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BILL FOR SPECIFIC PERFORMANCE.

(Filed Apr. 28, 1923.)

IN CHANCERY OF NEW JERSEY.

ROBERT BERRY, *Complainant,* v. THOMAS C. STEWART, *Defendant.*	On Bill for Specific Performance.

10

Robert Berry, complainant, respectfully shows:

1. That on the twenty-third day of February, A. D. 1923, that Thomas C. Stewart, defendant, was minded to sell and represented that he had the power to sell and convey, all that lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Atlantic City, County of Atlantic and State of New Jersey, bounded and described as follows:

20

BEGINNING at a point in the Westerly line of Albany Avenue, One hundred and twenty (120) feet North of the Northerly line of Porter Avenue and extending thence (1) Westwardly, parallel with Porter Avenue, One hundred and five (105) feet to a point; thence (2) Northwardly, parallel with Albany Avenue, ninety-six (96) feet to a point; thence (3) Eastwardly, parallel with Porter Avenue, One hundred and five (105) feet to a point in the Westerly line of

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Albany Avenue; thence (4) Southwardly, in and along the said Westerly line of Albany Avenue, ninety-six (96) feet to the place of beginning.

And that Robert Berry, being minded to purchase said lands, an agreement in writing was made and signed, whereby Thomas C. Stewart, sold and agreed to convey the said lands by a deed of general warranty, in fee simple, free and clear of all en-
10 cumbrance, except as mentioned in said agreement, and further agreed that the title should be a good and marketable title and such as the South Jersey Title and Finance Company will insure, to the said Robert Berry for the sum of twelve thousand dollars, payable and to be paid as follows, five hundred dollars upon the signing of the said agreement, the assumption of four five hundred dollar mortgages now existing on the said lands, thirty-five hundred dollars in cash on delivery of deed and final
20 settlement, and the creation of a purchase money mortgage for six thousand dollars, payable any time within one year, settlement on or before the twenty-third day of April, A. D. 1923, as in and by said writing now in the hands of said complainant, and ready to be produced, reference being had thereunto, will more fully appear.

2. That on the signing of said agreement, Robert Berry paid and Thomas C. Stewart received the said
30 sum of five hundred dollars, on account of said purchase price, according to the terms of said contract, the receipt whereof is therein acknowledged.

3. That the said Robert Berry made a mistake as to the date on which said settlement was to be made and instead of arranging for the settlement on the twenty-third day of April, A. D. 1923, he arranged

for the settlement on the twenty-fourth day of April, A. D. 1923, and that on the twenty-fourth day of April, A. D. 1923, the said Robert Berry went to the South Jersey Title and Finance Company prepared to settle and for the first time learned of his error of fact as to the date of settlement. The said Robert Berry immediately endeavored to get in touch with the said Thomas C. Stewart, but was unable to do so until the twenty-fifth day of April, A. D. 1923, at which time the said Thomas C. Stewart repudiated his said contract and said that the price of the property had increased, and that he would not carry out his agreement.

4. That time was not the essence of the agreement, and that Robert Berry is now and always has been willing, ready and able to perform and desirous of performing, the said agreement, on his part, according to the terms thereof, but the said Thomas C. Stewart, has refused and still refuses to perform the said agreement, on his part.

Robert Berry is without adequate remedy in the courts of law, and therefore, prays:

1. That Thomas C. Stewart, defendant, may answer this bill of complaint without oath, and,

2. That Thomas C. Stewart, defendant, be decreed to specifically perform the agreement above set forth, and,

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

4. That the complainant, Robert Berry, may have such further or other relief in the premises as the nature of the case may require, agreeable to equity.

JOHN C. REED,
Solicitor for and of Counsel with Complainant.

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10 ANSWER.

(Filed June 2, 1923.)

IN CHANCERY OF NEW JERSEY.

ROBERT BERRY, *Complainant,* v. THOMAS C. STEWART, *Defendant.*	Answer.

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Thomas C. Stewart, of the City of Atlantic City, County of Atlantic and State of New Jersey, answering the bill of the complainant, says:

30 1. He admits paragraph 1.

2. He admits paragraph 2.

3. He denies paragraph 3.

4. He denies paragraph 4.

By way of defense, the defendant says:

FIRST DEFENSE.

1. That immediately after said agreement, referred to in paragraph 1, was signed, the defendant advised the complainant's agents that he would insist upon settlement on the twenty-third day of April, 1923, and would not convey said premises at any later date. 10

SECOND DEFENSE.

1. That on said twenty-third day of April, 1923, the defendant presented himself at the South Jersey Title and Finance Company, and tendered to its representatives a deed for the said premises and demanded the payment of the purchase money and the delivery of the mortgage referred to in said agreement, but that neither the plaintiff or anyone 20 for him was present or appeared at any time on said day.

2. That on April twenty-fourth, 1923, the defendant advised the agents of the complainant that he would not convey in any circumstance and that no tender was made to him on that day or any other day and none has been made down until the present time.

30

THIRD DEFENSE.

1. That on April 25, 1923, for valuable consideration, the defendant sold and conveyed the premises described in the bill, to one Kent.

WILLIAM CHARLTON,
Solicitor for Defendant.

ANSWER.

(Filed Dec. 3, 1923.)

IN CHANCERY OF NEW JERSEY.

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10 Between

ROBERT BERRY, *Complainant,* and THOMAS C. STEWART and THOMAS KENT, *Defendants.*	On Bill, Etc. Answer.

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Thomas C. Stewart, of the City of Atlantic City, County of Atlantic and State of New Jersey, and Thomas Kent, of the City of Pleasantville, County of Atlantic and State of New Jersey, answering the amended bill of camplaint, say:

1. They admit paragraph 1, except as is stated in the first defense hereinafter set forth.

30 2. They admit paragraph 2, except as is stated in the first defense hereinafter set forth.

3. They deny paragraph 3. They admit that on April 25th, 1923, Thomas C. Stewart, conveyed the said lands to Thomas Kent and that said conveyance is recorded in the office of the clerk of Atlantic County.

4. They deny that said conveyance was not in good faith.

5. They deny paragraph 5.

FIRST DEFENSE.

1. That complainant, Robert Berry, is not the real complainant and was not the real purchaser and that the check given by him to the defendant, Thomas C. Stewart, for five hundred ($500.00) dollars, while signed by him, was in fact, a mere transfer of money from the principal of the said Robert Berry, to Robert Berry as an agent.

2. That the real complainant and principal of Robert Berry, was either Berg, Ulizio & Gibbons, a corporation, or David Berg, or B. George Ulizio.

3. That a fraud was perpetrated upon the complainant in this respect and in that part of the agreement requiring him to pay a commission to Berg, Ulizio & Gibobns, or David Berg, or B. George Ulizio, for acting as agents in this transaction.

SECOND DEFENSE.

1. That before the signing of the agreement referred to in paragraph 1 and after the signing thereof, the defendant, Thomas C. Stewart and William Charlton, who is the one-half owner of the premises in question, although the title stands wholly in the name of the defendant, Thomas C. Stewart, advised the complainant's principals, that the defendant, Thomas C. Stewart, would insist upon a settlement upon the twenty-third day of April, 1923, and would refuse to convey said premises unless settlement was made on or before that day without fail.

2. That the complainant's principals, who were then present both before and after the signing of the agreement referred to hereinbefore, agreed that they would settle for the said premises on or before the twenty-third day of April, 1923, or would forfeit the deposit paid to secure said agreement.

THIRD DEFENSE.

10

1. That no tender was ever made to the defendant, Thomas C. Stewart, either prior to the twenty-third day of April, 1923, or subsequently and none has been made yet down to the present date.

FOURTH DEFENSE.

1. That on the said twenty-third day of April, 1923, the defendant, Thomas C. Stewart, presented
20 himself at the South Jersey Title & Finance Company, Atlantic City, New Jersey, and tendered to its representatives, a deed for the said premises and demanded payment of the purchase money and the delivery of a mortgage referred to in said agreement, but neither the complainant nor any one for him, was present or appeared at any time on said day.

2. That the complainant and his principals well
30 knew that the twenty-third day of April, 1923, was the day set for settlement and had arranged with the South Jersey Title & Finance Company as their representatives and agents, to arrange for a title on or before that day.

3. That the said South Jersey Title & Finance Company was ready and prepared on its part to complete the settlement on or before April 23rd,

1923. That the complainant and his principals failed to tender themselves ready and willing then and there.

WILLIAM CHARLTON,
Solicitor for Defendants.

AMENDED BILL OF COMPLAINT.

(Filed Nov. 14, 1923.) 10

IN CHANCERY OF NEW JERSEY.

ROBERT BERRY, *Complainant,* v. THOMAS C. STEWART, and THOMAS KENT, *Defendants.*	On Bill for Specific Performance. Amended Bill of Complaint. 20

Robert Berry, Complainant, respectfully shows:

1. That on the twenty-third day of February, A. D. 1923, that Thomas C. Stewart, defendant, was minded to sell and represented that he had the power to sell and convey, all that lot, tract or parcel 30 of land and premises hereinafter particularly described, situate, lying and being in the City of Atlantic City, County of Atlantic and State of New Jersey, bounded and described as follows:

BEGINNING at a point in the Westerly line of Albany Avenue, One hundred and twenty

(120) feet North of the Northerly line of Porter Avenue and extending thence (1) Westwardly, parallel with Porter Avenue, one hundred and five (105) feet to a point; thence (2) Northwardly, parallel with Albany Avenue, ninety-six (96) feet to a point; thence (3) Eastwardly, parallel with Porter Avenue, One hundred and five (105) feet to a point in the Westerly line of Albany Avenue; thence (4) Southwardly, in and along the said Westerly line of Albany Avenue, ninety-six (96) feet to the place of beginning.

And, that Robert Berry, being minded to purchase said lands, an agreement in writing was made and signed, whereby Thomas C. Stewart, sold and agreed to convey the said lands by a deed of general warranty, in fee simple, free and clear of all encumbrance, except as mentioned in said agreement, and further agreed that the title should be a good and marketable title and such as the South Jersey Title and Finance Company will insure, to the said Robert Berry for the sum of twelve thousand dollars, payable and to be paid as follows, five hundred dollars upon the signing of the said agreement, the assumption of four five hundred dollar mortgages now existing on the said lands, thirty-five hundred dollars in cash on delivery of deed and final settlement, and the creation of a purchase money mortgage for six thousand dollars, payable any time within one year, settlement on or before the twenty-third day of April, A. D. 1923, as in and by said writing now in the hands of said complainant, and ready to be produced, reference being had thereunto, will more fully appear.

2. That on the signing of said agreement, Robert Berry paid and Thomas C. Stewart received the said

sum of five hundred dollars, on account of said purchase price, according to the terms of said contract, the receipt whereof is therein acknowledged.

3. That the said Robert Berry made a mistake as to the date on which said settlement was to be made and instead of arranging for the settlement on the twenty-third day of April, A. D. 1923, he arranged for the settlement on the twenty-fourth day of April, A. D. 1923, and that on the twenty-fourth day of April, A. D. 1923, the said Robert Berry went to the South Jersey Title and Finance Company prepared to settle and for the first time learned of his error of fact as to the date of settlement. The said Robert Berry immediately endeavored to get in touch with the said Thomas C. Stewart, but was unable to do so until the twenty-fifth day of April, A. D. 1923, at which time the said Thomas C. Stewart repudiated his said contract and said that the price of the property had increased, and that he would not carry out his agreement.

4. That on April 25th, 1923, Thomas C. Stewart, by deed, conveyed the land above described to one Thomas Kent, which deed was recorded on April 25th, 1923, in the office of the clerk of Atlantic County. Said conveyance was not in good faith or for a valuable consideration, but was made for the sole purpose of avoiding the force and effect of the said agreement to convey said land to complainant.

5. That time was not the essence of the agreement, and that Robert Berry is now and always has been willing, ready and able to perform and desirous of performing, the said agreement, on his part, according to the terms thereof but the said Thomas C. Stewart has refused and still refuses to perform, the said agreement, on his part.

That Robert Berry is without adequate remedy in the Courts of Law, and therefore prays:

1. That Thomas C. Stewart, and Thomas Kent, who are the defendants, in this suit may answer this bill of complaint, without oath, and each statement therein contained.

2. That Thomas C. Stewart, defendant, be de-
10 creed to specifically perform the agreement above set forth.

3. That the defendant, Thomas C. Stewart or Thomas Kent, one or both, if necessary, be decreed to convey to complainant the legal title to said land, freed and discharged of any lien or encumbrance thereon.

4. That a writ of subpoena may issue command-
20 ing the defendants to answer this bill of complaint, and to abide by such decree as the Court may make in the premises.

5. That the complainant, Robert Berry, may have such further or other relief in the premises as the nature of the case may require, agreeable to equity.

JOHN C. REED,
Solicitor for and of Counsel with Complainant.

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[ENDORSED]

I consent to the filing of this amended bill of complaint.

William Charlton,
Solicitor for Thomas C. Stewart.

AMENDED ANSWER.

(Filed Dec. 19, 1923.)

IN CHANCERY OF NEW JERSEY.

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Between ROBERT BERRY, *Complainant,* v. THOMAS C. STEWART, and THOMAS KENT, *Defendants.*	On Bill, etc. Amended Answer.

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Thomas C. Stewart, of the City of Atlantic City, County of Atlantic and State of New Jersey, and Thomas Kent, of the City of Pleasantville, County of Atlantic and State of New Jersey, answering the amended bill of complaint, say:

1. They admit paragraph 1, except as is stated in the first defense hereinafter set forth.

2. They admit paragraph 2, except as is stated in the first defense hereinafter set forth. 30

3. They deny paragraph 3. They admit that on April 25th, 1923, Thomas C. Stewart conveyed the said lands to Thomas Kent and that said conveyance is recorded in the office of the clerk of Atlantic County.

4. They deny that said conveyance was not in good faith.

5. They deny paragraph 5.

FIRST DEFENSE.

1. That complainant Robert Berry is not the real complainant and was not the real purchaser and
10 that the check given by him to the defendant, Thomas C. Stewart, for five hundred dollars ($500.00), while signed by him, was in fact, a mere transfer of money from the principal of the said Robert Berry, to Robert Berry as an agent.

2. That the real complainant and principal of Robert Berry, was Herman G. Mulock.

3. That a fraud was perpetrated upon the com-
20 plainant in this respect because the said Mulock shared in the commission agreed to be paid by the defendant Thomas C. Stewart to Berg, Ulizio & Gibbons by whom the said Mulock was employed, and by whom the said Mulock was not permitted to enter into any contracts for the sale of land.

SECOND DEFENSE.

1. That before the signing of the agreement re-
30 ferred to in paragraph 1 and after the signing thereof, the defendant Thomas C. Stewart and William Charlton, who is the one-half owner of the premises in question, although the title stands wholly in the name of the defendant, Thomas C. Stewart, advised the complainant's principals, that the defendant, Thomas C. Stewart, would insist upon a settlement upon the twenty-third day of April, 1923, and would

refuse to convey said premises unless settlement was made on or before that day without fail.

2. That the complainant's principal, who was then present both before and after the signing of the agreement referred to hereinbefore, agreed that he would settle for the said premises on or before the twenty-third day of April, 1923, or would forfeit the deposit paid to secure said agreement.

10

THIRD DEFENSE.

1. That no tender was ever made to the defendant Thomas C. Stewart either prior to the twenty-third day of April, 1923, or subsequently and none has been made yet down to the present date.

FOURTH DEFENSE.

1. That on the said twenty-third day of April, 1923, the defendant, Thomas C. Stewart, presented himself at the South Jersey Title & Finance Company, Atlantic City, New Jersey, and tendered to its representatives, a deed for the said premises and demanded payment of the purchase money and the delivery of a mortgage referred to in said agreement, but neither the complainant nor anyone for him, was present or appeared at any time on said day.

20

30

2. That the complainant and his principals well knew that the twenty-third day of April, 1923, was the day set for settlement and had arranged with the South Jersey Title & Finance Company as their representatives and agents, to arrange for a title on or before that day.

3. That the said South Jersey Title & Finance Company was ready and prepared on its part to complete the settlement on or before April 23rd, 1923. That the complainant and his principal failed to tender themselves ready and willing then and there.

WILLIAM CHARLTON,
Solicitor for Defendants.

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NOTICE.

(Filed March 12, 1924.)

IN CHANCERY OF NEW JERSEY.

Between 20 ROBERT BERRY, *Complainant,* v. THOMAS E. STEWART, *et als.*, *Defendants.*	On Bill, etc. Notice.

Sir:

30 Take notice that on Wednesday, the 12th day of March, 1924, at 10 o'clock in the forenoon, before Honorable Robert H. Ingersoll, Vice-Chancellor, to whom the above cause has been heretofore referred, I will move to amend the amended answer heretofore filed in this cause by inserting on the third page thereof, after the fourth defense, the following additional matter, to wit:

"Fifth Defense. 1. That on or about the 23rd day of February, 1923, the complainant, through Herman G. Mulock and L. B. Roberts, represented to the defendant that they had secured as a purchaser for the premises in question one, Robert Berry, whom they represented to be a wealthy resident of Philadelphia whose purpose in buying the property was to improve the same by the erection of building thereon, which said buildings were to be erected immediately after the said Berry had acquired title to said premises; that said representations were false in that the said Berry was not a wealthy resident of the City of Philadelphia but was, in fact, a resident of the City of Atlantic City engaged in the occupation of driving a jitney, and the said Berry did not intend to purchase said premises for the purpose of improving same by the erection of buildings thereon but that he was purchasing the same for speculation; that defendant was induced to sign the contract particularly described in complainant's bill of complaint by said false representations and was also induced to agree to convey said premises at a less price than he would have agreed to convey them had not said false representations been made; that defendant relied upon said false representations and believed them to be true and by reason of his belief was induced to sign the contract sued upon."

Yours respectfully,

WILLIAM CHARLTON,
Solicitor of Defendant.

To: John C. Reed, Esq.,
Solicitor of Complainant.

[ENDORSED]

Service of the within notice duly acknowledged this 29th day of February, 1924.

John C. Reed,
Solicitor of Complainant.

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REPLICATION.

(Filed March 12, 1924.)

IN CHANCERY OF NEW JERSEY.

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20 Between

ROBERT BERRY, *Complainant,* and THOMAS E. STEWART and THOMAS KENT, *Defendants.*	On Bill, Etc. Replication.

30

Complainant joins issue on the answer of the defendant.

JOHN C. REED,
Solicitor for and of Counsel with Complainant.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between ROBERT BERRY, *Complainant,* and THOMAS E. STEWART and THOMAS KENT, *Defendants.*	On Bill, etc. Replication. Specific Performance.

10

(Testimony taken before ROBERT H. INGERSOLL, Vice-Chancellor, at Atlantic City, N. J., March 12, 1924.)

20

APPEARANCES:
JOHN C. REED, for complainant.
FRANK A. SOOY, for defendants.

30

By Mr. Reed: We subpoenaed a witness, who is one of the defendants, and I have an idea he won't come here. We made a mistake in the dates in our office, stating yesterday for today—that is the 11th. We told him that he was to be here this morning and he was to serve for the 12th. I don't know whether he will be here or not.

By Mr. Sooy: I think we will admit anything you say.

By Mr. Reed: I would like to have him here and admitting the clerk made a mistake, but when this was served he was told he was to be here this morning. I don't know what to say—I want his evidence.

The Vice-Chancellor: I think, under the circumstances, I will give you time to produce him.

By Mr. Reed: This is a bill for specific performance, on a contract made between Berry v. Stewart.

HERMAN J. MULOCK, a witness produced on behalf of the complainant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Reed:

Q. Do you know Robert Berry, Mr. Mulock?
A. Yes, sir.
Q. Do you know Thomas Stewart?
A. Yes, sir.
Q. February, 1923, were you engaged in business in Atlantic City with Berg & Ulizio?
A. Yes, sir.
Q. In real estate business?
A. Yes, sir.
Q. Did Thomas E. Stewart ever list with you, properties on the boulevard for sale?
A. Charlton and Stewart.

Q. What was your position at Berg & Ulizio at that time?

A. General manager.

Q. Did you have the properties mentioned in this contract or agreement of sale, listed by Stewart?

A. Yes, sir.

Q. Did you find a customer for that property?

A. Yes, sir.

Q. Who was the customer?

A. One of the representatives in the office, Mr. Robert, found the customer. 10

Q. Was he produced to you?

A. Yes, sir.

Q. Who was he?

A. Mr. Berry.

Q. Did you notify Mr. Stewart you had a buyer?

A. Yes, I notified Mr. Charlton's office.

Q. Have an interview with Mr. Charlton and Mr. Stewart?

A. Yes, they came down to the office after talking over the phone. 20

Q. What happened after they came to the office?

A. We submitted—the property was listed in our office at $150.00 a foot and Mr. Berry had left a check for $500.00, to make a tender of $125.00 a foot. We submitted the offer, and I submitted it first to Mr. Charlton. He said he would take it up with Mr. Stewart and they came down to the office later on in the day, and finally accepted the offer.

Q. And at that time did they, in your presence, execute —— 30

A. Stewart signed this contract.

Q. Did you see him sign it?

A. Yes, sir.

Q. Did you deliver the check ——

A. Let me see it—yes, sir.

Q. Is the check that was handed to you by Mr. Berry to make this purchase?

A. Yes, sir.

Q. And did you deliver this check to Mr. Charlton after Stewart had signed the contract?

A. Yes, sir.

I offer the contract and the check in evidence.

10 (Agreement or contract referred to, received in evidence and marked Exhibit P1.)

(Check referred to, received in evidence and marked Exhibit P2.)

Q. What was said at the time this contract was concluded as to the settlement date?

A. The settlement was to be made—sixty days
20 from the date of the agreement.

Q. Did you have charge of the conduct of this business for Berg & Ulizio at that time?

A. Yes, sir.

Q. What did you do after the contract was signed, with respect to the settlement?

A. We always file copies—we filed the copy of the agreement in the office, and later on I checked it up and came up to the title company's office.

Q. Which title company?

30 A. South Jersey. I asked the bookkeeper if she had anything to go up and she said there had not been any settlement day ordered for this agreement, and I asked her what the date of the settlement was.

The Vice-Chancellor: It's not what the bookkeeper told you—it's what you did at the title company.

A. After this conversation with the bookkeeper, I made an arrangement for settlement on the 24th of April.

Q. Did you go to the title company on the 24th of April?

A. Yes, sir.

Q. What did you learn when you went to the title company on the 24th of April?

A. I learned Mr. Stewart had been there the day before and said that he was to have a settlement 10 there for that property.

Q. After that, did you keep the original contract that the Vice-Chancellor has?

A. I kept the original contract. I had the contract with me then.

Q. You knew the contract called for settlement on the 23rd—what did you do after you learned this contract called for settlement on the 23rd?

A. On the morning of the 24th I called up Mr. Charlton and told him we would be ready to settle 20 at 2 o'clock. He reminded me that the date of settlement had been the day before. It had not entered my mind up until that time—I had not paid any attention to it. I told him we would be there at 2 o'clock, that it was my impression it was the 24th and we would be there at 2 o'clock to make settlement.

Q. On the 24th?

A. Yes, sir.

Q. Did you ever see Mr. Stewart about this mat- 30 ter after he didn't appear at the settlement?

A. Certainly.

Q. When did you see him, Mr. Mulock?

A. I wasn't able to see him that day, but the next morning.

Q. Tried to get in touch with him on the 24th?

A. I tried to get in touch with him on the 24th.

Q. When did you get in touch with him?

A. On the morning of the 25th.

Q. Who was with you at that time?

A. Mr. Roberts.

Q. What conversation did you have with Mr. Stewart at that time, relative to this settlement?

A. I told him there had been a mistake in the date. I figured sixty days and when I ordered the settlement made up, figured the 24th, which was sixty days, but afterward I found the agreement had been dated the 23rd, through a mistake in the office, and there was no reason in the world why we couldn't settle on the 23rd. We were under the impression it was the 24th. He said, "Well, there is no use of saying anything about it, your time was on the 23rd and you didn't appear to settle and we are not going to settle." I said I didn't think this ought to stop the settlement, it was simply an error. It was all in good faith, we were ready to settle and had been from the start. He said, "You don't think I am going to hand you five or six thousand dollars, of course, the value of the property has increased," and I said, "If that is the way you feel about it I don't want to do any business with you, I will take some other means of getting it." He said, "All right, go ahead, go as far as you like."

Q. Was Mr. Berry with you on the 24th when you went to the title company?

A. Yes, sir.

Q. Was Mr. Berry at the time you negotiated this contract with Mr. Stewart?

A. No, sir.

Q. What part did Mr. Berry take in the negotiation of this contract, will you explain to the Vice-Chancellor what he had done?

A. Mr. Berry had been in the habit ——

Q. I mean about this particular piece of property —had he looked at this property?

A. Yes, sir.

Q. Made an offer?

A. Made an offer.

Q. And left a check with you as agent?

A. Yes, left a check.

Cross-examination.

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By Mr. Sooy:

Q. Had you had anything to do with the sale of the piece of property adjoining this tract of land, from Mr. Stewart and Mr. Charlton to Cuskaden?

A. Yes, sir.

Q. Were you present at the settlement of that property?

A. I don't remember.

Q. Were you the agent in charge of that deal? 20

A. Yes, sir.

Q. You remember there had been some delay in the settlement for the Cuskaden property, didn't you?

A. Yes, sir.

Q. And there has been some objection on the part of Stewart and Charlton over that delay?

A. I don't know about any objection.

Q. There was dissatisfaction over that delay. It wasn't settled on the day it was to be settled? 30

A. Yes, sir, Mr. Cuskaden gave them a reasonable excuse and they didn't seem to be worried about it.

Q. The settlement of this property was after the Cuskaden settlement?

A. Yes, sir.

Q. Isn't it a fact, you saw Mr. Charlton and Mr. Stewart in reference to this property, the first time,

on the 23rd day of February, when they were coming out, after a conversation with Mr. Ulizio in Mr. Ulizio's office?

A. They didn't have a conversation with Mr. Ulizio, he wasn't there.

Q. Hadn't Mr. Charlton and Mr. Stewart, on the 23rd day of February, gone down to see Mr. Ulizio, and hadn't they been closeted with him for a while?

A. No.

10 Q. You don't remember that?

A. Mr. Ulizio wasn't in town that day.

Q. When did you see Mr. Charlton and Mr. Stewart with reference to the signing of this agreement, first?

A. In the afternoon of the 23rd.

Q. And you saw them down at the office of Berg & Ulizio?

A. Yes, sir.

Q. How did they happen to go there?

20 A. I talked to Mr. Charlton on the phone about it, and made the offer over the phone first and he said he would have to see Mr. Stewart. He and Mr. Stewart came down to the office together. They came, as the result of the telephone conversation—they came down to the office.

Q. Who was present when they got there and discussed the question of the sale of this property?

A. Mr. Roberts.

Q. And yourself?

30 A. Yes, sir.

Q. Anyone else come during the time you were discussing it?

A. I don't remember—the bookkeeper was there.

Q. Who is the bookkeeper?

A. Miss Street.

Q. During the time you were discussing the sale

of the property, do you remember whether or not Mr. Goldberg—Dave Goldberg came in?

A. Well, Mr. Goldberg came in the office occasionally. I don't remember whether he came in on that day or not.

Q. Do you remember that Mr. Berry was there on that day when the agreement was signed?

A. He was not there.

Q. You say he was not there when you were talking to Charlton and Mr. Stewart in reference to the sale of the property? 10

A. No.

Q. Had he come at the time Charlton and Stewart got there, or prior to the time they got there, to sign the agreement which you introduced in evidence?

A. No, he signed it after Charlton and Stewart signed it.

Q. He had given you a check prior to that time?

A. He left a check with Mr. Roberts. 20

Q. How many days before?

A. The same day.

Q. Now, at the time you were discussing the matter with Stewart and Charlton, they insisted, did they not, that if you were given sixty days, settlement must be made within sixty days?

A. They stated there would be no extension of the time of the agreement.

Q. And they did tell you there would be no extension? 30

A. Yes, sir.

Q. What was the reason?

A. There had been an extension in the other settlement and they didn't any extension of this settlement, and there was no use of asking for any, and I didn't ask for any.

Q. Afterwards, after the signing of the agree-

ment, do you remember that either you or Mr. Roberts telephoned to Mr. Charlton and asked for an extension to be granted?

A. No.

Q. You don't remember that?

A. No.

Q. You don't know whether or not, after the signing of the agreement, and before the 23rd day of April, there was a request for an extension?

10 A. It was never made by me.

Q. It was by someone else, you don't know?

A. No, I don't know.

Q. Did they ask you at the time you signed this agreement who Robert Berry was?

A. No.

Q. Did you tell them who he was?

A. No.

Q. Did Mr. Roberts tell them who he was?

A. I don't know. I didn't hear him.

20 Q. Who, in fact, was Mr. Berry—what was his business at that time?

A. He had been dealing in real estate.

Q. What was his main business?

A. He wasn't in any other business at that time that I know of.

Q. Was he driving a jitney at that time?

A. No.

Q. How long has it been since he's been driving a jitney?

30 A. He told me sometime previous to that he had sold his automobile.

Q. That was about January of that year, wasn't it?

A. No, I don't think it was.

Q. You don't know?

A. No, I don't just remember how long.

Q. Had you and Mr. Berry been in deals together for real estate in Atlantic City before that time?

A. No.

Q. Never?

A. No.

Q. Had you and Mr. Berry been dealing on real estate on your own account prior to that time?

A. I don't remember whether we did or not.

Q. As a matter of fact, had you at any time?

A. Yes. 10

Q. And had Mr. Berry been in with you in these deals?

A. Not prior to that.

Q. Afterwards he was?

A. Yes, sir.

Q. Many times?

A. No.

Q. And that was while you were connected with the firm of Berg and Ulizio?

A. No. 20

Q. Was it afterwards?

A. Yes, sir.

Q. What particular deals were they?

A. I was in a deal with Mr. Berry on some lot—on the west side.

Q. Had it been sold?

A. No.

Q. You and he bought them together, did you?

A. Mr. Berry and Mr. Carroll and myself.

Q. Did you explain or did you or Mr. Roberts, 30 in your presence, state to Mr. Charlton or Mr. Stewart that this property was not being purchased for the purpose of speculation?

A. No, sir.

Q. Did you tell them there was no extras to be made on the property after Mr. Berry became the owner of it?

A. No, sir.

Q. Nothing was discussed that you remember with reference to improvements?

A. No.

Q. You say the property had been listed, do you mean by them, that they had given you a written listing or authority to sell the property?

A. No, they didn't give me a written listing. They just listed it verbally—told me to sell it at $150.00
10 a foot.

Q. How long prior to the Cuskaden settlement had they listed it?

A. Prior to the Cuskaden settlement?

Q. Yes.

A. I don't just remember that. It was prior to that time, probably a couple of months. That was a definite listing, at a definite price prior to the Cuskaden settlement. They raised the price after the Cuskaden settlement.

20 Q. Did they notify you of the raise?

A. Told me verbally. It must have been three weeks before the 23rd. The Cuskaden settlement was made about three weeks before.

Q. And you say Berry was not there when this agreement was signed?

A. No.

Q. Had the agreement been drawn prior to the time Stewart and Charlton came down to the office to see you on the 23rd day of February?

30 A. It may have been drawn between the time I was talking over the phone and the time they got there and it may have been drawn while they were there. I don't remember that.

Re-direct examination.

By Mr. Reed:

Q. Where did you have this interview with Mr. Stewart?

A. At the Waggoner Hospital.

Q. Atlantic City?

A. Yes, sir.

Q. As near as you can recall, I would like you to repeat the conversation that you had with Mr. Stewart at that time—this being the 25th—what you said and what he said? 10

A. Well, I first saw him, I asked him how about —I had a talk with Mr. Charlton previous to seeing Stewart. Mr. Charlton told me to go up to Stewart, he was satisfied to do anything Mr. Stewart agreed to do. Wen I saw Mr. Stewart I said, "How about this settlement?" He said, "How about it?" He said, "The settlement was to be made on the 23rd and you weren't there." I explained to him —— 20

Q. What do you mean you explained to him?

A. I simply told him it was our impression that the settlement was to be on the 24th. It was our impression of the sixty days, but in some way there had been a mistake in making the agreement on the 23rd and then I had ordered a settlement at the title company for the 24th and we were there ready to settle on the 24th and were surprised to find it had been set for the 23rd. They wouldn't call me on the phone. I would have been there in ten minutes if they had called me on the phone and reminded me it was the 23rd. 30

Q. Did you ask why he didn't call you up?

A. Yes.

Q. What did he say?

A. He said it wasn't his business to call me—"I was there ready to settle and you weren't."

Q. Did he tell you what time he was at the title company?

A. No, he didn't say what time it was.

Q. Did he tell you that the price of this land had gone up?

A. He said he inferred it by ——

10 By Mr. Sooy: I object to saying he inferred.

A. He said, "You don't expect me to hand you five or six thousand dollars, do you?" I said, "If that is what you are figuring on and that is the way you look at it, I don't want to do any more business with it. We will take some other means."

Q. What reply did he make to that?

A. He said, "Go as far as you like."

Q. Did you make any claim at that time that there
20 had been any misrepresentation by you or Mr. Roberts or Berry, as to who Berry was and what use was to be made of this property?

A. No, there was no misrepresentation.

Q. Did he state to you his reason for repudiating this contract, other than you were not there on the 23rd?

A. No.

Q. What did he say was the reason?

A. He said the reason was we were not there on
30 the 23rd—that's all.

Re-cross examination.

By Mr. Sooy:

Q. You were there on the 24th to make settlement at the title company?

A. Yes, sir.

Q. What title company?
A. South Jersey.
Q. Who did you see?
A. Mr. Barrett.
Q. And talked to him about it?
A. Certainly.
Q. You called—did you tell Berry that Charlton and Stewart had told you there wouldn't be any extension of time, and settlement must be made according to the terms of the agreement—had you told Berry about that? 10
A. No.
Q. You didn't think it important enough ——
A. I didn't think it was necessary, we didn't ask for any extension.
Q. When Berry signed the agreement, you didn't say anything to him about any conversation you had with Charlton or Stewart?
A. No.
Q. When you went to the title company, you made no tender at all, did you? 20
A. We were there ready to settle.
Q. You didn't have the mortgage delivered there, did you?
A. That was to go in the terms of the agreement. The mortgage was to be drawn by the title company.
Q. Answer my question?
A. No.
Q. And had not been drawn yet, had it? 30
A. No.
Q. And you did not have the cash there, did you?
A. Had a check.
Q. You didn't—what bank was the check on?
A. I don't know. I noticed the check for the deposit was on the Chelsea National Bank.
Q. How did you know there was a check there?

A. I didn't see the check—we were there ready to settle. I presume there was a check.

Q. The only reason you think the money was there, you presume it?

A. We were there to settle.

Q. You didn't know whether or not Berry had the money?

A. I didn't question that.

Q. You just took it for granted he had the money
10 and was ready to settle?

A. Yes, sir.

Q. That was before you had seen Stewart?

A. Yes.

Q. And you didn't see Stewart about it until the 25th?

A. I couldn't see him—we tried to see him that afternoon.

Q. But you didn't?

A. No.

20

Lee Brently Roberts, a witness produced on behalf of the complainant, being duly sworn, testified as follows:

Direct examination.

By Mr. Reed:

30 Q. What is your business?

A. Real estate salesman.

Q. Were you present at Berg and Ulizio's office when Mr. Stewart signed this contract, and are you the attesting and subscribing witness?

A. I witnessed Mr. Stewart's signature.

Q. Did you also give Mr. Stewart this check, or Mr. Charlton?

A. I think Mr. Charlton took it—they were both there.

Q. Did you hear the negotiation between Mr. Charlton and Mr. Stewart and Mr. Mulock?

A. Yes, sir.

Q. Was Mr. Berry present at that time?

A. No, sir.

Q. Were you at the title company on the 24th with Mr. Berry and Mr. Mulock?

A. Yes, sir. 10

Q. What was your purpose in going there?

A. I had made the sale. I was to get their commission.

Q. Who were you working for at that time?

A. Berg & Ulizio.

Cross-examination.

By Mr. Sooy: 20

Q. Mr. Roberts, when did you say you witnessed the signature of the parties to the agreement?

The Vice-Chancellor: He didn't say that.

A. I witnessed Mr. Stewart.

Q. Won't you look up the agreement and tell me you are not mistaken in that and whether or not you didn't witness the signature of Berry instead of 30 that of Stewart?

A. I witnessed that of Stewart. I witnessed Mr. Stewart and I witnessed his signature.

Q. Look up the agreement—don't you want to change your testimony and testify you witnessed the signature of Berry instead of the signature of Stewart?

A. I think I witnessed Mr. Stewart's signature. I think that must have been Stewart's. I think I witnessed Mr. Stewart's signature.

Q. After looking at the agreement, which shows Paul as to Thomas E. Stewart, you still think you—that is a mistake and you witnessed the name of Stewart?

A. It is possible I am wrong, but to the best of my ability I witnessed Mr. Stewart's signature.

10 Q. If you are wrong, don't you think it must be that the signature of Berry was on there before the signature of Stewart?

A. No, sir, it was not.

Q. That the persons who first signed that agreement ——

A. Was Mr. Stewart.

Q. That the person who first signed that agreement as a witness appears to be whom?

A. Well, it wouldn't necessarily be.

20 Q. My question—that the person who first signed that agreement as a witness appears to be whom?

A. Appears to be myself.

Q. And the person whose signature you witnessed on the agreement appears to be whom?

A. I don't admit that at all.

The Vice-Chancellor: Answer the question.

A. It doesn't appear to be that way at all.

30 Q. You say it doesn't appear to be as though L. B. Roberts had signed first and Snyder had signed second as witness?

A. I don't remember which one signed. I know Mr. Stewart signed first and I think I witnessed that signature. I don't remember which one signed the agreement first—Mr. Stewart signed the agreement first.

The Vice-Chancellor: Let that be stricken out.

Q. Yes, I think that can be construed in two ways. You are not able to remember who signed the agreement first?

A. Absolutely.

Q. But you are not able to remember who signed as a witness first?

A. I believe I did to Mr. Stewart's signature.

Q. Do you testify that —— 10

A. To the best of my knowledge, I witnessed his signature.

Q. The question is who signed as a witness first?

A. I couldn't swear to that; I believe I did.

Q. You also heard Mr. Stewart and Mr. Charlton, at the time of the signing of this agreement, say that they would advance no extension at all?

A. I didn't hear them say it. They said they wanted the settlement—sixty day settlement. We didn't want any extension and we didn't ask for 20 any extension.

By Mr. Sooy: I ask that the last part be stricken.

By the Vice-Chancellor: Let the last part be stricken out.

Q. They did say they wouldn't give any extension?

A. I think they said they wanted a sixty day settlement, and they wanted the settlement as of sixty 30 days.

Q. Did they say anything about any extension at all?

A. I don't remember that.

Q. You didn't hear that part?

A. I don't remember whether I did or I did not.

Q. You heard Mr. Mulock say ——

By Mr. Reed: I don't really see how my friend can prevail in bringing in statements of this kind.

The Vice-Chancellor: I will permit the cross-examination.

A. I can't really remember that at the present time.

Q. You heard Mr. Mulock say that at the time
10 of the signing of the agreement by Stewart, either Mr. Charlton or Stewart said there would be no extension of the time, did you not?

A. If he said it, I heard him say that.

Q. That isn't the answer.

By the Vice-Chancellor: There seems to be no objection to the question. It is hard to say what this witness says.

20 Q. Did you see Mr. David Goldberg there at the time you were signing this agreement?

A. I don't remember having seen Mr. Goldberg at that particular time.

Q. Were you present in the office of Berg & Ulizio when Mr. Charlton and Mr. Stewart came there?

A. Yes, sir.

Q. And did they come—had they been in conversation with Mr. Ulizio prior to the time they started the negotiations for this particular property?

30 A. I know nothing about any conversation, they might have had with Mr. Ulizio or anyone else.

Q. You don't know whether they came down and talked with Ulizio before they talked to you?

A. No, sir, I know nothing about that.

Q. Had you been engaged in any deals—real estate deals, with Mr. Barry prior to the time of the signing of this agreement?

A. I think so.

Q. Had you been engaged with Mr. Berry prior to the time of the signing of this agreement, with anyone else?

A. I don't think so. I don't remember.

Q. Can you remember whether or not you had been engaged with any—with Mr. Berry and Mr. Mulock prior to the time of the signing of this agreement?

A. I don't think so. 10

Q. Will you say positively?

A. I wouldn't say positively, yes or no.

Q. Afterwards you had been engaged in deals with the other two?

A. No, I don't think so.

Q. With Mr. Berry alone?

A. No, not alone.

Q. With Mr. Berry in company with someone else?

A. I believe so. 20

Q. More than three?

A. I can't recall that, no, sir.

By Mr. Reed: I object to this line of testimony.

By Mr. Sooy: I don't want to annoy the Court, but ——

By Mr. Sooy: Question withdrawn.

30

Q. Did you ever at any time know that Mr. Mulock had any interest in the purchase of the premises in question other than his interest as the manager of Berg & Ulizio?

A. No.

Q. You did state, however, to Mr. Charlton that Mr. Mulock is in on the deal now?

A. No, sir.

Q. Or Mr. Stewart to that effect?

A. No, sir.

Q. Did you discuss with Mr. Charlton or Mr. Stewart at and before the time of the signing of this agreement, where Mr. Berry came from, who he was, or anything of that kind?

A. No, sir.

Q. Did you discuss with them the question as to
10 whether or not Mr. Berry, after he became the owner of the property, was to improve them?

A. No, sir.

Q. Do you remember whether or not Mr. Stewart or Charlton or either of them asked whether or not Mr. Berry was buying this for speculation?

A. No, I don't remember asking that question—asking any question at all what purpose Mr. Berry had in buying the property. I don't believe they did.

20 Q. After the agreement had been signed and prior to the 23rd day of April, 1923, did you ask for an extension of time for settlement?

A. No, sir.

Q. Did you have any conversation with Mr. Charlton in reference to extending the time?

A. No, sir.

Q. Did you talk to Charlton at all after the signing of this agreement with reference to settlement, or any phase of the settlement?

30 A. I did see Mr. Charlton up in his office a few days ago.

Q. But nothing prior to the day of settlement?

A. No.

Q. When I said did you talk to him, you included in your answers telephone conversations?

A. Oh, yes.

Q. You had no telephone conversation?

A. I don't believe I did. I can't remember. I may have called him about some other matter, but I don't remember anything specifically.

Q. Did you ever talk with Mr. Ulizio in reference to the sale of this particular piece of property?

A. No, sir.

Q. Did you ever state to Mr. Ulizio that you and Mr. Mulock and Mr. Berry were in the deal together?

A. Absolutely not. 10

Q. Were you present on the 24th, when Mr. Berry and Mr. Mulock went to the office of the title company?

A. Yes, sir.

Q. Was there any mortgage prepared at that time in conformity with the terms of the agreement?

A. Mr. Mulock took care of the settlement. I never had anything to do with them.

Q. You never knew whether one was prepared or not? 20

A. To the best of my knowledge ——

Q. Will you answer that question?

A. I don't know whether we did or did not have it.

Q. Did you see cash or a check there that day?

A. I know Berry was there prepared to settle.

Q. Repeat—did you see cash or a check there that day?

A. Mr. Berry had a check.

30

The Vice-Chancellor: Let that be stricken out.

A. I presume Mr. Berry had a check.

The Vice-Chancellor: Repeat the question.

A. I didn't see any cash or check there, no.

Re-direct examination.

By Mr. Reed:

Q. Was Mr. Stewart or Mr. Charlton at the title company on the 24th when you were there?

A. No, sir.

Q. Any occasion to have that money or check or mortgage at that time?

10 By Mr. Sooy: Objection.

The Vice-Chancellor: Objection sustained.

Q. Were you with Mr. Mulock when he called on Mr. Stewart on the 25th of April?

A. Will you repeat the question?

Q. My question—were you with Mr. Mulock when he called on Mr. Stewart on the 25th of April?

A. Yes, sir.

20 Q. Hear the conversation that took place between Mr. Mulock and Mr. Stewart as to this deal?

A. Yes, sir.

Q. Can you repeat it?

A. Yes, sir. Mr. Mulock and I walked into the Waggoner Hospital on the morning of the 25th and Mr. Mulock said we were there ready to settle—what's the matter with that settlement, what are you trying to do, or words to that effect, and Stewart said, "You were supposed to settle on the 23rd, 30 according to the agreement." Mr. Mulock said it was a mistake, he had understood it was for the 24th of April and not the 23rd, and Mr. Stewart said, "Well, you forfeited your right, you don't think I am going to hand you five or six thousand dollars now." So Mr. Mulock said, "If that is the kind of a man you are, I don't want to have any-

thing to do with you." Mr. Mulock said that he would get the ground in another way, and Mr. Stewart said, "You can go as far as you like."

Q. Did he make any complaint at that time as to any misrepresentation that had been made about Mr. Berry's occupation?

A. No, sir, not a word.

Q. Didn't make any complaint as to what use the land was to be put to by Mr. Berry?

A. Not a word. 10

Q. His repudiation, then, was on the ground of Berry not being there on the 23rd?

A. Yes, sir.

ROBERT BERRY, the complainant, being duly sworn, testified as follows:

Direct examination. 20

By Mr. Reed:

Q. You are the complainant in this case—are you the complainant in this case, or the plaintiff?

The Vice-Chancellor: You are the man bringing the suit?

A. Yes, sir.

Q. Were you present at the time this contract was signed? 30

A. No, sir.

Q. When did you sign this contract?

A. The next day.

Q. After Mr. Stewart's signature had been put on there?

A. Yes, sir.

Q. At the time you made this offer for this property did you know who the owner was?

A. I did not.

Q. Will you tell the Vice-Chancellor how it came about you made an offer on this property and how you did it?

A. Mr. Roberts came to me sometime previous to the 23rd of February ——

10

By Mr. Sooy: I don't think that is material as to why or how he made an offer. I therefore object.

The Vice-Chancellor: Objection sustained.

By Mr. Reed: There seems to be great interest about how it was signed. I was going to show how he came.

20

The Vice-Chancellor: That may come in in rebuttal.

Q. You gave your check to Roberts to buy the property?

A. Yes.

Q. Did he make a report after that transaction?

A. He did, yes, sir.

Q. When was that?

30

A. The next day.

Q. Did he present this contract for your signature?

A. Yes, sir.

Q. Is this your check?

A. Yes, sir, that is my check.

Q. This check is made out on a blank check—how did that happen?

A. On the morning of the 23rd, when I was dealing in reference to this property, I didn't happen to have a check on me on my bank and Mr. Roberts got a blank check from the office of Berg and Ulizio and I filled it out.

Q. You signed this check and handed it to Mr. Roberts with instructions to buy this property at so much a foot?

A. Yes, sir.

Q. Was this check made out of the funds of your bank account? 10

A. Yes, sir.

Q. Mr. Berry, when did you go to the title company to settle for this property?

A. I went to the title company on the afternoon of April the 24th, the day I thought was the day of settlement.

Q. Did you have a copy of that agreement in your possession?

A. Yes, sir. 20

Q. Why was it you didn't go on the 23rd?

A. I was under the impression, and I was told by Mr. Mulock and Mr. Roberts, that the title was ordered for April the 24th.

Q. Were you prepared to carry out your contract?

A. Absolutely.

Cross-examination.

By Mr. Sooy: 30

Q. When you went to the title company on the afternoon of the 24th you were still dealing with the Chelsea National Bank?

A. Yes, sir.

Q. And that was your banking institution?

A. Yes, sir.

Q. Did you have any other banking institution in town, other than that?

A. No.

Q. And it was your intention to give the check for the purchase money out of the funds in the Chelsea National Bank—what bank were you going to?

A. I wanted to put up a check. I was to get a check at that time.

Q. You wanted to get a check—you were to get
10 money from someone else?

A. I had it right there.

Q. Money from someone else—who was the someone else?

A. I sold the ground to somebody.

Q. Who was the somebody else?

A. Mr. Weiss.

Q. Was Mr. Weiss with you, for the purpose of making this settlement, on a settlement then to be made with Mr. Weiss, is that the idea?

20 A. Well, I was to get the check and settle that day.

Q. My question—was Mr. Weiss with you for the purpose of making this settlement on a settlement then to be made with Mr. Weiss, is that the idea?

A. Yes.

Q. You yourself didn't have in your bank account a sufficient amount of money to have paid the balance of the purchase price of this land on the 24th?

A. I didn't, not in my bank, no, sir.

30 Q. You had not, at that time, at the time you went there for your settlement with Mr. Weiss, had you?

A. No.

Q. And the settlement with Mr. Weiss was to have been after the settlement with Mr. Stewart, was it not?

A. No.

Q. When was it to have been?

A. He was to give me the check at that time.

Q. You depended on his giving you a check to make settlement?

A. Absolutely.

Q. Have you a copy of the agreement that you had between your self and Mr. Weiss?

A. No, I did not.

Q. Was that a verbal agreement?

A. It was a written agreement. 10

Q. What did you do with the agreement?

A. What did I do with the agreement—my lawyer has it.

(On request of Mr. Sooy, Mr. Reed tenders agreement for perusal.)

Q. Did you at that time sign a mortgage in the sum of six thousand dollars to Thomas E. Stewart, covering the land in question? 20

A. I did not, no, sir.

Q. When I say at that time, I mean the time you went there for the purpose of settlement on the 24th?

A. No. No, I did not. There was nobody there.

Q. You expected, did you, that some others would execute a mortgage for six thousand dollars instead of yourself?

A. I expected ——

Q. That was about it? 30

A. I don't get you.

Q. My question—you expected, did you, that some others would execute a mortgage for six thousand dollars instead of yourself?

A. Yes.

Q. And you expected some others, in addition to that, to put up cash for thirty-five hundred dollars

that was called for in the agreement between Stewart and yourself?

A. Yes, sir.

Q. You didn't expect, however, to execute the mortgage yourself for six thousand dollars payable to the order of Stewart?

By Mr. Reed: I object to the use of the word "expect."

10

The Vice-Chancellor: I would like to hear the objection.

By Mr. Reed: I don't see how that would be evidential of anything at all. He went there to carry out his contract with the owners.

The Vice-Chancellor: He testified he went there for the purpose of completing the terms of the con-
20 tract. Now, on cross-examination, he didn't go there with the intention of doing certain provisions which were called for by the agreement. To that extent I will permit it. Whether "expect" covers the ground or not, I am not prepared to say.

A. I expected to fulfill my obligation under that contract.

Q. Won't you answer that question—the question is were you there prepared to deliver a mortgage
30 from yourself to Stewart for six thousand dollars, or did you expect some others were to deliver a mortgage for six thousand dollars?

A. I expected to deliver what was in that contract.

Q. That doesn't answer the question—my question—were you there prepared to deliver a mortgage from yourself to Stewart?

A. I expected to deliver both mortgages.

Q. Signed by whom?

A. Weiss. By Mr. Weiss.

Q. You say in your own bank account on the 24th, you did not have sufficient money to pay the balance of the purchase price?

A. Absolutely.

Q. On the 23rd you did not have sufficient balance on your bank account to pay the purchase price?

A. No. 10

Q. Now then, the day of settlement set forth in the agreement between yourself and Stewart was the 23rd, according to the agreement itself. The day of settlement between yourself and Mr. Weiss as set forth on the agreement, was the 24th ——

A. It was to be the same day ——

Q. Answer the question.

The Vice-Chancellor: If that was a fact.

By Mr. Sooy: Their exhibit isn't in. 20

The Vice-Chancellor: Then you can't prove that by him.

Q. I show you what's supposed to be an agreement between Robert Berry and Harry and Jake Weiss, dated the 5th day of March, 1923, signed by all the parties, and ask you whether or not the date of the settlement as set forth in this agreement is or is not the 24th day of April? 30

A. It is.

Q. So that on the 23rd day of April you were not in position to have paid from your bank account the thirty-five hundred dollars called for in the agreement between you and Mr. Stewart, were you?

A. I was in a position to do it sixty days after the time of my contract.

Q. On the 23rd, no.

A. I didn't think it was on the 23rd.

Q. Had you ever talked with Mr. Charlton or Mr. Stewart with reference to the purchase of this property either before or after you signed the agreement?

A. No, sir, I never knew who Mr. Stewart was until he walked in this morning.

Q. Had you ever talked with Mr. Roberts or Mr. Mulock with reference to getting an extension of time of the performing of this agreement between yourself and Mr. Stewart?

A. No, sir, I had no occasion to apply to him—I had the property sold.

By Mr. Sooy: May I ask the last part be stricken out—the answer is no or yes.

The Vice-Chancellor: Let the latter part be stricken out.

By Mr. Sooy:

Q. You entered into this agreement and intended to take the property merely as a speculation, did you not?

A. Not necessarily.

Q. That was true of that apartment, wasn't it?

By Mr. Reed: Objected to as having nothing to do with this.

The Vice-Chancellor: Objection sustained.

Q. When you signed the agreement between yourself and Mr. Stewart, who was present?

A. Between myself and Mr. Stewart, Mr. Stew-

art wasn't present when I signed the agreement. I was present. I was just given the contract and I signed it. When I was given the contract there may have been a few people in the office at that time, I really don't know.

Q. Where did you sign it?

A. In the office of Berg & Ulizio.

Q. And at the time you signed the agreement, did you pass the check?

A. The check was given the day before—the morning before. 10

Q. And did you know who was present at the time you signed?

A. There was someone there—it might have been Mr. Mulock, I really couldn't tell you.

Q. You have no recollection at all?

A. Absolutely not.

Re-direct examination.

By Mr. Reed: 20

Q. You had the money to make this settlement on the 23rd, hadn't you?

A. I could have paid it, yes, sir.

By Mr. Sooy: I ask that be stricken as not being responsive.

A. Yes, sir. 30

The Vice-Chancellor: I will permit that to remain.

Q. You were in position to get this money whenever this settlement was to be made?

A. Yes, sir, within five minutes—two minutes.

Q. You were prepared to execute and deliver any papers to carry out towards your settlement?
A. Absolutely.

By Mr. Sooy: That is a leading question and I ask that the answer be stricken.

The Vice-Chancellor: Objection sustained. Let that be stricken out.

10

Q. When you went to the title company on the 24th, what was your expectation?

By Mr. Sooy: Objection.

The Vice-Chancellor: Counsel on the other side has been asking about expectation.

20 A. I expected to settle for that said piece of ground.
Q. In making that settlement, what did you expect to do?
A. In making the settlement I expected to turn over the deed to the party I sold it to.

By Mr. Reed: If you want to stipulate that this property was conveyed to Kent on the 25th of April, 1923, and that the purpose of that conveyance was
30 for the purpose of evading this contract, that makes our case. He isn't here, and I do not see any necessity of holding it up.
Mr. Kent, this property was conveyed to Mr. Thomas Kent or Robert Kent, on the 25th of April, 1923. We recite in our bill that was a conveyance without consideration for the purpose of evading this contract.

By Mr. Sooy: Mr. Charlton says we will admit that.

By Mr. Reed: If you will admit that, that is our case.

By Mr. Sooy: We do not admit this for the purpose of evading this contract. We will admit it was a conveyance without consideration but not for the purpose of evading this contract. 10

The Vice-Chancellor: It was a conveyance without consideration?

By Mr. Sooy: Yes, sir, a conveyance without intending to evade the contract.

By Mr. Reed: Are you willing to agree it was made to Kent without consideration and he has no interest in this property at this time and Mr. Stewart is the owner of it? 20

By Mr. Sooy: Yes, sir.

By Mr. Sooy: May I ask Mr. Reed whether or not he will admit that this data from the Chelsea National Bank is the copy of the account of Robert Berry, as between the dates of March 6th, 1923, and May the 9th, 1923? Otherwise I will have to get the bookkeeper.

30

By Mr. Reed: I do not know whether that is the date or not—I have no objection to making such an admission. I will admit that.

The Vice-Chancellor: Let them be admitted and marked Exhibit D1.)

(Two pages.)

David Goldberg, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Sooy:

10 Q. You live in Atlantic City?

A. Yes, sir.

Q. You remember being present in the office of Berg & Ulizio on the 23rd of February when Mr. Charlton and Mr. Stewart, Mr. Mulock and Mr. Berry were there—I mean Mr. Roberts and Mr. Berry. We're talking over the question of the agreement for the sale of land on Albany Avenue.

20 By Mr. Reed: Objected to as leading—if you will specify any time, I will permit it.

A. I remember being in there many times.

Q. When this deal was being discussed?

A. I was in when Mr. Stewart, and I guess that is the gentleman's name, Mr. Charlton. They were talking about the agreement of sale.

Q. What were they talking about?

A. Mr. Stewart came in with Mr. Charlton on 30 agreement or something to be signed. It didn't concern me.

Q. What was said by Mr. Stewart or Mr. Charlton?

A. I couldn't say.

Q. Anything said in reference to time that you remember?

A. No, sir, I don't remember.

WILLIAM CHARLTON, a witness produced on behalf of the defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Sooy:

Q. Mr. Charlton, you are one of the owners of this piece of land, are you not? 10
A. Yes, sir.

By Mr. Reed: I object to that.

The Vice-Chancellor: I will allow that.

Q. Were you present on the 23rd day of February, 1923, when the agreement, marked P1, was signed?
A. By Mr. Stewart. 20
Q. Prior to the time of the actual signing of this agreement, had you discussed with Mr. Mulock or with anyone else in connection with Berg & Ulizio, the selling of this piece of land?
A. I returned from Bermuda ——

By Mr. Reed: I object to that.

The Vice-Chancellor: Objection sustained.

A. No, I did not. 30
Q. Had you been in Atlantic City prior to the 25th day of February, continuously?
A. From the 2nd to 23rd I was in Bermuda.
Q. From the 2nd day to the 23rd day of February?
A. Yes, sir.

Q. Had you, prior to that time, prior to going to Bermuda, discuss the question of the sale of these premises with Mr. Mulock?

A. I might have.

Q. Did you list them with the firm of Berg & Ulizio?

A. No.

Q. Do you know of them being listed with the firm of Berg & Ulizio?

10 A. No, I did not. I knew Mr. Mulock was going to try to sell them. I didn't know they were listed.

Q. On the 23rd of February, prior to the time you went to the office of Berg & Ulizio, had you talked to anyone with reference to the prospective sale of this property?

A. No.

Q. What was the circumstance under which you happened to be in the office of Berg and Ulizio on the 23rd of February?

20

By Mr. Reed: Objected to—immaterial, irrelevant and not competent.

The Vice-Chancellor: The witness stated on the 23rd he was in Bermuda—I don't see how he can be here.

Q. When did you say you returned from Bermuda?

30 A. On the 23rd.

Q. What do you mean?

A. I returned from there on the 20th and on the 23rd from New York.

Q. Now then, would you answer the preceding question?

A. Mr. Ulizio was interested in a possible purchase of the Waggoner Hospital that Mr. Stewart

and I owned together, and Mr. Stewart had got hold of me after I came in on the New York train. I went to the Waggoner Hospital, I wanted to put my clothes in there.

Q. You went down to visit Mr. Ulizio?

A. Yes, sir.

Q. About what?

A. About some real estate he owned at Trenton and Atlantic Avenues—somewhere there.

Q. After you had your discussion with Mr. Ulizio, did you see anyone with reference to this property? 10

A. Yes, sir, Mr. Mulock and Mr. Roberts, in Mr. Ulizio's outer office, and we came out of his room.

Q. Is that the first time you knew they had a prospective purchaser?

A. Yes, sir.

Q. What did they say about it?

A. I think it was Mr. Roberts that said first that he had a client, if you call him a client, for this ground, and wanted to pay a hundred and twenty- 20 five dollars a foot. I said to Mr. Roberts, Mr. Mulock was there at the time, who is this man? He said, "Mr. Berry." Well, Mr. Mulock then spoke up and he said, "He is alright, it is a good deal." Mr. Roberts produced the original and the copy of the contract and they were then signed by Berry. I read them over and I said this contract does not provide that time is of the essence and I won't allow Mr. Stewart to sign this contract unless that is in there. So Mr. Roberts or Mr. Mulock said, 30 "We have Berry's signature and we can't go back now and ask him to make a new contract to sign again." He had either gone away or was going away. He said, "You know us, and you know we will make settlement on the day, etc. I said, "You know what happened in the Cuskaden case, when you were two weeks late and we were lenient and let

you go there." I said, "I want time of the essence put in there because I want you to know we are going to hold you strictly to this agreement." I think Mr. Mulock had the check. He said, "Oh, yes, those things only happen once, we will be absolutely certain to get there." I said, "Who is Berry, what is his business?" Now, I am not certain whether it was Roberts or Mulock that said, "He is a wealthy man from Philadelphia now living here." I said, 10 "You know we are not interested in selling to speculators—what is this man's intention to do with the property?" Then either Roberts or Mulock made a remark about this man stating he had consulted or was about to consult contractors for the purpose of building a garage or show room on this boulevard.

Q. Who do you mean by "he?"

A. Berry had. I asked again if he was a man of means and really intended to use the property and 20 was told again that he was and then Mr. Stewart and I retired for a moment until we had a conversation between ourselves. We came back from that conversation and I again said we hold you strictly to the day of this time, although time is not of the essence under the contract. Mr. Stewart then signed, I took the check, I took the copy of the contract which had been handed me, and we went away.

Q. Are you positive that the signature of Berry was on the agreement, marked Exhibit P1, at the 30 time Stewart signed it?

A. Absolutely.

Q. These contracts were produced as is?

A. With the exception of Stewart's signature. Stewart's signature—they were drawn up before we got there.

Q. Were you, at that time, and Mr. Stewart, ne-

gotiating for the purchase of properties, of other properties, situated in the Chelsea Heights district?

A. We were.

By Mr. Reed: Objected to.

By the Vice-Chancellor: What relevancy can that have?

By Mr. Sooy: The sale of this property for improved purposes would have a large bearing on that part of the remaining property. If this property was to be sold to be improved by the erection of a garage and showroom, it would, in our opinion, the defendants in this case, have raised the value of the other properties and it was this fact that led them to sign this agreement. 10

By Mr. Sooy: In the case that there has been a representation by the purchaser that the other people relied on —— 20

The Vice-Chancellor: I will permit it on the bill for specific performance.

By Mr. Reed: Berry wasn't there at all—I don't see how it would effect him at all.

Q. My question—were you, at that time, and Mr. Stewart, negotiating for the purchase of property —of other property situated in the Chelsea Heights district? 30

A. We were.

Q. What was your purpose of your asking as to what Mr. Berry intended to do with the land in case he purchased it?

By Mr. Reed: Objected to.

The Vice-Chancellor: Objection sustained.

Q. Did you believe that Mr. Berry was intending to erect a building there or a garage for show purposes?

A. Yes, sir. I had confidence in Mr. Mulock and Mr. Roberts.

10 Q. If you had not believed that he had intended so to improve that property, would you have permitted Mr. Stewart to sign that agreement?

A. I would not.

By Mr. Reed: I object.

The Vice-Chancellor: Permitted.

A. I said specifically no speculator.

20 Q. After the agreement had been signed by Mr. Stewart, you said you took it with you, together with the check?

A. I did.

Q. After that time, did either have any discussion between you and either Mr. Mulock or Mr. Roberts as to the extension of time of settlement?

A. There was.

Q. With whom was that conversation?

A. Mr. Roberts.

30

By Mr. Reed: I object to Roberts' conversation. I think all this should be stricken out. Berry wasn't present.

The Vice-Chancellor: How do you expect to bind Mr. Berry with all this?

By Mr. Sooy: From the testimony we will, Mr. Berry was acting through Berg & Ulizio, through the instrumentality of Mulock and Roberts. This is shown by the fact he gave the check, according to Mr. Charlton and, before the agreement had been drawn and signed, counting as further by the fact that Mr. Mulock and Mr. Roberts for Mr. Berry went to the defendant Stewart, and asked for the time to be extended, and all the facts of the case seem to bear out the facts that Roberts and Mulock were acting for Berry. Statements made by Roberts and Mulock, under these circumstances, would bind Berry unless he repudiated it. 10

The Vice-Chancellor: I can't see how they would bind Berry, any more than they would Stewart. There is no claim that could bind Stewart in counter distinction to the contract signed by him but that it would bind the others as well.

I will permit it to go in, to be stricken out if it is not connected. Up to the present time Roberts and Mulock are undeniably the agents of Stewart. That is the present testimony. 20

Q. After the signing of the agreement, and before the 23rd day of April, 1923, did you have any conversation with Mr. Roberts or Mr. Mulock in reference to a change in the date of settlement?

A. With Mr. Roberts on the telephone.

Q. What did he request? 30

By Mr. Reed: I object.

The Vice-Chancellor: I will permit it, on the same condition that it can be stricken out.

A. Mr. Roberts and I use our Christian names to each other—he said, "Bill, how about an exten-

sion on that Berry and Stewart matter," he said, "just for a couple of weeks." I said, "Lee, I will talk it over with Stewart before I answer alright." I wouldn't call him back or he wouldn't call me. He called me or I called him. I don't know which, later, the same day or the next day. I told him there could be no extension, that settlement must be made on the 23rd of April. There was some conversation over that, but that is the drift of it.

10 Q. Did you ever see Berry up until after the signing of the agreement and after the 23rd day of April, 1923?

A. I never saw Mr. Berry until—to know who he was—until this morning in the court room.

Q. You were not present with Stewart on the 23rd when he went to the title company?

A. No, I was not. I prepared the deed, however.

Q. That was all signed and executed?

A. Yes, sir.

20

By Mr. Reed: I have no cross-examination, except I move to strike this testimony out at this time unless it is connected up with Mr. Berry.

The Vice-Chancellor: I will decline to strike it out at this time.

By Mr. Reed: If it is connected, I would like to cross-examine this witness. As it stands now, there

30 is nothing to cross-examine.

The Vice-Chancellor: You may recall him for cross-examination, under the circumstances.

THOMAS E. STEWART, one of the defendants, being duly sworn, testified as follows:

Direct examination.

By Mr. Sooy:

Q. Mr. Stewart, you are the record owner of the property in question, are you not? 10

A. I am.

Q. Do you remember where Mr. Charlton was the 23rd day of February prior to one o'clock?

A. He was on his way home from Bermuda that day. I met him around two, I think it was.

Q. Where did you meet him?

A. At the Waggoner Hospital.

Q. Did you and he go from there to Berg & Ulizio's office?

A. We stayed in the hospital for quite a while. 20 We didn't go down until about 5.15 in the afternoon —5.15 or 5.30.

Q. Prior to that time, had you had any conversation with Mr. Mulock or Mr. Roberts with reference to the sale of this property?

A. I had not, no, sir.

Q. At the time you went down to the office of Berg & Ulizio, did you know that Mr. Roberts or Mr. Mulock or either of them had a customer for the property? 30

A. I had no conversation whatever about either one of them.

Q. And you went down for a conversation with Mr. Ulizio?

A. Yes, sir.

Q. After you had the conversation with Mr. Ulizio, what happened?

A. I think we were in Ulizio's office for about fifteen minutes, talking about some ground at Trenton and Atlantic Avenues which we were trying to trade for the Waggoner Hospital. After we came out, Mr. Mulock said, "I have an offer of $125.00 a foot for Albany Avenue." I said, "No, I don't think I will consider that on Albany Avenue. I wouldn't give it a thought." One word led on to another, then finally showed me the agreement. They said, "You better sign this now, everything is alright." I read the thing over, the first thing I noticed about the agreement that time of the essence was not in there. I asked why that was not in there. Mr. Roberts spoke up and said that was an oversight on their part. He said this party is alright, and it will be alright. I said, that will have to be in before I sign it. Mr. Roberts then spoke up and said this man had made a good deal of money and now he is living down here. This agreement he had shown me, it already had been signed and witnessed. He said Berry was just leaving town and he didn't want to go back to him with a new agreement. I said I wanted a few minutes to talk to Charlton. Charlton and I went to one side and talked this matter over. The result of it was I signed the agreement.

Q. There was no conversation as to who Berry was?

A. Yes, sir, I asked who Berry was.

Q. Who did they say he was?

A. Mr. Roberts told me he was a wealthy man from Philadelphia and was living down here now. I asked what his idea was to do with the ground. He told me his idea was to put up a nice building, sort of an automobile showroom and a garage. I said, "Are you sure?" I said, "I want no speculation with my ground. I can speculate with it my-

self." He said there is nothing of that sort in the deal, that this man is perfectly O. K.

Q. Were you and Mr. Charlton at that time interested in any other property in Chelsea Heights district?

A. I had been in touch with a party in town about that other corner, which I was thinking very seriously of taking hold of.

Q. Was it in reference to this other property that you asked the question as to what Berry was going to do with this land? 10

By Mr. Reed: Objected to.)

The Vice-Chancellor: Objection sustained.

Q. You believed, did you, that Mr. Berry was going to build a building on this ground?

A. I had no reason to doubt either Mr. Mulock or Mr. Roberts. 20

Q. Now, you say you had said you wanted time as the essence of the contract—did Charlton say anything about when settlement was to be made?

A. Mr. Charlton told them he would insist on settlement on the 23rd day of April. In other word, live up to the contract word for word. He also told them, "You know we helped out with the Cuskaden matter—you were two weeks late, and we let you get away with it that time. There will be no extension in this contract." 30

Q. You mean no delay?

A. No delay in this contract. Mr. Roberts insisted everything will be O. K.

Q. After the signing of the agreement, on the 23rd day of April, or February, was there ever a time when the question of extension of time was discussed?

A. The only time the question of time was discussed with me was to Mr. Charlton. I have never seen Mr. Mulock or Roberts to talk to since the 25th day of April. That was in the Waggoner Hospital, outside of two days ago I met Mr. Roberts in Charlton's office. That is the first time I have seen them to speak to.

Q. Prior to the 25th of April, had there been any request for an extension?

10

By Mr. Reed: Objection.

The Vice-Chancellor: Objection sustained.

Q. Did you ever list this property with Berg & Ulizio for sale—the property in question?

A. Not in writing. I think I told Mr. Ulizio I had some ground down there, if he cared to he could have his sign put on and it led up to the sale of seventy-two feet to Cuskaden.

20

Q. That was with reference to the Cuskaden tract —was any Berg & Ulizio sign on this part, too?

A. No, the Berg & Ulizio sign was removed after the Cuskaden sale was made.

Q. After the Cuskaden deal, did you ever have any conversation with Berg or Ulizio or any of the staff, or their representative, with reference to the sale of this particular piece?

A. Not up until the 23rd day of February.

30

Q. Up until the 23rd day of February—you mean until the signing of this agreement?

A. The signing of this agreement.

Q. Had you ever seen Mr. Berry up until the signing of this agreement?

A. Never saw him until this morning.

Q. When Roberts and Mulock told you they had a customer, you didn't even know the customer?

A. I had no idea who he was.

Q. When they told you the customer was Mr. Berry, you didn't know the man at all?

A. I didn't, no, sir.

Q. After the signing of the agreement by you, who took the one copy of the agreement and the check?

A. Mr. Charlton.

Q. That was about what time in the afternoon?

A. That was in the afternoon about quarter of six or six o'clock. 10

Cross-examination.

By Mr. Reed:

Q. Why did you convey this property to Thomas Kent?

A. I did it on the advice of my attorney.

Q. Receive any money for that deed?

A. No, sir. 20

Q. You were at the title company on the 23rd, were you?

A. On the 23rd of April.

Q. Who prepared that deed?

A. Mr. Charlton.

Q. What time did you go there?

A. I went there in the morning of that day, around eleven, and went back again at one-thirty and back again at two-thirty, and from two-thirty I stayed until possibly five o'clock. 30

Q. Did you call Mr. Berry up, or Mr. Roberts?

A. No, sir.

Q. You were perfectly willing to have made this settlement, ready and anxious to complete its deal if Mr. Berry had appeared?

A. I felt I was compelled to make it, irrespective of what I knew.

Q. After all this discussion with Mr. Roberts and Mr. Mulock at Berg & Ulizio's office, you signed the contract as it was presented and were willing to carry it out, is that right?

A. Yes, sir, I signed it on that day.

Q. Why didn't you call up Mr. Berry?

A. I didn't know Mr. Berry.

Q. Why didn't you call up Mr. Mulock or Mr. Roberts and tell him you were there ready to settle?

10 A. After certain things had happened.

Q. Why didn't you do that?

A. Why didn't I do that—it wasn't my place to do it.

Q. Didn't you feel that you should send for these people to complete this transaction?

A. After what I knew, by no means.

Q. Did you have any notice of the title company that they were ready to pass title on the 23rd for this property?

20 A. No, sir.

Q. Examine the settlement book when you went there on the 23rd?

A. I did.

Q. Did they tell you this property was to be settled for on the 24th?

A. They did not. I had no interest in the 24th. I stopped on the 23rd.

Q. Was there any date there for settlement on the 23rd?

30

By Mr. Sooy: I object.

The Vice-Chancellor: I will permit that.

Q. Any attempt for this property to be settled on the 23rd in the title company's office?

A. Not that I know of.

Q. Wasn't there a date there for settlement on the 24th?

A. Not that I know of.

Q. Did you examine the book?

A. I didn't go beyond the 23rd.

Q. Examined the book?

A. Yes, sir.

Q. Make any inquiry?

A. Yes, sir.

Q. What was your inquiry? 10

A. I was there—had there been an appointment on the 23rd for Berry and Stewart.

Q. What did they tell you?

A. No.

Q. You made these three calls without appraising Mr. Roberts or Mr. Berry or Mr. Mulock?

A. I did, yes, sir.

Re-direct examination.

20

By Mr. Sooy:

Q. Did you know, on the 23rd, after having signed the agreement and having relied on the fact that Mr. Berry was going to build there and having relied on the fact he was a wealthy Philadelphia man, and could build there, that after that turned out to be untrue, you could refuse to perform that contract?

30

By Mr. Reed: I object.

The Vice-Chancellor: Objection sustained.

By Mr. Sooy: What I want to show is this—at the time on the 23rd Mr. Stewart was under the impression that he had no defence to the carrying out of the terms of this agreement.

The Vice-Chancellor: I will sustain the objection.

Q. You never ordered a search of this property for purpose of settlement?

A. No, I did not.

Q. Did you investigate to find out whether Berry or anyone had ordered a search?

10 A. Yes, I asked the title company.

Q. Did they tell you a search had been ordered?

A. They told me a search had been ordered on the 23rd of February.

Q. Tell you by whom?

A. Mr. Mulock.

Q. When you say the search, you mean the search for the purpose of the agreement?

A. There was an application for a search, but no application for a settlement date.

20

Herman J. Mulock, a witness produced on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Sooy:

30 Q. When had you ordered a search for the settlement under this agreement?

A. Not on the 23rd.

Q. When was it?

A. I don't know, sometime after, probably two or three weeks.

Q. From whom did you order it?

A. From one of the clerks at the South Jersey Title Company. He gave me the date of the 24th.

Q. For whom did you order it?

A. For Mr. Berry.

Q. At whose request?

A. Mr. Berry's.

Q. For whom did you go to Mr. Stewart on the 25th of February and talked to him with reference to the settlement of the property?

A. Mr. Berry, of course. 10

George B. Ulizio, a witness produced on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Sooy: 20

Q. Mr. Ulizio, in February, 1923, were you a member of the firm of Berg & Ulizio?

A. Yes, sir.

Q. Engaged in the real estate business?

A. Yes, sir.

Q. And at that time, did you have working for you Mr. Roberts and Mr. Mulock?

A. Yes, sir.

Q. You personally know of the negotiations that led up to the signing of the agreement between Mr. Berry and Mr. Stewart, I mean at the time of the signing, etc.? 30

A. You mean the day of the signing?

Q. Yes, sir.

A. I know a little about it. I don't know much about it.

Q. Were you engaged in the transaction yourself?

A. Yes, sir, Mr. Charlton and Mr. Stewart came to my office to see me on a business matter, talked to me for a while, about half-past five or six o'clock. I was just about getting ready to go home. As I stepped out of my private office into the main office, there was Mr. Stewart, Mr. Charlton, Mr. Mulock, Mr. Roberts, and I don't know whether there was
10 anybody else there or not. They were having a discussion about an agreement. I said, "What's the argument?" Somebody said, "About Mr. Berry," and I don't remember the exact words, but Mr. Stewart didn't want to sign the agreement for some reason or other. I said, "Why not, is anything wrong with it?" Then they related about another piece of ground, I don't know the piece of ground, something about being late, and I turned to Mr. Mulock, "Herman, what about this?" He said, "Oh,
20 this is alright. Berry will settle. He will settle on the date. This is absolutely alright." I said, "Stewart, go on, if Herman says it is alright, it is alright, isn't it?" They were discussing the date of settlement and time. Something about being late on somebody else. I didn't get it clear. I was about going home, it was something about the time or another purchase of being late and Tom said we won't wait a day with it, or Charlton said it, I don't know which it was, either one. They were all talk-
30 ing about the time. I got in just about the middle of the discussion. I wasn't there from the beginning. Something about a building, or something.

Q. You heard some talk with reference to a building?

A. Yes, sir, they said the man was going to build or he was going to build, I don't know. He was

going to build, and he had to settle, and the mortgage was to be taken up before the time.

Q. In other words, you heard either Mr. Mulock or Mr. Roberts discussing a question of the erection of a building on this piece of property?

A. They were all talking about it. I don't just which was talking about it.

Q. Did you, at that time, know who Berry was?

A. No, I did not.

Q. At the time of the discussion down at your office, did you have any conversation with Mr. Roberts as to who Mr. Berry was and who was buying this property? 10

A. No.

Q. Did Mr. Roberts tell you what his interest in this property in question was—how he was interested in it?

A. Why, sometime not so long ago he said he was interested in a property with Berry. That is only lately—some months after that. 20

Q. Did that conversation have reference to the property that is now in suit?

A. Yes, that was it. Somebody, I don't know whether it was Mr. Mulock or Roberts, "I thought Stewart was a friend of yours." I said, "Why, what's the matter?" They told me about this party being late or something of that kind, and they said the girl had made a mistake at the title company—had a mistake of the date—I didn't know just how it was. They talked to me about it. I said, "If we made a mistake, we are responsible for it." They said they didn't know how Mr. Berry was going to take it. He was a Philadelphia man and he was buying a lot of stuff and had a lot of money and they were afraid of getting in wrong with Mr. Berry and I said, "Why, if we are in the fault we will 30

have to stand for our mistake." I said, "I will go to see John Reed," then Mulock talked about it. I heard no more about it until this morning. Stewart came down and subpoenaed me about it. That's all I know about it.

Q. Did Roberts ever tell you anything with reference to whether he, Roberts, was directly interested in this deal with Berry?

A. Yes, he told me that much, just when, I don't
10 remember. The discussion came out, we were talking about different properties. I wanted Berry to come in on something and he said another time. He was interested with Berry in this thing and would like to get it straightened out.

Q. Did he say how he was interested with Berry?

A. No, he didn't say that.

By Mr. Reed: I have no cross-examination, but I move to strike out all his testimony. You can't bind
20 Mr. Berry on that.

The Vice-Chancellor: Overrule the motion to strike out the witness' testimony.

By Mr. Sooy: Mr. Bassett, of the South Jersey Title Company, I understand, is ill. I wanted to show by Bassett that this search was ordered by Mulock on the 23rd. It is corroborative of several things in the case and connects Mr. Mulock and Roberts and that they were acting for Berry.

30 The Vice-Chancellor: Of course you are entitled to have Mr. Bassett and I understand Mr. Reed wanted him used.

By Mr. Sooy: I presume Mr. Reed wants Mr. Kent, but I was going to suggest that if there is to be an adjourned hearing for more testimony we also take Mr. Bassett at that time.

By Mr. Reed: I am willing to take their statement they conveyed to Kent but I really don't—I can't see the importance of Bassett testimony as to who ordered the search. That seems to be a matter of law. As we are through, we should conclude it and close it out.

The Vice-Chancellor: I want to conclude the case, but I want to hear the witnesses and won't conclude it if one of the witnesses is ill. 10

Jay Kline, a witness produced on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Sooy:

20

Q. Mr. Kline, are you connected with the South Jersey Title Company?

A. Yes, sir.

Q. In what capacity?

A. Title examiner.

Q. Have you before you the records in connection with the properties, as well as all letters from Stewart to Berry under an agreement dated February 23, 1923, of land situated on the westerly line of Albany Avenue? 30

A. Our records, so far as the title company is concerned—I don't believe we have any signed agreement. Here is a form of application that is used by our company which shows here to Mr. Berry originally by Mr. Mulock.

Q. What date?

A. On the 23rd day of February, 1923.

Q. And that is an order for what?

A. That is an order for title insurance—an examination against the property. The description made here is Thomas E. Stewart sold to Robert Berry premises west line of Albany Avenue, one hundred twenty feet north of Porter Avenue, west one hundred fifty-five feet by ninety-six feet, lots 32, 34, 36 and 38, block 67. This shows the application was made by Herman J. Mulock from the
10 23rd day of February, 1923.

Q. It doesn't show the time of the day it was made, does it?

A. The time of the day—no, it doesn't show the time of the day.

Q. What time of the day does the title company close its office for business?

A. Four o'clock, the doors are closed.

By Mr. Sooy: I offer that in evidence—I don't
20 suppose there is any necessity of keeping the record here.

The Vice-Chancellor: No, I think the testimony as it stands will be sufficient.

Cross-examination.

By Mr. Reed:

30 Q. You didn't make this up personally?

A. No. Mr. Bassett made this up.

Q. You don't know how he received the application?

A. This informs me through Mr. Mulock personally.

Q. Who signed that, do you know?

A. That is Mr. Barrett's handwriting. That is not Mr. Mulock's handwriting.

Q. How did he receive this application, over the telephone?

A. Personally, in his office.

Q. Why didn't Mr. Mulock sign it?

A. Why?

Q. Very evidently it is not signed?

A. It is a good policy—where we are dealing with people we don't know, we have them sign. Where we are doing business with people we do business with every day, we don't require the signature of the people. This memorandum here, the settlement was to be, according to that, on the 4-24-23. We carry a line on the bottom of our application which shows the first, it shows the first, April 24th, 1923.

By Mr. Reed: I object to the admission of that.

The Vice-Chancellor: It is not strictly admissible. The witness has testified that most of the figures contained in it are not in his own handwriting. Objection is made that Mr. Barrett is not present to prove it.

By Mr. Reed: I don't want it marked for exhibit —I don't see the purpose of it—I don't see what my friend wishes to prove by it.

By Mr. Sooy: We want to prove that Mr. Herman Mulock, on the 2-23-23, at a time prior to four o'clock in the afternoon, ordered this investigation and title insurance, as per the testimony of Mr. Kline. That is what we want to prove.

The Vice-Chancellor: The papers cannot be admitted in evidence at the present time. That is overruled.

By Mr. Sooy: I will have to ask we be permitted to call Mr. Barrett—I think we would save time to have Mr. Barrett here.

By Mr. Reed: I think he ought to be called.

The Vice-Chancellor: If it is essential—we can take another recess.

10 By Mr. Sooy: What Mr. Kline says is hearsay, but Mr. Barrett will testify to it and I want it on the records.

Clark S. Barrett, a witness produced on behalf of the defendant, being duly sworn, testified as follows:

20 Direct examination.

By Mr. Sooy:

Q. Are you connected with the South Jersey Title Company?
A. I am.
Q. In what capacity?
A. Secretary of the company.
Q,. Did you on the 25th day of February, 1923, receive from Herman G. Mulock, an application for
30 title policy or premises situated on the west line of Albany Avenue, 120 feet north of Porter Avenue?
A. I did.
Q. Whereabouts did you receive it?
A. As I recall it, it was in my office.
Q. Mr. Mulock personally made the request?
A. I think that he did.

Q. And the notation at the top sheet shows that you have entered that in as "2-23-23"—in whose handwriting is that?

A. My handwriting.

Q. And the rest of that writing in your handwriting?

A. Yes, sir. With this exception—this figure "34" and this cancellation notation.

Q. Do you remember what time of the day that application was made?

A. I am not positive, but I think it was late in the afternoon. 10

Q. You close your office when?

A. I work all hours. The office closes or is supposed to close four or five o'clock. I have been there all hours in the past two or three years.

Q. Have you any recollection when that was made?

A. My recollection—I should say quite late in the afternoon, but before five o'clock.

Q. Was there any time—at the time this application was put in—was there any time made for settlement? 20

A. Yes, they asked if it finished up on the 24th day of April.

Q. Did they ask for a date—will you refer to your book and say whether or not you gave them a date?

A. Yes, we gave them a date to correspond with this application.

Q. Was there any date given for the 23rd day of April? 30

A. No.

Q. On the 23rd day of April was your settlements all filled?

A. Of course, I cannot say that at this time. I don't know only what the notations show me. It was fixed for the 24th. I noticed it at the same

time, at two o'clock on the 24th. This is my handwriting, Thomas E. Stewart to C. H. Berry. This number is put on by the clerk afterwards. The clerks supply that number.

Q. What is that notation here? (Indicating.)

A. That is a notation of the application. This application, 11250, and the same number was used here.

Q. Will you turn to your settlements for April
10 24th, 1923, and tell me whether or not there had been placed for settlement that day any settlement for the same premises between Berry and Weiss—April the 24th?

A. No.

Q. The name Herman G. Mulock—H. G. Mulock —(Indicating)—is that in your handwriting, also?

A. Yes, sir, to be reported to H. G. Mulock.

Q. Did he say who the purchaser of the property was?

20 A. No, except he gave the name Robert Berry.

Q. You didn't see Mr. Charlton or Mr. Stewart at that time, in reference to that title insurance?

A. On that day?

Q. Yes.

A. Not to my knowledge.

(Paper referred to, submitted by Mr. Barrett, received in evidence and marked Exhibit D2.1

30

(Book of record submitted by Mr. Barrett, received in evidence and marked Exhibit D3.)

Q. You had no talk with Mr. Berry at all about this matter?

A. I don't know Mr. Berry.

The Vice-Chancellor: Was this order referred to, as a part of the business of February 23rd, or did that go into the business of February 24th?

A. That is entered on February 23rd and on their books it would be transferred into our regular business and it would be transferred as of that same date.

DEFENSE RESTS. 10

HERMAN G. MULOCK, recalled.

Direct examination on rebuttal.

By Mr. Reed:

Q. Did you hear the statements made as to the improvements you and Mr. Roberts made to Mr. Charlton? 20

A. Yes, sir.

Q. Did you make any misrepresentations as testified to?

A. Positively no.

Q. Were you authorized by Mr. Berry to make any representation for him?

By Mr. Sooy: Objected to. 30

The Vice-Chancellor: I will permit that.

A. No, certainly not.

Q. What is your recollection as to the placing this application for title examination?

A. I positively did not make that application on

the 23rd of February. There must be another mistake in this. It was utterly impossible. I was in the office, at the time he says—Mr. Barrett says—I was in the office, I was in my office trying to negotiate this deal. We never left the office until after six o'clock. I wasn't out of my office all that afternoon.

Q. Did you visit the South Jersey Title Company office after four o'clock on the 23rd of February?

10 A. Positively not.

Q. Did you phone this order in to Mr. Barrett?

A. No, sir.

Q. If so, this application, then, that was produced here today, never was so?

A. The application, when I made the application it was put on the book that was displayed here by the girl at the counter.

Q. The date was given to you on that book?

A. It was given to me from the application book

20 that was just displayed here.

Cross-examination.

By Mr. Sooy:

Q. Who instructed you to make the application?

A. They are made every day.

Q. You made it for Mr. Berry?

A. Certainly, I imagine I did.

30 Q. Is that the date for Mr. Berry, the date for settlement?

A. Yes, sixty days from the 23rd day of February.

By Mr. Reed: I ask that the latter be stricken out.

By Mr. Sooy: Let it.

Q. You reported it to Mr. Berry that you made the application?
A. Yes, sir.

LEE BRENTLY ROBERTS, recalled.

Direct examination. 10

By Mr. Reed:

Q. You heard the testimony by Mr. Charlton as to the representation that was made as to who Berry was and what he was going to do with this property?
A. I heard them, but they are absolutely false.

By Mr. Sooy: I suppose the last can be stricken out. 20

The Vice-Chancellor: Yes.

Q. Did you make any such representations?
A. No, sir.

ROBERT BERRY, recalled.

Direct examination. 30

By Mr. Reed:

Q. Did you ever authorize Mr. Roberts to make an application for an extension of time for this settlement?
A. I absolutely did not.

Q. Who arranged the time of settlement for you, Mr. Berry?

A. Mr. Mulock.

Q. Did he tell you on what date this settlement was to take place?

A. Yes, sir.

Q. What date?

A. April 24th, in the afternoon, at 2 P. M., in the South Jersey Title Company.

10 Q. Did you authorize Mr. Mulock or Mr. Roberts to make any representations as to who you were or what you were going to do with that property?

A. Absolutely not.

Q. Did you ever know any such representations had been made by them for you?

A. No, sir.

Q. Do you know Mr. Charlton?

A. Yes, sir, I have known him for some time.

Q. How long have you known him?

20 A. For a few years.

Q. Come in contact with him?

A. At times.

Q. Do business with him?

A. Well, he handled jitney insurance when I was in that business and came in contact with him.

Q. Did you come in contact with him?

A. Yes, sir.

Q. You knew him and he knew you?

A. Yes, sir.

30

By Mr. Sooy: I object—that is a conclusion.

The Vice-Chancellor: Yes.

Q. Are you ready and willing to take this property and pay for it now?

A. Absolutely.

Q. Were you ready and willing on the 24th?
A. Absolutely.

By Mr. Sooy: I object as to this being rebuttal.

Q. Were you on the 24th of April prepared to —
A. Absolutely so.

Cross-examination.

10

By Mr. Sooy:

Q. Mr. Mulock told you he had made application for title insurance for this property, did he?
A. Yes, sir.
Q. When did he tell you that?
A. Oh, a few weeks later.
Q. You told him to make application for the title insurance only?
A. I don't know that I specified it—I don't remember that. 20
Q. Sometime after the agreement was signed, you remember you did tell him to get the title insurance?
A. Absolutely.
Q. Were you driving a jitney up until when?
A. Before January, 1924.
Q. Up until January, 1924, you say?
A. Yes, sir.
Q. And you were driving a jitney in February, 1923? 30
A. February, 1923.
Q. When you said 1924 you meant 1923?
A. Yes, sir.
Q. Stopped in January, 1923?
A. I wasn't driving a jitney at the time I bought this.
Q. You had been up until January, 1923?

A. Yes, sir.

Q. January 15th?

A. I don't know the date.

Q. You were a resident of Atlantic City at that time?

A. Yes, sir.

BOTH SIDES REST.

10

The Vice-Chancellor: The first proposition is a legal proposition whether this contract which, on the face of it, time is not of the essence of the contract, and unless otherwise changed would be binding upon the defendant, wherein the date, not the time had expired, unless by the representation of the complainant of these others by him, there has been any not necessarily found in specific performance cases, but there has been such representation as
20 would prevent the complainant in the court of equity having specific performance of the contract. First, would be the question of whether or not such statement had been made; and second, if made, were they of such character as to stop the complainant from having specific performance? Isn't that a matter that would be much better briefed than argued orally? It would probably have to be eventually briefed, anyhow.

30 By Mr. Reed: That is my view of the case entirely.

By Mr. Sooy: It would be much better to brief it than argue.

The Vice-Chancellor: I think, under the circumstances, attorney for the defendant should have ten

days, plaintiff five days to answer them, because the situation is the defendant has to carry the burden upon that point. The contract as presented, if not effected by the matters I have spoken of, is sufficient, without doubt, to compel specific performance. The burden is upon Mr. Sooy to show the Court that in equity and law the complainant is not entitled to every relief which under the contract he would be entitled. You may take the burden.

10

CONCLUSIONS.

(Filed Oct. 22, 1925.)

IN CHANCERY OF NEW JERSEY.

Between ROBERT BERRY, *Complainant,* and THOMAS E. STEWART, *et al.,* *Defendants.*	On Bill for Specific Performance. On Final Hearing. Conclusions.

20

MR. JOHN C. REED, for the complainant.

MR. WILLIAM CHARLTON, for the defendants.

30

INGERSOLL, V. C.:

On the 23rd day of February, 1923, the defendant, Thomas C. Stewart, being the owner of a tract of land in Atlantic City, described in the bill of complaint, entered into an agreement in writing with the complainant, wherein he agreed to convey said

lands and premises to the complainant, for the sum of $12,000. The consideration was to be paid: $500 upon the signing of the agreement, the assumption of a mortgage then existing of $4,500; $3,500 in cash upon the delivery of the deed, and the creation of a purchase money mortgage for $6,000 payable within one year.

The settlement and the delivery of the deed was to be made on or before April 23rd, 1923.

10 William Charlton, the solicitor of the defendant, Stewart, is an equitable owner of an undivided one-half of the premises in question. Mulock, the manager of Berg & Ulizio, real estate brokers in Atlantic City, testified that Stewart and Charlton listed for sale among other properties the said land in the office of Berg & Ulizio.

On the day in question, Mulock notified Mr. Charlton's office that he had a purchaser for the land. In response to this notice, Charlton and Stewart 20 called at the real estate office and Mulock submitted an offer which was accepted. Mulock then presented Berry's check for $500 and the contract for sale, which had been signed by Berry and was in Mulock's possession. The agreement called for settlement sixty days from the date of the agreement.

Mr. Charlton testified that he and Stewart called at the real estate office about five o'clock on the said 23rd day of February, 1923, in reference to certain 30 property owned by Berg, and met Mr. Berg of the the firm, Mr. Mulock and Mr. Roberts, a salesman. He denies that this property was listed with the firm, but that he knew Mulock "was going to try to sell them."

Roberts informed them that he had a client for the ground in question, and produced the agreement signed by Berry; that he read it over and said

to Roberts and Mulock: "We have Berry's signature and we can't go back now and ask him to make a new contract, to sign again." He had either gone away or was going away. "He said you know us and you know we will make settlement on the day * * *." I said, "You know what happened in the Cuskaden case, when you were two weeks late and we were lenient, and let you go there." I said, "I want time of the essence put in there because I want you to know we are going to hold you strictly to this agreement," I think Mulock had the check. He said, "Oh, yes, these things only happen once, we will be absolutely certain to get there." I said, "Who is Berry, what is his business?" Now, I am not certain whether it was Roberts or Mulock that said, "He is a wealthy man from Philadelphia now living here." I said, "You know we are not interested in selling to speculators—what is this man's intention to do with the property." Then either Roberts or Mulock made a remark about this man stating he had consulted or was about to consult contractors for the purpose of building a garage or show room on this boulevard. Q. Who do you mean by "he?" A. Berry had. I asked again if he was a man of means and really intended to use the property and was told again that he was and then Mr. Stewart and I retired for a moment until we had a conversation between ourselves. We came back from that conversation and I again said we hold you strictly to the day of this time, although time is not of the essence under the contract. Mr. Stewart then signed, I took the check, I took the copy of the contract which had been handed me, and we went away."

Between the date of the agreement and the time for settlement Mr. Roberts called Mr. Charlton on the phone and asked for an extension for a couple

of weeks, which request, after consultation with Stewart, was refused.

Mr. Stewart testified:

"I think we were in Ulizio's office for about fifteen minutes, talking about some ground at Trenton and Atlantic Avenues which we were trying to trade for the Waggoner Hospital. After we came out, Mr. Mulock said, 'I have an offer of $125.00 a foot for Albany Avenue.' I said, 'No, I don't think I will consider that on Albany Avenue. I wouldn't give it a thought.' One word led on to another, then finally showed me the agreement. They said, 'You better sign this now, everything is alright.' I read the thing over, the first thing I noticed about the agreement that time of the essence was not in there. I asked why there was not in there. Mr. Roberts spoke up and said that was an oversight on their part. He said this party is alright, and it will be alright. I said, that will have to be in before I sign it. Mr. Roberts then spoke up and said this man had made a good deal of money and now he is living down here. This agreement he had shown me, it already had been signed and witnessed. He said Berry was just leaving town and he didn't want to go back to him with a new agreement. I said I wanted a few minutes to talk to Charlton. Charlton and I went to one side and talked this matter over. The result of it was I signed the agreement."

The following questions and answers followed:

"Q. There was no conversation as to who Berry was?

A. Yes, sir, I asked who Berry was.

Q. Who did they say he was?

A. Mr. Roberts told me he was a wealthy man from Philadelphia and was living down here now. I asked what his idea was to do with the ground. He told me his idea was to put up a nice building, sort of an automobile show room and a garage. I said, 'Are you sure?' I said, 'I want no speculation with my ground. I can speculate with it myself.' He said, 'There is nothing of that sort in the deal, this man is perfectly O. K.' 10

Q. You believed, did you, that Mr. Berry was going to build a building on this ground?

A. I had no reason to doubt either Mr. Mulock or Mr. Roberts.

Q. Now, you say you had said you wanted time as the essence of the contract—did Charlton say anything about when settlement was to be made?

A. Mr. Charlton told them he would insist on settlement on the 23rd day of April. In other words, live up to the contract, word for word. He also told them, 'You know we helped out with the Cuskaden matter—you were two weeks late, and we let you get away with it that time. There will be no extension in this contract.' 20

Q. You mean no delay?

A. No delay in this contract. Mr. Roberts insisted everything would be O. K.

Q. After the signing of the agreement, on the 23rd day of April, or February, was there ever a time when the question of extension of time was discussed? 30

A. The only time the question of time was discussed with me was to Mr. Charlton. I have never seen Mr. Mulock or Roberts to talk to since the 25th day of April. That was in the Waggoner Hospital, outside of two days ago, I

met Mr. Roberts in Charlton's office. That is the first time I have seen them to speak to."

On the 23rd day of April, Stewart appeared at the office of the Title Company, where the settlement was to be made with the deed, prepared to make the settlement. He went there at eleven o'clock, back again at one-thirty and back again at two-thirty and then remained until "possibly
10 five o'clock." Neither Berry nor anyone representing him appeared, and Stewart made no effort to get into communication with him, and states that certain things had happened, he did not consider "it was his place to notify them;" that he was there prepared to make settlement, because he felt he was compelled to make it irrespective of what he knew.

Mulock testified that he ordered the search for the settlement for Mr. Berry, and that the Title Company gave him April 24th for settlement.

20 Mr. Ulizio, of Berg & Ulizio, testified as follows:

"Mr. Charlton and Mr. Stewart came to my office to see me on a business matter, talked to me for a while, about half-past five or six o'clock. I was just about getting ready to go home. As I stepped out of my private office into the main office, there was Mr. Stewart, Mr. Charlton, Mr. Mulock, Mr. Roberts, and I don't know whether there was anybody else there or not. They were having a discussion about an agreement. I said,
30 'What's the argument?' Somebody said, 'About Mr. Berry.' I don't remember the exact words, but Mr. Stewart didn't want to sign the agreement for some reason or other. I said, 'Why not, is anything wrong with it?' Then they related about another piece of ground, I don't know the piece of ground, something about being late and I turned to Mr. Mulock, 'Herman, what

about this?' He said, 'Oh, this is alright. Berry will settle. He will settle on the date. This is absolutely alright.' I said, 'Stewart, go on, if Herman says it is alright, it is alright, isn't it?' They were discussing the date of settlement and time. Something about being late on somebody else. I didn't get it clear. I was about going home, it was something about the time or another purchase of being late and Tom said we won't wait a day with it, or Charlton said it, I don't know which it was, either one. They were all talking about the time. I got in just about the middle of the discussion. I wasn't there from the beginning. Something about a building, or something.

Q. You heard some talk with reference to a building?

A. Yes, sir, they said the man was going to build or he was going to build, I don't know. He was going to build, and he had to settle, and the mortgage was to be taken before the time.

Q. In other words, you heard either Mr. Mulock or Mr. Roberts discussing a question of the erection of a building on this piece of property?

A. They were all talking about it. I don't know just which was talking about it.

Q. Did you, at that time, know who Berry was?

A. No, I did not.

Q. At the time of the discussion down at your office, did you have any conversation with Mr. Roberts as to who Mr. Berry was and who was buying this property?

A. No.

Q. Did Mr. Roberts tell you what his interest

in this property in question was—how he was interested in it?

A. Why, sometime, not so long ago, he said he was interested in a property with Berry. That is only lately—some months after that.

Q. Did that conversation have reference to the property that is now in suit?

A. Yes, that was it. Somebody, I don't know whether it was Mr. Mulock or Roberts, "I thought Stewart was a friend of yours." I said, 'Why, what's the matter?' They told me about this party being late or something of that kind, and they said the girl had made a mistake at the Title Company—had a mistake of the date —I didn't know just how it was. They talked to me about it. I said, 'If we made a mistake, we are responsible for it.' They said they didn't know how Mr. Berry was going to take it. He was a Philadelphia man and he was buying a lot of stuff and had a lot of money and they were afraid of getting in wrong with Mr. Berry and I said, 'Why, if we are in the fault, we will have to stand for our mistake.' I said, 'I will go to see John Reed,' then Mulock talked about it. I heard no more about it until this morning. Stewart came down and subpoenaed me about it. That's all I know about it.

Q. Did Roberts ever tell you anything with reference to whether he, Roberts, was directly interested in this deal with Berry?

A. Yes, he told me that, just when, I don't remember. The discussion came out, we were talking about different properties. I wanted Berry to come in on something and he said another time. He was interested with Berry in this thing and would like to get it straightened out.

Q. Did he say how he was interested with Berry?

A. No, he didn't say that."

Mr. Barrett, the secretary of the Title Company, testified that:

"Mulock ordered the search and asked if it could be finished up on the 24th of April, and we gave them the date to correspond with the application." 10

Mulock testified that they made no misrepresentation and Roberts denies Charlton's testimony as to the representation that was made as to who Berry was, and what he was going to do with this property. On April 24th, Berry and his representative was at the Title Company, prepared to make settlement, and so notified Stewart, who refused to convey, basing the refusal entirely upon the ground that "time was of the essence of the contract," and that the date of settlement was April 23rd. 20

Time was not made of the essence by the contract itself, and from the testimony, I am not satisfied that it was ever so made. The complainants were ready to complete their contract, and did tender themselves ready to do so on the day following the time set forth in the contract. I am convinced that that delay was through an error as to the time. The defendant evidently hoped that settlement would not be made on the day fixed, and evidently did not call complainant's or his representative's attention to their error in time, in order that he might claim a default in the settlement. I am convinced that the prayer of the bill should be granted, and will advise a decree to that effect. 30

FINAL DECREE.

(Filed Nov. 19, 1925.)

IN CHANCERY OF NEW JERSEY.

10

Between ROBERT BERRY, *Complainant,* and THOMAS C. STEWART and THOMAS KENT, *Defendants.*	On Bill for Specific Performance. Final Decree.

20

This cause coming on to be heard in the presence of John C. Reed, solicitor for and of counsel with complainant, and William Charlton, solicitor for and of counsel with defendants, and it appearing that the complainant, Robert Berry, entered into an agreement with the defendant, Thomas C. Stewart, evidenced by a certain writing bearing date the 23rd day of February, A. D. 1923, wherein and whereby
30 the said Thomas C. Stewart agreed to convey to the said Robert Berry for the sum of twelve thousand ($12,000) the following described premises, situated in the City of Atlantic City, County of Atlantic and State of New Jersey, bounded and described as follows:

BEGINNING: At a point in the Westerly line of Albany Avenue one hundred twenty (120)

feet North of the Northerly line of Porter Avenue and (1) West parallel with Porter Avenue one hundred and five (105) feet to a point thence; (2) Northwardly parallel with Albany Avenue ninety-six (96) feet to a point thence; (3) Eastwardly parallel with Porter Avenue one hundred and five feet (105) to a point in the Westerly line of Albany Avenue thence (4) Southwardly in and along the Westerly line of Albany Avenue ninety-six (96) feet to the place of beginning. Being further known as Lots No. 32-34-36-38, in Block 67 on Map of Atlantic City and known as Chelsea Heights, being the same premises described in said agreement of sale above referred to.

And it further appearing to the Court, that after having made the agreement aforesaid, the defendant refused to perform said agreement of sale by conveying the said premises above described and accepting the agreed purchase price in the manner and form according to the provisions of said agreement, but conveyed the same to Thomas Kent, in fraud of complainant's rights, and the Court being of the opinion that the complainant is entitled to specific performance of the above mentioned agreement and that he is entitled to relief as prayed for in his bill of complaint;

It is thereupon, on this twelfth day of November, A. D. 1925, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed, that the defendants, Thomas C. Stewart and Thomas Kent, within ten days from the date of this decree, to make, execute and acknowledge in due form of law, and deliver to the complainant, Robert Berry, his heirs, executors, administrators or assigns, a good and sufficient deed of

general warranty, for the premises described in the bill of complaint, to wit, all the following described premises, situate in the City of Atlantic City, County of Atlantic and State of New Jersey, bounded and described as follows:

BEGINNING: at a point in the Westerly line of Albany Avenue one hundred twenty (120) feet North of the Northerly line of Porter Avenue and (1) West Parallel with Porter Avenue one hundred and five (105) feet to a point thence; (2) Northwardly parallel with Albany Avenue ninety-six (96) feet to a point thence; (3) Eastwardly parallel with Porter Avenue one hundred and five feet (105) to a point in the Westerly line of Albany Avenue thence (4) Southwardly in and along the Westerly line of Albany Avenue ninety-six (96) feet to the place of beginning. Being further known as Lots No. 32-34-36-38, in Block 67 on Map of Atlantic City and known as Chelsea Heights.

It is further ordered, adjudged and decreed, upon the making, executing, acknowledging and delivery of the said deed above mentioned, the complainant, Robert Berry, his heirs, executors, administrators or assigns, do pay or cause to be paid unto the said Thomas C. Stewart and Thomas Kent, the sum of $12,000.00, as is provided for in the agreement of sale, which this final decree is entered to enforce the specific performance thereof.

It is further ordered, ad judged and decreed, that in the event or failure of the said Thomas C. Stewart and Thomas Kent to execute and deliver a deed for said premises within the time prescribed by this decree, then in that event, the complainant shall and may pay the aforesaid sum of $12,000.00, in cash, to the clerk in Chancery, and that upon so doing,

the complainant, Robert Berry, his heirs, executors, administrators or assigns shall have a good and sufficient title to the lands and premises above described.

It is further ordered, adjudged and decreed, that the costs of the complainant shal be taxed against the defendants, Thomas C. Stewart and Thomas Kent, which taxed costs shall include a counsel fee of $100.00) one hundred dollars, for the counsel of the complainant, which is hereby allowed the complainant. 10

E. R. Walker,
C.

Respectfully advised:
R. H. Ingersoll,
V. C.

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NOTICE OF APPEAL.

(Filed Dec. 8, 1925.)

IN CHANCERY OF NEW JERSEY.

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Between ROBERT BERRY, *Complainant,* and THOMAS E. STEWART and THOMAS KENT, *Defendants.*	On Bill, Etc. Notice of Appeal.

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To the within named Complainant:

Take notice that the defendants appeal to the Court of Errors and Appeals of the State of New Jersey, from the whole and every part of the decree in this cause entered in the Court of Chancery on the 12th day of November, 1925.

Dated December 3, 1925.

COLE & COLE,
Solicitors of Defendants.

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PETITION OF APPEAL.

(Filed Dec. 8, 1925.)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between ROBERT BERRY, *Complainant-Respondent,* and THOMAS E. STEWART and THOMAS KENT, *Defendants-Appellants.*	On Appeal from Chancery. Petition of Appeal.

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

The petition of Thomas E. Stewart and Thomas Kent, the appellants in the above stated cause, respectfully shows that your petitioners find themselves 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 the 12th day of November, 1925, wherein the said petitioners were defendants and Robert Berry was complainant, and from the whole and every part thereof, to wit: that said decree obliges the appellants to specifically perform the contract referred to in the bill when the bill of complaint should have been dismissed. And your petitioners humbly appeal from every part of the said decree of the said Chan-

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cellor upon the ground that the same is erroneous. Your petitioners therefore pray that the said decree of the said Chancellor may be, in the particulars aforesaid, reversed, set aside and for nothing holden. And that your petitioners may have such relief in the premises as to this Honorable Court shall seem meet.

COLE & COLE,
Solicitors and Counsel with Appellants.

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Card No.

Name ROBERT BERRY

Address

In account with THE CHELSEA NATIONAL BANK, ATLANTIC CITY, N. J.

Old Balance	Date		Checks		Date	Deposits	Date	New Balance
38.74	Mar 19 '23	5.00—			Mar 19 '23		Mar 19 '23	33.74*
33.74	Mar 24 '23	20.00—			Mar 24 '23		Mar 24 '23	13.74*
13.74					Mar 26 '23	1,025.00	Mar 26 '23	1,038.74*
1,038.74	Mar 31 '23	25.00—	375.00—	250.00—				
	Mar 31 '23	125.00—			Mar 31 '23		Mar 31 '23	263.74*
263.74	Apr 2 '23	250.00—			Apr 2 '23		Apr 2 '23	13.74*
13.74					Apr 3 '23	125.00	Apr 3 '23	138.74*
138.74	Apr 5 '23	125.00—			Apr 5 '23		Apr 5 '23	13.74*
13.74					Apr 11 '23	20.00	Apr 11 '23	33.74*
33.74	Apr 12 '23	5.00—	15.00—		Apr 12 '23		Apr 12 '23	13.74*
13.74	Apr 19 '23	5.00—			Apr 19 '23		Apr 19 '23	8.74*
8.74					Apr 23 '23	50.00	Apr 23 '23	58.74*
58.74	Apr 24 '23	33.33—			Apr 24 '23	40.00	Apr 24 '23	65.41*
65.41	Apr 25 '23	50.00—			Apr 25 '23		Apr 25 '23	15.41*
15.41	Apr 26 '23	5.00—			Apr 26 '23		Apr 26 '23	10.41*
10.41	Apr 30 '23	50.00—			Apr 30 '23	1,000.00	Apr 30 '23	960.41*
960.41	May 1 '23	187.50—	225.00—	50.00—				
	May 1 '23	225.00—	100.00		May 1 '23		May 1 '23	172.91*

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ARTICLES of AGREEMENT, made this twenty third day of February in the year of our Lord one thousand nine hundred and Twenty Three BETWEEN Thomas C. Stewart of the City of Atlantic City, County of Atlantic, State of New Jersey of the first part, and Robert Berry, of Atlantic City, County of Atlantic, State of New Jersey of the second part;

WITNESSETH, that the said party of the first part, for and in consideration of the sum of Twelve Thousand Dollars ($12,000) to be paid and satisfied as hereinafter mentioned and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that he the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed a General Warranty free from all incumbrance except as hereinafter mentioned: on or before the Twenty Third day of April 1923 all that certain lot, tract or parcel of land and premises hereinafter particularly described, situate, lyingand being in the City of Atlantic City, in the county of Atlantic and State of New Jersey Beginning: At a point in the westerly lineof Albany one hundred twenty (120) feet north of the northerly lineof Porter Avenue and (1) west parallel with Porter Avenue one hundred and five (105) feet to a point thence; (2) northwardly parallel with Albany Avenue ninety six (96) feet to a point thence; (3) eastwardly parallel with Porter Avenue one hundred and five feet (105) to a point in the westerly line of Albany Avenue thence (4) southwardly in and along the westerly line of Albany Avenue ninety six (96) feet to the place of beginning. Being further known as Lots No. 32-34-36-38, in Block 67 on Map of Atlantic City and known as Chelsea Heights.

AND the said Robert Berry, for himself heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, his heirs, executors and administrators assigns, that he the said party of the second part, will pay and satisfy or cause to be paid and satisfied unto the said party of the first part, the said sum of Twelve Thousand Dollars ($12,000.00) as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say: Five Hundred Dollars at the time of the signing of this agreement receipt of which is hereby acknowledged; the assumption of four (4) Five Hundred Dollar ($500) mortgages now existing on said lots; Thirty Five Hundred Dollars ($3500) in cash at the time of settle-

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ment; and the purchase money mortgage for Six Thousand Dollars ($6000) payable any time within one year from date of settlement, said mortgage to bear interest at six percent per annum payable semi-annually.

Settlement to be made at the Office of South Jersey Title & Guarantee Company.

The party of the first part agrees to pay to Berg & Ulizio three (3) percent commission of the purchase price of said land for services rendered.

AND IT IS FURTHER AGREED, by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises on the day of settlement and from thence take the rents, issues and profits to and their use.

AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators, and they hereby agree to pay, upon failure to perform the same, the sum of Five Hundred Dollars ($500) which they hereby fix and settle as liquidated damages thereof.

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

SIGNED, SEALED AND DELIVERED: in the presence of	:	Thomas E. Stewart
	:	Robert Berry
L. Brently Roberts	:	
Paul Snyder as to Thomas E. Stewart.	:	

Be it remembered, that on this twenty fourth day of April, A. D. 1923, before me a Master in Chancery of New Jersey, personally came L. Brently Roberts, of full age, who, being by me duly sworn, on his oath saith: That he saw the within-named Thomas E. Stewart sign, seal and deliver the within instrument as his voluntary act and deed; and that deponent at the same time signed the same as subscribing witness.

L. Brently Roberts.

Sworn to and subscribed to before me at twenty fourth this 24th day of April A.D.1923.

John C. Reed
Master in Chancery of
New Jersey

Rec. 4/25/23 Atl. Co. Clrks. Office Book 707 of Deeds Folio 300 &c.

New Jersey Court of Errors and Appeals

Between
ROBERT BERRY,
Complainant-Respondent,
and
THOMAS E. STEWART, *et al.*,
Defendants-Appellants.

ON APPEAL FROM CHANCERY.

BRIEF FOR APPELLANTS.

STATEMENT.

This is a vendee's bill for the specific performance of an agreement concerning real estate. The agreement and its terms are not in dispute. It expressly provides for a time and place of settlement. Appellant appeared at the time and place provided ready and able to perform. Respondent did not appear. The day following, he, through a supposed agent, sought the appellant and pretended to be ready and able to perform and offered an explanation for his failure. In fact, as we claim, he was not ready and able to perform. Appellant refused to perform. The decree compels performance and from it the defendant, vendor, appeals.

ARGUMENT.

No citation of authority is longer necessary to support the statement, that specific performance is not a matter of strict equitable right. But see

Plummer v. Kepler, 26 Eq. 481;
Thommessen v. Absecon Land Co., Vol. 3, N. J. A. R., page 1666.

In an appropriate case equity will refuse to decree performance and relegate the complaining party to an action at law.

Our contention is that the instant case is destitute of equity favorable to respondent.

The agreement is explicit as to time and place of settlement. Respondent says he erred as to time. Carefully analyzed, it will appear by the evidence that some other interested party erred and that the agreement was speculative in character and that respondent was never in a position financially to perform and that he was wholly dependent upon his vendee performing in order to realize his (respondent's) profit.

The contention is justified that the agreement was negotiated by Herman G. Mulock, using respondent's name, as vendee, for the sole purpose of assigning and dividing the profits. There was a considerable rise in the value of the property between the date of the agreement and the date of performance and it will likely be claimed that that fact was the reason for appellants' refusal. We may concede that the anticipation of that possibility caused appellant at the time of the making of the agreement to admonish respondent's agents that time was to be of the essence, despite the fact it

was not written in the agreement. The Vice-Chancellor's finding to the contrary was unwarranted.

William Charlton, a member of this bar, explains the transaction at pages 57-58.

> "Q. What did they (meaning Mulock and Roberts, real estate agents) say about it?
>
> A. I think it was Mr. Roberts that said first that *he had a client,* if you call him a client, for this ground, and wanted to pay a hundred and twenty-five dollars a foot. I said to Mr. Roberts, Mr. Mulock was there at the time, who is this man? He said, 'Mr. Berry.' Well, Mr. Mulock then spoke up and he said, 'He is alright, it is a good deal.' Mr. Roberts produced the original and the copy of the contract and they were then signed by Berry (meaning that Berry had already signed). I read them over and I said this contract does not provide that time is of the essence and I won't allow Mr. Stewart to sign this contract unless that is in there. So Mr. Roberts or Mr. Mulock said, 'We have Berry's signature and we can't go back now and ask him to make a new contract to sign again.' He had either gone away or was going away. He said, 'You know us, and you know *we wil make selttlement* on the day, etc., I said, 'You know what happened in the Cuskaden case, when you were two weeks late and we were lenient and let you go there.' I said, 'I want time of the essence put in there because I want you to know *we are going to hold you strictly to this agreement.'* I think Mr. Mulock had the check. He said, 'Oh, yes, *those things only happen once,* we will be absolutely certain to get there,' &c."

Then follows statements as to who Berry was and what use was to be made of the land. Their answers were untrue according to Mr. Charlton. At pages 64-65 Stewart corroborates Charlton. Neither had seen Berry, or known him until after the default. Mulock corroborates Charlton and Stewart at page 27, on cross-examination:

> "Q. Now, at the time you were discussing the matter with Stewart and Charlton, they insisted, did they not, that if you were given sixty days, settlement must be made within sixty days?
>
> A. They stated there would be no extension of the time of the agreement.
>
> Q. And they did tell you there would be no extension?
>
> A. Yes, sir."

See also what follows and at pages 28 and 29.

The Vice-Chancellor assumed that Mulock and Roberts were appellants' agents. The evidence shows they were respondent's, if not actually interested in the agreement with him. Berry proved to be a jitney driver, had no thought of building upon the land and was financially unable to complete the bargain.

See exhibit showing his bank balance.

Mulock is put forward to explain the failure to be present for settlement at the time named. At page 23 he says:

> "I had not paid any attention to it."

At page 24 he says, after relating Stewart's refusal to perform:

> "And I said, if that is the way you feel about it I don't want to do any business with you, *I will* take some other means of getting it."

The foregoing indicates a personal interest.

Mulock said at page 23: "I called up Mr. Charlton and told him *we would be ready to settle at two o'clock.*" The truth is no one on behalf of respondent was ready to settle on the day set or the day after. We have referred to respondent's bank account. See his testimony at page 45, direct:

> "Q. Were you prepared to carry out your contract?
>
> A. Absolutely."

A few excerpts on cross-examination, pages 46, 47 and 48:

> "A. I sold the ground to somebody.
>
> Q. Who was the somebody else?
>
> A. Mr. Weiss.
>
> Q. You depended on his giving you a check to make settlement?
>
> A. Absolutely.
>
> Q. Did you, at that time, sign a mortgage in the sum of six thousand dollars to Thomas E. Stewart covering the land in question?
>
> A. I did not, no, sir.
>
> Q. My question, you expected, did you, that some others would execute a mortgage for six thousand dollars instead of yourself?
>
> A. Yes.
>
> Q. And you expected some others, in addition to that, to put up cash for thirty-five hundred dollars that was called for in the agreement between Stewart and yourself?
>
> A. Yes, sir."

Our insistence is that the evidence requires findings as follows:

A. Mulock and Roberts were representing Berry.

B. They misrepresented as to who Berry was and the object of the purchase.

C. They were distinctly told on the day of the agreement and before appellant would sign that there would be no extension.

D. Berry must assume the consequences of Mulock's negligence.

E. Mulock admitted that he paid no attention to the date.

F. It nowhere appears that respondent, or any one for him, was prepared to perform the agreement even on the day following the date set for performance.

G. They expected Weiss to do the performing. But it does not appear that he was able, ready and willing.

Appellant was not required to accept a bond and mortgage executed by Weiss.

The Vice-Chancellor's finding at page 95 as follows:

> "The *complainants* (there is only one) were ready to complete their contract and did tender themselves ready to do so on the day following the time set forth in the contract,"

is contrary to the facts.

In view of the facts as we claim they are, we contend that respondent has no equity calling for relief. He is without a strict equitable right to the aid of a court of conscience. In the circumstances,

appellant was justified in refusing to perform after the date expressly agreed upon and with due admonition given before he signed. Equity should not relieve against clear negligence and misrepresentation.

Thommessen v. Absecon, etc., supra.

The decree is erroneous and should be reversed.

Respectfully submitted,

COLE & COLE,
Solicitors of Appellant.
C. L. COLE,
Of Counsel.

NEW JERSEY COURT OF ERRORS AND APPEALS

Between

ROBERT BERRY,

Complainant-Respondent,

and

THOMAS E. STEWART and THOMAS KENT,

Defendants-Appellants.

ON APPEAL FROM CHANCERY.

BRIEF OF COMPLAINANT-RESPONDENT

On a vendee's bill for the specific enforcement of a contract to convey real estate, there was a decree for the complainant. That decree is here on appeal for review and is said to be erroneous on two principal grounds; first, that time of performance was made essential by parol declarations of the vendor before actual signing of the written contract; and second, that the contract was induced by false representations respecting the residence and financial standing of the vendee and the proposed use of the land, the subject of the agreement. 10

The case shows that Berg & Ulizio is a firm of real estate brokers in Atlantic City employing as salesmen one Mulock and one Roberts; that the firm was authorized to find a purchaser at a named price of the land belonging to the appellant, Stewart, described in the contract; that through these salesmen, or one of them, the brokers procured as a purchaser of the land the respondent, Berry, at the price and upon the terms of the owner, and had him sign a writing agreeing to purchase and pay for the land on 20

the owners' terms and leave it with them, together with his check for $500.00, as down money. With this writing and this check in their possession Roberts and Mulock, or one of them, had the appellant, Stewart, call at the office of the brokers, Berg & Ulizio, for the purpose of signing the writing, already signed by Berry, respondent, and concluding the contract. At an interview at the place and for the purpose just stated there were present Stewart, Charlton his attorney and also interested in the ownership of the land, Mulock and Roberts, and the following occurred in the absence of Berry. (S. P. 57, 58, Charlton, Direct):

> "Mr. Roberts said he had a client for this ground, and wanted to pay $125.00 a foot. I said to Mr. Roberts, Mr. Mulock was there at the time, who is this man? He said 'Mr. Berry.' Well, Mr. Mulock then spoke up and he said, 'He is all right, it is a good deal.' Mr. Roberts produced the original and the copy of the contract and they were then signed by Berry, I read them over and I said *this contract does not provide that time is of the essence,* and I won't allow Mr. Stewart to sign this contract unless that is in there. So Mr. Roberts or Mr. Mulock said 'We have Berry's signature and we can't go back now and ask him to make a new contract to sign again.' . . . I said, 'I want time of the essence put in there because I want you to know we are going to hold you strictly to this agreement.' . . . I said, 'Who is Berry, what is his business.' I am not certain whether it was Roberts or Mulock that said, 'He is a wealthy man from Philadelphia, now living here.' I said, 'You know we are not interested in selling to speculators—what is this man's intention to do with the property?' Then either Mulock or Roberts made the remark about this man stating he had consulted or was about to consult contractors for the purpose of building a garage or show room on this boulevard. . . .
>
> Mr. Stewart and I retired for a moment until we had a conversation between ourselves. We came back from that conversation and I again said we hold you

strictly to the day of this time, *although time is not of the essence of the contract.* Mr. Stewart then signed, I took the check. I took the copy of the contract which had been handed me, and we went away."

The contract as finally concluded provided for the payment of the purchase money and the conveyance of the property on or before April 23, 1923, and further provided for the payment by the vendor of a commission on the sale to Berg & Ulizio, the brokers employed by vendor, who had procured the vendee as the purchaser. 10

I.

The learned Vice-Chancellor very properly determined that time was not of the essence of the contract, either by express stipulation, necessary implication, circumstances or notice. He found that complainant was ready to complete the contract on the day following that named in the contract and offered to do so which offer the vendor refused with the intention of claiming a default in settlement as an excuse for avoiding the contract to convey. He further found that the delay was due to a mistake on the part of the vendee as to the time fixed for executing the contract. The vendor 20 insisted that time was made as of the essence of the contract in consequence of the warning contained in the above quoted testimony, given prior to signing of the contract, that exact compliance therewith as to time would be exacted.

The general rule is thus stated by Professor Pomeroy (Pom. Eq. Jur., section 1408):

> "In all ordinary cases of contract for the sale of land, if there is nothing special in its objects, subject-matter, or terms, although a certain period of time is stipulated for the completion or for the execution of any of its 30 terms, equity treats the provisions as formal rather than essential, and permits a party who has suffered the period to elapse to perform such acts after the prescribed date, and to compel a performance by the other party notwithstanding his own delay. . . .

The delay which occasioned it (the default) must be explained and accounted for."

See also King vs. Ruckman, 21 N. J. E. 599, 604, holding:

1. That it is not inequitable in that case to decree performance, though payment or offer of payment was not made on the day fixed.

2. That parol evidence of conversations between the parties at and before the execution of the contract is not admissible to alter, add to, or vary the terms of the written instrument and thus render it a contract of which time is of the essence.

Mulock, it will be remembered, was the employee of Berg & Ulizio, who were agents of the vendor; Mr. Barrett, secretary of the Title Company, testified (S. P. 78-80), that Mulock ordered the search and asked if it could be finished by the 24th of April, and was told that it could be and was given that date for settlement, which he communicated to the vendee. This circumstance and the finding by him that the vendee was ready to make settlement on April 23d, the day fixed by the contract, was deemed sufficient explanation of the delay.

Thommessen vs. Absecon Land Company, cited in the brief for appellant, is in harmony with this view. The proof in that case showed that the vendee neglected to appear at the designated place and pay the purchase money at the time specified, which neglect, the court deemed, under circumstances disclosed, to have been *without legal excuse,* hence the vendor was held justified in considering the contract terminated.

II.

The alleged misrepresentations could not affect the right of the vendee to specific performance by the vendor. The proof showed that they were made, if at all, by the

vendor's own agents, Mulock and Roberts, and so far as appears were never authorized by the vendee or known to him. Fry Sp. Perf. (6th Eng. Ed.), Section 657, page 270. They were not *material*. That misrepresentation may be the ground for any relief, affirmative or defensive, in equity or at law, it must be material. As stated by Pomeroy (2 Pom. Eq. Jur., section 898):

> The statement of facts of which it consists must not only be relied upon as an inducement to some action, but it must also be so material to the interests of the party thus relying and acting upon it that he is pecuniarily prejudiced by its falsity, is placed in a worse position than he otherwise would have been. The party must suffer some pecuniary loss or injury as the natural consequence of the conduct induced by the misrepresentation. . . . Fraud without resulting pecuniary damage is not a ground for the exercise of remedial jurisdiction, equitable or legal; courts of justice do not act as *mere* tribunals of conscience to enforce duties which are *purely* moral. Citing a long list of authorities, including Marsh vs. Cook, 32 N. J. E. 262 (at 266) where the principal is acted on by Vice-Chancellor Van Fleet.

There is nothing in the proof from which it could be inferred that the vendor would not have made the same contract with the vendee irrespective of his residence or financial standing if he were able to pay the price of the land, nor that the price he agreed to take was less than it would otherwise have been.

A similar situation was dealt with in Scott vs. Shiner, 27 N. J. E. 185, 189, in the Court of Chancery, and also in Carskaddon vs. Kennedy, 40 N. J. E. 259, 276, in this Court.

Involved in the decree is the finding that no misrepresentations were made since both Mulock and Roberts denied making them. In any event there is nothing to show that

they operated to the prejudice of the appellant. Surely the fact of a resale of the land by the respondent even at an increased price could not prejudice appellant. The stipulation in the contract was for a conveyance to respondent-vendee in fee and while parol evidence would be admissible to rebut complainants' equity it could not be received or acted on to limit the use by him of the land after conveyance thereof by the vendee.

Respectfully submitted that the decree appealed from
10 should be affirmed.

JOHN C. REED,

Solicitor for and of Counsel with

Complainant-Respondent.