 11),

"Q. And you sold it just the same as Dr. Mahaffey did, as a speculation?

A. Yes.

Q. Like Dr. Mahaffey and some of the others you engaged in some speculation yourself, haven't you?

A. A little."

The only tender made by complainants was at the time of settlement. This is proven by the testimony of Wilber J. McAllister as follows: (Page 29, line 32),

"* * * We said there was nothing else to do but to tender the deed, and the deed was then filled out as to date and executed by all the parties, Dr. Mahaffey and his wife, and Dr. Schall and his wife, and tendered to Mr. Sarshik, and Mr. Kisselman then carried out the tender and asked Mr. Sarshik whether he had the money and he produced the money and that was the end."

We are therefore faced with the question of whether defendant was required to pay over the balance of the purchase money, execute and deliver the purchase money mortgage, and accept title to the property while actual possession was still held by the complainants.

It seems to us that the theory that the complainants had a reasonable time after the date set for the settlement to tender performance has no application in this case inasmuch as they requested no extension, made no tender subsequent to the time of settlement, and relied on their right to have settlement prior to vacating the property.

It seems that the complainants did not deal with the defendant in good faith. It is indicated in the testimony that no attempt was ever made to vacate the property either prior to the date of settlement or subsequent thereto and prior to the date of the final hearing.

This appears in the testimony of Dr. Mahaffey on Pages 46, 47 and 48; also in the testimony of Dr. Schall on Pages 53 and 54.

The complainants speculated upon the outcome of the suit; never for a moment giving up either title or possession of the property. Even at the time of the final hearing they were in no better position to turn over the property to the defendant than they had ever been. We contend that in view of these circumstances the Court erred in granting complainants relief.

IV

IF THE COMPLAINANTS WERE ENTITLED TO ANY RELIEF, THE REMEDY PROVIDED BY THE DECREE FOR THE DEFENDANT'S FAILURE TO OBEY THE MANDATES THEREOF IS NOT PROPER.

The original undertaking of the parties was the purchase and sale of the premises for the total sum of $175,000, $150,000 of this was to be made by a purchase money mortgage. The decree herein provides that, if the defendant shall fail to make settlement, then the total unpaid consideration of $17,500 which was to have been paid in cash at the time of final settlement and the sum of $150,000 to be made by the mortgage, a total of $167,500 together with the taxed costs of the suit, should become impressed

as a lien upon the said lands and premises in favor of the complainants to the end that said land and premises might be sold pursuant to law to raise that sum, and that, in case any deficiency should arise, the defendant might be ordered to pay that deficiency.

It is a matter of common knowledge that real estate which is well financed brings a far better price by a forced sale or at any sale than that which is not well financed. We feel and contend that if defendant should fail, neglect or refuse to make settlement as provided for in the decree, he should not be put into a position where he might be required by the Court to pay any deficiency between the price brought by the sale and the total unpaid balance of $167,500. He should be permitted, if he is willing, to partly perform to the extent of executing the mortgage or having his nominee execute the mortgage so that the premises might be sold subject thereto, thereby securing the better opportunity for an advantageous sale and so that in any event the deficiency which might arise could in no way exceed the amount of cash which he was required by the agreement to contribute at the time of the final settlement.

This procedure would more nearly conform to the obligations of the parties as fixed by their agreement than would the procedure fixed by the decree of the Chancellor.

It is respectfully submitted therefore:

1. That the Court below was not warranted in its finding nor justified in granting the complainants relief and that the decree should be reversed.

2. That if the complainants are entitled to relief that the decree should be altered to conform to the suggestion of the defendant-appellant.

CARL KISSELMAN,
Solicitor for and of Counsel with Defendant-Appellant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

JESSE LYNN MAHAFFEY, *et al.*,
Complainants-Respondents,
v.
MORRIS A. SARSHIK,
Defendant-Appellant.

APPELLANT'S BRIEF IN REBUTTAL.

INTRODUCTORY.

This brief is presented for the purpose of considering the appellant's contention with regard to new matter raised in the brief for respondents.

I.

As to the ambiguity of the meaning of the word "possession." If the word "possession" is so ambiguous in its meaning as to indicate that the minds of the parties never met on its interpretation, then the agreement should be void and the parties relieved from all obligations thereunder.

It seems to us that the discussion on page 5 of the respondents' brief concerning the question of the meaning of the word "possession" as used in the agreement, is mere equivocation.

The testimony of the complainants clearly shows that there is no question but that the word possession as used in the agreement contemplated actual possession. Moreover, delivery of actual possession is normally essential to good title.

Eisler v. Halperin, 98 Atl. Rep. 245, 89 N. J. L. 278.

II.

We take exception to the statement made in respondents' brief relating to the failure of the parties to use the printed form in common use in drawing the agreement which is the subject-matter of this litigation.

There is absolutely no evidence or testimony of the existence of a printed form in common use or any evidence that if there is such a form the words "Time is the essence of this agreement" is contained therein.

We, therefore, respectfully submit that the presence of this statement in respondents' brief beginning at the end of page 5 and continuing through the first paragraph of page 6, is highly improper and unfair and that it should not be considered by this Court in arriving at its decision.

Likewise, the same situation is true with regard to the statement in the following paragraph that the extension agreement (D2) was reduced to writing *later.*

III.

The appellant does not ask to have the benefits and to be relieved of the burden of the contract. Contrary to the thought of the respondents, appellant does not ask to be relieved of the $17,500 cash

payment but he asks that if the respondents are entitled to any relief, that such relief be limited to that contemplated by the executed agreement.

The agreement provides (lines 5 to 10, page 105)) that the appellant might name the person to whom title should be conveyed and who should also execute the mortgage.

The obvious intention of the parties was to relieve the buyer personally from liability on the bond to accompany the mortgage. Thus, it was never contemplated that appellant would ever be required to contribute more than the sum of $25,000 in cash. Of that he has already paid the respondents $7500. Would it not be unfair and inequitable if the circumstances were such that he was unable to contribute the remainder, $17,500.00, to burden him with a judgment which under the decree herein might be as high as $167,500? Would it not more nearly fulfil the intention of the parties (if the respondents are entitled to any relief) to permit the appellant to perform such part of the agreement as he is able?

Respondents find fault because appellant has not tendered himself willing to partially perform his part of the agreement though the evidence is that no opportunity was ever afforded him to partly perform.

It is respectfully submitted that respondents were not entitled to relief at the hands of the Court below, that in granting relief the Court was in error and if any relief should have been granted that the relief was improper in its nature and that the petition of the appellant should be granted.

CARL KISSELMAN,
Attorney for and of Counsel with Appellant.

NEW JERSEY COURT OF ERRORS & APPEALS

JESSE LYNN MAHAFFEY ET AL., Complainants-Respondents, vs. MORRIS A. SARSHIK, Defendant-Appellant.	APPEAL FROM COURT OF CHANCERY.

BRIEF FOR RESPONDENTS

STATEMENT OF THE CASE

This appeal brings up a decree for complainants upon a vendor's bill for specific performance. The complainants agreed to sell and the defendant agreed to buy the Bellevue Hospital, in the City of Camden. At the purchaser's request and for his convenience the settlement date was fixed at 6 months after the agreement was entered into. The purchaser was not even ready then and secured two postponements, 15 days in all.

Immediately after the agreement was executed, the matter of the kind of possession the purchaser desired was discussed. The Vice Chancellor found the testimony (pages 85 and 86) overwhelmingly to the effect that the purchaser then and there led the sellers to believe that it wouldn't be necessary before the day of settlement for them to close down the hospital business and remove the patients from the building, but that if the purchaser did

not at the time of settlement want the hospital as a going concern the sellers could have a reasonable time, referred to as 60 or 90 days, to remove the patients after the time of settlement. The defendant preferred this course because he did not know whether he would find a purchaser who would wish a going concern in the nature of a hospital or one who would like an early possession.

During the 6 months following the execution of the agreement and the 15 days' extension of time the defendant gave no indication of any change in his wishes in this respect. On April 7, 1926, however, when the parties met for settlement, the defendant suddenly demanded an immediate possession of the hospital emptied of its patients. He was told that this was directly contrary to his previous statements as to what he desired, but he refused to make settlement on any other terms. He knew, of course, that his demand could not be complied with. The hospital could not in a moment be emptied of its patients. The complainants offered to make settlement at once and empty the hospital within 60 or 90 days as the defendant had previously suggested, or to make settlement and deliver to him immediate possession of the hospital, patients and all, or to deposit executed deeds and mortgage together with the balance of the purchase money with the title company for a few days during which the hospital could be vacated. The defendant would have none of these things, but insisted upon, what he had himself made impossible, an immediate delivery of the hospital emptied of its patients.

The Vice Chancellor could see no theory upon which a successful defense could be based. The defendant had agreed to buy the property and pay for it and should be compelled to live up to his agreement.

The Vice Chancellor accordingly advised a decree for specific performance, and using the machinery of the

Court, directed the parties to meet at a Master's Office, on November 20, 1926, at 10 o'clock in the forenoon, and there, under the supervision of the Master, carry out the terms of the agreement and also deliver possession free and clear of all tenants and occupants. From this decree the appeal is taken.

BRIEF OF THE ARGUMENT

1. The sellers were, on April 7, 1926, prepared to give and offered to give the appropriate kind of possession of a hospital.

2. Time was not, on April 7, 1926, of the essence of the contract.

3. The defendant waived any right he might have to require the hospital vacated at settlement and estopped himself from setting up as a defense the fact that all patients had not been removed.

4. The plea of appellant to have the benefits without the burdens of the contract is inequitable.

5. Appellant in one breath insists that the agreement cannot be modified or interpreted by parol and in another breath insists that Dr. Schall's idea of the meaning of the language used is effective to vary or interpret that language, even though Dr. Mahaffey may not concur in that interpretation.

6. The appellant's claim that the decree has in effect required him to specifically perform a parol agreement is untenable.

7. The appellant's claim, that the contract limits the sellers' remedy to retaining the down payment as liquidated damages, is likewise untenable.

ARGUMENT

I.

THE SELLERS WERE, ON APRIL 7, 1926, PREPARED TO GIVE AND OFFERED TO GIVE THE APPROPRIATE KIND OF POSSESSION OF A HOSPITAL.

It is alleged (pages 2 and 3, par. 3) that the premises consisted of a hospital filled with patients. The answer (pages 10 and 11, par. 3) admits that "the premises were used as a hospital and contained patients."

The defendant in his answer (page 11, lines 16 to 18) "admits that on April 7, 1926, he refused to take over possession of the hospital unless the same were free of patients." He admits (page 81, lines 22 to bottom) that complainants tendered a deed to which he had no objection.

The agreement provided that "all adjustments shall be made as of the date of settlement and *possession* shall be given the buyer on that date" (page 8, lines 6 to 8, page 16, lines 9 to 11, and page 104, lines 35 to bottom).

The agreement further provided that settlement should be made (page 15, lines 26 to 28) at the offices of Carl Kisselman, 541 Market Street, Camden, N. J.

"Possession" is a word of ambiguous meaning. 31 Cyc., 923. In determining that meaning as the word is used in any particular document, the context must be taken into consideration. *Pegram vs. Carson, 10 Bosw. (N. Y.) 505, 515.*

Here the context shows, as the subject matter of the agreement, a property engaged or used in a public service —a hospital filled with patients.

The possession to be given of property engaged or used in a public service, such as a water works plant, a railroad, a hotel or a hospital, is merely a constructive or legal possession. Oftentimes any other possession would work a destruction of the property itself. For example, let us assume that A agrees to give possession of a water works plant and before the time arrives A cuts off every consumer, every service connection. A could hardly escape the charge that he had violated the spirit of his agreement and destroyed the very subject matter of the agreement.

If any further aid were required from the context it would be furnished by the provision concerning the place of settlement. Possession is to be given at the time of settlement and that settlement is to take place at the office of Carl Kisselman.

If actual possession had been contemplated, the appropriate place for settlement would have been the premises themselves. There a clod of earth could have been handed over and actual possession given. The fact that settlement was to be made elsewhere in itself indicates that a legal or constructive possession was intended.

The legal or constructive possession offered was a complete compliance with the agreement.

II.

TIME WAS NOT ON APRIL 7, 1926, OF THE ESSENCE OF THE CONTRACT.

The agreement between the parties was prepared by counsel for Mr. Sarshik (page 32, lines 1 to 5, page 32, lines 25 to 28, and page 40, lines 1 to 7). For some

reason that does not appear, he did not use the printed form in common use, containing the words, "Time is the essence of this agreement," but instead had the agreement typewritten, omitting these words.

On March 23, 1926, the time fixed for settlement, Mr. Sarshik was not ready. He first obtained by telephone a ten days' extension (page 41, lines 11 to 21) and afterwards (page 41, lines 22 to 27) a further extension to April 7th. Later the extension agreement was reduced to writing and is marked (page 43, lines 11 to 22) Exhibit D-2 for identification.

On March 23, 1926, he suddenly demanded (page 78, lines 7 to 9, page 29, lines 27 to 33, page 30, lines 27 to bottom, page 31, lines 1 to 5, page 42, lines 1 to 16, page 50, lines 17 to bottom, page 51, lines 1 to 4, page 64, lines 1 to bottom) an immediate possession of the hospital, emptied of its patients, and refused either to accept any other kind of possession or to grant an extension of time to enable the premises to be vacated.

Time was not originally of the essence of this agreement and was not of its essence on April 7, 1926.

Lord Eldon in Levy vs. Lindo, 3 Mer., 81, says, "Lord Thurlow has said, on occasions without number, that time is not of the essence of the contract, and that not even the agreement of the parties can make it so. I have deviated from that rule, so far as to say that time may, in certain cases be of the essence of the contract."

This Court in *King vs. Ruckman, 21 N. J. Eq., 599, 604,* declared, "It is a general rule that in equity time is not deemed to be of the essence of the contract, unless the parties have expressly so stipulated, or it necessarily follows from the nature and circumstances of the contract." In a number of cases since King vs. Ruckman this Court has adhered to the same rule.

There are no circumstances about the contract in the instant case that would or could require that time should be of the essence. On the contrary, everything indicates that time is not to be of the essence. The purchaser was not ready on March 23, 1926, and obtained two extensions of the time.

Even if time had originally been considered a matter of importance, the purchaser could no longer insist that it was still of importance after he had twice failed to settle at the times fixed.

Vice Chancellor Backes, in *Orange Society vs. Konski, 94 N. J. Eq., 632, 635, 636,* holds that where the time fixed is regarded as a formality only and the period has gone by, or where time is of the essence and there is a waiver, it can still be made of the essence by a formal demand that the title be closed by a certain day, but the time given must be reasonable. He finds that at least 20 days should be given and says, "The snap action by Konski was not, in my judgment, for the reason that he wanted to bring the matter to a conclusion because time was of importance to him, but rather, as I look upon it, because he wanted to back out of his contract, and he saw what he thought was his opportunity."

This language of Vice Chancellor Backes applies with full force here. The claim of Sarshik, so suddenly made, that he must have settlement on April 7th is mere pretense and subterfuge.

The statement of Vice Chancellor Leaming is fully justified. He says (page 88), "This extension of time was made at the request of the defendant and was no more than a postponement, and measurably shows that on the day of settlement there should have been a further postponement of settlement, given by the defendant, and giving to the sellers an appropriate time to vacate the

hospital of its patients and equipment. Indeed, when the postponement of the contractual time for settlement was made at the request of defendant the hospital was being regularly operated as theretofore, and no suggestion was made by defendant indicating his disapproval of that or in any way suggesting that on the postponed day he would prefer to have the building vacated. So I can see no theory on which there can be based a successful defense to this suit."

III.

THE DEFENDANT WAIVED ANY RIGHT HE MIGHT HAVE TO REQUIRE THE HOSPITAL VACATED AT SETTLEMENT AND ESTOPPED HIMSELF FROM SETTING UP AS A DEFENSE THE FACT THAT ALL PATIENTS HAD NOT BEEN REMOVED.

The testimony as to waiver and estoppel is overwhelming.

Indeed, it is only partially and weakly denied by Mr. Sarshik himself. He makes first (page 77, lines 7 to 12) a general negative pregnant denial, then (page 77, lines 13 to 15) denies that he had any conversation relating to possession at all, after which he admits (page 77, lines 16 to 22) that the possibility of patients being there with chronic diseases or lengthy illnesses where the patient could not be removed in time for settlement was discussed and he, Sarshik, told Doctors Mahaffey and Schall that he was humane and wasn't going to stand in the way of anybody suffering unreasonably.

On cross-examination (page 80, lines 21 to bottom, and page 81, lines 1 to 3) Sarshik admits that on a preliminary examination he testified that he may have told Miss Burkey, the superintendent of the hospital, to go ahead and book patients.

Wilbur J. Mac Allister, a witness, says (pages 26, 27 and 28) that after the agreement was executed the matter of getting patients out was discussed and Mr. Sarshik said he wanted the complainants to continue on and they would have time after settlement to vacate, for which time a rental could be determined on. The time mentioned, as the witness recalls it, was a matter of one or two months.

Dr. Mahaffey testified (pages 40 and 41) that after the agreement was signed the nature of the hospital business and the matter of giving possession at settlement was discussed and Sarshik said he might lease the place to the complainants or, if he had a purchaser for it, they might have 30, 60 or 90 days to vacate.

Dr. Schall testifies (page 50, lines 2 to 15) that after the agreement was executed Sarshik told them they could have 30, 60 or 90 days after settlement to vacate.

Mrs. Mahaffey (pages 62 and 63) states the conversation that took place after the agreement was signed, resulting in Sarshik stating that they might have after settlement 30, 60 or 90 days to remove patients.

Edgar Myers, who negotiated the sale, was present after the agreement was signed and (pages 66 and 67) heard Mr. Sarshik say he was humane and a length of time after settlement within which to vacate was discussed, Mr. Sarshik agreeing to it, but he, the witness, is uncertain as to just what time was fixed.

Raymond Marple, a disinterested witness (pages 68 and 69), was in and out of the room and heard the dis-

cussion and got the impression that for vacating the property there was to be a reasonable time after settlement and a reasonable rental.

When Miss Burkey, the superintendent at the hospital, discussed with Mr. Sarshik the meaning of possession, he said (page 71, lines 21 and 22), "I am not inhumane."

The complainants relied and had a right to rely on these statements by Sarshik. It is submitted that no stronger case of waiver and estoppel is conceivable.

The fact that the agreement specifically enforced concerns land and is within the protection of the statute of frauds cannot change the relation of the parties growing out of waiver and estoppel. There is nothing sacred about the statute of frauds. A man can waive his constitutional rights, his statutory rights or his contract rights.

The principle of waiver has been recognized in a number of specific performance cases. *Baerenklau vs. Peerless Realty Co., 80 N. J. Eq., 26; Connely vs. Haggarty, 65 N. J. Eq., 596,* affirmed, *68, N. J. Eq., 794; Orange Society vs. Konski, 94 N. J. Eq., 632.*

The Vice Chancellor was fully justified in his finding (page 86, lines 30 to bottom) that the defendant led the owners of the property to believe that they wouldn't be required to vacate the property of its patients at the time of settlement and could have a reasonable time, which was estimated to be 60 or 90 days after that time for that purpose. He properly applied (page 87, lines 13 to 17) the doctrine of equitable estoppel that it is not in the power of the defendant to come here and make a defense for non-performance the claim that the vendors failed to do the very thing he led them to believe they need not do.

IV.

THE PLEA OF APPELLANT TO HAVE THE BENEFITS WITHOUT THE BURDENS OF THE CONTRACT IS INEQUITABLE.

The appellant agreed to buy (page 14, line 33) the property for $175,000 (page 15, lines 5, 6 and 7) to be paid as follows: $7500 was to be paid prior to settlement and the balance at settlement. In paying the balance of $167,500, at least $17,500 must be paid in cash and upon the payment of $17,500 in cash, $150,000 might remain on mortgage.

It was, of course, farthest from the thoughts of the parties that settlement could be made merely by the execution of a mortgage and without the cash payment. The whole $167,500 might be paid in cash, but the whole $167,500 could not be secured by mortgage. The right to give the mortgage was tied up to the payment of the $17,500.

The appellant now asks to be relieved of the $17,500 cash payment, and, without even tendering himself willing to execute a mortgage, asks the Court to sell the property subject to an imaginary mortgage of $150,000.

He says (appellant's brief, page 13), "He should be permitted, *if he is willing,* to partly perform." He does not say he is willing, but, even assuming that he is willing, he may not partially perform.

Where a contract is performed, the contract itself fixes the rights of the parties, but where it is not performed, the law measures the consequences in money.

The appellant cannot claim the benefits and rid himself of the burdens of the contract.

V.

APPELLANT IN ONE BREATH INSISTS THAT THE AGREEMENT CANNOT BE MODIFIED OR INTERPRETED BY PAROL AND IN ANOTHER BREATH INSISTS THAT DR. SCHALL'S IDEA OF THE MEANING OF THE LANGUAGE USED IS EFFECTIVE TO VARY OR INTERPRET THAT LANGUAGE, EVEN THOUGH DR. MAHAFFEY MAY NOT CONCUR IN THAT INTERPRETATION.

Pages 7 and 8 of appellant's brief are devoted to showing that, under the statute of frauds, the written agreement cannot be changed or altered by parol.

On pages 5 and 6 of the same brief appellant takes Dr. Schall's answers to lengthy and confusing questions and seeks to torture those answers into a construction of the agreement inconsistent with the right to specific performance. In reading the questions, it is difficult to tell exactly what counsel had in mind and consequently just what Dr. Schall meant by his answers.

The questions might properly present to Dr. Schall's mind a situation where Sarshik would be bankrupt or execution proof. Dr. Schall may have been considering what he would be compelled to do in case it turned out that all legal and equitable remedies against Sarshik failed.

Whatever the questions and answers mean is immaterial as the contract must speak for itself and cannot be varied by what one of the parties might think it meant. Moreover, it is not claimed that Dr. Mahaffey knew anything about Dr. Schall's mental interpretation of the contract nor that he concurred in it. Consequently he could not in any event be bound by it.

VI.

THE APPELLANT'S CLAIM THAT THE DECREE HAS IN EFFECT REQUIRED HIM TO SPECIFICALLY PERFORM A PAROL AGREEMENT IS UNTENABLE.

The second cause of action mentioned in the bill (pages 5 and 6), it is true, asked for a reformation of the agreement to accord with a subsequent oral agreement. This cause of action, however, was abandoned at the hearing (page 24, lines 16 to bottom, and all of page 25) and the case was tried on the theory of waiver and estoppel.

The matter of waiver and estoppel is discussed at some length under heading No. III.

But even if waiver and estoppel were not a complete answer, the entire division II of appellant's brief is based on a misconception of the decree. The decree does not enforce any parol agreement. It does not require settlement before possession. It directs (page 93, lines 30 to bottom, and page 94, lines 1 to 30) the defendant on November 20, 1926, at ten o'clock in forenoon to perform his part of the agreement and directs the complainants to deliver at the same time possession free and clear of all tenants and occupants. It enforces the written agreement.

VII.

THE APPELLANT'S CLAIM, THAT THE CONTRACT LIMITS THE SELLERS' REMEDY TO RETAINING THE DOWN PAYMENT AS LIQUIDATED DAMAGES, IS LIKEWISE UNTENABLE.

He contends (page 23, lines 1 to 11) that the agreement conferred an exemption from performance at the option of the defaulting party and he asks the Court

(appellant's brief, page 4) to read into the contract the word "either" to give the agreement that effect.

This claim now put forth is strangely at variance with his claim in his suit at law to recover the down payment. The suit at law was restrained by the decree in this case (page 93, lines 20 to 29, and page 95, lines 12 to 18). The petition and notice which were before the Vice Chancellor would show more fully the nature of the action at law. Indeed, having elected in one suit to claim that the down payment was not liquidated damages, he cannot be heard in another suit to claim that it was liquidated damages. As Vice Chancellor Backes expresses it, "A man shall not be allowed to approbate and reprobate." *Blum Bldg. Co. vs. Ingersoll* (not officially reported), *134 Atl, 176, 178.* This Court, in *Claron vs. Thommessen, 96 N. J. Eq., 650, 653,* declared that a man who brought suit to recover deposit money "irrevocably committed himself in solemn form to a repudiation of all obligation under the agreement." See also *Maturi vs. Fay, 98 N. J. Eq., 377.*

This present claim of appellant entirely ignores the early part of the agreement in which the appellant agrees absolutely to buy (page 14, line 33) not an option but the land itself and ignores also the fact that throughout the agreement he is called "the Buyer." There are no "ifs" nor "ands" about it; he agrees to buy.

Agreements for the sale of land never mention specific performance. That remedy is given without specific mention. Agreements often do mention other remedies but such other remedies when mentioned, are not equivalent to performance. In fact it may now be considered a rule of property that performance, not non-performance, is the object of contracts of this nature and the presence of a stipulation, for liquidated damages does not defeat the primary object which is performance. The cases

are collected in *Nolan vs. Kircher, 98 N. J. Eq., 452.* These decisions must be read into the contract, as the parties are presumed to have contracted with reference to such decisions.

The paragraph in the agreement (page 15, lines 26 to 31), on which appellant relies, reads, "The balance shall be paid in cash at the time of final settlement, which shall be made at the offices of Carl Kisselman, 541 Market Street, Camden, N. J., on or before March 23, A. D. 1926, or the deposit made herewith shall be forfeited as liquidated damages to the Seller, and not as a penalty, * * *."

Even in the absence of the above-mentioned decisions, the result would be the same, because this paragraph must be construed in the light of the context, the absolute agreement of Sarshik to buy. It must be so construed as to prevent an absurd or unreasonable result. It would be both unreasonable and absurd where a party calls himself "the Buyer" and unequivocally "agrees to buy," to say later on that he is not a buyer and does not agree to buy.

To that end such words as "or" and "shall" will be given whatever meaning is required to bring the different parts of the agreement into harmony. In Words and Phrases, there are listed many and varied meanings given to the word "or" and also to the word "shall," to prevent absurd or unreasonable results. This is predicated on the assumption that it could not have been intended to produce absurd and unreasonable results, and the word to be corrected was inserted by inadvertence or clerical error. *Manson vs. Dayton, 153 Fed., 258, 269, 82 C. C. A., 588.*

By taking the words "or the deposit made herewith shall be forfeited as liquidated damages to the Seller" and giving to "or" the meaning "and" and to "shall" the meaning "may" the reading will be, "and the deposit

made herewith may be forfeited as liquidated damages to the Seller." That will be in entire harmony with the Buyer's preceding unqualified agreement to buy and will give the Seller his right to specific performance or in lieu thereof, if the Seller so elects, a right to retain the deposit as liquidated damages. It can hardly be doubted that this is what the language used meant to the parties signing the agreement.

So that whether we view it as a matter of estoppel to claim that the down payment was liquidated damages after having declared in an action at law that it was not liquidated damages, or whether we view it as a rule of property that a clause of this character cannot defeat specific performance, or whether we construe the clause in connection with the context, the result is the same, the claim under consideration is untenable.

CONCLUSION

The complainants were prepared on April 7, 1926, and offered to carry out the agreement either by giving immediately the kind of possession of this hospital which Mr. Sarshik had previously told them was satisfactory, or by depositing the papers with the title company for a few days while the patients were removed. The claim suddenly made by Sarshik that neither course was satisfactory to him was mere pretense and subterfuge to enable him, as Vice Chancellor Backes puts it, "to back out of his contract." Sarshik cannot have the benefits without the burdens of the contract. The decree does not in any sense, direct the specific performance of a parol agreement, and the contract contains nothing that could take away or impair the complainants' right to a decree of specific performance. The result is that the decree should be affirmed.

All of which is respectfully submitted.

FRENCH, RICHARDS & BRADLEY,
For Respondents.