New Jersey Court of Errors and Appeals

HERBERT GATES,
Complainant-Appellee,

vs.

ERNEST H. WILLIAMS,
Individually, and as Attorney in Fact for Daphne Williams,
Defendant-Appellant.

On Appeal from the Court of Chancery.

STATE OF THE CASE

GERAN AND MATLACK,
Solicitors for Appellant.
Isaiah Matlack, of Counsel.

DURAND, IVINS & CARTON,
Solicitors for Appellee.
James D. Carton, of Counsel.

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EXHIBITS

Exhibits (Continued)

Bill of Complaint—Filed Dec. 17, 1925.

IN CHANCERY OF NEW JERSEY.

To the HONORABLE EDWIN ROBERT WALKER,
Chancellor of the State of New Jersey:—

The complainant, HERBERT GATES, residing in the City of Asbury Park. in the County of Monmouth and State of New Jersey, respectfully shows that:—

1. By Articles of Agreement bearing date the 18th day of October, 1921, between complainant and Earnest H. Williams, individually and as attorney-in-fact for Daphne Williams, his wife, the defendant herein, signed and duly executed under the hand and seal of the defendant, defendant agreed to sell and convey in consideration of the sum of $87,500. to be paid and satisfied in the following manner:—"$5,000. cash on the signing of this agreement, the receipt whereof is hereby acknowledged; $40,000. on the date of closing and delivery of deed or deeds conveying said premises, free of encumbrances, and the balance, $42,-500. by the second party executing to the first party a mortgage for said amount covering said premises, the said mortgage to run for a period of ten years and to bear interest at the rate of six per cent per annum, payable semi-annually, which said mortgage shall contain a provision that the said party of the second part hereto shall have the right, at his option, to pay said principal sum of said mortgage or any part thereof at any time prior to said ten year period by giving ninety days' notice in writing to the first party hereto of his intention so to do" by deed of warranty, free from all encumbrances on or before the 18th day of January, 1922,—ALL that certain lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Asbury Park, in the County of Monmouth and State of New Jersey, situate at the south east corner of Main Street and Munroe Avenue, fronting one hundred and forty feet on Munroe Avenue and one hun-

dred and fifty feet on Main Street, in the City of Asbury Park, together with the buildings and improvements thereon.

2. Daphne Williams, the owner of said premises, is a lunatic and the contract between Earnest H. Williams, individually and attorney-in-fact for Daphne Williams, his wife, contains the following provision:—

"It is understood between the parties hereto that record title to said premises is now in the name of Daphne Williams, wife of the said Ernest H. Williams, who is at present incompetent to execute a deed and that the said party of the first part shall take such proceedings as may be necessary to make a good and marketable title and conveyance for said property.

And it is particularly understood and agreed that the sum of $5,000. paid on account of the purchase price herewith in the Asbury Park Trust Company, of Asbury Park, New Jersey, in a special account in escrow and retain the same until the said first party takes and completes proper proceedings to make proper title to convey the interest of his wife, as above stated, and is thereby enabled to give good and marketable title to the said second party."

A copy of said agreement, containing said provision is hereto annexed and made a part of this Bill of Complaint. The complainant deposited the said sum of $5,000. with the Asbury Park Trust Company, in accordance with the contract of sale and the party of the second part, Earnest H. Williams, took proceedings in the Court of Chancery to sell the lands of the said lunatic, Daphne Williams, and by order of this Honorable Court, bearing date April 18th, 1922, the guardian, Earnest H. Williams, was ordered to sell the said lands in such way and manner and upon such terms as to credit and security as said guardian shall deem

safe and most expedient for the interest of the said lunatic and in all respects conduct the same according to the provisions of the statute in such case made and provided, etc. A copy of said order in hereto annexed and made part of this Bill of Complaint.

3. On the said 18th day of January, 1922, complainant attended at the office of Durand, Ivins & Carton, in the City of Asbury Park, with $40,000. in cash and tendered himself ready to take a deed for said property and pay said sum of $40,000. in cash on account of the purchase price thereof and to execute and deliver to the said defendant a mortgage for $42,500. as provided for in said contract, but defendant refused to carry out his contract and deliver to complainant a deed for said premises.

4. Complainant since the said 18th day of January, 1922, has repeatedly requested, both orally and in writing, that the defendant comply with the agreement to convey to complainant the said property described in said Agreement, together with the buildings and improvements thereon, but defendant has persistently refused to carry out his contract to convey said property to complainant.

5. On the 18th day of October, 1921, when the defendant and complainant entered into said contract to sell and purchase complainant was in possession of said property by virtue of a certain agreement between complainant and defendant and the said contract between defendant and complainant to sell and purchase said property provides that the party of the second part (the complainant), his heirs, executors, administrators and assigns, may enter into the said land and premises on the 18th day of January, 1922, and from thence take the rents, issues and profits to his and their use, and complainant is still in possession of said premises.

6. On the 24th day of November, 1923, Daphne Wil-

liams, by Earnest H. Williams, defendant herein, brought an action in the District Court of the First Judicial District of the County of Monmouth, against complainant, alleging that the right of possession of said premises of the said Herbert Gates (complainant herein) expired on the first day of April, 1923, to dispossess said complainant of said premises, all of which doings, actings and refusals of the said Ernest H. Williams, individually and as attorney-in-fact and as guardian for Daphne Williams are contrary to equity and tend to the manifest wrong and injury of this complainant.

Complainant is without adequate remedy in the Courts of law and therefore prays—

1. That Earnest H. Williams, individually and as attorney-in-fact and as guardian for Daphne Williams, who is the defendant to this suit may answer this Bill of Complaint and such statement therein made.

2. That the defendant may be decreed to specifically perform the agreement to convey, contained in said Indenture of Agreement and to convey to complainant the said property described in said agreement and the buildings and improvements thereon upon payment to him of the price thereof, in accordance with the terms of said agreement.

3. That in the meantime and until the further order of the Court the said Earnest Williams, individually and as attorney-in-fact and as guardian of Daphne Williams and his attorneys and agents may be restrained from further prosecuting the said action brought by Daphne Williams, by Earnest Williams, guardian, against complainant, in the District Court of the First Judicial District of the County of Monmouth to recover possession of said premises.

4. That complainant may have such further and other

relief as the circumstance of the case may require and as shall be agreeable to equity.

5. That a writ of subpoena may issue commanding said Earnest H. Williams, individually, and as attorney-in-fact, and as guardian of Daphne Williams, the defendant, to answer this Bill of Complaint and to abide by such decree as this Court may make in the premises.

Durand, Ivins & Carton,
Solicitors for Complainant.

James D. Carton,
of Counsel.

THIS AGREEMENT, Made the eighteenth day of October, A. D., 1921, BETWEEN

ERNEST H. WILLIAMS, Individually and as Attorney-in Fact for DAPHNE WILLIAMS, his wife, of the City of Asbury Park, County of Monmouth and State of New Jersey, parties of the first part,

AND

HERBERT GATES, of the City of Asbury Park, County of Monmouth and State of New Jersey, party of the second part;

WITNESSETH, That the said parties of the first part, for and in consideration of the sum of

EIGHTY-SEVEN THOUSAND AND FIVE HUNDRED DOLLARS

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 they, the said parties of the first part, will well and sufficiently convey to the said party of the second part, his heirs, executors and assigns, by Deed of Warranty, free from all encumbrances, on or before the eighteenth day of

January, 1922, next ensuing the date hereof, ALL that lot, tract or parcel of land and premises, hereinafter particularly described situate, lying and being in the City of Asbury Park, in the County of Monmouth and State of New Jersey, situate at the southeast corner of Main Street and Munroe Avenue, fronting 140 feet on Munroe Avenue and 150 feet on Main Street in the City of Asbury Park, New Jersey, TOGETHER with the buildings and improvements thereon.

AND the said party of the second part for himself his heirs, executors, administrators and assigns, doth covenant, promise and agree to and with the said parties of the first part, their heirs, executors, administrators and assigns, that the said party of the second part, will pay and satisfy, or cause to be paid and satisfied unto the said parties of the first part, the sum of

EIGHTY-SEVEN THOUSAND AND FIVE HUNDRED DOLLARS

As and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:—

FIVE THOUSAND DOLLARS ($5,000.) cash on the signing of this agreement, the receipt whereof is hereby acknowledged;

FORTY THOUSAND DOLLARS ($40,000.) on the date of closing and delivery of deed or deeds conveying said premises, free of all encumbrances, and the balance $42,000. by the second party executing to the first party a mortgage for said amount covering said premises, the said mortgage to run for a period of ten years and to bear interest at the rate of six per cent. per annum, payable semi-annually, which said mortgage shall contain a provision that the said party of the second part hereto shall have the right at his option to pay said principal sum of said mortgage, or any part thereof, at any time prior to said ten year period, by giving ninety days' notice in writing to the first party hereto of his intention so to do.

IT IS UNDERSTOOD that all adjustments of inter-

est, taxes, insurance premiums, etc., shall be pro rated as of the date of closing.

AND IT IS FURTHER AGREED by the parties to these presents that the said party of the second part, his heirs, executors, administrators and assigns, may enter into the said land and premises on the Eighteenth day of January, 1922, hereof, and from thence take rents, issues and profits to his and their use.

IT IS UNDERSTOOD between the parties hereto that record title to said premises is now in the name of DAPHNE WILLIAMS, who is at present incompetent to execute a deed, and that the said party of the first part shall take such proceedings as may be necessary to make a good and marketable title and conveyance for said property.

AND IT IS PARTICULARLY UNDERSTOOD AND AGREED that the said party of the first part will deposit the said sum of FIVE THOUSAND DOLLARS ($5,000.) paid on account of the purchase price herewith in the ASBURY PARK TRUST COMPANY, of Asbury Park, N. J., in a special account in escrow, and retain the same until the said first party takes and completes proper proceedings to make proper title to convey the interest of his wife, as above stated, and is thereby enabled to give good and marketable title to the said second party.

AND in the event of the said first party being unable to procure on proper and diligent application the necessary order or Decree authorizing the conveyance of the interest of the said Daphne Williams, then and in that event, the said first party shall have the right to re-pay to the said second party the said sum of $5,000. so paid on account of the purchase price and deposited in escrow as above, and have this contract surrendered up for cancellation.

IT IS UNDERSTOOD AND AGREED that ALLEN R. HUETH is the agent negotiating the above sale and it is agreed that the said party of the first part is not obliged to pay to the said agent any commission for bro-

kerage for effecting said sale and that there shall not be deducted from or on account of the purchase price any sum for the payment of such commission.

AND IT IS FURTHER AGREED, by the parties hereto that the said deed of warranty shall be delivered at the office of Durand, Ivins & Carton, Asbury Park, N. J., between the hours of ten in the forenoon and four o'clock in the afternoon of the said Eighteenth day of January, 1922.

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

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF

(Signed)

ERNEST H. WILLIAMS, (L.S.)
Individually and for
Daphne L. Williams.

HERBERT GATES, (L.S.)

On Petition—Order of Sale

IN CHANCERY OF NEW JERSEY.

In the Matter of the Application of ERNEST WILLIAMS, Guardian of Daphne Williams, a lunatic, for the Sale of Lands.	On Petition, etc. Order of Sale

On reading and filing the report of Rulif V. Lawrence, one of the special masters of this Court, made in the above matter and bearing date the Fourteenth day of April, Nineteen hundred and twenty-two, from which it appears satisfactorily to the Chancellor that the interest of the said lunatic, requires and will be substantially promoted by the sale of her real estate, mentioned in the petition in this matter, for reasons, stated in said report.

It is on this 18th day of April, 1922, on motion of Isaiah Matlack of Geran & Matlack, of counsel with the applicant, ORDERED by the Chancellor, that the said guardian do sell the said lands in the said petition particularly described in such way and manner and upon such terms as to credit and security as said guardian shall deem safe and most expedient for the interest of the said lunatic and in all respects conduct the same according to the provisions of the statutes in such case made and provided; and that before any deed is executed, the said sale and the terms thereof shall be reported to the Chancellor by the said guardian in writing and upon his oath or affirmation, to the end that the same may be passed upon by the Chancellor before the sale is confirmed, and that he may make such order as he shall deem fit touching the investment of the proceeds.

On Petition—Order of Sale

And it is further ordered that the said guardian give bond in the sum of One hundred and thirty-five thousand dollars with the surety recommended in the master's report, which bond shall be approved by the said master, and filed with the Clerk of this Court.
Respectfully Advised.

BAYARD STOCKTON, E. R. WALKER,
A. M. C.

Answer—Filed Jan. 8, 1924.

IN CHANCERY OF NEW JERSEY.

Between

HERBERT GATES,
Complainant,

and

EARNEST H. WILLIAMS,
Individually, etc.,
Defendant.

Answer.

The defendant answering the Bill of Complaint of the complainant says:—

1. Defendant admits paragraph one of the complaint.
2. Defendant admits paragraph two of the complaint.
3. Defendant denies paragraph three of the complaint.
4. Defendant denies paragraph four of the complaint.
5. Defendant admits paragraph five of the complaint.
6. Defendant admits paragraph six of the complaint, so far as same alleges that Daphne Williams by Earnest H. Williams, the defendant herein, brought an action in the District Court of the First Judicial District of the County of Monmouth to dispossess the complainant of the possession of said premises, and denies the balance of said paragraph.

DEFENSE.

Defendant alleges that the complainant refused to take title to said property in accordance with the terms of the contract entered into between the complainant and the de-

fendant, and that complainant thereupon cancelled the said contract, and as a result thereof, the complainant and the defendant entered into negotiations for the leasing of said property, and terms were agreed upon, but shortly before the time when said lease was to take effect, the complainant refused to sign the same.

WHEREFORE, the defendant prays that the Bill of Complaint be dismissed.

GERAN & MATLACK,

Solicitors for Defendant.

Dated: January 3rd, 1924.

Replication—Filed Jan. 12, 1924.

IN CHANCERY OF NEW JERSEY.

HERBERT GATES,
Complainant,

and

EARNEST H. WILLIAMS,
Individually, etc.,
Defendant.

Replication.

The Complainant joins issue on the answer of the defendant.

DURAND, IVINS & CARTON,
Solicitors for Complainant.

Dated: January 10, 1924.

Petition of Appeal—Filed Oct. 16, 1925.

NEW JERSEY COURT OF ERRORS AND APPEALS.

HERBERT GATES, Complainant-Appellee, vs. ERNEST H. WILLIAMS, Defendant-Appellant.	On Appeal from the Court of Chancery. Petition of Appeal.

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

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

1. Petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date September 11, 1925, in a certain cause in said Court of Chancery wherein the said Herbert Gates was complainant and the said Ernest H. Williams was defendant, in this respect, to wit, that the said decree adjudged that he, the said Ernest H. Williams, specifically perform a certain contract to convey to the said Herbert Gates the lands and premises in said contract described.

And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that the evidence established a recission by the said complainant of the aforesaid contract; and in that the preponderence of the evidence was in favor of the defendant; and in that it would be inequitable to decree that defendant convey said lands and premises to complainant.

Petitioner therefore prays that the said decree of the said Chancellor may be reversed, set aside and for nothing

holden, and that petitioner may have such other relief in the premises as to this Court shall seem proper.

GERAN & MATLACK,
Solicitors for Appellant.

ISAIAH MATLACK,
of Counsel with Appellant.

Answer to Petition of Appeal—Filed Nov. 14, 1925.

NEW JERSEY COURT OF ERRORS AND APPEALS.

HERBERT GATES, Complainant-Appellee, vs. ERNEST H. WILLIAMS, Defendant-Appellant.	On Appeal from the Court of Chancery. Answer to Petition of Appeal.

The answer of Herbert Gates, the above named appellee, to the petition of appeal of Ernest H. Williams, the above named appellant.

This appellee, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that a decree was, on September 11, 1925, made and entered in the Court of Chancery of New Jersey, in the above entitled cause, for the purposes in said petition mentioned and as therein set forth but as to the substance and form of said decree, this appellee begs leave to refer thereto when the same shall be produced.

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

DURAND, IVINS & CARTON,
Solicitors for Appellee.

JOSEPH R. MEGILL,
Of Counsel with Appellee.

IN CHANCERY OF NEW JERSEY.

HERBERT GATES, Complainant, and ERNEST H. WILLIAMS, Individually, etc., Defendant.	Transcript of testimony.

Transcript of testimony taken in the above entitled cause before Hon. John E. Foster, Vice Chancellor, at the Chancery Chambers, Long Branch, New Jersey, on Friday, November 21, 1924.

APPEARANCES:—

Mr. James D. Carton for Complainant.

Messrs. Geran & Matlack for Defendant.

MR. CARTON: We have a stipulation here, entitled in this cause, that pending the determination of the suit for specific performance by the complainant against the defendant * * * * that the premises be rented to Mr. Gates at the rate of $2,000 a year, payable in equal monthly payments, commencing April, 1923, to the termination of the suit.

That written stipulation was entered into, and Mr. Matlack suggested that I file it, and then there should be a further stipulation, that the fact that no deed was tendered would not be taken advantage of by the other side, nor the fact that the purchase price was not tendered would not be taken advantage of, and that no point would be made of the fact that the deposit was returned and accepted.

COURT: When was it returned?

MR. CARTON: Sometime after, at Mr. Matlack's office, when we made the arrangement concerning the releasing —

COURT: Why was it returned at that time?

MR. CARTON: The situation had been this: the contract provided that this $5,000 down payment made at the time was to be deposited in escrow in the Asbury Park Trust Company, pending the authority, because if that proceeding didn't go through, we would abandon the contract. After we made this stipulation and made this arrangement with regard to the lease, then Geran & Matlack returned this check to Mr. Gates, and I wrote the letter to Mr. Geran, and we stipulated that we would hold the check, or something to that effect, and that no one would be prejudiced one way or the other by the returning of it.

COURT: Was that check returned after you say you received this letter that Mr. Gates had abandoned the contract?

MR. CARTON: About a year after that.

COURT: What was the purpose of returning it at that time?

MR. GERAN: My recollection is that about a month or two after the receipt of this letter, we offered the check to Mr. Carton, and he said "Let us not do anything about it; just hold it awhile", and we kept holding it for nearly a year, and finally Mr. Carton said, "All right, we don't want the money on this contract," and it was deposited in escrow—"and want you to take the contract back; the contract is at an end." Mr. Carton did not admit that the contract was rescinded, but took the money back without prejudice.

COURT: Does it appear in the bill that you allege

at a certain time you acquired the power to make the conveyance?

MR. CARTON: That is alleged in the bill.

HERBERT GATES, Sworn.

DIRECT EXAMINATION BY MR. CARTON:

Q. You are the complainant in this suit?
A. Yes.
Q. You are the Herbert Gates mentioned in the contract with Ernest H. Williams?
A. I am.

MR. CARTON: The written lease is admitted in the pleadings, and I offer the original contract.
(Marked Exhibit C 1.)

Q. Mr. Gates will you describe generally where the property referred to in the contract, Exhibit C 1, is located?

COURT: Does not the contract explain that?

MR. CARTON: It does.

COURT: You need not go into the details.

The issue is narrowed down very much. Whether it was rescinded—why not take him further on that point?
Q. You were in possession, as I understand, of a portion of the property contracted for at the time the contract was made?
A. Yes.

COURT: As a tenant?

WITNESS: Yes.

Q. Under Mrs. Williams?
A. Yes.
Q. And under a lease?
A. Yes.
Q. And that lease expired when?
A. Last April.
Q. April 1, 1923?
A. Yes.
Q. What business did you conduct?
A. Furniture business.
Q. How long have you been a tenant there?
A. I was in the building for five years.
Q. As a tenant under Mr. or Mrs. Williams?
A. Under Mr. Williams.
Q. Have you ever refused to carry out this contract—the purchase of the property?
A. No, sir.
Q. Or ever abandon it in any way?
A. Not in any way. I was always ready to accept it and had the money ready to pay for it.
Q. Did you ever authorize your attorney to abandon or revoke the contract?
A. No, sir, I was always after him to get it. I wanted it to build on right away.
Q. What was the fact about the delay, if there was a delay, in having the contract carried out according to its terms; that is, at the time specified in the contract to be carried out?
A. As I understood it, there was some proceedings to go through—lunacy proceedings or something of that sort, which would take quite a little while, three months or so; it was to be delivered within four months, I believe, after the time of the agreement.

COURT: The date of the agreement is the 18th of

October, 1921, and the deed was to be delivered on or before the 18th of January, 1922?

Q. Three months, is that your recollection?

A. Yes.

Q. What happened, if anything, after January 18, 1922, with regard to this property?

A. We never seemed to get possession of it, and I know it was never offered.

Q. What is the fact about other tenants occupying this property?

A. The restaurant on the corner had a three-year lease, and the garage had a two-year lease next to me, and my understanding was—

MR. MATLACK: There is no allegation to ask specific performance with an abatement of any kind.

COURT: I don't know what purpose Mr. Carton has in mind in giving this detail; it is not particularly vital.

MR. CARTON: It leads up to the proposition that we were to get possession on January 18.

COURT: Do you set up as a reason for not performing that you couldn't get possession?

MR. CARTON: No.

COURT: Then why go into it?

MR. CARTON: Mr. Gates, at that time, was after me very strenuously to have Mr. Williams get in shape and serve proper notices, so he could get possession, because he had plans out for rebuilding. The letter is April 28, 1922. Anything that was done about that time that would negative the idea of a rescission or abandonment, would be competent, while it might not be obligatory to do so.

COURT: I will receive it.

Q. What did you do with Mr. Willams, if anything, with regard to getting possession; what did you do, if anything, after the contract, between yourself and Mr. Williams? Did you make any investigation about the terms of the tenants' leases?

A. Yes.

Q. Did you find out that they ran for a term longer than January 1, 1922?

A. They ran for three years from that date.

Q. When did you make that investigation?

A. Sometime in December, I think the first part of December.

Q. Of 1921?

A. Yes.

Q. What did you do then when you found that out?

A. I told Mr. Carton about it, and he right away notified the tenants to vacate April first, I understood.

Q. Do you know whether you caused me to have written notices served on these tenants?

A. Yes.

Q. On behalf of Mr. Williams?

A. Yes.

MR. CARTON: Mr. Williams was away in December and I assumed to serve these notices in his behalf.

COURT: It is only a question of whether you were or were not interested in the property.

Q. When did you first notice that Mr. Williams had offered to sell this property as guardian for his wife?

A. About three months after the time of purchase.

Q. That would be in January; the purchase was October, 1921, and according to the contract you were to close title on the 18th of January, 1922. When did you learn

that Mr. Williams had secured the authority to carry out this contract?

A. Sometime in December, I think.

Q. Tell me why it wasn't carried out?

A. It was never delivered; I was ready to accept it at all times.

Q. How did you indicate that to Mr. Williams?

A. I understood Mr. Williams was ready to sell, but his daughter became of age and objected to selling.

Q. Were many meetings had between you and Mr. Williams and Mr. Geran himself?

A. Yes, many meetings.

Q. About January 18, 1922?

A. Yes.

Q. What was the object of these meetings?

A. To go on with the sale, to transact the thing.

Q. To close this contract?

A. Yes.

Q. Where did you meet?

A. In Mr. Matlack and Geran's office.

Q. When was your last meeting with that object in view, about?

A. I cannot recall that date.

Q. What month or year?

A. I think that was some time later.

Q. The last time that you do recall, when was it?

A. It is about a year ago, wasn't it?

COURT: You started your suit in December, 1923, about eleven months ago?

WITNESS: Yes.

Q. Was your last meeting shortly before suit was instituted, or quite some time before?

A. Not long before, I don't think so.

Q. What was the upshot of that meeting; what hap-

pened; Mr. Williams was present, I take it?

A. Mr. Williams was present, yes.

Q. What was done and said at that meeting; that is your last one?

A. He decided that he changed his mind about selling.

COURT: What reason did he give for changing his mind?

WITNESS: The suit was started.

COURT: What reason was given?

WITNESS: He said that his daughter objected to the sale; that is the only reason I could understand.

COURT: Did he make any reference to the fact that you had abandoned the contract and notified him that you didn't want it carried out?

WITNESS: No.

COURT: What was the fact? Did you desire to quit and be out of the contract?

WITNESS: No, sir, never.

Q. Did he make any statement about his daughter having then arrived at age?

A. Yes, that his daughter was of age and that she didn't want the property sold.

COURT: This is in December last year?

WITNESS: Shortly before the bill was filed in December, 1923.

MR. CARTON: Some two or three months prior is my recollection; it was prior to the filing of the bill.

COURT: That shows it was not long before the suit was started.

Q. Is that right?

A. It may have been a month or two.

Q. Did you meet with Mr. Williams and your attorney and his attorney in Mr. Geran's office about continuing in the property—after your lease expired pending the termination of this matter; did you meet with him in that regard? About continuing?

A. Yes.

Q. You met in Mr. Geran's office at that time?

A. Yes.

Q. When a new sum of rent was agreed to be paid until this matter was disposed of?

A. Yes.

Q. You remember that?

A. Yes.

Q. Why didn't you and Mr. Williams come to an understanding and you pay him for the property and he give you a deed?

A. He didn't want to sell; he changed his mind.

Q. What reason did he have then?

A. I don't know. The only reason I ever heard of was he couldn't get his daughter; that was all.

Q. Did he then make any reference to the fact that you or your counsel seemed dead?

A. Never.

COURT: He or you had abandoned the contract?

WITNESS: No.

COURT: You never knew?

WITNESS: No.

COURT: Did you ever authorize anyone to write and abandon this contract?

WITNESS: No.

Q. Did Mr. Williams ever come to you and tell you that the contract had been abandoned, and he couldn't accept your abandonment, or anything of that sort?

A. No. I don't believe I ever spoke to Mr. Williams outside of meeting him in the office about the property.

Q. You say that you have always been able, ready and willing to close the contract?

A. Yes.

Q. Did you have the money at or about the 18th of January?

A. Yes, I had it laying there for two years.

Q. In the bank?

A. Yes.

Q. Specially reserved for this purpose?

A. I had a loan already arranged so I could get it.

Q. When did you finally discontinue holding it?

A. I still have it.

Q. Still have the pledge to carry out the contract?

A. Yes.

COURT: Did you ever notify anybody that you would no longer need the money?

WITNESS: No.

Q. Have you paid any interest on account of this money?

A. No.

Q. Or have you agreed to?

A. No, because it has been ready; all I would have

to do would be go to the bank and get it.

Q. You were going to get it from the bank?

A. Yes.

Q. With what bank did you make your arrangement?

A. Asbury Park and Ocean Grove.

Q. With what official of the bank?

A. Mr. Watson.

Q. Did you ever notify him up to the present time that you wouldn't need the money?

A. No.

Q. The fact is you had turned over $5,000 to Mr. Williams as a deposit which was to be held in escrow?

A. Yes, sir.

Q. Pending lunacy proceedings?

A. Yes.

Q. Was that $5,000 later on returned to you?

A. Yes.

Q. When?

A. It was returned on July 12, 1923.

Q. By whom?

A. By Mr. Williams.

Q. His personal check?

A. His personal check.

Q. Have you the check?

A. Yes, the check hasn't been cashed.

Q. Paid in two checks?

A. Two checks, one check I gave you, and Mr. Williams returned one; that hasn't been cashed.

(Witness produces a check made to the order of Durand, Ivins & Carton, under date of October 18, 1921, drawn on the Asbury Park Trust Company for $5,000, signed by Gates Furniture Company and credited to Durand, Ivins & Carton.

MR. CARTON: We don't offer our check, we deposited that, and our check for $5,000 was given to Geran & Matlack, and apparently Geran and Matlack turned it over to Mr. Williams.

MR. MATLACK: You gave it direct to Mr. Williams; we were not—

MR. CARTON: We gave it direct to Mr. Williams, then.

COURT: Mr. Gates also produces another check, July, 1922, drawn on the Asbury Park Trust Company to his own order, for the sum of $5,000, signed by E. H. Williams, and apparently never used. The check is certified on the 11th of July, 1922.

Q. Did you receive that, as I see the pencil note, on July 12, 1922?

A. 1923.

Q. A year after its date?

A. Yes.

COURT: Then you received it a year after its date?

WITNESS: Yes, a year and one day.

Q. How did you receive it; how did it come to you?

A. By registered mail.

Q. From whom?

A. From Geran & Matlack.

Q. When you got the check what did you do with it?

A. My bookkeeper received it, and I sent the check to you, or went down with it and asked you what I should do with it, and you told me to hold it.

Q. Did you make any demand for the return of the $5,000 to you?

A. No.

Q. Directly or through counsel?

A. No, never.

Q. Did you instruct me to communicate with Geran & Matlack with regard to this check?

A. Yes.

Q. You have been holding the check ever since?

A. Yes.

Q. Are you now ready, able and willing to carry out this contract and make the payment and take the deed?

A. Yes, right away.

Q. Had you any plans after you entered into your contract with regard to changing your business or building on the premises in question?

A. I don't quite get that.

COURT: In anticipation of being the owner?

WITNESS: Oh, yes, I had a rebuilding sale; I went to the expense and had my plans drawn, practically had a contractor.

COURT: At what time was all that done? By the 18th of January?

WITNESS: That was after I knew that the lunacy proceedings were all settled.

COURT: That you had incurred these expenses?

WITNESS: Oh, yes.

COURT: When did you have your removal sale?

WITNESS: I think that was the following spring.

COURT: 1922?

WITNESS: Yes.

COURT: What is the date of this letter of rescission?

MR. GERAN: April 28, 1922.

Q. Can you tell me about approximately the date of this sale?

COURT: You can settle it; the advertisement will tell.

Q. What else did you do, if anything, after April, respecting the improvements?

A. I arranged to raze the old buildings and put up a new building, and I had my plans drawn and everything arranged to go right ahead with it as soon as I got title, and I have been waiting ever since for title.

Q. Did your building scheme on the Williams property contemplate erecting on the other property you owned adjoining; did you own other property adjoining the Williams property, in the same block?

A. Yes, on Summerfield avenue.

Q. And did your building operation contemplate your building covering both properties, or a portion?

A. No, just a portion of both properties, just the back end, where it goes through and connects with his property; I would have to build there to get in; to make a square corner and level piece of ground, I would have to build on the rear end of it.

CROSS EXAMINATION BY MR. MATLACK:

Q. Isn't it a fact that you began to investigate the leases on this property in December of 1921, two months after you had entered into the contract to buy the property?

A. Yes; I wouldn't say for sure it was before the first of January; I know we didn't have many days; I think it was later than that.

Q. That is the time that you found that some of the leases on this property ran beyond April, 1922, isn't it?

A. Yes.

Q. And isn't that the time, or about the time, that you

began to object to taking title at all?

A. No, sir; never.

COURT: Did you object to taking title?

WITNESS: Never such a thing.

Q. Do you recall receiving a letter from us in April, 1922, informing you that we were ready to give you title?

A. To me directly?

Q. Yes.

COURT: Have you a copy?

MR. CARTON: We both suggested that all letters would be used on both sides, originals and carbons.

Q. I show you copy of a letter dated April 24, 1922, addressed to you and ask if you ever received that?

A. I believe I did receive this letter; I wouldn't say that I received it or whether it came from Mr. Carton.

COURT: You remember seeing it?

WITNESS: Yes.

(Marked Exhibit D 1 for identification.)

Q. This letter, D 1 for identification, informs you that Mr. Williams has obtained an order of the court of chancery for the sale of this property, and that he asks you "Will you kindly advise when you will be ready to pass title."

A. Yes.

Q. Did you make any reply to that letter, either directly or through counsel?

A. No, I believe not, and I cannot just recall where I saw the letter; I don't know whether I received it.

Q. Did you direct a reply to be sent, stating when you would be ready?

A. I told Mr. Carton to go after it right away.

Q. Go for the title?

A. I was always after him to get it over, so I went up or phoned up.

Q. You say you made no reply?

COURT: He said he directed Mr. Carton to go after it.

Q. Did Mr. Carton ever show you any letters that he wrote in reply to that?

A. I cannot say about that. If I saw the letter, maybe I could tell better.

Q. I show you letter dated April 28, from Mr. Carton, addressed to Messrs. Geran & Matlack, and ask you if you saw that, or ever read it?

A. No, I never saw that letter.

Q. Did you know before today that it had ever been written?

A. Only lately, that is all.

Q. How did you learn it lately?

A. Through Mr. Carton; it was just a few days ago, when this case came up.

(Letter of April 28, 1922, from Mr. Carton to Geran & Matlack, offered and marked Exhibit D 2 for identification.)

Q. You say you never saw that or authorized it?

A. No.

Q. Did you say you never saw it or authorized it to be written?

A. No, sir, I never saw it nor authorized it to be written; I know nothing about it, except here a few days ago.

Q. Yet, Mr. Carton represented you at that time?

A. Yes.

COURT: Represented him for what?

Q. He had drawn the contract for you?
A. Yes.

COURT: Did Mr. Carton have any authority to rescind the contract for him, against his instructions, or without any instruction, any more than you would have to rescind for Mr. Williams at that time?

MR. MATLACK: I don't suppose so.

Q. After this letter of April 28th what did you do; did you get busy with Mr. Williams?

COURT: He doesn't know about the letter of April 28. After seeing the letter of April 24th, from Geran & Matlack, what did you do? You told Mr. Carton to go after it; what else did you do?

WITNESS: Simply arrange some way for lease arrangement until this case was settled.

EXAMINATION BY THE COURT:

Q. I don't understand any necessity for a lease arrangement at that stage.
A. My lease had expired.
Q. You had received notice, under date of April 24, from Geran & Matlack; you remember seeing it, you don't know where, in which he told you they were now ready, with authority from the Court, to make a deed for this property under this agreement. Mr. Matlack inquires what did you do as the result of that notice aside from telling Mr. Carton to go after it. What else was done by you or Mr. Carton representing you?
A. I didn't do anything else, except keeping steadily after Mr. Carton to go through with it. I was ready to take it over.
Q. All right, I don't know why there was any question of lease, when here was the notice that Mr. Williams

was in the possession of a deed; why wasn't the deed taken?

A. It was a short time after that that he changed his mind, and the daughter became of age, and his daughter didn't want him to sell it; that is all I know.

FURTHER CROSS EXAMINATION BY MR. MATLACK:

Q. Did you communicate with Mr. Williams after the receipt of the letter of April 24?

A. No.

Q. Did you authorize anybody else to communicate with him?

A. No.

COURT: Did you get ready to get your money to make the payment and take the deed and have the mortgage and all fixed up?

WITNESS: Yes.

Q. What did you do after April 24?

A. I didn't do anything, because I had the arrangement in the bank; all I had to do was to go down to get it.

Q. How long did that situation continue, that you didn't do anything, do you remember?

A. What date was that?

Q. April 24, 1922.

COURT: Why, nothing was done, so far as the record shows, except to make a lease which would be operative until this suit is started in December, 1923, practically twenty months after the receipt of that letter, except to have this admitted arrangement about continuing in possession made. I don't see why that time elapsed without something being done.

MR. MATLACK: The Court is under a misapprehension about the lease in December, 1923. At that time we had started the action in the District Court for dispossession. We had tried to enter into a lease in April of 1923.

COURT: That is a year after you wrote the letter?

MR. MATLACK: Yes.

COURT: My question was why something wasn't done, instead of going into a lease, to get the title passed.

MR. CARTON: I can bring that out.

Q. You didn't have any conference with Mr. Williams at any time prior to entering into negotiations for that lease of your property, did you?

A. No.

COURT: When did you first take up the question of negotiating a new lease; when was that first started?

WITNESS: That was after my lease expired—before when it was to expire.

COURT: That was April 1st, 1923?

Q. That was the first conference in which you got together with Mr. Williams to try to arrange something, and that took the form of trying to arrange for a new lease?

A. No, that was supposed to be a lease pending—temporary lease until this case was settled.

COURT: This case wasn't pending then.

Q. Who was present at this conference, as you testified, in our office, Geran & Matlack's office, to effect this

new lease in the early part of 1923?

A. Mr. Williams, yourself and Mr. Geran and Mr. Carton and myself and my wife.

Q. What was the purpose of that conference?

COURT: What was said and done.

A. The purpose of the conference was, as I understand it, we went down there to settle about the property; when we got there, Mr. Williams said he didn't want to sell it, he would give me a lease.

Q. Did you agree on terms for the new lease?

A. No, just a temporary lease.

COURT: What did you say when he told you he didn't want to sell?

WITNESS: I said we would start suit for it.

COURT: And why did you delay the suit from April or March until December?

WITNESS: The only purpose—Mr. Carton can tell you that.

Q. Did you agree to a lease to be drawn by Mr. Carton and ourselves, Geran & Matlack, ordering new terms for a five year lease?

A. Only a temporary lease, as I understood it.

COURT: Your stipulation that that was to be done after purchase was agreed to at that time?

MR. MATLACK: Not that particular lease; the payment of rent pending this suit was after purchase. He has paid rent from December.

COURT: Then the lease is not included in that stipulation?

MR. MATLACK: No.

MR. CARTON: The manner under which we are in possession is included. Prior to the stipulation it was Mr. Williams' suggestion that he give us a lease, when this contract was to be put through, which we never agreed to, because he wanted it for five years. Those negotiations did not culminate in anything, but instead we agreed to not have any lease, but pay at the rate of $3,000 a year, which is after purchase. We did have negotiations about a lease.

COURT: He said that agreement to purchase only related to from December, 1923. I understand the negotiation for the lease was long prior to the institution of the suit?

MR. MATLACK: Yes.

Q. Did you reach an agreement at that time by which $2,000 was to be paid?

A. No, $3,000 was to be paid.

COURT: And no agreement was reached at that time?

MR MATLACK: At the conference, none was.

COURT: Was the agreement submitted?

MR. MATLACK: It was drawn up, but never signed by Mr. Gates.

COURT: Did you see the agreement Mr. Matlack refers to?

WITNESS—No.

COURT: A lease or whatever it was?

WITNESS: There was some sort of a lease submitted, but I didn't sign any lease.

COURT: Why didn't you?

WITNESS: Because I was afraid I would interfere with the case, and because as I understood from Mr. Carton, we were to have the agreement to pay the rent the law demanded, and I thought that was satisfactory. I didn't want to lease that property, when I was buying it.

Q. Wasn't this in the early part of 1923 that this conference took place and this lease prepared?

A. I don't think so.

Q. Do you recall that after the written form of agreement for lease was sent to Mr. Carton, that you asked him to have included in there a provision that you would have the right to use the driveway in from Monroe Avenue to your property over Mr. Williams' property

A. Yes, but I think that was on the temporary arrangement, because the party in the other house was kicking all the time because we were using—

EXAMINATION BY THE COURT:

Q. What you call temporary arrangement is the one that Mr. Matlack keeps referring to as the occasion when you had a conference in the spring of 1923 and agreed on this temporary or permanent arrangement, which ever it was; do you remember such a lease being drawn at that time, Mr. Matlack asks you, and which you didn't sign, and which embodies those conditions that you speak of?

A. No, I understood that that was a temporary arrangement.

Q. How long was it to continue in this temporary form, as you understood?

A. My lease expired April 1, 1923.

Q. How long was this temporary arrangement, as you understood it?

A. Temporary until the present time.

Q. At that time; I don't speak about its effect. I asked you what was said between you and Mr. Williams or counsel at that conference, whenever it was held, that showed this to be temporary only for a certain time or purpose?

A. I cannot recall anything except this one lease; that is all I know of, the arrangement until the case was settled.

FURTHER CROSS EXAMINATION BY MR. MATLACK:

Q. As a matter of fact, you didn't know anything about the stipulation being entered into that is on file now, as to the payment of $2,000?

COURT: It wasn't in existence at that time; there wasn't any suit.

You and he are apparently talking about two different periods; you are talking about the spring of 1923 before his lease expired?

MR. MATLACK: Yes.

MR. CARTON: I think Mr. Gates is considering it as one year.

COURT: Mr. Matlack is referring to the time when you were present with your wife.

WITNESS: That was the time when I went to the office to settle the property; when we got there, we found out they didn't want to settle on account of his daughter coming of age.

COURT: And as a result of his refusal to settle, then you began negotiations about a lease?

WITNESS: Yes, until the case was settled.

COURT: Mr. Carton told Mr. Geran that he would start suit for possession, &c.

Q. Isn't it a fact that at that conference, you came to that conference to arrange a lease?

A. No, to get the property, as I thought.

Q. When you got there you asked if he would still sell to you the property, and he said "No", isn't that so?

A. Yes; that is what I wanted.

COURT: Did that conversation take place between you and Mr. Williams?

WITNESS: Yes.

Q. Why did you ask if he would still sell the property?

A. I didn't ask it that way; I said something about it; Mr. Carton did most of it.

COURT: If you don't remember, say so.

Q. You say that is a fact, that Mr. Williams said he would not sell you the property?

A. That he decided that he didn't want to sell.

Q. Didn't you enter into a negotiation for a new lease for five years at that meeting?

A. No.

Q. Was anything said about a new lease at that meeting?

A. No, just a temporary lease.

COURT: Strike out his answer.

Q. After Mr. Williams told you that he wouldn't sell the property because his daughter had become of age, did you or did he or anyone else say anything about then leasing the property temporarily or permanently?

A. No, I don't remember anything about that.

Q. Was anything said at that conference about the rent being $3,000 a year after your old lease expired?

A. Not that I know about.

BY THE COURT:

Q. Did you ever have a conversation with Mr. Williams' counsel when the rental was spoken of as $3,000 a year; did you ever have such a conference when such a conversation took place?

A. Not as I can remember, no.

Q. Did you ever have a conversation when you said you would prolong the entire lease five years with graduated payment of rent?

A. No.

Q. As a result of any meeting, did you ever see a form of lease submitted for your approval?

A. There was some sort of a lease of the store; I sent back and I wouldn't sign it.

COURT: How did it come there?

WITNESS: From Geran & Matlack.

COURT: To whom did you return it?

WITNESS: Directly to them.

COURT: Did you show it to Mr. Carton or any of his firm before returning it or rejecting it?

WITNESS: I don't think so.

COURT: Why did you return it without signing?

WITNESS: Because I didn't think it was right for me to sign it.

COURT: As affecting your rights under the contract, you mean?

WITNESS: Yes.

Q. Did you ever authorize Mr. Carton to write this letter, dated February 20, 1923, addressed to Mr. Geran?

A. I remember about this damaging to the areaway.

COURT: Repeat the question.

Q. (Last question repeated.)

A. Yes.

(Letter of February 20, 1923, from Mr. Carton to Mr. Geran, marked Exhibit D 3 for identification.)

Q. With that date of February, 1923, before you in the letter, does it refresh your memory as to when you had this conference about the temporary lease, or whatever it may be called?

A. This is it.

Q. Were you at that conference?

A. Yes.

Q. Somewhere about February, then?

A. Yes.

Q. And prior to the date of this letter, and presuma-

bly prior to the date of this letter, in view of the contents?

A. Yes.

Q. Have you a form of lease which we submitted to you?

MR. MATLACK: The original was sent to Mr. Carton.

MR. CARTON: You had a lease which wasn't satisfactory, as I recall it.

Q. I show a lease and ask you whether you ever read a paper similar to this one, which purports to be a form of lease between you and Mr. Williams?

A. I believe that is a copy of the lease that I returned; I didn't read it all the way through. All I read was the amount of rent charged there, and I returned it.

Q. You mean you didn't read it all through now or when you received it?

A. When I received it.

Q. After you saw Geran, it was submitted to you and you returned it?

A. Yes.

(Lease marked Exhibit D 4 for identification.)

Q. When you received this, do you recall whether that was early in 1923, sometime around February or the first of March?

A. I don't remember the date.

COURT: Was it about this time you got this communication or this letter about the driveway—February, 1923, which you just read?

WITNESS: Yes, it was about that time.

Q. Does the fact that this paper provides for a rent of $16,500 over five years, recall to your mind the con-

ference? at which it was arranged for this amout of rent?

A.. No.

COURT: You don't recall there was such a conference at which that was agreed on?

WITNESS: Not any such price as that; I understood it was to be double rent, that it all.

Q. Your rent had been $1,000?

A. Yes.

Q. Speaking of the double rent, when did you begin to pay that double rent?

Maybe that will recall it to your mind.

A. After my lease expired April 1, 1923.

Q. Did you begin in April, 1923, or was it after December, 1923?

A. I think that was paid from April until October; it was paid in October; I didn't start paying right in April.

Q. You recall you didn't pay any rent from April until October?

A. April until some later date.

COURT: What was the rent a year?

MR. CARTON: The new rent $2,000.

Q. How did you come to begin in October instead of April?

A. I have forgotten; I believe Mr. Carton must have told me to do that or something; I don't remember that.

Q. Do you recall my serving you with a notice to quit the premises in 1923?

A. Yes.

Q. Is that the copy of the notice that I served upon you, dated April 24, 1923?

A. I wouldn't recognize this; I remember there was

a notice, the usual form of notice.

Q. Which told you you would be held for double rent?

A. Yes.

Q. And demanding possession?

A. Yes.

Q. After receiving that notice what did you do?

A. I still stayed there.

Q. Did you communicate with Mr. Williams?

A. I communicated with Mr. Carton in regard to it, and he did something to the court to have it laid over or something.

Q. Then your bill of complaint in this matter was filed the next December, 1923?

COURT: December 17, 1923.

Q. Isn't it a fact that when you received this notice in April, 1923, to give up possession, that that was the first time that you instructed Mr. Carton to bring a bill for specific performance of the contract?

A. It has been hanging so long that it is pretty hard to remember the dates and years; it is three years.

Q. This would be eighteen months ago; isn't that the first that you instructed him to bring specific performance?

A. I instructed him when we had the last meeting in your office to go ahead, whatever date that was.

Q. You say you instructed him at our office?

A. Yes, I told Mr. Carton to go ahead.

Q. After that meeting?

A. Yes.

COURT: When you made the payment of rent in October, 1923, did that cover all the months from April to October?

WITNESS: Yes.

Q. You say you had a removal sale after this contract had been entered into, in April, 1922?

A. I think it was.

Q. You say you made some alterations?

A. To the building?

Q. Yes.

A. Yes, we made some improvement inside.

Q. Who was the architect who prepared the plans?

A. A Mr. Jackson, Seventh Avenue, Asbury Park.

Q. Speaking of repairs, does the meeting in our office —is it recalled any better to you by the fact that you have promised to change the front of that store under this new lease?

A. I cannot say; I don't remember that.

Q. You don't know whether that was discussed or not?

A.. No.

COURT: How long did you understand you would be called upon to pay double rent?

WITNESS: Until it came to court.

Q. Did Mr. Williams, or Mr. Matlack representing him, ever remind you that you had abandoned this contract by the letter of April 28th?

A.. No.

Q. Never called your attention to that fact?

A.. No.

Q. As the reason for refusing to go through with it?

A. No, sir, never.

Q. Except at this meeting in our office, there was some talk at that time?

COURT: No talk of rescission, but the talk when Mr. Williams said that he couldn't carry it through because of his daughter having arrived at her majority.

WITNESS: That is the only reason I ever heard.

COURT: And no reference to the letter from Mr. Carton stating that you had abandoned the contract?

WITNESS: No.

Q. Didn't you complain at that conference because you couldn't get possession in order to make the improvements you contemplated? 10

A. No, sir, I did not; I was in.

COURT: The so-called temporary lease.

RE-DIRECT EXAMINATION BY MR. CARTON:

Q. After the letter of April 28, 1922, the letter I wrote to Geran & Matlack, do you remember any meetings thereafter in Mr. Geran's office about this matter; do you remember whether or not all the parties met shortly thereafter in Mr. Geran's office? 20

A. The same time we are talking about.

COURT: He is trying to direct your attention to April 28, 1922, or before April 24, when you say you saw this letter that Mr. Geran or Mr. Matlack had written. Mr. Carton asked you do you remember having a meeting shortly after that, or a conference with the other parties to this contract. 30

WITNESS: There were several meetings arranged.

Q. Do you remember what took place at the meeting, or what was said, if anything, after this letter was received, why the contract wasn't carried out?

A. No, only that Mr. Williams decided on account of 40

his daughter, he didn't want to sell.

Q. When was the first meeting after April 28, 1922, had in Mr. Geran's office when that came up?

A. That was earlier, I believe.

COURT: Let me ask counsel, these proceedings in lunacy to get the order for sale, were they specifically directed to this particular contract and this particular sale to this vendee?

MR. CARTON: Yes, I have the file here, but the order ran that way and referred to this contract.

COURT: To what extent, if any, Mr. Williams had authority to include the order, and refused to carry it out, if he did.

MR. GERAN: It does not say he must sell; it gives him authority to.

MR. CARTON: He would then have to report back to the court.

Q. As to dates of meeting in Mr. Geran's office, can you give us any better date than you have, when we met after April 28, 1922, or how shortly thereafter we met?

Q. There was one meeting arranged and someone didn't show up, about six months later, or three months later; I cannot say.

COURT: Develop, if you can, why the institution of this suit was delayed for twenty months, and why during some part of that period instead of instituting suit, negotiations were made for a lease, whether a temporary one or otherwise.

Q. Can you tell why you delayed all this time before

you actually brought your suit, what your reason for delaying was given, or what was taking place in the meantime, if anything?

A. Nothing that I know of.

COURT: I don't understand why you should pay them a thousand dollars a year more than you were pledged to pay under your old lease, and he there, instead of beginning suit promptly.

WITNESS: He was to deliver back to us.

COURT: Have you anything to show that it was to come back to you?

WITNESS: I think there is some arrangement between the two attorneys.

COURT: Is there anything else you can tell us, from conference at these meetings with Mr. Williams, why you did not bring the suit earlier?

MR. CARTON: I was away and ill and was responsible for a good part of it.

Q. When I told you to go ahead, was that when the lease was—

MR. MATLACK: We began our action in the District Court in May or June, and Mr. Carton was ill, and we didn't proceed with it, the understanding being he having said that he would file a bill for specific performance. I think from June to December we can account for it by Mr. Carton's illness, but not before April 1, 1923, when the lease expired.

A. I believe that in the early part of the spring there, as my busy season runs from March until September, I told you I didn't want the case to come up in that time, if I could help it, because I was pretty busy, and wouldn't be able to get away very well.

RE-CROSS EXAMINATION BY MR. MATLACK:

Q. I show you a letter addressed to you, dated July 12, 1923; did you receive that letter?

A. Yes, that is the letter that had the check in it.

Q. That returns the deposit in July?

A. Yes.

Q. From Geran & Matlack to Mr. Gates?

A. Yes.

(Letter dated July 12, 1923, referred to, marked Exhibit D 6 for identification.)

MR. MATLACK: I offer letter dated August 6, 1923, from Mr. Carton to Geran & Matlack.

(Marked Exhibit D 7 for identification.)

COURT: Has the property materially enhanced in value?

WITNESS: I understand from real estate men that it is not worth what I paid for it; I wanted it in connection with my other property.

MR. MATLACK: I offer the file in the lunacy proceeding.

COURT: Mr. Matlack admits that proceedings were instituted for the purpose of obtaining authority to carry out that contract with Mr. Gates; that is admitted and appears by the record?

MR. CARTON: Yes.

COURT: And on the petition of the guardian, the court made an order giving him power to carry out the contract and effect the sale, and that is his contention, it was

no fault of theirs that it wasn't carried out, it was your own fault—not obtaining the contract.

MR. CARTON: The order is here, authorizing the sale, and is dated April 20, 1922.

MR. MATLACK: I offer certified copy of the order for sale.

(Marked Exhibit D 8.)

MR. MATLACK: The order gives him power to sell.

MR. CARTON: But the proceedings refer to the sale on which the order was issued.

ERNEST H. WILLIAMS, sworn,

DIRECT EXAMINATION BY MR. MATLACK:

COURT: After qualifying him, direct his attention to the question of rescission, and these leases as bearing on it.

Q. Were you ready in April, 1923, to give title to the property in question?

A. Yes.

Q. Under the order of the court?

A. Yes, sir.

Q. And stood ready at that time?

A. Yes, sir.

Q. And instructed to notify Mr. Gates to that effect?

A. Yes.

Q. How long did you remain ready to give title?

A. Until you were informed by Mr. Carton that they had abandoned the contract and made a demand for the money.

COURT: Did Mr. Carton make a demand for the money in his letter of April 28th?

MR. MATLACK: I don't think there was any actual demand; it makes reference to one.

Q. You say you were ready to give title?

A. Yes.

Q. For how long did you remain ready?

A. I think that it was a period of about two months after you received the letter from Mr. Carton's office with the demand for the money; it was discussed between you and I as to whether we should bring a suit against Mr. Gates to compel him to carry out his contract, and after giving it some thought, I decided that I would not do that, inasmuch as they had asked for their money back, and I want the property. I then went down to the Asbury Park Trust Company and drew a check and had it certified and turned it over to Mr. Gates.

Q. That appears to be dated July 12, 1922?

A. Yes. The letter, I believe, was the last of April.

Q. The letter was written on April 28?

A. Yes.

Q. The sequence of events seem to be, that the order of the court was made and entered on the 22nd of April, 1922; the letter from Geran & Matlack to Mr. Gates was dated and mailed presumably on the 24th of April, 1922, in which they notified him that Mr. Williams was then qualified to give title to the premises and close the contract; the letter from Mr. Carton or his firm to Messrs. Geran & Matlack, announcing the abandonment or rescission, was dated April 28, 1922, and the certified check from Mr. Williams, through Geran & Matlack, to Mr. Gates, for $5,000, was made and certified on July 12, 1922; that seems to be the situation as I have it.

A. That is right.

Q. After you gave Mr. Geran the check when was the

next time you heard anything at all about the matter?

A. I think the next time that we had any meeting, we had a meeting in your office regarding the drawing of a lease.

COURT: How had Mr. Gates been paying you the rent up to this time, monthly?

WITNESS: Up to the time that his lease expired, which I believe was April 1, 1923, he had been paying the rent monthly.

Q. How did he pay it, by mail, or bring it to you?

A. As a rule it was put in my door; the check was put in my door.

Q. You have an office in the same building?

A. No, I lived directly back of his store, and they stepped out the back door and put the check under my door.

Q. You are a police officer in Asbury Park?

A. Yes, I am detective sergeant, and not around home much, as a rule; that is the way as a rule I received the rent.

Q. You said you had a meeting; when was that meeting?

A. I think in January, the latter part of January, as near as I know the date; I cannot recall.

Q. 1923?

A. Yes.

Q. And who was present?

A. Mr. Gates, his wife, Mr. Carton, and myself, and Mr. Geran and Mr. Matlack.

Q. What happened at the meeting; tell us what happened.

A. We agreed on the terms of a new lease for a period—it has been said for five years, but it was a period of six years.

COURT: Who suggested that conference; how did it come to be held?

WITNESS: That I don't recall; it was between the two attorneys; the terms of the lease were like this: it was to be three years at $2500 and three years more at $3,000, that is $3,000 per year, and everything was agreeable, and I left the conference there thinking that everything was settled.

Q. Prior to that had you had any talk with Mr. Gates about the contract or taking title to the property?

A. I never talked to Mr. Gates.

Q. Between April 24th down to the January conference?

A. No, sir, I never talked to him; it was all done through the attorneys.

Q. At this conference did you tell Mr. Gates that your daughter objected to your selling the property, and you wouldn't sell it?

A. No, sir, that was never mentioned; my daughter did not talk of it until April, 1923.

Q. Did Mr. Gates ask you to give him title to the property at that conference in January?

A. No, that wasn't mentioned, the giving of the title.

Q. So that the purpose of the conference was simply to arrange a lease?

A. Yes, that is what I went there for, and that is what was done.

Q. Was it understood that that drawing of the lease was merely a temporary matter, pending the determination of the suit for specific performance to be brought by either you or Mr. Gates?

A. No.

Q. Anything said at that conference or prior to it about such a suit?

A. No, sir.

Q. When you left the conference what had been agreed upon?

A. The terms of the lease had been agreed upon and it was all settled.

Q. Who was to prepare the lease?

A. Mr. Geran and Mr. Matlack.

Q. Was Mr. Carton present?

A. Yes.

Q. And we were to submit the lease to Mr. Carton for approval?

A. Yes.

Q. Was anything said at that conference which would indicate a willingness or desire on the part of Mr. Gates to close the contract for the purchase of the property?

A. Not that I recall.

Q. Did Mr. Gates sign that lease?

A. I don't think so.

COURT: He says he didn't.

Q. Then not having signed it, what was the next step that you took?

A. I think the next thing that was done, you were instructed to start proceedings to dispossess Mr. Gates.

Q. You gave me those instructions when?

COURT: How long after the January conference?

WITNESS: I think in April Mr. Gates still continued in the property.

Q. Without having signed a new lease?

A. Yes.

Q. And without having paid the new rent?

A. Yes, without having paid the rent—then I instructed my attorney—the exact date I cannot tell you, but I think I instructed my attorney to start dispossess proceedings, which he did.

MR. MATLACK: I gave notice on April 24, 1923.

MR. CARTON: November 24, 1923, I have alleged in the bill; I assume I have that date right.

Q. So that at no other time, except this conference in our office, did you have any direct conversation with Mr. Gates about this title?

A. No, sir.

Q. Do you recall at the conference in our office whether anything was mentioned about the alteration of the building by Mr. Gates?

A. Yes, that was the reason that a lease was taken for that length of time, because Mr. Gates was going to change the front of the building.

Q. Mr. Gates has testified as to a removal sale; do you know when he had that?

A. I do not; there was one.

COURT: Why aren't you willing to have the contract carried out now, Mr. Williams?

WITNESS: Well, Mr. Gates had abandoned the contract; I had to refinance the property I had; at the time the contract was signed, or soon thereafter, I notified the mortgagee that the mortgage would be paid; I presume they made some other arrangement for the use of their money; however, they insisted on the money, and I had to refinance and got the property straightened out again. After all the trouble I don't care to sell it to him now.

COURT: Do you think it will not be to your interest to have sale consummated?

WITNESS: I don't think so, no.

Q. Have you received any increase in rent since?

A. I have.

Q. From other tenants?

A. Yes.

Q. Is the income from the leases greater than the income would be from investing the proceeds from the sale?

COURT: I don't know that we need go into that aspect of it.

How have your relations been with Mr. Gates; amicable?

WITNESS: Oh, yes.

COURT: Never had any trouble?

WITNESS: No.

COURT: Meet him frequently?

WITNESS: Yes, I see him and talk to him, and meet him on the street. I have stopped in the store after the rent each month, since the double amount has been paid. There was one check lost at one time, and I spoke to Mr. Gates about it, and we agreed that I should come to the store after the rent, instead of his putting it under the door, as he had been doing.

COURT: In any of the visitations made out there, before suit was started, was anything said about this contract?

WITNESS: No, never discussed.

COURT: By either of you?

WITNESS: No, sir.

Q. When did you begin to receive this double rent?

A. I think I received the first check for $1666 and some cents; I think that was in October; however, it was the rent from April until the date that I received this check, and that was the amount, and it was $166 per month. There would be ten months rent I received.

Q. At the conference in which the attempt was made to arrange a lease, did Mr. Gates ask permission to use the property between Monroe Avenue and the rear of his property?

A. I didn't think that he asked for it at that time. I think later, through his attorney, he communicated and asked to have that put in the lease.

Q. That had not been discussed at the meeting?

A. No, not that I remember.

CROSS EXAMINATION BY MR. CARTON:

Q. Mr. Williams, you say you stood ready to carry out your contract in April, 1922, that is after you got your order?

A. Yes.

Q. Did you ever offer Mr. Gates any deed?

COURT: As a matter of fact, I think it is only significant on the account he gives. They wrote him on the 24th of April that he was ready to carry it out.

Q. Mr. Williams, in all, how many meetings do you say were held in Mr. Matlack's office about this transaction?

A. I recall two that I attended, Mr. Carton.

Q. You say there was a meeting held in the early part of 1923?

A. I believe it was in January.

Q. And Mr. Gates' lease expired on April first that year?

A. Yes.

Q. Do you remember a meeting being held right after

April first, that year, 1923?

A. There was a second meeting held.

Q. And was that the time the so-called temporary lease was taken up, or the permanent lease?

A. The first meeting was the time that the terms of the lease was taken up.

Q. What was the purpose of the second meeting, after the first of April?

A. That I didn't know when I went there; Mr. Matlack had asked me to come there, and when I got there Mr. Gates was there and you were there, and Mr. Howell. Mr. Gates then brought up the question of the condition of the roof on this building, something that hadn't been discussed before, and he used that as a reason for refusing to sign the lease.

COURT: When was that meeting held?

WITNESS: This was the second meeting; this was probably—I don't know, it was—

Q. How long after the January meeting, a considerable time?

A. It might have been in March.

Q. At that second meeting was there anything said about the title, closing title under the contract?

A. I think at the second meeting then Mr. Gates said something about the contract, he wanted it settled.

Q. What did you say to him?

A. I refused.

Q. Why?

A. The contract had been abandoned, and I didn't care to sell it to him at that time.

Q. Was the property worth more then?

A. That is hard for me to say then.

Q. That didn't influence you one way or the other?

A. No.

Q. Didn't Mr. Gates at the prior meeting in January, whenever it was, that year, tell you he wanted to carry out his contract and wanted deed or title?

A. I don't think so. As I remember, Mr. Carton, at that meeting we only discussed the lease.

Q. At that meeting in January, 1923, you had considered in your own mind, the contract abandoned, hadn't you?

A. Yes, I considered it abandoned at the time.

Q. When you received my letter?

A. Yes, a few days after.

Q. Why didn't you then tender your check for $5,000, your deposit check, back to Mr. Gates, and say, "Here, our contract is out of the way?"

A. I think I explained that before. I thought it over, and Mr. Matlack suggested to me that we bring suit to compel Mr. Gates to carry out his contract. After some thought, I decided that I wouldn't do it. In fact, I had never been in a lawsuit, and didn't want to get into one, and I decided no, I wouldn't do that; if he didn't want it, I would return his money. I then drew up a check and went to the bank and had the check certified and turned it over to my attorney.

Q. You didn't do that until the following July?

A. There was a delay of about two months.

Q. If you considered it abandoned, why didn't you say, "Why, here is your money back?"

A. I turned it over to my attorney.

Q. You didn't turn it over until your attorney—

A. July 12th, a matter of about sixty days.

Q. Did Mr. Gates ever tell you that he wouldn't go through with this contract?

A. No, I never talked to him about the matter.

Q. Did you ever write Mr. Gates that he had abandoned his contract, and you considered he had abandoned it?

A. No.

Q. Or have your attorneys write to that effect?

A. No, I never write him; my attorney took care of it.

Q. You knew the written contract had been entered into?

A. Yes.

Q. If you considered that this letter to him was an abandonment of the contract, why didn't you couple that abandonment with sending the check back and say the contract was cancelled?

A. I didn't accept it; I drew up a check and turned it over to my attorney. That was all I had to do with it.

Q. You didn't do that until months after?

A. Two months, about sixty days. The date is on the check.

Q. You say you didn't state at one of our conferences, when Gates asked you to carry out the contract, that your daughter had then become of age, and you had been talking with her and she didn't want to sell?

A. No, she was not of age at that time.

COURT: Did you say anything of this kind that he is directing your attention to?

WITNESS: No.

Q. Didn't you say that in Mr. Gates' presence?

A. No.

Q. Made no reference to your daughter?

A. No.

Q. Your daughter did become of age in April, 1923?

A. Yes.

(All letters referred to in the testimony are offered in evidence by both sides.)

FOSTER, V. C. (Orally)

The preponderance of proof is in favor of the defendants.

In addition to that, there is the letter of Mr. Carton's, written in reply to the letter of Geran & Matlack's, notifying him that he was now qualified to give title. The letter in

reply, of Mr. Carton's, stating that he had abandoned the contract, or had previously abandoned it and had demanded the money back, and the deposit; and further, the fact that in all the time that has elapsed since, no effort has been made to close the contract, although apparently two or three efforts were made to close a lease, on an entirely different basis. I cannot see anything that would warrant me in exercising my discretion to decree specific performance. I think I shall leave the parties to their remedy at law, and let the complainant recover his damages, if there has been a breach of his contract. I will not decide the case today, but will give counsel an opportunity to submit their views in writing.

Conclusions of Berry, V. C.

IN CHANCERY OF NEW JERSEY

Between HERBERT GATES, Complainant, and ERNEST H. WILLIAMS, Defendant.	On bill for Specific Performance. Conclusions. Not for print in either official or unofficial reports.

Durand, Ivins & Carton, for Complainant

Geran & Matlack, for Defendant.

BERRY, V. C.

This is a bill for specific performance of a contract for the sale of land. The case was heard before the late Vice Chancellor Foster, but not decided by him. After his death the case was re-referred to me and was submitted upon the pleadings, testimony taken before the late Vice Chancellor Foster and briefs. There is only one question involved and that is as to whether or not the contract of sale was or was not rescinded by the complainant. The contract and all its provisions are admitted. I should have no hesitancy whatever in advising a decree for specific performance except for the fact that at the close of the hearing Vice Chancellor Foster intimated that he considered the preponderance of proof to be in favor of the defendant, but, notwithstanding this remark, he reserved decision and requested that briefs be filed. I have examined the pleadings and proofs with a great deal of care and I am unable to reach the conclusion that the contract here in question was ever rescinded or abandoned by the complainant.

The contract was entered into in October, 1921, and by its terms the closing was to take place on January 18, 1922. Because of the incompetence of the wife of the defendant,

it was necessary for the defendant to obtain authority from the Court of Chancery to carry out the terms of the agreement. For some unexplained reason, this authority was not obtained from the Court of Chancery until some time in April, 1922. Prior to that time and on March 10, 1922, the attorneys of the complainant wrote to the attorneys of the defendant the following letter:

10

"March Tenth,
1922

Messrs. Geran & Matlack
Asbury Park, N. J.

Gentlemen:

In the matter of the proposed transfer from your client, Ernest H. Williams, to our client, Herbert Gates,
20 of the Main Street property, Mr. Gates is much annoyed at what he claims is unnecessary delay. He states that the matter was to have been closed January 18th and that when this date was fixed ample time was given for you to conduct your proceedings namely three months.

As five months have now elapsed, he insists that unless the matter can be closed out at once or within a short reasonable time, he will cancel his contract. He states further that he has been informed by the tenants
30 in some of the properties covered by this sale that they have long leases and that they do not expire April first of this year as represented by Mr. Williams and that he (Gates) will not be able to get possession of same at that time.

Will you please take this matter up with Mr. Williams at once and ascertain if he is in a position to give Mr. Gates title and possession by April first? If he is, Mr. Gates is willing to wait this additional time, but if Mr. Williams is unable to carry out his contract
40 now and will not be on or before that time, Mr. Gates

will not wait longer and will demand the return of the $5,000 deposit.

Yours very truly,

JDC/S DURAND, IVINS & CARTON"

There is certainly no cancellation or rescission of the contract contained in that letter. The most that can be said of it is that there is contained therein a threat to rescind and demand the return of the deposit of $5,000 which had been made in escrow under the terms of the agreement. In fact, counsel for defendant does not claim rescission based on this letter. In my judgment, this was what might be called a "hurry up" letter. On April 24, 1922, the attorneys of the defendant notified the complainant that they had obtained from the Court of Chancery authority to carry out the contract and also notified the attorneys of the complainant to the same effect. In answer to this letter, the complainant's attorneys wrote to the attorneys of the defendant as follows:

"April 28th, 1922.

Messrs. Geran & Matlack
Asbury Park, N. J.

Gentlemen:

We are in due receipt of yours of the 24th inst. in which you enclose copy of the Order for Sale in connection with the Ernest Williams matter, in which our client, Herbert Gates, was formerly interested under his conditional contract with Mr. Williams.

We have already communicated to you in this matter on two or three occasions to the effect that as your client was unable to carry out the terms of his contract as provided, both in the matter of time and in the matter of giving possession of the property, that he would no longer be bound by it and demanded the return of the $5,000 deposit.

Yours very truly,

JDC/S DURAND, IVINS & CARTON"

Conclusions

It is claimed by the defendant that this letter was a rescission of the contract of sale. The testimony shows, however, that this letter was unauthorized by the complainant, and this testimony is not contradicted. Also, it will be noted that this letter refers to a previous rescission, but there is no evidence of any previous rescission, and the attorneys of the defendant apparently knew of none or they would not have written the letter of April 24th. As a matter of fact, however, it appears from subsequent correspondence that the contract was still treated as being in full force notwithstanding the letter of April 28th. As late as December, 1922, correspondence between the attorneys indicated that the contract was still in force, as both firms of attorneys wrote in reference to *"the contract"* between the parties. There was but one contract and that was the contract for the sale of land. If it had been rescinded it would no longer have been a contract. Considerable time elapsed between the refusal of the defendant to carry out the contract and the filing of this bill for specific performance, but a very large part of that time is accounted for by the illness of complainant's attorney. This is not disputed. Notwithstanding the fact that defendant claims the contract was rescinded by the letter of April 28, 1922, he seems to have retained the $5,000 deposit until the July following, when he drew a check for the amount and gave it to his attorneys to return to the complainant. As a matter of fact, the check was not returned to the complainant for over a year afterwards. It seems to me that the retention of this check and the negotiations and conduct of the parties subsequent to the letter of April 28th, 1922, all indicate that everyone considered the contract still in force. Undoubtedly, the defendant was trying to find some excuse for abandoning it, but apparently the complainant was continually insisting upon its being carried out. Finally, a temporary lease was entered into pending disposition of the contract, but I do not think that the entering into this lease in any way militated against the complainant's rights. There is no claim that any rescis-

sion of the contract was made either before or after April 28, 1922. The only rescission claimed is based upon that letter. I am unable to find that there was any such rescission and I will, therefore, advise a decree for the complainant.

Submitted July 30, 1925.

Decided August 18, 1925.

Final Decree Filed Sept. 11, 1925

IN CHANCERY OF NEW JERSEY

Between HERBERT GATES, Complainant, and ERNEST H. WILLIAMS, Individually and as Attorney in fact for Daphne Williams, Defendant.	On bill, etc. Final Decree.

THIS CAUSE coming on to be heard in the presence of DURAND, IVINS & CARTON, Solicitors of the complainant, and GERAN & MATLACK, Solicitors of the Defendant, and in the pleadings and proofs having been read, and the arguments of the respective solicitors having been heard and considered,

AND IT APPEARING to the satisfaction of the Court that on the Eighteenth day of October, 1921, the defendant, Ernest H. Williams, Individually and as Attorney in Fact for Daphne Williams, his wife, entered into a Contract in writing whereby he agreed to convey to the complainant for the sum of Eighty-seven thousand, five hundred dollars ($87,500.) by Deed of Warranty, free from all encumbrances, on or before the Eighteenth day of January, 1922, all those certain lands and premises, situate, lying and being in the City of Asbury Park, in the County of Monmouth and State of New Jersey situated at the southeast corner of Main Street and Munroe Avenue, fronting one hundred and forty feet on Munroe Avenue and one hundred and fifty feet on Main Street, in the City of Asbury Park, New Jersey together with the buildings and improvements thereon, Five thousand dollars of said purchase price to be paid in cash on signing the agreement, Forty thousand dollars in cash on the delivery of deed, and the balance of the

purchase price, Forty-two thousand, five hundred dollars, by complainant executing to defendant a mortgage for said amount, covering said premises, said mortgage to run for a period of ten years and bearing interest at the rate of six per cent per annum, payable semi-annually, said mortgage to contain a provision that complainant should have the right to pay the principal sum of said mortgage or any part thereof at any time prior to said ten year period by giving ninety days notice in writing of his intention so to do,

AND IT FURTHER APPEARING that title to said premises was at the date of said contract vested in the said Daphne Williams, wife of the said Ernest H. Williams, then an incompetent and that the said Ernest H. Williams agreed to take such proceedings as might be necessary to carry out the terms of said contract and make good and marketable title to same and in compliance with agreement took such proceedings by separate action in this court that resulted in an order being advised on the Eighteenth day of April, 1922, ordering the said Ernest H. Williams, Guardian of Daphne Williams, a lunatic, to sell the lands described in said contract.

AND IT FURTHER APPEARING to the satisfaction of the court that the said defendant, Ernest H. Williams, has refused and failed to perform the said agreement on his part and that the said complainant has always been and still is ready and willing in all things to comply with the terms of the said agreement on his part,

AND the court being of the opinion that the complainant is entitled to the specific performance of the aforesaid agreement as prayed for by him in his Bill of Complaint filed herein,

IT IS on this Eleventh day of September, 1925 ordered, adjudged and decreed that the said agreement be in all things specifically performed by the said defendant, and that the said defenant, Ernest H. Williams, Individually and as Guardian of Daphne Williams, his wife, do make, execute and acknowledge in due form of law and deliver to the

complainant, Herbert Gates, on the Fifteenth day of October, 1925, at the offices of Durand, Ivins & Carton, in the Asbury Park and Ocean Grove Bank Building, Asbury Park, New Jersey, good and sufficient deeds of conveyance for all those lands and premises, situate, lying and being in the City of Asbury Park, in the County of Monmouth and State of New Jersey, situated at the southeast corner of Main Street and Munroe Avenue, fronting one hundred and forty feet on Munroe Avenue and one hundred and fifty feet on Main Street, in the City of Asbury Park, New Jersey, together with the buildings and improvements thereon, free and clear of all encumbrances, and deliver at the same time to the said Herbert Gates possession of the said lands and premises upon the payment by the complainant of the amount of the purchase price in said agreement named, Eighty-seven thousand, five hundred dollars, by paying Forty-five thousand dollars in cash, and by executing to the defendant either Individually or as Guardian of Daphne Williams, or both, as he shall request, a mortgage for the balance of the purchase price, Forty-two thousand five hundred dollars, covering said premises, said mortgage to run for a period of ten years from its date and to bear interest at the rate of six per cent per annum, payable semi-annually, which said mortgage shall contain a provision that the said complainant shall have the right, at his option, to pay the said principal sum of said mortgage or any part thereof at any time prior to said ten year period by giving ninety days notice in writing of his intention so to do,

IT IS FURTHER ORDERED that the said defendant pay to the complainant the cost of this suit to be taxed, including a counsel fee of $200.00, which is hereby allowed to said complainant.

IT IS FURTHER ORDERED that true, but uncertified copy of this decree be served on the Solicitors of the defendant within three days after the date hereof.

Respectfully advised,

MAJA L. BERRY

E. R. WALKER

C.

EXHIBITS

December 26, 1921.

MR. ERNEST WILLIAMS,
Care of Police Department,
Asbury Park, N. J.

Dear Sir:—

In the matter of the Gates contract, I just called the office of Geran & Matlack, your attorneys, thinking that possibly you might want to give some of the tenants notice by January first. I find however, that they are out of town, and of course, do not want to advise you in their absence any more than to call your attention to the fact that if there are any notices to be served on the tenants you might want to do so before the first of the year.

Yours very truly,
JAMES D. CARTON.

January 4, 1922.

MESSRS. GERAN & MATLACK,
Asbury Park, N. J.

Gentlemen:—

With regard to the transfer from your client, Williams to Gates, will you be good enough to procure from your client the abstract of searches covering this property, so that we may have same for our use in connection with the examination of title?

We will appreciate receiving same for this purpose.

DURAND, IVINS & CARTON.

March 10, 1922.

MESSRS. GERAN & MATLACK,
Asbury Park, N. J.

Gentlemen:—

In the matter of the proposed transfer from your client, Ernest H. Williams, to our client, Herbert Gates, of the Main Street property, Mr. Gates is much annoyed at what he claims is unnecessary delay. He states that the matter was to have been closed January 18th and that when this date was

fixed ample time was given for you to conduct your proceedings, namely three months.

As five months have now elapsed, he insists that unless the matter can be closed out at once or within a short reasonable time, he will cancel his contract. He states further that he has been informed by the tenants in some of the properties covered by this sale, that they have long leases and that they do not expire April first of this year as represented by Mr. Williams and that he (Gates) will not be able to get possession of same at that time.

Will you please take this matter up with Mr. Williams at once and ascertain if he is in a position to give Mr. Gates title and possession by April first? If he is, Mr. Gates is willing to wait this additional time, but if Mr. Williams is unable to carry out his contract now and will not be on or before that time, Mr. Gates will not wait longer and will demand the return of the $5,000 deposit.

DURAND, IVINS & CARTON.

March 23rd, 1922.

MESSRS. GERAN & MATLACK,
Asbury Park, N. J.
Gentlemen:—

We wrote you some days ago in the matter of the contract between Williams and Gates, but as yet have had no reply.

Mr. Gates is very anxious to have this matter disposed of one way or the other and we wish you would let us hear from you promptly.

DURAND, IVINS & CARTON.

March 24, 1922.

DURAND, IVINS & CARTON,
Asbury Park, New Jersey.
Gentlemen:—

Owing to the fact that Mr. Williams has been out of

town we have not been able to take up the matter referred to in your letter of recent date.

Of course as to the proceedings necessary to be taken, you are aware that the same could not be concluded any sooner.

We will will let you hear further from us with respect to the matter.

Very truly yours,

GERAN & MATLACK.

Exhibit D 1

April 24, 1922.

MR. HERBERT GATES,
Asbury Park, N. J.
Dear Sir:

On behalf of Ernest Williams, guardian, of Daphne L. Williams, we beg to advise you that on the 18th day of April last the Chancelor of New Jersey signed an order for the sale of the property covered by your agreement of October 18, 1922 with Ernest Williams individually and as an attorney in fact for Daphne Williams.

We are enclosing you a copy of this order. Will you kindly advise when you will be ready to pass title.

Very truly yours,

ELMER H. GERAN.

April 24, 1922.

JAMES D. CARTON, Esq.,
Asbury Park, New Jersey.
Dear Sir:

We are enclosing you herewith a copy of letter this day mailed your client, Herbert Gates in connection with the Williams' title.

Very truly yours,

ELMER GERAN.

Exhibits

Exhibit D 2

April 28th, 1922.

MESSRS. GERAN & MATLACK,
Asbury Park, N. J.
Gentlemen:—

We are in due receipt of yours of the 24th inst. in which you enclose copy of the Order for Sale in connection with the Ernest Williams matter, in which our client, Herbert Gates, was formerly interested under his conditional contract with Mr. Williams.

We have already communicated to you in this matter on two or three occasions to the effect that as your client was unable to carry out the terms of his contract as provided, both in the matter of time and in the matter of giving possession of the property, that he would no longer be bound by it and demanded the return of the $5,000 deposit.

Yours very truly,

DURAND, IVINS & CARTON.

December First, 1922.

MESSRS. GERAN & MATLACK,
Asbury Park, N. J.
Gentlemen:—

In the matter of the contract of Gates with Williams, for the Main Street property, I think these parties should arrange for an appointment in order to finally dispose of this matter.

If you will suggest such a meeting with Mr. Williams at your office, I will have Mr. Gates attend same.

Yours very truly,

JAMES D. CARTON.

December 5, 1922.

DURAND, IVINS & CARTON, Esqs.,
Asbury Park, N. J.
Gentlemen:—

Your letter with reference to the contract of Gates with

Williams has been received. Mr. Geran who is handling this matter is now on his vacation and will not return until the first of the year. We think it better that this matter be held in abeyance until his return.

Very truly yours,

ISAIAH MATLACK.

January 24, 1923.

MR. ELMER GERAN,
Asbury Park, N. J.
Dear Mr. Geran:—

I would like to arrange for a meeting with you some day in the near future to take up and dispose of the unsettled Williams-Gates matter. If you will call me up some day when you are in your office, I will come down and see you.

Yours very truly,

JAMES D. CARTON.

Exhibit D 3

February 20th, 1923.

MR. ELMER GERAN,
Asbury Park, N. J.

Dear Sir:

I have just talked with Mr. Gates concerning your suggestion made yesterday with regard to damage done to Mr. Williams' buildings by Mr. Gates trucks.

Mr. Gates states that whatever damage has been done to date he will have taken care of at once and will agree to be responsible for any damage that might be incurred in the future.

In this connection, he would like the lease to cover the fact that he shall have the right of the use of the driveway in from Monroe Avenue to the property, and also the use

of the 25 x 50 feet in the rear adjoining the property.

Yours very truly,

JAMES D. CARTON.

Exhibit D 4

THIS INDENTURE

Made the day of in the year of our Lord, One Thousand Nine Hundred and Twenty-three,

BETWEEN EARNEST A. WILLIAMS, guardian of Daphne L. Williams, a lunatic, of the City of Asbury Park, in the County of Monmouth and State of New Jersey, party of the first part,

AND, HERBERT GATES, of the City of Asbury Park, County of Monmouth and State of New Jersey, party of the second part.

WITNESSETH, That the said party of the first part has hereby let and rented to the said party of the second part, and the said party of the second part has hereby hired and taken from the said party of the first part,

ALL that certain building, situate and known as number 508 Main Street, Asbury Park, New Jersey, together with the right of ingress, egress and regress over a certain alleyway between 710 and 712 Monroe Avenue to the loading platform of the party of the second part for the term of six years to commence on the first day of April, A. D., 1923, at the rent of Sixteen thousand five hundred dollars, payable as follows:

Four Hundred Sixteen Dollars and seventy-eight cents ($416.78) on the execution of this lease.

$208.33 on the first day of each and every month until and including January 1, 1926.

$750.00 on the first day of April, 1926.

$250.00 on the first day of each and every month during the balance of the term.

The said party of second part agrees to pay for all

water used in said premises during the term of this lease.

It is agreed between the parties hereto that if any rent be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part to re-enter the said premises and to remove all persons therefrom.

And the said party of the second part covenants to pay to the said party of the first part, the said rent at the time and in the manner aforesaid.

And the said party of the second part does further promise and agree that he will not re-let, sub-let or under-let the whole or any part of said premises, nor assign this lease, nor use or permit any part thereof to be used for any other purpose than furniture ware-rooms, without a written consent of the said party of the first part, his heirs, assigns, agents or attorneys, under penalty of forfeiture and damages.

If the said premises shall become vacant or deserted during the said term, the said party of the second part does hereby authorize the said party of the first part, his heirs, assigns, agents or attorneys, to re-enter the same at his option and to re-let them, and receive and apply the rents so received to the payment of the rent due by these presents.

And the said party of the second part agrees to make all repairs to the said premises and does further agree to keep the premises in as good repair as the same shall be at the commencement of said term; and at the expiration of said term to yield up the peaceable possession to the said party of the first part, his heirs, assigns, agents or attorneys.

The party of the second part agrees to repair any damage to the alleyway or driveway between No. 710 and 712 Monroe Avenue, and to repair any damage caused to buildings or other damage to property caused by the use of the said alley or driveway, within thirty days after notice has been given by the said party of the first part of said damages, to said leasee. In the event that the said party of the second part does not make repairs, then and in that event

the party of the first part may cause said repairs to be made and the amount of said repairs shall be added to and become a part of the rent and payable on the next rent day of said property hereby leased to the party of the second part.

It is understood and agreed that the use of the alley or driveway herein granted includes only sufficient width for the passing of one vehicle directly from Monroe Avenue, to the rear of the premises hereby leased to the party of the second part and does not include the use of any other land.

And the said party of the first part covenants that the said party of the second part on paying the said monthly rent and performing covenants aforesaid, shall and may peaceably and quietly have and hold and enjoy the said demised premises for the term aforesaid.

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

Signed, sealed and delivered
in the presence of

March 2, 1923.

DURAND, IVINS & CARTON,
Asbury Park, N. J.
Gentlemen:—

We are herewith enclosing draft of lease in the Williams and Gates matter. Mr. Williams is very glad to incorporate in the lease the privileges of useing the alley between 710 and 712 Monroe Avenue. We cannot however give him the right to use the rear yard 25 x 50 feet because it belongs to the rear yard of the houses on Monroe Avenue, and is leased within.

If the form of the lease is approved by you, will you arrange to have it executed.

Very truly yours,

GERAN & MATLACK.

Exhibits

Exhibit D 6

July 12, 1923.

HERBERT GATES, Esq.,

508 Main Street,

Asbury Park, New Jersey.

Dear Sir:

We enclose you herewith check of E. H. Williams for Five thousand dollars. The same is payable to your order and is dated July 11, 1922, certified by the Asbury Park Trust Company on the same date and is a charge against Book No. 6261. The Bank book has been left at the Bank so that it will be paid upon presentation.

This Five thousand dollars was deposited by you in accordance with the terms of contract heretofore entered into between you and E. H. Williams, as attorney for Daphne Williams.

You will recall that through your attorney, Mr. Carton, you declined to consummate the transaction and take title to the property, in accordance with Mr. Carton's letter, because, as he alleged, Mr. Williams was not ready to deliver title on time and there were certain unexpired leases covering a portion of the property.

Shortly after the receipt of this communication from Mr. Carton, and on two or three other occasions, I tendered him this money and he suggested that I retain it until you and Mr. Williams made arrangements for the releasing of the property.

Very truly yours,

ELMER H. GERAN.

Exhibits

Exhibit D 7

August 6, 1923.

GERAN & MATLACK,
Asbury Park, N. J.

Gentlemen:—

As you know, I have been out of the office some weeks owing to my recent illness, and I have just been able to take up the matter of your communication of July 12th addressed to Mr. Herbert Gates in the Williams matter.

This letter will acknowledge the certified check of $5,000. which you enclose. I wish to take issue, however, to the contention in your letter that Mr. Gates refused to take title and consummate the Williams transaction. The fact is that Mr. Gates has always been ready and anxious to close the matter out, but was provoked and annoyed because of what he considered the unusual and unnecessary delay of Mr. Williams in completing his proceedings, and the further and more substantial failure because of his inability to give Mr. Gates possession of the property, as agreed. Mr. Gates is and always has been ready to carry out his part of the transaction, providing your client is able to carry out his part of the contract and to give him possession, as agreed.

In addition to this, you will recall that but recently both Mr. Gates and Mr. Williams met in your office in conference with us in an endeavor to get together on an amicable adjustment of this matter, if possible, which they were unable to do, after which it was understood that I should file a bill for the specific performance of the contract in order to adjust the matter. Because of my illness and being out of town, I have been unable to prepare this bill, but will do so in the course of a few days, and will file it and send you copy of same.

While I suppose there is but little importance in the matter referred to in the last paragraph of your letter, that is, your statement that the check for $5,000 was tendered to me and that I suggested that you retain it, however, I do not

recall any connection where the check was ever tendered to us. My recollection is that while we did talk about the matter on very many occasions, it was always understood that the check be retained by you until the matter was finally disposed of one way or the other. However, I assume there is but little importance connected with the matter.

Yours very truly,

JAMES D. CARTON.

October 20th, 1923.

DURAND, IVINS & CARTON,

Asbury Park, N. J.

Gentlemen:—

Last April you promised to begin suit in the Williams and Gates matter.

This has been going along from time to time, and we have withheld dispossession proceedings on your representation that you would bring suit in Chancery.

Our client has now instructed us that unless something is done immediately, that suit for dispossession must be started.

We feel that you should have begun suit before this, and would therefore request that if you intend to begin suit in Chancery, that you do so before the middle of next week, or we shall be forced to bring suit for dispossession.

Very truly yours,

GERAN & MATLACK.

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New Jersey Court of Errors and Appeals

HERBERT GATES,
Complainant-Appellee.

vs.

ERNEST H. WILLIAMS,
Individually, and as Attorney in Fact for Daphne Williams,
Defendant-Appellant.

On Defendant's Appeal.

Brief for Appellant

GEORGE S. SILZER,
Counsel for Defendant-Appellant.

GERAN & MATLACK,
Solicitors.

SCHUYLER PRESS, ASBURY PARK, N. J.

NEW JERSEY COURT OF ERRORS AND APPEALS

HERBERT GATES, Complainant-Appellee. vs. ERNEST H. WILLIAMS, Individually, and as Attorney in Fact for Daphne Williams, Defendant-Appellant.	On Defendant's Appeal. BRIEF FOR APPELANT

This appeal brings up a Decree of the Court of Chancery advised by Vice Chancellor Berry under date of September 11, 1925, directing the vendor to specifically perform a contract for the sale of real estate.

STATEMENT OF FACTS

The Facts as appear from the pleadings and printed case are as follows: Daphne Williams, incompetent by reason of her lunacy, was the owner of certain premises situate in Asbury Park, New Jersey (Case, pages 6 and 13.) Her husband, Ernest Williams, individually and pretending to act as Attorney in Fact of Daphne Williams, his wife, (although he had no such authority, she having been a lunatic for years before), purported to enter into a contract to sell said premises to the complainant, Herbert Gates, for the sum of $87,500.00 by agreement dated October 18, 1921, and to be consummated January 18, 1922 (Case, pages 5 and 7). Williams, in said agreement of sale, covenanted to take "proceedings as may be necessary to make a good and marketable title." The vendee, Gates, at the time of the making of said contract was in possession of a portion of

the property under lease which would expire on April 1, 1923 (Case, page 24, line 10).

Two other tenants occupied a garage and restaurant under leases each expiring January 1, 1925.

Both parties entered into the contract in good faith, and expected title to pass on January 18, 1922.

The contract did not provide for removing the two other tenants, but gave the purchaser the right of entry and "from thence take rents, issues and profits to his own use."

The matter of possession seemed to trouble Gates early, because on December 26, 1921, Carton wrote to Williams advising him to serve notice on the tenants before January 1, 1922 (p. 75). Later Carton himself served such notices (p. 26, l. 21).

In January, 1922, Carton received the title papers from Geran so he might search the title. He no doubt found the leases which did not expire until January 1, 1925.

On March 10, 1921, Gates had evidently made up his mind (a) that he did not want the property; and (b) that he must have some excuse. Accordingly in a letter from Carton to Geran (p. 76) he threatens to *cancel* the contract, unless the matter can be closed *at once*. He also complains that he won't be able to get possession "as the tenants' leases are longer than represented."

He further insists upon title and possession by April 1st, knowing (as he himself states) that possession cannot be given by that time.

He shows his position clearly by going on and demanding that "If Williams is unable to carry out the contract before that time, he (Gates) will wait no longer and will demand the return of the $5,000 deposit."

That he has firmly made up his mind to cancel, is shown by Carton's letter to Geran thirteen days later, March 23, 1922 (p. 76), in which he complains

of having had no reply to his letter of March 10th, and goes on to say:

"Gates is very anxious to have the matter disposed of *one way or the other*" and asks for a prompt answer.

It will be observed he is not insisting on having it disposed of one way, namely by having title passed, but wants it disposed on "one way or another" and is very anxious to have it settled *at once*.

While Gates has been changing his mind, and been unwilling to take title subject to leases, and asks for his money to be returned, Williams' attorneys have been taking Chancery proceedings and on April 18, 1922, secured an order from the Chancellor authorizing a sale of the lunatic's lands (p. 13).

Six days later Geran offers Gates the title and asks when he will take the deed (p. 77), a duplicate being sent to Gates' attorney, Mr. Carton (p. 77).

If Gates wanted the property, all he had to do was to accept Geran's invitation, pay the money and get the deed. He evidently did not want it, for he took no steps to accept title. On the contrary, his state of mind and position are clearly evidenced by a letter written by Carton to Geran four days later, April 28, 1922 (p. 78), in which he acknowledges receipt of the April 24th letter and refers to the contract as a "matter in which Gates was *formerly interested,* under his *conditional* contract with Williams." He complains that "Williams was in default both in matter of *time* and in giving *possession,*" that he would no longer be bound and demanded return of $5,000. deposit.

Nothing could be clearer than this evidence of abandonment of the contract and of Gates' desire not to take title. He evidently had made up his mind to this long before, but when offered the title he had to take a firm position and he did so by refusing, and at the same time attempting to justify his position.

The contract can be and is ended right here. On

July 11, 1922, Williams certifies a check for $5,000. and gives it to his attorney to return to Gates (p. 83). The certifying and delivering of the check took until July 11 because Williams and his attorney were considering bringing suit against Gates to compel him to take the property. When this was disposed of, the check was sent (p. 56, l. 15). Shortly after Geran offered the check to Carton who told Geran to hold it. (p. 22, line 30.)

The matter seems to have dropped for the time being, only to be revived when Gates recalled that his lease on the premises would expire shortly, on April 1, 1923. Consequently on December 1, 1922, Carton writes Geran suggesting a meeting "to finally dispose of the matter of contract for property (p. 78).

Gates evidently wanted to use the situation to get a new lease. He became anxious, for on January 24, 1923, Carton writes again asking for a meeting "in the near future," "to take up and dispose of the unsettled Williams-Gates matter." (p. 79).

Such a meeting was held and a lease is discussed and tentatively agreed upon, it being left to Geran to draw.

Complaint was made that Gates' trucks are damaging the property, and in a letter to Geran on February 20, 1923 (p. 79) Carton says the damage will be taken care of; and goes on to say "Gates would like the lease to cover right to use drive-way, also use of property in the rear."

The man who now says he always wanted to take title, was actually discussing the terms of a lease for the property he could have had by paying for it.

On March 2, 1923, Geran sends the lease to Carton to execute (p. 82). It provided for lease from April 1, 1923, to April 1, 1929 (p. 80).

Since Gates did not sign the new lease, on April 24, 1923, notice was served on Gates demanding possession and claiming double rent until possession delivered (p. 48, l. 40; p. 49, l. 1-10). In October, 1923,

he paid rent from April 1, 1923, the time his lease expired—four months at double rent (p. 49, l. 40); and has paid double rent ever since.

Having failed to sign the lease and the matter appearing at an end, Geran on July 12, 1923, returned the check of July 11, 1922, for $5,000 (which he had been holding since its date) to Gates, who accepted it (p. 83).

Gates and his attorney were still a little fearful because of his default and refusal to take title and so prepared and sent to Geran the letter of August 6, 1923 (p. 84) and attempted to justify the default, as they had previously done by reiterating that "Williams was to give possession" and inferentially not having been able to do so, Gates claimed he was justified in not taking title.

It will be observed that Gates now had no title because he would not take it, and that he also had no lease, for it expired April 1, 1923, and he had his $5,000. back, and was paying double rent.

Geran threatened proceedings to dispossess Gates, but held off the suit because Carton said he would bring an action for Specific Performance.

Gates could afford to drift along this way and keep possession, but on October 20, 1923, Geran in a letter to Carton (p. 85) threatens to proceed to dispossess if the Bill is not filed immediately (p. 85).

On December 17, 1923, the Bill is filed, with restraining order and Gates is safely in possession until it is disposed of.

It must be noted that from March 10, 1922, when he first complained of failure to get possession for the other tenants, until forced to file his bill for fear of being dispossessed, Gates has never made any effort to pay his money or to take title.

In his testimony he untruthfully says, he was always ready and willing to take title, but his actions show this is untrue; and his failure to take title when Geran offered it to him on April 24, 1922, or at any

time thereafter and his acceptance of the return of his $5,000. are conclusive proof against him.

After the filing of the bill, he pretends to want it, probably due to an increase in the value of the property; or, not expecting a decision in his favor by the Vice-Chancellor he simply carried on to continue a possession which he could not otherwise have held.

On the conclusion of the hearing, Vice Chancellor Foster orally expressed himself to the effect that the preponderance of the proof was in favor of the defendant and said:

> "I cannot see anything that would warrant me in exercising my discretion to decree specific performance."

and then directed that Briefs might be submitted. Before a formal decision was handed down the learned Vice Chancellor departed this life and the cause was then re-referred to Vice Chancellor Berry who, on the testimony and papers, decided that the complainant was entitled to relief.

Only two witnesses were sworn, i.e. Gates the complainant and Williams the defendant.

Gates' testimony is uncertain and unsatisfactory, and in parts obviously untrue. Williams' is clear and consistent.

These men did practically no business with each other, but left it for the attorneys, neither of whom was sworn. The letters exchanged between them, at the direction of or with their clients' consent, are very enlightening.

GROUNDS FOR REVERSAL

FIRSTLY: That the burden of proof on all of the issues was upon the complainant and that the complainant did not carry that burden, and that on the contrary

the facts clearly show complainant did not want a deed and repudiated the contract.

SECONDLY: The only proper parties to the suit are those who are named in the contract, and that an action will not lie against a guardian for a lunatic who was not a party to the contract.

The contract is not acknowledged by anybody on behalf of the married woman and the decree directs a guardian to convey. We respectfully contend that in all respects, the Decree is contrary to law and should, therefore, be reversed.

POINT I.

THE ONLY PROPER PARTIES TO A BILL FOR SPECIFIC PERFORMANCE ARE THE PARTIES TO THE CONTRACT.

In this case the contract is made on its face by Ernest H. Williams, Individually and as Attorney in Fact for Daphne Williams, his wife, as vendors and Herbert Gates as vendee. There is nothing in the case to show that in fact Ernest H. Williams had a written power of attorney from Daphne Williams, authorizing him to enter into a contract for the sale of the property in question. The contract on its face shows that he could not act for her, because he therein agrees to "take such proceedings as may be necessary to make a good and marketable title, etc." (Page 11, line 15-18). The proceedings in the case show that Daphne Williams is under a disability (Case, page 6, page 33, line 2), and had been insane for nine years before (Page).

Here we have the anomaly of a decree, that a person not a party to the contract, shall specifically perform it. No person who was not a party to the contract, can be made a party to a suit for specific performance.

Bacot vs. Wetmore, 17 N. J. Eq. 250.
Bowne vs. Ritter, 26 N. J. Eq. 457.
Collins vs. Leary, 71 Atl. Rep. 602, affirmed without opinion 74 N. J. Eq. 852.
Mechanick vs. Duschanek, 132 Atl. Rep. 854.

POINT II.

THE CONTRACT IS NOT ACKNOWLEDGED BY THE WIFE.

It is admitted in the bill of complaint and in the contract of sale that the title to the property is in the name of the wife, Daphne Williams (Case, page 6, page 11, line 12).

The Statute of Conveyance, Section 39 specifically provides that no estate of a femme covert in any lands, tenements, or hereditaments, lying and being in this State, shall hereafter pass by her deed or conveyance, without a previous acknowledgment made by her, etc.

Schwarz vs. Regan, 64 N. J. Eq. 139.
Corby vs. Drew, 55 N. J. Eq. 387.
Thomas vs. Flanagan, 132 Atl. Rep. 305.
Kapesski vs. Wira, 128 Atl. Rep. 382.

POINT III.

THE VENDOR IS UNABLE TO PERFORM.

The vendor in the contract was not the guardian of Mrs. Williams. Therefore a decree against Williams individually and as Attorney in Fact could not

and would not carry with it the interest of the guardian. The decree, however, attempts to go beyond the terms of the contract and the complainant makes the guardian a party defendant to the suit.

The decree, on its face, directs the guardian to convey, although the guardian has never, as such, made a contract for the conveyance of the lands in question. It stands to reason, under the decisions above cited, that had the guardian demurred, the motion would have been granted upon the theory that the guardian was not a party to the contract. Therefore, it follows that Williams, as a defendant individually and as Attorney in Fact has no title to the property in question which he can convey, and specific performance will not be granted where the defendant is unable to carry out the decree.

Klausner s. Watson, 86 N. J. Eq. 220.
McAllister vs. Atlantic City, 90 N. J. Eq. 358.
Public Service Corp. vs. Hackensack Meadows Co. 72 N. J. Eq. 283.
Flattau vs. Logan, 72 N. J. Eq. 338.
Friedlander vs. Lehr, 129 Atl. Rep. 241.

It further appears that if Mrs. Williams were to die, her heir-at-law would be a daughter who only recently arrived at the age of 21 years and who, according to the testimony of Gates, objected to the sale of the property (Case, page 27, line 10, page 28, line 32 and page 29, line 30).

If by any stretch of imagination it can be argued that Williams as guardian must be decreed to specifically perform, let us see what he agreed to do. This is what the contract says:

"It is understood between the parties hereto that record title to said premises is now in the name of Daphne Williams, who is at present incompetent to execute a deed, and that the

> said party of the first part shall take such proceedings as may be necessary to make a a good and marketable title and conveyance for said property." (Page 11, line 10-12).

He could then be decreed to *take steps* to "make a good and marketable title." That, however, would not compel the giving of a ded to Gates, because the Court of Chancery steps in to protect the lunatic, and fixes the only terms upon which a conveyance can be made.

> In this case the Chancellor ordered "that the guardian sell the said lands . . . in such manner and upon such terms as to credit and security as said guardian shall deem safe and most expedient for the interest of said lunatic . . . . and that before any deed is executed, the sale . . . . be reported to the Chancellor, to the end that the same may be passed upon by the Chanellor before the sale is confirmed, and that he may make such order as he shall deem fit touching the investment of the proceeds." (Page 13, line 25-40).
>
> The Chancellor further ordered "that the guardian give bond in the sum of $150,000 with surety . . . . which bond shall be approved by said master and filed with the Court." (Page 14, line 1-10).

The guardian has never decided that the terms were safe or expedient, or for the interest of the lunatic; has never reported to the Chancellor, has never given a bond. And most important of all the Chancellor has never confirmed any sale by the guardian. The protecting arm of the Court of Chancery is still around the lunatic.

How can a decree be sustained which compels a guardian to sell, when he has not complied with any part of the order giving him the right to sell?

How can he be forced to sell when he thinks it not to the best interest of the lunatic so to do?

Williams says (page 60, line 25-35) that after Gates' refusal to take the deed, he, Williams, "had to refinance and got the property straightened out again. After all the trouble I don't care to sell it to him now."

If then the estate of the lunatic was put to further expense and the guardian decided it was not to her best interest to sell, he was not obliged to do so. In fact, if he had so reported to the Chancellor he would not have been permitted to sell. Yet he is decreed to deliver a deed for the lunatic's property.

Neither party will admit that the property increased in value between the date of the contract October 18, 1921, and the date of filing the bill, December 17, 1925, but it is quite probable that it did and that the suit resulted because of such increase. Such is the usual explanation and experience.

If this be true, there should be no decree for specific performance, for in that case the guardian would not be justified in conveying for less than the lunatic's estate was worth, and the Chancellor would not permit it.

Simply because some one, claiming to be an Attorney in Fact, agreed to convey for a certain price, would not compel a guardian to do so if the property was worth more. The guardian could not be compelled to sacrifice the lunatic's estate, just because an alleged attorney in fact made a contract to convey for a less sum.

If this decree stands, it is equivalent to depriving the Court of Chancery of its constitutional power of control of the estates of lunatics.

If this decree stands, it removes from lunatics the time-honored protection of the Court of Chancery.

We must not lose sight of the fact that the Guar-

dian just happened to be the same man who made the contract.

Suppose he had not been, could he have been made a party to a bill for specific performance of a contract to which he was not a party?

Could he have been compelled to give a deed against his opinion that it was not for the best interest of the lunatic?

If the decree be affirmed, Williams must give a deed and take the money, notwithstanding the fact that the Court has not confirmed the sale and that there is no bond for the protection of the lunatic.

If the decree be affirmed, Williams *must* deed away the lunatic's estate, and would immediately be in contempt of the Court of Chancery for doing so, without an order of confirmation and bond.

If the decree be affirmed, a deed must be delivered and the money paid. The purchase price could be appropriated at once and the lunatic thus deprived of her estate, with a possible chance that the purchase price could never be recovered.

All of which shows the error in making a decree for specific performance, and the ridiculous results that follow.

POINT IV.

COMPLAINANT IS BARRED BY HIS DELAY.

According to the contract of sale, title was to close on January 18, 1922, (Case, page 12, line 12). The bill of complaint was not filed until December 17, 1923, an interval of nearly two years. The learned Vice Chancellor attempts to excuse this delay by charging it to the illness of counsel for the purchaser (Case, page 70, line 23). Liberal concession was made by counsel for the defendant, the present appellant, who says that Mr. Carton was ill for a period from June 1923 to December 1923 (Case, page 53, line 28 to 33).

It is in evidence that Gates had a lease for a portion of the premises which expired on April 1st, 1923 (Case, page 43, line 8, page 48, line 18, page 57, line 11) but notwithstanding the fact that the lease which Gates had for the portion of the building which he occupied, did not expire until April 1st, 1923, he desired to get this building and the possession of it and says he had made plans for a rebuilding or removal sale and plans to rebuild (Case, page 33); that he arranged to raze the old building and put up a new building (Case, page 34); that he investigated the leases and found that they ran for a term of three year (Case, page 26, line 13); that his attorney notified these tenants to get out April 1st; that Mr. Carton gave notice in the absence of Mr. Williams (Case, page 26). Gates testified that he learned sometime in December (1922) that Williams had procured authority to carry out the contract (Case, page 27). However, the letter of notification to close title is dated April 24, 1922, (Exhibit D-1, page 77). The original was sent to Gates and a copy sent to Mr. Carton and Mr. Carton responded four days later by Exhibit D-2, case, page 78, and in that letter the contract was repudiated and demand made for the return of the $5,000.00. The authority to write the letter is disputed by Gates (Case, page 36).

It is more likely that Gates is untruthful, than that Mr. Carton, a reputable attorney, would write such a letter without authorization from his client; a letter coming four days after the offer to deliver the deed, and an act consistent with Gates' attitude for months before. Nevertheless at the hearing it was stated on the record, in open Court, and not disputed by Mr. Carton as follows:

> "*Mr. Geran*: My recollection is that about a month or two after the receipt of this letter (April 28, 1922) we offered the check to Mr. Carton and he said 'Let us not do anything

about it; just hold it awhile', and we kept holding it for nearly a year, and finally Mr. Carton said, 'All right, we don't want the money on this contract,' and it was deposited in escrow —'and want you to take the contract back, the contract is at an end.' Mr. Carton did not admit that the contract was rescinded, but took the money back without prejudice." (p. 22, line 30).

A reading of the examination of the complainant, Herbert Gates, is very unsatisfactory. He does not give dates, times or state anything positively and his testimony shows that he is wholly confused. There is not one thing shown to have been done by him as seeking to have this contract enforced from April 28, 1922, until the writing of the letter of December 1, 1922 (Case, page 78).

At the request of the Court, Gates on re-direct was asked:

Q. Can you tell why you delayed all this time before you actually brought your suit, what your reason for delaying was given, or what was taking place in the meantime, if anything?

A. Nothing that I know of.

The case is entirely barren of any real evidence to account for the delay on Gates' part in bringing his suit from April, 1922, to March, 1923, and the Court of Chancery should not be called upon to exercise its discretion for specific performance.

Agens vs. Koch, 74 N. J. Eq. 528.

Barry vs. Ruskin, 133 Atl. Rep. 528, and cases there cited.

POINT V.

THE BURDEN OF PROOF.

In this case the only witness produced for the complainant is the complainant himself, plus the correspondence in the case. The defense produces the defendant, Williams. A reading of the complainant's testimony shows that he is uncertain. He does not fix any dates nor does he give any satisfactory explanation except that in answer to his counsel's leading questions he testifies that he was ready and willing to carry out the contract, and never gave up the contract and never authorized anybody to give it up. His actions and the letters do not sustain him, however.

The case is one in which the Court should not have exercised its discretion in favor of the vendee and a review of the entire facts by your Honors will undoubtedly lead to the same conclusion voiced by the late Vice Chancellor Foster immediately after hearing the case.

Outside of the many objections raised in the forepart of our Brief we are satisfied that the burden of proof was not sustained by the complainant and his whole testimony is contradictory in many respects and is wholly uncertain. Mr. Carton being in Court did not take the stand to testify that he, without authority, wrote he letter of April 28, 1922. We do not believe, and do not think your Honors will believe, the story of Gates when he says that the letter was written wholly without authority. Carton had charge of this transaction from A to Z and even if there was not an express understanding and an express instruction from Gates to Carton prior to the writing of the letter, Carton was clothed with the authority to write that letter and Gates knew of that letter. It is unbelievable that Mr. Carton would write that letter without authority and then would withhold from his client information of the fact that he had done so.

POINT VI.

SPECIFIC PERFORMANCE CAN ONLY BE DECREED WHEN THE RIGHT IS CLEAR AND CONCLUSIVELY ESTABLISHED.

The above is the settled rule in New Jersey.

Kelleher vs. Bragg, 96 N. J. Eq. 25.

The Court says, in the case of Rabinowitz vs. Rooney, 97 N. J. Equity 49,

> "to warrant specific performance proof must be clear and convincing. Specific performance is discretionary and not a matter of right. If the proof is substantially, evenly balanced, or if the Court is left in doubt because of lack of clearness of it, it denies specific; performance and leaves the parties to their remedy at law."

In the case of Friedman vs. Slaff, 95 N. J. Equity 767, affirmed 124 Atlantic 925, the Court says, among other things:

> "If any guessing is to be done, I think that it should be against the claim of the complainants."

To the same effect are the cases of

Lockerson vs. Stillwell, 13 N. J. Eq. 357.
Brewer vs. Wilson, 17 N. J. Eq. 180.
McTague vs. Finnegan, 54 N. J. Eq. 454.
Wolfinger vs. McFarland, 67 N. J. Eq. 687.

In this case we have one Vice Chancellor, who heard the case and who saw the witnesses, saying:

> "I cannot see anything that would warrant me in exercising my discretion to decree performance"

POINT VII.

SUIT SHOULD HAVE BEEN INSTITUTED AGAINST THE LUNATIC AND PROCESS SERVED UPON HER.

A suit will not lie against the statutory guardian, but must be against the incompetent person.

Coombs adv. Janvier, 31 N. J. L. 240
Van Horn v. Hann, Adms., 39 N. J. L. 207
In re Martin, 86 N. J. Eq. 265
Cooper v. Wallace, 55 N. J. Eq. 192
In re Rogers, 125 Atl. 318
Webb v. Webb, 124 Atl. 706

Though proceedings had been taken by the guardian under the statute, to obtain the right to sell the lunatic's property, and an order of sale had been made, it is apparent that the sale was not consummated. A year and a half after the order for sale had been made, suit for specific performance was instituted against the lunatic's representative. The lunatic had no notice of the making of the contract nor of the suit for specific performance. Process was not served upon her, and she was not made a party to the suit. The guardian had obtained an order to sell her property, based on a contract of which the lunatic had no notice.

Her status may have changed during the year and a half delay in bringing suit. Her mental condition may have been cured, or the value of the property may have so changed that she would be entitled to notice of the suit affecting her property rights.

If the guardian had attempted to sell the lunatic's property to another person during the year and a half delay, the lunatic would have had to have been given notice of the application to sell her property.

The order of sale was based on the value of the property at the time of the order, and by reason of the lapse of time between the date of the order and the institution of suit, she should have been made a party thereto and notice served upon her in order to give her the opportunity to appear and defend.

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and another Vice Chancellor saying there should be a decree.

This differing of the minds of two learned judicial officers seems to be sufficient in itself to force the conclusion that the complainant did not establish his right to relief and that there is such doubt in the proof and in the conclusions to be drawn therefrom that no decree for specific performance should be made.

ANALYSIS OF V. C. BERRY'S CONCLUSIONS

The gist of the conclusions is found on page 70.

The first point the learned Vice Chancellor makes is that the letter of April 28, 1922, in which Mr. Carton says that Gates will "no longer be bound by it (the contract) and demanded the return of the $5,000 deposit" was not a rescission because the letter was unauthorized.

It is true that Gates testifies (on page 30) that he did not authorize the abandonment of the contract. But that cannot be taken as final, because the circumstances and other evidence clearly indicate that he says what is not true.

Four days before this letter was written, Gates and Carton each received Geran's letter offering a deed to the property. It cannot be possible that so reputable an attorney as Mr. Carton will write the letter of April 28th abandoning the contract and demanding a return of the $5,000, without having first consulted his client and knowing his wishes.

It is also true that Gates never, even up to this time, paid a cent or made a tender of the purchase money or a request to be given a deed.

It is also true that thereafter he paid double rent, and is doing so now; and that he sought a new lease on the premises.

His mental attitude prior and since is clearly indicative of the fact that Mr. Carton truly states his mind and desires. In view of all this his more untruthful statement cannot overcome his actions.

The learned Vice Chancellor also makes the point that Gates' testimony is "not contradicted." Who could possibly have contradicted it? Certainly not Williams.

There is one man who could have settled the question at once. If Gates told the truth, I have no doubt Mr. Carton would have gone on the stand at once, and would have said that the letter was unauthorized and that he took upon himself all the blame for exceeding his authority. Mr. Carton, however, did not do this, because he undoubtedly had authority to do what he did. If he didn't, he certainly would be subject to severe censure for neglect of a client's interests. Mr. Carton would not be guilty of such conduct.

The learned Vice Chancellor makes the further point, that in subsequent correspondence the contract was treated as still being in force because both parties in correspondence referred to it as "the contract."

Such reference would no doubt be quite natural, but not significant; for after all it was a "contract" and nothing else, and the references were to the document and not to its present effect.

The learned Vice Chancellor is quite in error in saying after April 28th it was still treated as an existing contract, he having no doubt overlooked the letters in the case. Gates' attorney did not so refer to it or consider it.

In Mr. Carton's letter of January 24, 1923 (page 79) he does not use the word "contract" but refers to *"the unsettled Williams-Gates matter."*

In Mr. Carton's letter of rescission of April 28, 1922, page 78) he calls it *"the Williams matter, in*

which our client Gates was formerly interested under his conditional contract."

The learned Vice Chancellor excuses Gates' delay, and attributes it to illness of Mr. Carton.

Twenty and a half months elapsed between the letter of rescission and the filing of the bill. Of this time only three months can be charged to illness, from July 12, 1923, until August 6, 1923 (See Exhibit Number 7, page 84).

Strangely the learned Vice Chancellor says this is not disputed, when it is clearly denied and Mr. Carton's letter accounts only for a few weeks and makes no such claim as the Vice Chancellor now makes and says is undisputed.

The learned Vice Chancellor makes a point of the non-return of the $5,000. check until a later date.

The facts are that Gates repudiated the contract April 28, 1922. Williams and his counsel were considering filing a bill of specific performance to compel Gates to take the property but finally abandoned that (page 56, line 10) and then on July 12, 1922, Williams drew a check to Gates for $5,000, had it certified and sent it to his attorney for delivery to Gates. Geran held the check and finally sent it to Gates July 12, 1923 (page 85).

During all this time leases and damage to Williams' property, adjustment, etc. were being considered by the parties, and there evidently was an understanding between the parties about the check, for at the very opening of the case the attorneys call the Court's attention to a stipulation between them.

On page 22 Mr. Carton says: "I wrote to Mr. Geran and we stipulated that Mr. Geran would hold the check . . . . that no one would be prejudiced one way or the other, etc."

Notwithstanding Mr. Carton agreed to Geran's holding it without prejudice, the learned Vice Chancellor says it "indicates that everyone considered the contract still in force."

He says further: "Undoubtedly, the defendant was trying to find some excuse for abandoning the contract, but apparently the complainant insisting upon its being carried out."

The record shows nowhere any attempt of Williams to find any excuse.

It is equally untrue that Gates was continually insisting upon its being carried out. The fact is he never at any time offered his purchase price or made any effort to get the property, but on the contrary showed from March 10, 1922, until forced to specific performance, that he did not want the property.

The learned Vice Chancellor is equally in error in saying that a "temporary lease" and was entered into pending disposition of the contract "and says it does not militate against Gates."

The facts are that when Gates' lease expired April 1, 1923, Williams gave notice to quit the premises and that owing to his holding over he would be held in double rent (page 48, 49, 50). He held over and in October, 1923, paid four months' rent at double rates (page 48, line 20) and has continued to do so.

Then an attempt was made to agree to a lease for six years (page 45, 46 and 47 and page 57, line 35), but as Gates would not sign this, later a stipulation was made that double rent on $2,000 a year be paid until the termination of the suit (page 21, line 25).

It must be quite evident that the learned Vice Chancellor not only overlooked important and essential evidence, but drew erroneous conclusions as a result thereof.

For the reasons stated the decree should be reversed.

GEORGE S. SILZER,
Counsel for Defendant-Appellant.

GERAN & MATLACK,
Solicitors.

CHRONOLOGY

As a convenience to the Court, and because of its value in bringing to light the truth, the chronology follows:

Oct. 18, 1921 Contract for sale of property.....p. 9-12
The contract is by Williams individually and as *Attorney-in-fact for his wife*—consideration $87,500; $5,000 paid down, $40,000 to be paid on signing contract; balance, $42,000—by executing a mortgage to the "party of the first part." Gates to enter premises January 18, 1922. Williams is to take proceedings to give title for lunatic wife.

$5,000 paid on account to be deposited in escrow. "In event Williams unable to procure decree authorizing conveyance, he may repay $5,000 and contract is surrendered for cancellation."

Jan. 18, 1922 Date fixed for delivery of deed....p. 9-12

Dec. 26, 1921 Letter Carton to Williams advising him to serve notice on tenants before January 1, 1922 ..... p. 75
Gates was a tenant in building at time contract was made—his lease for same expired April 1, 1923 ..... p. 24
Restaurant on corner had a three-year lease to January 1, 1925 ..... p. 26
Garage had a two-year lease to January 1, 1925 ..... p. 26

Jan. 4, 1922 Letter Carton to Geran asking for title papers to search property ..... p. 75

Mar. 10, 1922 Letter Carton to Geran, saying Gates is annoyed at delay .....p. 76
That was to be closed January 18th—since five months have passed. "Unless matter can be closed at once *he will cancel contract.*"

He also complains that he won't be able to get possession as tenants leases are longer than represented. Wants to know if he can get title and possession by April 1st.

"If Williams is unable to carry out contract before that time Gates will wait no longer and will demand return of $5,000 *deposit."*

Mar. 23, 1922 Letter Carton to Geran—complains of no reply to previous letter.....p. 76

Says: "Gates is very anxious to have matter disposed of *one way or the other"* and wants prompt answer.

Mar. 24, 1922 Geran to Carton, promising a reply soon ..... p. 76

Apr. 18, 1922 Order by Chancellor authorizing sale ..... p. 13

Chancellor orders sale "in such way and manner and upon such terms as to credit and security as said guardian shall deem safe and most expedient for the interest of said lunatic."

And before any deed is executed, sale and terms are to be reported to Chancellor "to the end that the same may be passed upon by the Chancellor before the sale is confirmed."

That he give bond in sum of $135,000, etc.

Apr. 24, 1922 Letter Geran to Gates, asking when Gates will be ready to take his deed....p. 77

Apr. 24, 1922 Duplicate letter to Carton .....p. 77

Apr. 28, 1922 Letter Carton to Geran .....p. 78

Acknowledges receipt of letter offering deed. Refers to it as a "matter in which Gates was *formerly interested* under his *conditional contract* with Williams."

Refers to previous communications, saying Williams had been in default by his inability

to carry out the contract "both in the *matter of time* and in *giving possession*" and "*that he* would no longer be bound by it and demanded the return of the $5,000 deposit."

July 11, 1922 Williams certified check for $5,000 and gives it to Geran to deliver to Gates .....p. 64, line 22

July 1922 Geran offers check to Carton who tells Geran to hold it..... p. 22, line 30

Dec. 1, 1922 Letter Carton to Geran—suggest meeting to "finally dispose of this matter of contract for property" ..... p. 78

Dec. 5, 1922 Letter Matlack to Carton—asking matter lie over until Geran's return from vacation ..... p. 79

Jan. 24, 1923 Letter Carton to Geran—asks for meeting in near future "to take up and dispose of the unsettled Williams-Gates matter." ..... p. 79

Feb. 20, 1923 Letter Carton to Geran ..... p. 79
"Gates says any damage done by trucks to Williams building will be taken care of."
"In this connection, he would like the lease to cover right to use driveway, also use of property in the rear."

Mar. 2, 1923 Letter Geran to Carton ..... p. 82
Enclosing lease Williams to Gates, and asking its execution.

Mar. 2, 1923 Lease enclosed in above letter .....p. 80
Runs from April 1, 1923, for six years to April 1, 1929.

Apr. 1, 1923 Gates lease on building expired....p. 24

April 24, 1923 Notice is served on Gates to vacate the premises and in the meantime pay double rent ..... p. 48, l. 40, p. 49, l. 1-10

July 12, 1923 Letter Geran to Gates .....p. 83
Enclosing check of Williams for $5,000, dated July 11, 1922. Says he offered the check two or three times to Carton, who suggested it be held until Williams made arrangements for releasing the property.

Aug. 6, 1923 Letter Carton to Geran ..... p. 84
Takes up letter of July 12, 1923, Acknowledges receipt of check for $5,000.

He reiterates that Williams was to give possession and agrees that check was to be retained by Geran *"until the matter was disposed of finally, one way or the other."*

Oct. 1, 1923 Gates pays rent April 1 to Oct. 1, 1923, at double rates ..... p. 49 l. 40

Oct. 20, 1923 Letter Geran to Carton ..... p. 85
Says in April Carton promised to bring suit. "We have withheld dispossession proceedings." Client insists if nothing is done "suit for dispossession must be started immediately", etc.

Dec. 17, 1923 Gates files bill for Specific Performance against Williams ..... p. 5-14

New Jersey Court of Errors and Appeals

HERBERT GATES,
Complainant-Respondent,

vs.

EARNEST H. WILLIAMS, Individually and as Attorney in Fact and as Guardian of Daphne Williams,
Defendant-Appellant.

ON DEFENDANT'S APPEAL FROM THE COURT OF CHANCERY.

Brief of Complainant-Respondent

DURAND, IVINS & CARTON,
Solicitors for Complainant-Respondent.

JAMES D. CARTON
of Counsel.

SCHUYLER PRESS, ASBURY PARK, N. J.

NEW JERSEY COURT OF ERRORS AND APPEALS

HERBERT GATES, Complainant-Respondent, vs. EARNEST H. WILLIAMS, Individually and as Attorney in Fact and as Guardian of Daphne Williams, Defendant-Appellant.	ON DEFENDANT'S APPEAL FROM THE COURT OF CHANCERY.

BRIEF OF COMPLAINANT-RESPONDENT.

STATEMENT OF FACTS.

This matter is before the Court on an appeal from a decree of the Court of Chancery dated September 11, 1925, directing the defendant-appellant to specifically perform a contract for the sale of real estate and to convey certain lands and premises described in the bill of complaint to the respondent.

On October 18, 1921, the defendant individually and as Attorney in Fact for Daphne Williams, entered into a certain contract with the respondent, whereby the appellant agreed to convey certain real estate to the respondent on January 18, 1922. The contract (S. C. 11) provided that Earnest Williams, individually and as Attorney in Fact for his wife, Daphne Williams, would take such proceedings as might be necessary to make a good and marketable conveyance for the premises to be sold, the said Daphne Williams, at that time, being incompetent. The purchase price of the premises was $87,500.At the time of the execution of the contract, the respondent

paid a deposit of $5,000, which was returned July, 1923 (S. C. 32). On January 18, 1922, the purchaser was to pay $40,000 cash and the balance was to be secured by a mortgage.

Gates, the respondent, made arrangements for the $40,000, and at all times this money was available (S. C. 30). The respondent, at the time of entering into the contract, was in possession of a part of the premises as a tenant (S.C. 23), conducting a furniture business, and had been there for five years under a lease expiring Apr. 1, 1923. The respondent owned property adjacent to the premises being purchased (S.C. 34) and contemplated building operations on a portion of both premises. In anticipation of the purchase of the property from appellant, Gates had a re-building sale in the spring of 1922, after learning that the sale had been authorized by the Court of Chancery S.C. 33-34). He also arranged with an architect and made repairs. Several letters were sent by respondent's attorney to the attorneys for the complainant, requesting haste in the completion of the lunacy proceedings and the consummation of the contract (S.C. 75-76). On April 24, 1922, appellant's counsel wrote respondent and also respondent's attorney (S.C. 77) "on behalf of Earnest Williams, Guardian of Daphne Williams," that the Court of Chancery had signed an order for the sale of the property and asking when the respondent would be ready to pass title. This order was obtained upon the application of the defendant as guardian of Daphne Williams, his wife.

The order (S. C. 13) provided that before any deed "is executed" the said sale and terms thereof shall be reported to the Chancellor by said guardian in writing. The order further recited that it appeared satisfactorily to the Chancellor, upon reading the report of the Special Master, that the interest of the lunatic (Daphne Williams) required and would be

substantially promoted by the sale of the real estate mentioned in the petition (the contract of sale).

On April 28, 1922, respondent's counsel wrote the counsel of the appellant as follows:—

"April 28th, 1922.

Messrs. Geran & Matlack,
Asbury Park, N. J.

Gentlemen:—

We are in due receipt of yours of the 24th inst. in which you enclosed copy of the Order for Sale in connection with the Earnest Williams matter, in which our client, Herbert Gates, was formerly interested under his conditional contract with Mr. Williams.

We have already communicated to you in this matter on two or three occasions to the effect that as your client was unable to carry out the terms of his contract as provided, both in the matter of time and in the matter of giving possession of the property, that he would no longer be bound by it and demanded the return of the $5,000 deposit.

Yours very truly,

Durand, Ivins & Carton."

This letter was written without the authorization of respondent (S. C. 24-36), and without his knowledge (S. C. 36).

Subsequent to April 28, 1922, respondent's counsel met the counsel for the appellant on several occasions and held conferences regarding the consummation of this contract. (S. C. 22-51).

On December 1, 1922, counsel for the respondent wrote to the counsel for the appellant, asking if the question could not be finally settled. Arrangements were made and a conference was held between the

parties and their attorneys in January or February (S. C. 44-47). Respondent went to the conference to obtain the property as he thought (S. C. 44), but instead discussion was had regarding a lease. A lease was later sent to the respondent providing for a five year term (S. C. 45) at a graduated scale of rent. This lease was returned by respondent without being executed and without his entire perusal of it (S. C. 45-47) because it was respondent's understanding that the lease was to be a temporary matter pending the disposition of the question as to whether or not conveyance of the property would be made by the appellant (S. C. 48). In March or April arrangements for a temporary lease pending the suit were made at a rent of $2,000. From April to December, 1923, respondent's counsel was ill or absent from his office and suit was begun in December (S. C. 53). Appellant drew a check for $5,000 from the Asbury Park Trust Compaany on July 12, 1922, which check was retained by appellant or his attorneys until July, 1923, when it was returned to respondent. No demand was ever made by respondent or his counsel for return of this check (S.C. 32).

Prior to the trial, a stipulation was entered into, (S. C. 21) that "the fact that no deed was tendered would not be taken advantage of by the other side, nor the fact that the purchase price was not tendered would not be taken advantage of, and that no point would be made of the fact that the deposit was returned and accepted."

ARGUMENT

This case was tried solely on the theory as to whether or not the contract was rescinded by respondent, (S. C. 23-67) and if the contract had not been rescinded whether complainant was barred from enforcing specific performance by reason of laches in bringing suit. Appellant's only contention

as to rescission is based upon the letter of April 28, 1922, (S. C. 78) written by counsel for the respondent to defendant's attorneys. This letter refers to a previous rescission or threat of rescission, but an examination of the testimony and exhibits offered show that no previous rescission had ever been made.

Respondent submits that this letter did not amount to a rescission and must be considered in connection with previous correspondence between the attorneys and the respective parties. In none of them is the contract rescinded, although haste is urged by the respondent in the closing of the contract and the execution of the deed and threats are made that if the contract is not definitely closed, the contract will be rescinded. No claim is made by appellant, either before or since this letter of April 28, 1922, that any rescission was claimed by respondent or his attorney. This letter, standing alone, manifestly does not amount to a rescission, and in no previous correspondence was the contract rescinded.

Moreover, this letter was unauthorized by respondent (S. C. 30-36) and was written without his knowledge, and this testimony was uncontradicted. It was inferred by the Court at the trial and admitted by the counsel for the appellant that the attorney for the respondent would have no authority of his own volition to rescind this contract unless authorized by respondent.

At page 37, the Court made the following remark:—

> "Did Mr. Carton have any authority to rescind the contract for him, against his instructions, or without any instruction, any more than you would have to rescind for Mr. Williams at that time?
>
> Mr. Matlack: I don't suppose so."

Prior to the date of this letter and subsequent

thereto, respondent was continually after his attorney to have the contract completed (S. C. 36). In anticipation of becoming the owner of the premises, which he then occupied, respondent made repairs, had a re-building sale, engaged an architect, had plans drawn and incurred other expenses (S. C. 33-50). This sale was held in the Spring of 1922. Subsequent to the letter of April 28, 1922, counsel for respondent had conferences with Williams' counsel relative to this matter (S. C. 22-83-84). The fact that the deposit of $5,000, was retained by Williams or his counsel for more than a year after the letter of April 28, 1922, indicates strongly that there was no intention on the part of either party to consider the contract cancelled. As a matter of fact, the check was not returned until July, 1923, or until after negotiations had been finally broken off and a temporary lease entered into between the parties pending a suit for specific performance. In the interval between the date of the letter of April 28, 1922 and the final meeting in March or April there were several meetings between the parties and their attorneys, conferences between the attorneys alone and beginning in December, 1922 correspondence between the attorneys. There is nothing in the testimony to indicate that the defendant regarded this letter of April 28, as a rescission (S. C. 50) and the defendant did not definitely refuse to carry out the contract until the meetings held in the early part of 1923 (S. C. 50) and the reason then given had no reference to this letter (S.C. 50-60).

It is further important in this connection to note that despite the language used in the letter of April 24, 1922 (S. C. 77), to which the letter of April 28, 1922 was a reply, that Williams had not fully completed his part of the arrangement provided for by the contract of sale. Williams was in no position to give title at the time the letter of April 24th was written as is indicated by the order of the Court of Chancery

(S. C. 13). The order of sale provides that Williams, as guardian, sell the lands described in the petition and included in the contract between the parties and that before any deed is executed the sale and terms shall be reported to the Chancellor to the end that the Chancellor may pass upon same before confirmation of the sale.

Within a few days after this order was received, the letter of April 24, 1922 was written asking when Gates would be ready to take title. The evidence shows that Gates' counsel had received a copy of this order with the letter of April 24. It is apparent that counsel had knowledge of the contents of same and knew that Williams was in no position at that time to give title to the premises, and that he had not as yet fully completed his part of the contract, although he was in full possession of the further information desired by the Court as to the terms of sale, etc.

Counsel for appellant makes several statements of fact in his brief which are not warranted by the testimony in the case, particularly so, as to the length of time Daphne Williams, wife of Earnest Williams, defendant, had been a lunatic. There is nothing whatever to show the length of time, although counsel in his brief in one place states that she had been a lunatic for nine years.

Moreover, there is nothing in the testimony to indicate that the daughter of Daphne Williams would be her sole heir as is alleged by defendant under Point 3. There may have been other children so far as the testimony goes in this respect, no mention of them being made. Further there is nothing to indicate that Mrs. Williams had not made a will prior to her becoming an incompetent.

Counsel for defendant comments on the fact that Gates refused to accept the title, stating that "if Gates wanted the property, all he had to do was to accept Geran's invitation, pay the money and get the deed." As previously stated herein, and as shown by the or-

der of the Chancellor, Williams was in no position at that time to give a deed for the premises.

Counsel makes reference to the fact, under point 3, that although Gates testified that the property had not appreciated in value, that was undoubtedly the reason why he wanted it. Gates specifically testified that the property had not increased in value (54), and the defendant, on direct examination, would not admit that the property had increased in value (S. C. 63). If the property did become more valuable after the signing of the contract, that would seem to be a reason why Gates would want the contract carried out instead of rescinding same as is alleged by appellant. As a matter of fact, Gates was in possession of a portion of these premises, had been for several years, had a large furniture store on the property and owned adjoining property and he was anxious to obtain the premises in which he was a tenant for the purpose of erecting a large building on the site.

Respondent respectfully submits that the chronology submitted by appellant in his brief is not complete and that extracts from various letters cannot show the true meaning of the correspondence unless the context is read.

Complainant further submits that the chronology is not complete, in that, no mention is made of conferences between the parties subsequent to April 28, 1922 and prior to the letter of December 1, 1922.

POINT I.

THE CONTRACT WAS PROPERLY EXECUTED AND ALL THE PARTIES WERE PROPERLY BEFORE THE COURT.

No question was raised at the trial in the Court of Chancery as to whether or not this contract was executed by the proper parties. As previously stated herein the only question involved was the ques-

tion of rescission. It seems rather late to raise any question as to the propriety of the execution of the contract by the defendant as attorney-in-fact for his wife, Daphne Williams. He signed it as attorney-in-fact and whether or not he was the acting attorney-in-fact was not discussed. He is estopped by his own conduct from raising any question as to his authority as such attorney-in-fact. He will not be heard on a matter not raised in the Court below.

In the case of Ruggles vs. the Ocean Accident, etc., Co. decided by the Court of Errors and Appeals and reported in 89 N. J. Law page 180, the Court said:

> "In State v. Shupe, 88 N. J. L. 610, this court observed that it is a settled rule that a party need not be heard on a point not taken or a matter not raised and considered in the court below, referring to the cases in N. J. Dig. Anno., tit., "Appeal and Error," 5 (a)"
>
> Roberson vs. Crichfield, 87 N. J. Law page 708.

Respondent submits that the appellant asserted that he was the attorney-in-fact for his wife, Daphne Williams, and the facts of the case show that she was a party privy in interest and therefore this matter was properly before the Court. If appellant expected to rely upon the point set forth that Daphne Williams was not a party to the contract, that defense should have been set up in the answer.

Miller vs. Miller 25 Equity, 354 at 365.

In Cavanna vs. Brooks decided by the Court of Errors and Appeals and reported in 127 Atl. 247 the Syllabus reads:

> "Specific performance will not be refused, on the ground of lack of mutuality in the remedy, because at the time of the contract

the complainant did not have title to the premises to be conveyed, provided that such title is acquired and can be conveyed at the time for the performance of the agreement."

Respondent submits that the cases cited in support of defendant's contention under Point 1 are not applicable in that they refer particularly to persons, strangers to the contract, and therefore not entitled to the rights or subject to the liabilities which arise out of it. Manifestly that situation does not exist in the case at bar. Moreover all of the interest of the incompetent is covered in the proceedings to sell.

POINT II.

ACKNOWLEDGMENT OF THE CONTRACT BY THE WIFE WAS NOT NECESSARY AND SUCH ACKNOWLEDGMENT WOULD HAVE BEEN OF NO EFFECT.

Appellant argues that Daphne Williams, the wife, was a lunatic and then conversely argues that her acknowledgment should have been taken to the contract of sale. Although the statute of conveyances set forth by appellant provides that no estate of a femme covert in any lands shall pass by her deed of conveyance without an acknowledgment by her, this statute is not intended to include or refer to a person of unsound mind. If she had acknowledged this contract of sale it would have had no binding force and therefore would have been absolutely invalid as to her. Her interest was disposed of in the Chancery proceedings.

POINT III.

THE DEFENDANT WAS ABLE TO CONVEY AND SHOULD BE REQUIRED TO CARRY OUT THE TERMS OF THE CONTRACT.

When this contract was executed both parties knew that it would be necessary to apply to the Court of Chancery for permission to carry out the terms of the contract. Williams had been the attorney-in-fact for his wife for some time as is shown by the fact that Gates paid rent to Williams, and after the refusal of Williams to sell the property, he, by his testimony, re-financed same (S.C. 60). In his application to the Court of Chancery he set out that he was the guardian of Daphne Williams, the owner, and he is recognized as her guardian by his counsel, as stated in the letter from Geran to respondent on April 24th, 1922, (S.C. 77). Whether Williams signed the contract as attorney-in- fact for Daphne Williams or as guardian for Daphne Williams it is submitted makes no difference whatever in this matter. He was her guardian as the testimony and exhibits show.

The contract was made with the understanding that he would apply to the Court of Chancery for permission to sell the property, which he necessarily would have to do as the guardian of Daphne Williams. As previously stated in Point I, Daphne Williams was not a stranger to this contract. She was privy in interest and under the cases cited under Point I, the necessary parties were properly before the Court of Chancery.

Counsel makes reference to the fact that the interest of a lunatic would not be secured under such a sale. As a matter of fact the protecting arm of the Court of Chancery was thrown around the lunatic and her interests were under the full protection of the Court. This matter was investigated thoroughly

before any order directing the sale was made by the Chancellor. The matter had been referred to a special master who investigated the matter and presumably had the defendant before him for further inquiry. He reported, recommending the sale as appears from the order of sale (S.C. 13). This order recited that from the report of the special master it appears satisfactorily to the Chancellor that the interest of the lunatic requires and will be substantially promoted by the sale of her real estate, mentioned in the petition in this matter, for reasons, stated in said report. This petition was directed specifically to the sale of the particular real estate involved in this suit (S.C. 52).

Respondent further submits that Williams is estopped at this time to raise any question as to his power as guardian of Daphne Williams to sell the real estate as directed by the Court of Chancery. He did not raise the question in his answer or at the trial and it is only on the brief of defendant that the question has been raised at all.

The fact that Williams' daughter reached the age of twenty-one years in 1923 would have no bearing whatever. She was near her majority when the contract was entered into by Williams with full knowledge of the fact, and if he at that time and thereafter deemed it advisable that the interests of his wife in this particular real estate be sold, the objection of the daughter to said sale is absolutely without merit and should have no weight in the determination of this suit. There is nothing in the testimony to show that this daughter is the sole heir- at-law of Daphne Williams.

The only reason Williams offered for his refusal to carry out the contract is stated by him (S.C. 60), to be that Gates had abandoned the contract, that he had to re-finance the property and get the property straightened out again and after all that trouble he didn't care to sell. The paying off of an old mort-

gage and the securing of a new mortgage on the property could not have been very expensive and if it was necessary to place a new mortgage on the property it was due to Williams own refusal to sell the property in conformity with the provisions of the contract. As to the other excuse that because of inconvenience, he did not desire to sell the property, that is not a substantial reason for a refusal to carry out an order of the Court of Chancery to sell the property.

POINT IV.

THE DELAY WAS NOT DUE TO ANY FAULT OF COMPLAINANT.

Prior to the letter of April 28th, 1922, written by complainant's counsel there is nothing to indicate a rescission of the contract. Gates was in possession at the time the contract was entered into and had been for several years prior thereto. In December, 1921, he found that certain leases would not expire at the time he understood they would terminate. Notwithstanding that fact Gates went ahead with his plans for the purchase of the property and even after the date of the letter relied upon by the defendant, had his plans drawn and everything arranged to go right ahead as soon as he got title to the property (S.C. 34). The Complainant instructed his attorney to keep right after the title (S.C. 36).

The actions of Gates did not indicate that he intended to rescind the contract. Gates testimony was that he did not authorize the writing of the letter of April 28, 1922.

Comment has been made by counsel for the defendant that the respondent's attorney did not take the stand and corroborate Gates in his statement. Mr. Carton was Gates' attorney and not his witness. The fact that he did not act in both the capacity of

attorney and witness at the trial should not be used in derogation of the testimony of the witness. The fact remains that Gates testified that he did not authorize this letter and that he did not know it had been written until it was shown him a few days before the trial (S.C. 36). If such were the fact counsel would not have authority to cancel the contract. This was so regarded by the Court at the trial (S.C. 37).

Respondent further contends that the letter of April 28th, 1922, did not in itself constitute a rescission and that no previous correspondence could be construed as constituting a rescission of the contract. All the other correspondence is just the opposite of any intention to rescind.

Prior to April 24th, 1922, defendant was in no position to carry out the terms of the contract. Respondent submits that subsequent to April 24th, 1922, he has made no effort to consummate the contract or to secure the necessary decree from the Court of Chancery which would enable him to execute the deed to Gates.

After the letter of April 28th, 1922, Gates counsel met with counsel for the defendant and discussed the matter. This fact is shown by the statement of defendant's counsel (22). Gates testified that there were conferences held and in the meantime Williams or his counsel retained the check, no demand ever having been made by Gates for its return. The fact that this check was retained by defendant until July 1923, manifests the understanding of both parties that it was not intended that this contract should be rescinded. It was not until March or April, 1923, that final negotiations were held and a temporary lease was entered into to extend until the matter should be finally disposed of by Court action (S.C. 85). After that time defendant's counsel returned the check to Gates.

There was no plain or direct notice either by

letter or verbally to defendant or his counsel from either the complainant or his attorney that Gates did not intend to conform to the terms of the contract. On the other hand the proof shows that Gates was ready, eager and willing to perform the contract and carry out the terms of same. He had made arrangements to finance the proposition with his bank; he had building plans prepared; he had a sale in anticipation of rebuilding and he was not guilty of any laches in the bringing of this suit prior to March or April, 1923, as the evidence shows that negotiations extended to that point. Between April 1923 and December of that year the delay in bringing suit is accounted for by the absence or illness of complainant's counsel (S.C. 53). Even if there had been no excuse for the delay between those periods that fact in itself would not be sufficient to constitute laches on the part of complainant. It has been held in numerous cases that mere lapse of time in itself does not constitute laches but that a delay may be explained. This was held in New Barbadoes Toll Bridge Co. vs. Vreeland, 4 Equity, 157.

In Meidling vs. Trefz, 48 Equity, 638 the Court of Errors and Appeals at page 644, said:

> "No rule respecting the length of delay which will be fatal to relief can be laid down, for each case must depend on its peculiar circumstances."

Defendant has not shown that he was prejudiced by the delay other than that he was inconvenienced. Complainant respectfully submits that he was not prejudiced thereby.

Moreover Gates was in possession of this property and the continuance of possession after the expiration of his lease should be considered an assertion of his right under the contract and excludes the notion of abandonment in such case.

Pomeroy, Spec. Perf. Section 412 and cases cited.
Ketchum vs. Owen, 55 N. J. Equity at 349.

Inferences, assertions, and innuendoes have been made throughout the brief of defendant that Gates was untruthful. These allegations are based apparently upon the fact that Gates was unable to glibly recite months and dates of events happening three years prior thereto.

POINT V.

THE COMPLAINANT SUSTAINED THE BURDEN OF PROOF.

There were only two witnesses in this suit, complainant and defendant Williams, and the only question involved at the trial was the question as to whether or not complainant had rescinded the contract by the letter of April 28, 1922, and if not, whether he was guilty of laches in bringing suit for specific performance.

At the conclusion of the trial, Vice Chancellor Foster expressed extempore that the complainant had not sustained the burden of proof. He was not positive of that however, at the time, or he would have given a decision to that effect. Instead of that, he requested that both sides submit briefs. Before he could decide the matter, the learned Vice Chancellor died, and the matter was re-referred to Vice Chancellor Berry, who examined the testimony carefully and upon the pleadings and proofs he decided that the contract had never been rescinded or abandoned by the complainant (S.C. 67).

Defendant again makes reference to the fact that counsel for the complainant did not take the witness stand. We have already answered that comment in the early part of this brief. Counsel, at the trial, admitted that without express authority from Gates

that Mr. Carton was without power to cancel this contract. This was also the opinion of the learned Vice Chancellor. (S.C. 37).

POINT VI.

THE RIGHT OF COMPLAINANT TO SPECIFIC PERFORMANCE WAS CLEARLY AND CONCLUSIVELY ESTABLISHED.

There was no point raised at the trial as to the meaning of the contract or that the contract was not equitable in every way. Its terms were clearly and definitely established, and the parties were properly before the Court.

The cases cited by defendant in support of his contention under this point are not analogous to the situation in the instant case. In the case of Kelleher vs. Bragg, 96 N. J. Equity, 25, the facts were that the complainant was acting in a fiduciary relationship and purchased the property for her own use, whereas the seller supposed she was buying for a friend to whom he desired to sell.

In Rabinowitz vs. Rooney, also cited by defendant, an examination of the case shows that two of several heirs signed an agreement of sale and the vendee knew at the time there were other heirs.

Friedman vs. Slaff, 95 N. J. Equity, 767, another case upon which the defendant relies, has no similarity with the present case.

Although it is true that Courts of Equity hold that a contract of sale must be clearly proved to entitle specific performance, complainant submits that there was no question as to the terms of this contract, either in the pleadings or in the evidence offered before the Court.

From the testimony of Gates, his right to specific performance was established by the preponderance

of evidence according to the determination of the learned Vice Chancellor.

Respondent submits that there was no differing of the minds of the judicial officers of the Court below as is alleged under this point of appellant's brief. Vice Chancellor Foster had not settled this matter definitely, but merely expressed an opinion and reserved decision until he could make a more thorough examination of the testimony and receive the briefs of the parties to this suit.

We submit there is no doubt in the proofs and the conclusions to be drawn therefrom.

Complainant respectfully submits that the decree of the Court of Chancery should be affirmed.

DURAND, IVINS & CARTON,
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JAMES D. CARTON
of Counsel.