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Bill of Complaint.

BILL OF COMPLAINT.

Filed October 29, 1926.

In Chancery of New Jersey

To the Honorable Edwin Robert Walker, Chan- 10
cellor of the State of New Jersey.

The complainants, Michael Larkin and Mollie Larkin, his wife, of the City of Newark, in the County of Essex and State of New Jersey, respectfully show that:

1. On June 3, 1926, the complainant, Michael Larkin, was seized in fee simple of all that certain lot, tract or parcel of land and premises situate, lying and being in the City of Newark, County of Essex and State of New Jersey, 20
bounded and described as follows:

BEGINNING at a point in the southerly line of Lyons avenue therein distant one thousand feet and nine hundredths of a foot westerly from the westerly line of Elizabeth avenue, as the same are laid down on a map of the property of the Weequahic Park Land and Improvement Company, revised in 1909, 30
by George H. Gardner, surveyor, revised in 1912, by John E. Laird, surveyor, which beginning point is also the northwesterly corner of lot number 900 on said map; thence running westerly along the said southerly line of Lyons avenue thirty feet and four hundredths of a foot to the northeasterly corner of lot number 902 on said map; thence running southerly along the easterly line of lot number 902 ninety-four feet and ninety hun-

Bill of Complaint.

10 dredths of a foot to the northwesterly corner of lot number 907 on said map; thence running easterly along the northerly line of said lot number 907, thirty feet to the southwest-
 20 erly corner of said lot number 900; thence running northerly along the westerly line of said lot number 900, ninety-six feet and fifty-
 two hundredths of a foot to the said south-
 erly line of Lyons avenue and the point and place of BEGINNING, together with the build-
 ing now thereon.

Being lot number 901 on map of property of the Weequahic Park Land and Improvement Company, situated in the City of Newark, re-
 20 vised in 1909, by George H. Gardner, surveyor, revised in 1912, by John E. Laird, surveyor.

Being the same premises conveyed to the said Michael Larkin, by Michael Ward and Beatrice Ward, his wife, by deed dated April 20, 1923, and recorded in Book D-68 of Deeds for Essex County, on pages 210-211.

30 2. On the day first mentioned the complainants entered into a certain agreement in writing with Rudolph A. Koether, wherein and whereby complainants agreed to convey the said lands and premises by deed of warranty on or before the
 40 30th day of June, 1926; to the said Rudolph A. Koether in the consideration of the payment by said Rudolph A. Koether of the sum of \$21,000 and the said Rudolph A. Koether agreed to pay to complainants said purchase price of \$21,000 by the payment of \$2,100 upon the execution of said agreement and the payment of the remainder of said purchase price upon the delivery by the complainants of said deed to said Rudolph A.

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Bill of Complaint.

Koether of the sum of \$18,900; that said deed was to be delivered and the said \$18,900 paid at the office of William F. Conway, counselor-at-law, 19 Clinton street, Newark, N. J., between the hours of ten o'clock in the forenoon and four o'clock in the afternoon of the said day of closing title. A true copy of the said written agreement is hereto annexed and made a part hereof and marked "Exhibit A." 10

3. The said Rudolph A. Koether paid to complainants the said sum of \$2,100 at the time of the execution and delivery of the said agreement in writing.

4. On the said 30th day of June, 1926, at the hour of ten o'clock in the forenoon, complainants duly attended at the office of the said William F. Conway, 19 Clinton street, Newark, N. J., with a warranty deed conveying the said lands and premises hereinabove referred to, to the said Rudolph A. Koether and wife (pursuant to his direction), duly executed and acknowledged by the complainants, for the purpose of delivering the said deed to the said Rudolph A. Koether on the payment by the said Rudolph A. Koether of the balance of the purchase money pursuant to the terms of the aforesaid agreement; that the said Rudolph A. Koether did not appear at the said time and place, nor any time between the hours of ten o'clock in the forenoon and four o'clock in the afternoon of that day, pursuant to the terms of the said agreement. 20 30

5. Complainants have always been ready and willing and now tender themselves ready and willing to perform their part of the said agreement, and on being paid the remainder of said purchase money with interest, to convey the said 40

Bill of Complaint.

lands and premises to the said Rudolph A. Koether by warranty deed duly executed by complainants.

10 6. On or about October 6, 1926, the said Rudolph A. Koether instituted a certain action at law in the Essex County Circuit Court against the complainants, wherein he alleges that the complainants are not able to carry out the aforesaid contract because of a certain alleged defect of title therein, and in said action has demanded from the complainants the return of the said sum of \$2,100, together with interest thereon, and the payment to him of expenses of examining title and making survey of the said premises; that said claims of the said Rudolph A. Koether have no foundation in fact and that the complainants have been and are able to convey a good marketable title to the aforesaid premises.

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

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

30 2. That the said Rudolph A. Koether may be compelled by the decree of this court specifically and to pay to complainants the remainder of the said purchase money as in and by said agreement provided, with interest from the time said purchase money ought to have been paid, on delivery by complainants to said Rudolph A. Koether, of a deed executed by complainants as in said agreement provided.

40 3. That in case the said defendant, Rudolph A. Koether, should within the time limited by this court for such performance of said contract,

Bill of Complaint.

fail and neglect, upon the tender of said deed, to pay the said remainder of said purchase money, that then and in that event the said sum together with interests and costs may be and become a lien upon said lands and premises in favor of the complainants, and that the said lands and premises may be sold under the direction of this court for the satisfaction of such lien so impressed on said lands and premises; and in case a deficiency should arise upon said sale that the said defendant may be ordered by this court to pay such deficiency, together with interests and costs to these complainants.

10

4. That the said Rudolph A. Koether, his counsel, attorneys, solicitors and agents and each and every of them may be restrained and enjoined from further proceeding against complainants in the said action at law commenced against them in the Essex County Circuit Court and now pending therein.

20

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

LUM, TAMBLYN & COLYER,

30

Solicitors for and of Counsel
with Complainants.

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EXHIBIT A.

THIS AGREEMENT, Made the Third day of June, in the year of our Lord One Thousand Nine Hundred and Twenty-six, between MICHAEL LARKIN and MOLLIE LARKIN, his wife, of the City of Newark in the County of Essex and State of New Jersey party of the First Part; and Rudolph A. Koether, of the City of Newark in the County of Essex and State of New Jersey party of the Second part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of TWENTY-ONE THOUSAND DOLLARS, to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenant and agreements herein 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 party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of Warranty, free from all encumbrance, except as hereinafter stated, on or before the thirtieth day of June, 1926, next ensuing the date hereof, all that certain lot, tract, or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark, in the County of Essex and State of New Jersey.

BEGINNING at a point in the southerly line of Lyons Avenue therein distant one thousand feet and nine hundredths of a foot westerly from the westerly line of Elizabeth Avenue, as the same are laid down on a map of the property of the Weequahic Park Land

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and Improvement Company, revised in 1909, by George H. Gardner, surveyor, revised in 1912 by John E. Laird, surveyor, which beginning point is also the northwesterly corner of lot number 900 on said map; thence running westerly along the said southerly line of Lyons Avenue thirty feet and four hundredths of a foot to the northeasterly corner of lot number 902 on said map; thence running southerly along the easterly line of lot number 902 ninety-four feet and ninety hundredths of a foot to the northwesterly corner of lot number 907 on said map; thence running easterly along the northerly line of said lot number 907, thirty feet to the southwest-erly corner of said lot number 900; thence running northerly along the westerly line of said lot number 900, ninety-six feet and fifty-two hundredths of a foot to the said southerly line of Lyons Avenue and the point and place of BEGINNING, together with the building now thereon.

Being lot number 901 on map of property of the Weequahic Park Lank and Improvement Company, situated in the City of Newark, revised in 1909 by George H. Gardner, surveyor, revised in 1912 by John E. Laird, surveyor.

Being the same premises conveyed to the said Michael Larkin, by Michael Ward and Beatrice Ward, his wife, by deed dated April 20, 1923, and recorded in Book D68 of Deeds for Essex County, on pages 210-211.

The above property is to be conveyed subject to the rights, if any, of the receiver or trustee in bankruptcy of Herman B. Springer, in and to the lease covering the store in the premises, #78 Lyons Avenue, Newark, N. J.

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Bill of Complaint—Exhibit A.

10 And the said Rudolph A. Koether, for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that he the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of TWENTY-ONE THOUSAND DOLLARS, as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On Execution of this agreement for	
which it is also a receipt.....	\$ 2,100.00
On delivery of deed, cash.....	18,900.00
	<hr/>
	21,000.00

20

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

30 AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed of Warranty, shall be delivered and received at the office of William F. Conway, Counsellor-at-Law, 19 Clinton Street, Newark, N. J., Room #5, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon on the said day of closing title, next ensuing the date hereof.

40 The rents of said premises, insurance premiums, water rents, taxes, and interest on Mortgage, if any, shall be adjusted, apportioned and allowed as of the day of delivery of said deed.

Bill of Complaint—Exhibit A.

Gas and electric fixtures, gas stoves, hot water heaters and chandeliers, carpets, linoleum, mats, and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any, and all other personal property appurtenant to or used in the operation of said premises is represented to be owned by seller and is included in this sale. 10

The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part.

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part, shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated.

It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations and the provisions of the New Jersey State Tenement House Act as enforced by the State Board of Tenement House Supervision, to be shown by the report of the department or board enforcing the same where such ordinances, regulations and said act apply. 20 30

It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any Martin Act proceedings or any Act for the Sale of Land for non-payment of municipal taxes or assessments.

If at the time for the delivery of the deeds, the premises or any part thereof shall be or shall have been affected by an assessment or assessments which are or may become payable in an- 40

Bill of Complaint—Exhibit A.

nual installments of which the first installment is then due or has been paid, then for the purposes of this contract all the unpaid installments of any such assessment, including those which are to become due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged by the seller thereof, upon the delivery of the deed.

AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators.

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

(Signed) MICHAEL LARKIN (L. S.)
" MOLLIE LARKIN (L. S.)
" RUDOLPH A. KOETHER (L. S.)

Signed, sealed and Delivered in the presence of
WILLIAM F. CONWAY.

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Bill of Complaint—Exhibit A.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss:

BE IT REMEMBERED, that on this Third day of June, in the year of our Lord One Thousand Nine Hundred and Twenty-six, before me, the subscriber, A MASTER IN CHANCERY OF NEW JERSEY, personally appeared MICHAEL LARKIN AND MOLLIE LARKIN, his wife, who, I am satisfied, are the Grantors in the within agreement named; and I, having first made known to them the contents thereof, they did then acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed:

And the said MOLLIE LARKIN, being by me privately examined, separate and apart from her husband, did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, FREELY, without any fear, threats or compulsion of her said husband.

(Signed) WILLIAM F. CONWAY
A Master in Chancery of New Jersey.

In consideration of mutual promises and agreements herein stated, we hereby agree to extend the date for the delivery of deed and execution of this contract to _____ at the same hour and place

WITNESS our hands and seals this day of _____ A. D. 19

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Bill of Complaint—Exhibit A.

I HEREBY order and direct Michael Larkin and Mollie Larkin, his wife, to make a deed of the within described premises, to myself and my wife, Josephine A. Koether,

(Signed) RUDOLPH A. KOETHER.

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Answer and Counter-claim.

ANSWER AND COUNTER-CLAIM.

IN CHANCERY OF NEW JERSEY.

Between

MICHAEL LARKIN, *et al.*,
Complainants,
and
RUDOLPH A. KOETHER,
Defendant.

On Bill, &c.
Answer and
Counter-
Claim.

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The answer of Rudolph A. Koether, defendant, to the bill of complaint of Michael Larkin and Mollie Larkin, complainants.

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1. Paragraph 1 is denied. This defendant is informed and believes that the complainants do not own a part of said land on which the building referred to in par. 1 stands; the part being a strip of land extending across the front of said land as described in the bill of complaint, the whole width of said building, and being about 1½ feet wide on the easterly side and 2 19/100 feet on the westerly side. This defendant is informed and believes that the building stands in part on the front on land to which the complainants have no title; and they say that this condition is shown by a survey made by Marshall A. Congleton, surveyor, on June 29, 1926.

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2. Paragraph 2 is admitted.

3. Paragraph 3 is admitted.

4. Paragraph 4 is denied, and defendant says that complainants were notified that the title

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Answer and Counter-claim.

was defective and that the building stood on land to which the complainants had no title and could not give title and that the defendant would not accept the deed of conveyance.

10 5. Paragraph 5 is denied, and defendant says that the complainants have not at any time been ready to convey a marketable title in accordance with the agreement made by them.

6. Paragraph 6 is admitted.

The defendant by way of counter-claim says:

20 1. On June 3, 1926, at Newark, in the County of Essex, he entered into an agreement in writing with the complainants for the purchase of lands described in paragraph 1 of the bill of complaint, and the complainants agreed to convey the said land to him on June 30, 1926, by deed of warranty to him free from all encumbrances.

2. Defendant paid to the complainants pursuant to the agreement in writing aforesaid and on account of the purchase price, the sum of \$2,100.00 on June 3, 1926.

30 3. It was expressly agreed in the said agreement in writing aforesaid, that the buildings upon said land were all within the boundary lines of the property, as described in the deed therefor, and that there were no encroachments thereon and that the buildings comply with municipal ordinances.

40 4. Defendant alleges that the buildings aforesaid are not within the boundary lines of the property as described in the deed therefor, and extend over into Lyons avenue on the land of the City of Newark, and that the complainants were not able to carry out said contract because

Answer and Counter-claim.

of the defect in the title as aforesaid, and that they have no title to the land on which the building stands in part.

5. Defendant has incurred for expenses of examining the title and making survey, the sum of \$290.27, which defendant alleges is a reasonable amount. 10

6. Defendant notified complainants on June 30, 1926, that he would not accept a deed of conveyance for the reasons aforesaid and demanded the return to him of the said sum of \$2,100.00, together with interest thereon, and the payment to him of the reasonable expenses of examining the title and making the survey aforesaid, and the complainants have neglected and refused to pay the same. 20

Defendant prays that the agreement in writing made by and between him and the complainants, may be rescinded, and that he may recover from the complainants the said sum of \$2,100.00, together with interest thereon, and the sum of \$290.27 for the reasonable expenses of examining the title and making the survey, and also his costs of this suit and of the action at law.

FRANK E. BRADNER, 30

Solicitor for and of Counsel with Defendant.

Offer of Documentary Evidence.

IN CHANCERY OF NEW JERSEY.

*Between*MICHAEL LARKIN, and MOLLIE
LARKIN, his wife,*Complainants,**and*

RUDOLPH A. KOETHER,

Defendant.

Transcript of testimony taken in the above-entitled cause before Hon. Maja Leon Berry, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, on Monday, May 16, 1927, at 10 A. M.

Appearances:

For complainants, Messrs. Lum, Tamblin & Colyer, by Chester W. Fairlie, Esq.

For defendant, Frank E. Bradner, Esq.

It is admitted that on June 3, 1926, the complainant, Michael Larkin, was the owner in fee simple of the premises described in a contract bearing that date, made by him and his wife to Rudolph A. Koether, the defendant herein.

(Contract marked Exhibit C. 1.)

Mr. Fairlie: I offer in evidence the deed from Michael Ward and his wife to Michael Larkin, dated April 20, 1923, and recorded in the Essex County Register's office, in Book D-68 of Deeds for that county, on pages 210 and 211, by which the premises in question were conveyed to Michael Larkin, containing the same description as in the contract.

(Marked Exhibit C. 2.)

Offer of Documentary Evidence.

It is stipulated that at the time of the signing of the contract, C. 1, the defendant paid to Mr. Larkin the sum of \$2,100 mentioned in the contract.

Mr. Bradner: It is admitted that on June 29th, the day before the closing time, Mr. Conway, the agent of the company, was notified by the defendant's attorney, Mr. Erlich, that the title would not be accepted because the building was not within the boundary lines as described in the deed. We refused to take it, and demanded our contract back with the interest and reasonable search fees.

The Court: Under those circumstances it wasn't necessary for them to be there and offer any deed.

Mr. Bradner: Then after we waited some time for the complainant to pay back the money, we started suit in the Essex County Circuit Court, in which the summons is dated October 6, 1926, to recover the deposit money and interest and reasonable search fees.

(Complaint marked Exhibit D. 1.)

Mr. Fairlie: The summons is dated October 6, 1926. There is an entry, in pencil, "Served October 11, 1926."

Mr. Bradner: Before starting that suit, and on July 9, 1926, a letter was written to Mr. Conway, I presume by Mr. Erlich—I presume you have the original.

(Letter marked Exhibit D. 2.)

The Court: Is it admitted that the vendor was ready, willing and able to convey the property which he agreed to convey, except for this encroachment?

Offer of Documentary Evidence.

Mr. Bradner: Yes.

10 The complainant then applied to Vice-Chancellor Church and obtained an order to show cause why the action at law should not be enjoined, and on the return of that order I consented to the injunction upon the condition that we would be allowed a counter-claim for our deposit money and interest and reasonable search fees. There might possibly be some question there as to whether the Court would fix the fees, but it is not a very important matter in this case.

Mr. Fairlie: Will you produce the letter that was written to you after the ordinance vacating had been entered by the City?

20 Mr. Bradner: After the letter of July 9th had been written by Mr. Erlich to Mr. Conway and it didn't bring any results, the claim was put in my hands by Mr. Koether.

Mr. Fairlie: I prefer that you let me see those letters, so that I get them all in and not just those you pick out.

Mr. Bradner: I then communicated with Mr. Conway on September 7, 1926, and I call for that letter.

30 (Letter produced and marked Exhibit D. 3.)

Mr. Bradner: I received a letter from Mr. Conway dated September 13, 1926, and I offer that in evidence.

(Marked Exhibit D. 4.)

I afterwards received a letter from Mr. Conway, dated September 26, 1926, which I offer in evidence.

(Marked Exhibit D. 5.)

Offer of Documentary Evidence.

There is no allegation in the bill of complaint that this street has been vacated, and the defense is a non-compliance with the contract of sale. The action at law is admitted. The refusal to pay back the money is admitted. And on Thursday last Mr. Lum told me that they had an ordinance vacating that portion of Lyons avenue, and I consented to the use of a certified copy of that in evidence, if any ordinance is admissible in evidence in this case for any purpose. 10

The Court: I understand what you mean.

Mr. Bradner: There is nothing in the certified copy to show when application was made to the City of Newark to pass such an ordinance, and I understand it was not done until August 11, 1926. Is that the fact? 20

Mr. Fairlie: We will have to supply that date.

I offer in evidence certified copy of the ordinance which has been referred to.

Mr. Bradner: I object to any proof of the ordinance, because it is not an issue in this case. There is no allegation of the vacation of the street, and the issue is not raised in the pleadings. 30

The Court: I thought you just said you admitted the passage of the ordinance if it became material.

Mr. Bradner: I don't object to the paper being proved in that way, but I object to any proof of the vacation of the street, because it is not an issue in this case.

The Court: You object to the materiality?

Offer of Documentary Evidence.

Mr. Bradner: Yes, and my reason for making it is that if that issue had been raised, we would have come back with an answer setting up that time was of the essence of this contract; not expressly so, but by implication, and that the complainant stood on his rights. He couldn't wait
 10 until we brought an action at law and then come into the Chancery.

The Court: There was an effort at rescission?

Mr. Bradner: On our part.

The Court: My recollection is that where there is an acquiescence at rescission, the time to get ready is not extended to the final decree.

Mr. Bradner: That is true, too, but even
 20 apart from that, where they wait from June 29th to sometime in the latter part of October to file that bill, I claim that would be an acquiescence in that rescission.

The Court: You object to the competency of it?

Mr. Bradner: Yes.

The Court: I will admit it. I may not consider it.

30 Mr. Fairlie: If there is any merit in Mr. Bradner's point, that this cannot be considered by the Court unless it is specially pleaded or alleged in the bill of complaint, I want to note now my application to make such amendment to the bill of complaint as may be necessary to cover the facts which are agreed upon; that is, if the facts that we all admit aren't adequately covered in the bill of complaint, I want to amend it so as
 40 to cover it.

Offer of Documentary Evidence.

The Court: How can you be injured by such an amendment?

Mr. Bradner: I cannot be injured by it, if that is understood by the Court that the bill does allege the actual time when the application was made.
 10

The Court: I will permit the amendment.

Mr. Bradner: We make an answer, then, setting up the acquiescence and that time became of the essence by implication, and those facts we want to prove.

The Court: Your answer is that time became of the essence by implication?

Mr. Bradner: Yes.

Mr. Fairlie: You don't allege anything else
 20 by which time became of the essence, except by implication?

Mr. Bradner: That is all.

(Map of Weequahic Park Manor is offered in evidence and marked Exhibit D. 6.)

(Surveyor's sketch, made by Marshall A. Congleton, is offered in evidence and marked Exhibit D. 7.)
 30

Mr. Bradner: Could we have some understanding about the time when the application was made to the City to vacate the street? That must appear of record.

Mr. Fairlie: We will ascertain that, and it can be inserted later by Mr. Bindseil in the record.

Mr. Erlich: I learned this morning it was August 12th.

Mr. Fairlie: Let it appear as August 12th,
 40 subject to our verification.

Rudolph A. Koether, direct.

RUDOLPH A. KOETHER, defendant, being duly sworn according to law, testified as follows:

Direct examination by Mr. Bradner.

10 Q You are the defendant in this suit? A Yes.

Q What is your business? A I am a master plumber.

Q And at the time you agreed to purchase this property on Lyons avenue from Mr. Larkin, where did you have your place of business? A 17 Court street.

20 Q This property on Lyons avenue consists of what? A A lot 30 by 100 and a one-story building, 30 by 50, with two stores in it.

Q Where did you make your bargain with Mr. Larkin? A At his home.

Q Who were present? A My wife and Mr. Larkin.

Q At that time do you recall whether anything was said about moving your store?

30 Mr. Fairlie: This was all prior to the contract. I don't object to its going in. I want to call attention to this: I urge that it is not material or relevant.

The Court: I don't know what the purpose is. I understood Mr. Bradner to say that he wanted to show that it became of the essence of this contract by implication.

Mr. Bradner: Yes. I will state what I want to show. I want to show that this man was going to move right in there from his own store, and it was necessary to have the

Rudolph A. Koether, cross.

store, and also there was a new building going up adjoining this with stores, and he wanted to get in these stores, getting in there before the new store was finished.

The Court: And that fact was known to the other side?

Do you deny that? 10

Mr. Fairlie: I am told that it is not. I wasn't present.

The Court: I will admit it.

Q What was said about these stores? A I went to Mr. Larkin's house. I saw this property advertised for sale and I went down to find out what he wanted for it, and we agreed on the price and I told him the object of my looking for a place in that neighborhood—my place downtown 20 was being sold and I had to get out, and I wanted to move my business up there, and I also wanted to get this other store rented before this big operation was being completed.

Q What do you mean by "big operation?" A There was a row of stores right next door to this, on Bergen street; this adjoins a corner lot, and they were under construction, this row of buildings.

Q What was being put there, do you know? 30 A Stores and offices.

Q How many stores? A I don't know, but I should say about ten or twelve.

Cross examination by Mr. Fairlie.

Q \$21,000 is a very low price for this property, isn't it?

Mr. Bradner: I object. 40

Rudolph A. Koether, cross.

A I didn't make the price.

Q Is it a very low price?

The Court: What difference does it make?

A It was Mr. Larkin's price; it wasn't mine.

10 Q Did you have any conversation with Mr. Conway concerning this matter before the contract was signed? A I don't think so.

Q Were you in his office at all? A Yes, once.

Q Before the contract was signed? A I believe I was there with Mr. Erlich; I think he was the one—no, not before the contract was signed; never.

20 Q Are you positive about that? A I am most positive. I believe I was there only once with Mr. Erlich; I don't believe I was there more than once.

Q And where was the contract actually signed? A I can not answer that.

Q You don't remember where you signed it? A I believe I signed it in Mr. Conway's office. I am not sure on that point.

30 Q Were you present with Mr. Conway at any time before this was actually signed by you? A I was in his office once, but I don't know whether it was before or after the signing of the contract.

Q Did Mr. Conway witness your signature to the contract? A If it is on there, he must have.

Q Do you recall that he did? A No. I thought we signed that in Mr. Erlich's office; I am not clear or sure on that; it is a year ago.

Josephine Koether, direct.

Q But you remember distinctly what was said, do you, at the time the contract was signed?

A No. When that was signed?

Q Yes. A If you were to tell me, it might refresh my memory.

Q Tell me what was said by you at the time this contract was signed? A I can not. 10

Q Can you tell me anything that was said by you before this contract was signed? A Only what I said a few moments ago.

Q And where did that take place? A At Mr. Larkin's home.

Q And was the contract prepared at that time? A No, sir.

Q There were two stores in this building? A Yes.

20 Q Have you moved from your present place that you occupied at that time? A When I couldn't get this, I made arrangements to stay where I was.

Q You are still in your present place? A Yes.

JOSEPHINE KOETHER, being duly sworn according to law, on her oath testified as follows: 30

Direct examination by Mr. Bradner.

Q Mrs. Koether, do you recall going to Mr. Larkin's house with your husband? A Yes.

Q And what was the conversation about there? A I didn't pay much attention to the men when they were talking; I really can not tell you what they said.

Josephine Koether, cross.

Q What did you go there for? A I went with my husband; he asked me to go along.

Q What property was talked about? A The property on Lyons avenue.

Q Do you remember what it was; what kind of property? A Yes, it was the lot with those
10 two stores.

Q Do you remember any talk about stores? A My husband wanted the store. We had sold our place in Court street and he wanted it by the latter part of June, to move up there. He wanted to rent the other store before that other row of stores would be built.

Q You heard some talk like that there? A Yes, I positively did.

20 *Cross examination by Mr. Fairlie.*

Q Since this contract was signed, what have you heard your husband say about business conditions there in Lyons avenue where this property is situated?

Mr. Bradner: I object.

A We haven't talked about it.

30 Q Can you repeat any other conversation that took place at this conference you spoke of, other than what you have told us? A No, that is all we went there for.

Q Just that one thing is what you remember? A Yes.

Q And nothing else? A Because I had my mind set on him getting up there; it would be nearer to the home.

Mr. Bradner: We rest.

Michael Larkin, direct.

MICHAEL LARKIN, one of the complainants, being duly sworn, on his oath testified as follows:

Direct examination by Mr. Fairlie.

Q Did you have a conference at your home, at which Mr. and Mrs. Koether were present, before this agreement of sale in question was signed? A I come home one day at 12 o'clock for lunch and my wife had a telephone message, she said, from a man named Koether; he is a plumber on Lyons avenue. I said, "I think I know the gentleman." 10

The Court: Never mind your conversation with your wife; what we are interested in is, what happened between you and Mr. Koether. 20

Q What conversation took place between you and Mr. Koether? A He told her that he would come to my home that night.

Q And after he got there, what did he say and what did you say? A We made arrangement about price; I asked \$23,500 and he asked me if that was my lowest figure. I said to him "Yes," so we talked there awhile, and he said, "Well, can't you let me have it a little lower?" I said, "Yes, I will let you have it for \$21,000, provided you pay me cash." He said, "All right." He gave me three \$20 bills, \$60 dollars cash, and I gave him a note for it; that was to bind the bargain until we signed the contract in Mr. Conway's office, and there he gave me \$2,040, making \$2,100. 30

Q It was signed in Mr. Conway's office? A Yes. 40

Michael Larkin, direct.

Q And Mr. Conway witnessed the signatures while you were there? A Yes.

Q Was anything said by Mr. Koether to you at the time he first came to your home, in respect to his wanting this property immediately for any purpose, or anything of that kind? A Yes; I
10 asked him, "What are you going to do with the stores? Are you going to move up there?" He said, "Oh, no, I will keep them for an investment." That was all that was said.

Q Was any mention of that made? A No mention of his business. He said he would stay right where he was, on Court street. He mentioned he sold his property there.

Q At the time this contract was signed in Mr. Conway's office, was anything said by Mr.
20 Koether in respect to what he wanted to use this property for? A No, not that I remember.

Q Has he ever said anything to you as to whether or not he has learned anything further about business conditions on Lyons avenue since this contract was signed? A Yes.

Q What has he said to you? Only what he has said.

Mr. Bradner: I object.

30 The Court: I will permit you to ask the question but I don't think this has much more weight than the other testimony that has gone in, and I don't consider that has very much.

Q Answer what was said by Mr. Koether to you concerning his use of the property.

Mr. Bradner: When?

Michael Larkin, cross.

Q When and where was it said? A That was at my home that evening I asked him—when he gave me the \$60, I said, "Are you going to move your plumbing business up there?" Because I understand he said he sold it.

Q Afterward, after the contract was signed,
10 did you have any further conversation with him? A No.

Cross examination by Mr. Bradner.

Q Were those stores of yours vacant at the time you made the contract? A Now, one of them I think was, and the other fellow was—he got in some trouble; he got out right after that.

Q And is it a fact that a new building was going up on Bergen street? A That building
20 was up and being trimmed; it was practically finished; that was around the corner. I faced like Broad street and that was down the side street.

Q At that conversation at your house, was anything said about the new stores? A No, Mr. Koether said they will never let them stores; they are a lot of little handboxes.

Q There was something said about that,
30 then? A That is about all; it wasn't much.

Q Who started the conversation about the new stores? A I don't know; maybe him, maybe myself. He said they were building.

Q How was anybody interested in the new stores? Do you recall that? A I don't understand what you mean.

Q You said something was said about that.
A Only about they were small, and he brought up the subject.

Exhibit D. 2.

Q Hadn't he spoken to you about those new stores going up and there might be a good deal of competition there? A No, I don't remember that.

Q He simply said, without any reason for it, apparently, whatever, "Those stores don't amount to anything; they are a lot of hand-boxes?" A Something like that.

Q I would like to ask you whether this property has been leased to anybody since you made this contract? A No.

Q Stands vacant yet? A Yes.

Q Have you tried to let it to anybody? A I wouldn't let it. I didn't know whether I would be right or not. I didn't know whether I had the right to let it or not.

20 Mr. Fairlie: The property consists simply of a one-story building, in which these stores are?

The Witness: Yes.

Exhibit D. 2.

July 9, 1926.

30 Mr. William F. Conway,
Counsellor-at-Law,
19 Clinton St.,
Newark, N. J.

My dear Mr. Conway:—

Confirming conversation which I had with you on Thursday, the 8th inst., in regards to the agreement for the sale of property at #78 Lyons Avenue, by your client, Mr. Larkin, to Mr. R. A. Koether, will you please arrange to have

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Exhibit D. 3.

your client return to us the deposit paid, and also our Search fees and disbursements, in view of the fact that the building on the property described is not within the lines of the description by metes and bounds, as provided for in the agreement of sale, of which fact I informed you the day prior to the date set for the closing of title. 10

Will you please acknowledge receipt of this letter, and advise me when we may expect a check?

Yours very truly,

NE:JV

Exhibit D. 3.

Sept. 7, 1926.

20

Wm. F. Conway, Esq.,
19 Clinton St., City.

My dear Mr. Conway:—

I have called your office several times in the Koether matter and received no response. The search expenses including a survey amount to \$290.27.

If your client will pay back the deposit with interest and this expense of \$290.27, Mr. Koether will be satisfied. Kindly let me hear from you at once, because he wishes me to start suit. 30

Yours very truly,

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Exhibit D. 4.

EXHIBIT D. 4.

WILLIAM F. CONWAY
COUNSELLOR-AT-LAW
19 CLINTON STREET
Newark, N. J.

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September 13, 1926.

Hon. Frank E. Bradner,
Counsellor-at-Law,
Essex Building,
Newark, N. J.

My dear Mr. Bradner:

I have been away with my family for two weeks
and I have just returned to the office.

20 I find a letter from you in the Larkin-Koether
matter. I expect Mr. Larkin in to see me the
end of this week and will take the matter up with
him and will advise you one way or the other.

Thanking you for your consideration, I am

Very truly yours,
WM. F. CONWAY.

WFC/BG

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Exhibit D. 5.

EXHIBIT D. 5.

WILLIAM F. CONWAY
COUNSELLOR-AT-LAW
19 CLINTON STREET
Newark, N. J.

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September 27, 1926.

Frank E. Bradner, Esq.,
Counsellor-at-Law,
Essex Building,
Newark, N. J.

Dear Mr. Bradner:

I have seen Mr. Michael Larkin and suggested
to him the settlement of his matter with Mr.
Koether, involving property 78 Lyons Avenue,
Newark, N. J. Mr. Larkin does not feel inclined
to relieve Mr. Koether of his obligation to pur-
chase the property, inasmuch as Mr. Larkin
is able, ready and willing to deliver title accord-
ing to the terms of the contract, made between
him and Mr. Koether.

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Will you kindly fix a time for closing the
matter within two days and oblige

Very truly yours,

WILLIAM F. CONWAY.

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WFC/BG

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Ordinance.

CITY OF NEWARK.

CERTIFIED COPY OF AN ORDINANCE
ADOPTED BY THE BOARD OF
COMMISSIONERS.

10 William J. Egan
City Clerk
Newark, N. J.
3503-S

An ordinance providing for the vacation of part of Lyons avenue on the southerly side thereof from Bergen street westerly about 900 feet, excepting from such vacation that part of Lyons avenue within the limits of Parkview Terrace.

20 The Board of Commissioners of the City of Newark, Do Ordain:

Section 1. That Lyons avenue on the southerly side thereof from Bergen street westerly about 900 feet as shown on a map on file in the office of the Chief Engineer, Department of Public Affairs, known and designated as 1344-V, dated August 30, 1926, shall be vacated as a public street or highway, as follows:

30 BEGINNING at the point formed by the intersection of the present southwesterly line of Lyons avenue, eighty feet wide, with the northwesterly line of Bergen street and thence running southwesterly along said northwesterly line of Bergen street 0.79 feet, more or less, to the southwesterly line of Lyons avenue as it formerly existed; thence northwesterly along said southwesterly line of said avenue as it formerly existed, the various course thereof 900 feet, more or less, to its intersection with the present southwesterly line of Lyons avenue; thence southeasterly along

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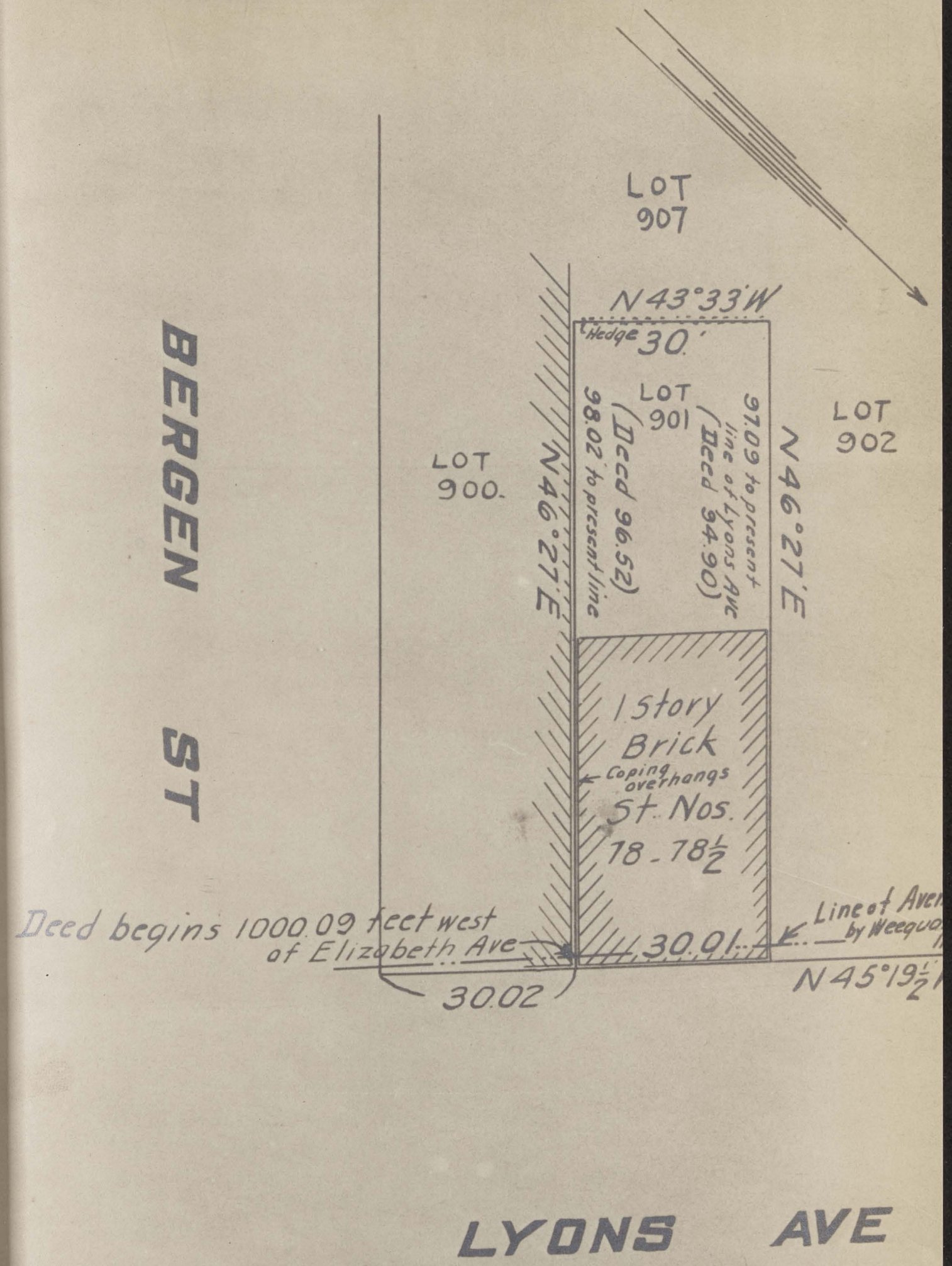


EXHIBIT D. 7.

Newark, N. J., June 29, 1926

Marshall A. Bonght
Surveyor

3696

Ordinance.

said southwesterly line of Lyons avenue as now laid out 900 feet, more or less, to the aforesaid westerly line of Bergen street and the place of BEGINNING, excepting from such vacation that part of Lyons avenue within the limits of Park-view Terrace.

Under and by virtue of the provisions of Section 1, sub-division (b) of Article XXII, of an Act of the Legislature of the State of New Jersey, entitled "An Act Concerning Municipalities," approved March 27, 1917, and the acts amendatory thereof and supplementary thereto. 10

Section 2. That this ordinance shall take effect immediately and all ordinances or parts of ordinances inconsistent with the provisions of this ordinance, be and the same are hereby repealed. 20

THOMAS L. RAYMOND
W. J. BRENNAN
JOHN HOWE
CHARLES P. GILLEN
JNO. F. MURRAY, JR. 20

THE BOARD OF COMMISSIONERS OF THE
CITY OF NEWARK, N. J. 30

I HEREBY CERTIFY that the foregoing is a true copy of an ordinance adopted by the Board of Commissioners of the City of Newark at a meeting held September 28, 1926.

IN TESTIMONY WHEREOF, I have hereunto set my hand, and affixed the seal of the City of Newark, this 14th day of May, A. D., 1927.

(SEAL) (Sgd.) W. J. EGAN,
City Clerk of Newark, N. J. 40

Conclusions of Vice-Chancellor.

CONCLUSIONS OF VICE-CHANCELLOR.

IN CHANCERY OF NEW JERSEY.

10	<i>Between</i> MICHAEL LARKIN, <i>et als.</i> , <i>Complainants,</i> <i>and</i> RUDOLPH A. KOETHER, <i>Defendant.</i>	}	<i>On Bill, &c.</i> <i>On Final</i> <i>Hearing.</i> <i>Conclusions.</i>
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Lum, Tamblyn & Colyer (Chester W. Fairlie, Esq.), for complainants.

20 Frank E. Bradner, Esq., for defendant.

BERRY, V.-C.

This bill seeks the specific performance of a contract for the sale of lands. The complainants are vendors and the defendant is the vendee. The contract is dated June 3, 1926, and provides for the conveyance to the defendant of property therein described on or about June 30, 1926, for the sum of \$21,000, \$2,100, of which was paid to the complainants by the defendant as a down payment on the execution of the contract. The property is described by metes and bounds and by reference to a map of the Weequahic Park Land and Improvement Company. The front line of the property is described as lying along the southerly line of Lyons avenue. The written contract contains the following clause: "It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed there-

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Conclusions of Vice-Chancellor.

for and that there are no encroachments thereon." Time was not expressly of the essence of the contract. On the date the contract was executed there was a one-story building erected on the lot covering the whole lot frontage and extending back about 50 feet from the street line. The property was examined and inspected by the defendant prior to the execution of the contract. On June 29th, one day before the settlement day as fixed by the contract, the defendant's attorney notified the complainant's attorney that defendant would not accept title because the building was not within the boundary lines as described in the contract and the defendant refused to take title and demanded a return of his deposit with interest and reasonable search fees. A survey of the lot which was the subject of the sale, completed on June 29, 1926, indicated that the building erected on said lot encroached on the street line as shown on said map for a distance of 1.5 feet at one corner, increasing to a width of 2.19 feet on the other corner. The building did not encroach on the actual street line as laid out and accepted by the city. None of the parties to this suit had any knowledge whatever of the alleged encroachment until the completion of the survey on June 29, 1926. On August 12, 1926, complainant applied to the Board of Commissioners of the City of Newark for an ordinance vacating that portion of the lands lying between the actual southern boundary line of Lyons avenue and the southerly line of said avenue as shown on said map and an ordinance affecting such vacation was finally passed by said Board on September 28, 1926. In the meantime, defendant's attorney had several times demanded the return of the down money, which demands were either

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Conclusions of Vice-Chancellor.

10 ignored or refused, and on October 6, 1926, the defendant began an action in the Essex County Circuit Court to recover the deposit money and search fees. This bill was then filed and a consent order restraining the suit at law, entered. At the final hearing complainants were permitted to amend their bill by alleging that they were ready, willing and able to give title at that time; and the defendant was permitted to amend his answer by setting up that time was of the essence of the contract by implication and that the complainant acquiesced in the defendant's refusal to take title. The defense set up in the original answer was that the complainant's building stands "in part on the front on land to which the complainants have no title." Defendant has also counter-claimed for his deposit and search fees. It should be noted that immediately upon discovery of the alleged encroachment and one day before the date fixed for settlement the defendant advised complainant that he would not accept title, demanding the return of his down money and attempting to rescind the contract of sale. No opportunity was given to complainants for the removal of the title objection and the possibility of its removal is indicated by the adoption of the ordinance above referred to. Obviously this arbitrary action cannot be justified because time was not of the essence of the contract and no definite date was thereafter fixed by either of the parties for closing. *Orange Society v. Korski*, 94 N. J. E. 632, affirmed 95 N. J. Eq. 254. Where time is not of the essence, an arbitrary and sudden determination of the transaction cannot be permitted to immediately end pending disputes or negotiations as to title. The other party must be allowed a reasonable

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Conclusions of Vice-Chancellor.

length of time in which to perform. An arbitrary notice of termination may be entirely disregarded. *Pomeroy's Specific Performance*, Sec. 396. Defendant does not claim that time was ever *expressly* of the essence, but insists that it was of the essence by implication and bases this insistence upon his claim that he was purchasing the property for a specific purpose which was made known to the complainants before the contract was entered into; but the evidence on this point is meagre and sharply in conflict. It is sufficient to say that defendant has not sustained the burden of proof with respect to this point.

"Intent to make time essential must be clearly, unequivocally and unmistakably shown."

Pomeroy's Specific Performance, 3d Edition, Sec. 392.

Where time is not of the essence and there has been no lawful rescission, it is sufficient if the vendor is able to perform at the time of the decree. The objections raised by the defendant having now been removed by enactment of the vacating ordinance, there is no possibility of interference by the city with the maintenance of the building in its present location. Aside from the vacating ordinance it is highly improbable that the defendant would ever have experienced any difficulty on account of the original encroachment on the street line, as it appears that the front of the building conforms to the building line as established by the city. There is no encroachment on the property to be conveyed and therefore *Herring v. Esposito*, 94 N. J. Eq. 348, cited by counsel for defendant, is not applicable. The

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Conclusions of Vice-Chancellor.

claim of defendant. that complainants acquiesced in the attempted rescission is without foundation. This is based on the delay from June 29, 1926, to August 12, 1926, in applying to the City Commission for the vacating ordinance, but in view of defendant's arbitrary action of June 29th and complainant's refusal to return the deposit money, complainants cannot be considered as having consented to a rescission. There is as much reason for saying that the defendants acquiesced in complainant's delay. In short, time was not of the essence; there was no lawful rescission; no reasonable time was given for removal of objections and time was not made of the essence by act of either of the parties subsequent to the day fixed for settlement. This case presents the anomalous situation of a vendee complaining because he will receive more land than he purchased. It is unnecessary to decide what would have been the effect of such a complaint had time been of the essence of the contract. In *Van Blarcom v. Hopkins*, 63 N. J. Eq., at page 474, Vice-Chancellor Pitney said:

“But in cases like the present, where the purchaser acquires the precise lot of land for which he contracted, and which he saw and inspected, and the only objection is that it was less in quantity than it was represented to be, the courts have, naturally enough, found little difficulty in giving a vendor his remedy against the vendee.”

A fortiori should this rule be applied when the objection is that the vendee will receive more than he purchased. I will advise a decree for complainant in accordance with the prayer of the bill.

Decided June 10, 1927.

Final Decree.

FINAL DECREE.

Filed June 27, 1927.

62/265.

IN CHANCERY OF NEW JERSEY.

Between

MICHAEL LARKIN and MOLLIE
LARKIN, his wife,
Complainants,

and

RUDOLPH A. KOETHER,
Defendant.

On Bill, etc.
Final Decree.

This cause coming on to be heard in the presence of Ralph E. Lum, of counsel with the complainants, and Frank E. Bradner, Esquire, of counsel with the defendant, and the Court having examined the pleadings and having taken proofs orally and in open court and heard and considered the arguments of counsel thereon; and it appearing to the satisfaction of the Court that the complainant, Michael Larkin, was on the 3rd day of June, 1926, seized in fee simple of all that certain lot, tract or parcel of lands and premises situate, lying and being in the City of Newark, County of Essex and State of New Jersey, bounded and described as follows:

BEGINNING at a point in the southerly line of Lyons avenue therein distant one thousand feet and nine hundredths of a foot westerly from the westerly line of Elizabeth avenue, as the same are laid down on a map of the property of the Wee-

Final Decree.

quahic Park Land and Improvement Company, revised in 1909, by George H. Gardner, surveyor, revised in 1912 by John E. Laird, surveyor, which beginning point is also the northwesterly corner of lot number 900 on said map; thence running westerly along the said southerly line of
 10 Lyons avenue thirty feet and four hundredths of a foot to the northeasterly corner of lot number 902 on said map; thence running southerly along the easterly line of lot number 902 ninety-four feet and ninety hundredths of a foot to the northwesterly corner of lot number 907 on said map; thence running easterly along the northerly line of said lot number 907, thirty feet to the southwesterly corner of said lot number 900; thence running northerly along the westerly line of said
 20 lot number 900, ninety-six feet and fifty-two hundredths of a foot to the said southerly line of Lyons avenue and the point and place of BEGINNING, together with the building now thereon.

Being lot number 901 on map of property of the Weequahic Park Land and Improvement Company, situated in the City of Newark, revised in 1909 by George H. Gardner, surveyor, revised in 1912 by John E. Laird, surveyor.

30 Being the same premises conveyed to the said Michael Larkin, by Michael Ward and Beatrice Ward, his wife, by deed dated April 20, 1923 and recorded in Book D-68 of Deeds for Essex County, on pages 210-211.

And it further appearing that on the said 3rd day of June, 1926, the said Michael Larkin and Mollie Larkin, his wife, the complainants herein, entered into an agreement in writing with the defendant, Rudolph A. Koether, wherein and whereby said complainants agreed to convey said

Final Decree.

lands and premises by deed of warranty, free from all encumbrances except as hereinafter stated, on or before the 30th day of June, 1926, to the said Rudolph A. Koether, and the said Rudolph A. Koether agreed to pay therefor the sum of Twenty-one thousand dollars (\$21,000.)
 10 by the payment of Twenty-one hundred dollars (\$2,100.) which was paid at the execution of said agreement, and by the payment of the remainder of the purchase price upon the delivery of said deed by the payment of Eighteen thousand nine hundred dollars (\$18,900.) in cash;

And it further appearing to the satisfaction of the Court that the said defendant has refused and failed to perform the said agreement on his part, and that the said complainants have always been and still are ready and willing in all things
 20 to comply with the terms of the said agreement on their part;

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

It is on this 27th day of June, 1927, ORDERED, ADJUDGED and DECREED that the said agreement be in all things specifically performed by the said defendant, and that the
 30 said defendant on the 14th day of July, 1927, at the hour of 10 o'clock in the forenoon, at the office of Messrs. Lum, Tamblyn & Colyer, Room 1401, No. 786 Broad street, in the City of Newark, in the County of Essex and State of New Jersey, pay to the said complainants the sum of Eighteen thousand nine hundred dollars (\$18,900.) with interest thereon from the 1st day of October, 1926, together with the taxed costs of this suit as hereinafter allowed, upon delivery at the same

Final Decree.

time and place by said complainants to said defendant, Rudolph A. Koether of a warranty deed duly executed and acknowledged by the said complainants, Michael Larkin and Mollie Larkin, his wife, conveying to the said Rudolph A. Koether, said lands and premises in fee simple, pursuant to the terms of the aforesaid contract;

10 And it is FURTHER ORDERED, ADJUDGED and DECREED that if, at the time and place hereinabove mentioned, the said defendant should fail or neglect to pay the said sum of Eighteen thousand nine hundred dollars (\$18,900) with interest as hereinbefore mentioned, together with said taxed costs as hereinbefore mentioned, upon the tender of the said deed, the aforesaid sum of Eighteen thousand nine
20 hundred dollars (\$18,900.) with interest as aforesaid, together with the taxed costs of this suit as hereinbefore mentioned, shall be and become and are hereby impressed as a lien upon the said lands and premises in favor of said complainants, to the end that said lands and premises may be sold pursuant to law and under the direction of this Court, to satisfy such lien, and that in case a deficiency should arise upon such sale, the said defendant may be ordered by this Court to
30 pay such deficiency;

And it is FURTHER ORDERED that the said defendant pay to the complainants the costs of this suit to be taxed including a counsel fee of \$500 which is hereby allowed the said complainants;

And it is FURTHER ORDERED that true but uncertified copies of this decree and of said taxed costs be served upon the solicitor of said defendant within 10 days after the date hereof.

Final Decree.

And it is FURTHER ORDERED, ADJUDGED and DECREED that defendant's counter-claim filed herein be and the same hereby is dismissed.

And it is FURTHER ORDERED, ADJUDGED and DECREED that the defendant be and he hereby is perpetually enjoined and restrained from further prosecuting his action at law against complainants mentioned in the bill of complaint herein. 10

E. R. WALKER,
C.

Respectfully advised,
MAJA LEON BERRY,
V.-C.

A true copy,
THOMAS BARBER,
Clerk. 20

Notice of Appeal.

NOTICE OF APPEAL.

Filed June 30, 1927.

IN CHANCERY OF NEW JERSEY.

10 *Between*

MICHAEL LARKIN and MOLLIE LARKIN, his wife, <i>Complainants,</i> <i>and</i> RUDOLPH A. KOETHER, <i>Defendant.</i>	}	<i>On Bill, etc.</i> <i>Notice of</i> <i>Appeal.</i>
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20 NOTICE IS HEREBY GIVEN that the defendant, Rudolph A. Koether, appeals to the Court of Errors and Appeals in the last resort in all causes, from the final decree made by the Chancellor on the advice of Vice-Chancellor Maja Leon Berry, which decree bears date June 27, 1927.

Dated June 30, 1927.

30 FRANK E. BRADNER,
Solicitor of Defendant.

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

FRANK E. BRADNER,
Of Counsel with Defendant.

Petition of Appeal.

PETITION OF APPEAL.

Filed July 12, 1927.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10 *Between*

MICHAEL LARKIN and MOLLIE LARKIN, his wife, <i>Complainants-Respondents,</i> <i>and</i> RUDOLPH A. KOETHER, <i>Defendant-Appellant.</i>	}	<i>On Appeal</i> <i>from</i> <i>Chancery.</i> <i>Petition of</i> <i>Appeal.</i>
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To the Honorable the Court of Errors and Appeals in the Last Resort in All Causes:

The petition of Rudolph A. Koether, the defendant in the above-stated cause, respectfully shows:

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, which decree bears date June 27, 1927, and does order, adjudge and decree that a certain agreement in writing made by and between the defendant and the complainants and bearing date June 3, 1926, for the purchase of certain lands and premises on Lyons avenue in the City of Newark, shall be in all things specifically performed by the said defendant; and that the said defendant shall pay to the complainants the sum of \$18,900 with interest thereon from October 1, 1926, and shall also pay

Petition of Appeal.

to complainants the taxed costs of suit including a counsel fee of \$500 to complainants' counsel; and that the defendant's counter-claim shall be dismissed and the defendant perpetually enjoined from prosecuting his action at law to recover the deposit made on said agreement.

10 2. Petitioner appeals from the final decree upon the ground that the same is erroneous, for these reasons:

1. The evidence proved that the building which was the subject matter of the agreement aforesaid, stood in part upon land to which the complainants had no title and encroached upon said land; which was contrary to the express agreement made between the parties that the buildings are all within the boundary lines of the property and that there are no encroachments.

20 2. The evidence proved that the defendant rescinded the agreement to purchase on June 29, 1926, for the reason that the buildings encroached on land which did not belong to the complainants and that the complainants acquiesced in such rescission. There was no proof whatever that the complainants had at any time prior to the hearing notified the defendant that they had obtained from the City of Newark or from any person or
30 persons a release of any estate or interest in the lands on which the building encroached or had obtained title to the said lands.

3. The evidence proved that time was of the essence by implication.

4. The evidence proved that the complainants had wilfully neglected to make any effort to obtain any rent from the said building and they should have been charged with the fair rental value, to be ascertained by the Court.

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Petition of Appeal.

5. The defendant should not have been charged with interest on the unpaid purchase money.

6. The complainants were not equitably entitled to costs and counsel fee.

7. The bill of complaint should have been dismissed and the counter-claim allowed for the recovery of the deposit. 10

3. Petitioner therefore, prays that the said decree of the Chancellor may be reversed, set aside and for nothing holden and that petitioner may have such other relief as to this Court may seem equitable.

FRANK E. BRADNER,

Solicitor for and of Counsel with Petitioner. 20

(Formal answer filed.)

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New Jersey Court of Errors and Appeals

Between

MICHAEL LARKIN and MOLLIE
LARKIN, his wife,
Complainants-Respondents,

and

RUDOLPH A. KOETHER,
Defendant-Appellant.

*On Appeal
from Court
of Chancery.*

BRIEF FOR APPELLANT.

Abstract of the Case.

The parties to this suit made an agreement in writing on June 3, 1926, for the sale of a lot of land with a building thereon, located on Lyons avenue, Newark, N. J., which lot is specifically described in the agreement (p. 6). The description is by metes and bounds and begins in the southerly line of Lyons avenue, distant 1,000 feet and 9/100 of a foot westerly from the westerly line of Elizabeth avenue as the same are laid down on a map of the property of the Weequahic Park Land & Improvement Company, &c. The map has not been printed with the case, but a copy has been filed with the sergeant-at-arms.

The vendors were to convey the property by a warranty deed free from all encumbrance on or before June 30, 1926. The purchaser agreed to pay \$21,000 in cash; \$2,100 on the execution of the agreement and \$18,900 on delivery of the deed (p. 8). The purchaser was to be given possession of the land and premises on the day of closing title, and from that date was to take the rents (p. 8). The written agreement contained the following express contract between

the parties: "It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor, and that there are no encroachments thereon (p. 9, l. 20)."

On June 29, 1926, the purchaser notified the vendor's attorney that the building extended over on the street and was not within the boundary lines as described in the contract and that he did not wish to carry out the contract. The encroachment on the street is shown on Exhibit D. 7, opposite page 36. The fact that such notice was given, appears in the admissions made at the hearing (p. 19, l. 9 *et seq.*).

On July 8, 1926, the attorney of the purchaser sent a letter to the attorney of the vendors (Exhibit D. 2, p. 32), in which he says: "Confirming conversation which I had with you on Thursday, the 8th inst., in regards to the agreement for the sale of property at 78 Lyons avenue, will you please arrange to have your client return to us the deposit paid, in view of the fact that the building on the property described is not within the lines of the description by metes and bounds as provided for in the agreement of sale, of which fact I informed you the day prior to the date set for the closing of title." No reply was made to this letter. On September 7, 1926 (Exhibit D. 3, p. 33), another letter was sent to the attorney of the vendors, in which a request is made for the return of the deposit and that response be made at once, or suit will be brought. On September 13, 1926, the attorney of the vendors notified the present solicitor of the appellant (Exhibit D. 4, p. 34) by letter, that he had been away for two weeks and said "I expect Mr. Larkin in to see me the end of this week and will take the matter up with him and will

advise you one way or the other." On September 27, 1926, the attorney of the vendors sent another letter (Exhibit D. 5, p. 35) in which he says: "Mr. Larkin does not feel inclined to relieve Mr. Koether of his obligation to purchase the property, inasmuch as Mr. Larkin is able, ready and willing to deliver title according to the terms of the contract, and requests that a time be fixed for closing the matter within two days."

There is nothing in the testimony, nor in the documentary evidence, which shows that any information was ever given to the purchaser that an application had been made to the City of Newark to vacate a part of Lyons avenue.

At the hearing before the Vice-Chancellor, the complainants produced a certified copy of an ordinance vacating part of Lyons avenue; from which it appears that the ordinance was adopted on September 28, 1926, and was passed pursuant to the provisions of section 1 (subd. b) Art. XXII of an Act of the Legislature of the State of New Jersey, entitled "An Act concerning municipalities," approved March 27, 1917, and the acts amendatory thereof and supplementary thereto. The ordinance is printed on pages 36 and 37. At the hearing, it was stated that application for the ordinance was made on August 12, 1926 (p. 25, l. 40). At the hearing, complainants were permitted to amend, by alleging the ordinance and the defendants were permitted to set up that time was of the essence by implication and acquiescence.

When the final decree was made, the defendant objected to being charged with interest except from the date of the decree; for the reason that the complainants had not made any effort to get any rents from the premises and that the time for closing the title had been postponed

by the Court to the date of the decree. The decree however, charges the defendant with interest from October 1, 1926, upon the theory that the complainants were ready to close title on that day.

Specification of Errors.

1. The evidence proved that the building in part is upon land to which the complainants had no title and encroached upon said land, which was contrary to the express agreement, that the buildings were at the time the agreement was made within the boundary lines of the deed and that there were no encroachments.

2. The evidence proved that the defendant rescinded the agreement to purchase on June 29, 1926, and that the vendors did not at any time prior to the final hearing, notify the purchaser that they had obtained a release of the estate or interest of the city or anybody else, of the land upon which the building encroached, or had obtained title to said lands, and therefore, the vendors acquiesced in the rescission.

3. The evidence proved that time was of the essence by implication.

4. The evidence proved that the complainants had wilfully neglected to make any effort to obtain any rent from the building and they should have been charged with the fair rental value to be ascertained by the Court.

5. The defendant should not have been charged with interest on the unpaid purchase money.

6. The complainants were not equitably entitled to costs and counsel fee.

7. The bill of complaint should have been dismissed and the counter-claim allowed for the recovery of the deposit.

BRIEF OF ARGUMENT.

1. The contract was legally rescinded by the purchaser.

It expressly provides that the buildings are all within the boundary lines of the property as described in the deed and that there are no encroachments. Exhibit D. 7, opposite page 36, shows clearly in connection with the admission made at the hearing (p. 19, l. 10 and p. 23, l. 28) that the building encroaches on the line of the dedicated street. The entire building stands on land in which the public has an easement of way by reason of the dedication. The purpose of the express agreement, that the buildings are within the boundary lines, was to give the purchaser the right to elect whether he would take the land with the buildings encroaching on the street, or not. While this is not a case of encroachment on the land to be conveyed, it is a clear case of violation of the express agreement that the property is within the boundary lines. A parallel case was decided in the Court of Chancery—*Herring v. Esposito*, 94 N. J. Eq. 348, in which the Vice-Chancellor says: "To disregard the clause of the contract quoted above would be to draw a new contract for the parties upon which their minds have never met and that is a policy that courts have universally refrained from acting upon." At the time fixed by the parties for closing the title the complainants were unable to perform and the defendant said that he would not take the property, and that was his legal right. There is no force in the argument that the vendor did not know that the

buildings were not within the boundary lines. It was his duty to know. *He did not contract that he would put the buildings within the property lines; his contract is, that they are now within those lines* and the defendant had the legal right to rely upon that contract, and when he discovered that the buildings were not within the lines, he had the legal right to say, "I don't want the place."

2. The complainants acquiesced in the rescission of the contract.

The evidence shows that the defendant stated on June 29th, that he would not take the property, and he gave his reasons. Some conversation took place between the attorneys for the respective parties on July 8th, and on July 9th a letter was written by the attorney of the defendant which confirms that conversation (Exhibit D. 2, p. 32). *The clear inference from that letter is that there had been some agreement made that the deposit should be returned.* However, no reply seems to have been made to the letter. A further letter was written on September 7th (Exhibit D. 3, p. 33) which indicates that there had been some conversation about the return of the deposit. On September 13th, the attorney of the complainants writes a letter (Exhibit D. 4, p. 34), in which he states that he would take the matter up with his client, *but he does not say that he has any intention of making any effort to perfect the title.* On September 27th, the attorney of the complainants writes another letter (Exhibit D. 5, p. 35), in which he says that his client is able, ready and willing to deliver title according to the terms of the contract, *but does not mention the fact, if it was a fact, that any application had been made to the*

City of Newark to vacate the street. He fixes two days' time to close the matter.

The bill was filed October 29, 1926. It has been uniformly held in this state that a suitor who seeks specific performance of a contract, should be diligent and prompt. These complainants delayed filing the bill until they were forced to do so by the action at law that was brought against them. But the facts in this case show something more than delay. They show an acquiescence in the rescission of the contract. *If this purchaser had slept on his right to rescind because the buildings were not within the property lines, his delay would have afforded plenary proof of an election not to rescind, which would be final.* In this case, if the vendor thought he was entitled to the performance of the contract, he should have brought his suit promptly after the refusal of the purchaser to perform. *If the vendor contemplated making an application to the City of Newark to vacate the street, he should at least have informed the purchaser that he would do so. There is absolutely nothing in the case which even tends to show that the vendor notified the purchaser that he had any idea of having the street vacated.* He did not make any application for fully six weeks after he was told by the purchaser that he would not perform. His silence naturally led the purchaser to believe that the contract had been rescinded and that his deposit money would be paid back to him. Finally, the purchaser acted on that belief and brought suit at law. The complainants waited until the last moment and then filed this bill and applied for an injunction.

The question is, can it be inferred from the facts that the vendor acquiesced in the rescission?

As was stated by Garrison, *J.*, in *Faulkner v. Wassmer*, 77 N. J. Eq. 537, at p. 543, "the question in itself is not peculiar to this class of cases; it is present in all cases involving a reasonable time concerning which it is admitted that no hard and fast rule obtains, and also, that the difficulty that exists in cases that lie close to the line, disappears with the lapse of time that has been permitted to intervene." Bearing in mind that this contract was made on June 3rd and the title was to be closed on June 30th, the time that elapsed between June 30th and October 29th, fully four months, is unreasonable, and as was stated in *Faulkner v. Wassmer*, affords plenary evidence that the vendors acquiesced in the rescission and were merely holding back the deposit made in the hope that some settlement could be made so that the vendors would not have to pay the full amount of the deposit and interest and search fees.

3. The title offered at the hearing is doubtful and unmarketable.

The vendor must prove that his title is good beyond a reasonable doubt and will not expose the defendant to litigation.

Doutney v. Lambie, 78 N. J. Eq. 277, at p. 279.

In that case, the building encroached approximately two inches on the highway. Bearing in mind the condition existing at the time title was to be closed, it is clear that this title on June 30th was doubtful within the definition of doubtful title contained in the case cited. In further cases, the courts have held that such an encroachment is a continuing trespass and is a cloud on the title and renders it unmarketable.

Krich v. Zemel, 96 N. J. Eq. 208;

Capone v. Ranzelli, 4 N. J. Adv. 1487;
Vassar Holding Co. v. Wuensch, 4 N. J. Adv. 1995.

If the purchaser had taken this title on June 30th, he would have been exposed to the possible demand of the city, that the building should be moved back so that the city could open Lyons avenue the full width, as dedicated. "No right is to be acquired against the public because a dedicated street was not opened to its full width." The city could have opened it at any time.

Atlantic City v. Snee, 68 N. J. Law 39;
Freeholders v. Sharpless, 83 N. J. Law 443.

If Lyons avenue was dedicated, as appears from the map, the City of Newark had at the time the contract was made and at the time for closing title, an easement of way over part of the land, assuming that the complainant's title extended to the middle of Lyons avenue, as laid out on the map. This constitutes a doubtful title. See note to *Connell v. Andrews*, 35 N. J. Eq. 7, at p. 8. In order to meet this objection, the complainants were allowed to prove at the hearing that the dedicated street had been vacated. Assuming for the moment, that the ordinance was legally passed, the question arises whether the easement given to the public by dedication can be vacated. It was held in *Hoboken Land & Improvement Co. v. Mayor*, 36 N. J. Law 549, that the city cannot release or discharge the public right except by legislative authority. The question is, has the Legislature authorized the City of Newark to release the dedicated street? The street has not been accepted, and therefore, there was nothing to vacate.

See *Holmes v. Jersey City*, 12 N. J. Eq. 299.

The ordinance in evidence in this case purports to have been adopted pursuant to section 1 (subd. b) of Art. XXII, P. L. 1917, which will be found in N. J. Municipalities Law, p. 210.

The statute referred to in sect. 1 (subd. b) authorizes the municipality: "To vacate any street, avenue, highway, lane or alley or portion thereof," and then further provides for an ordinance. But the same statute in subdivision 1a, defines the word "street" as meaning any public street, avenue, highway, esplanade, boulevard, park or square, and the same statute in Article XXII, sec. 2, provides that the governing body of every municipality shall have power to accept any street, etc., dedicated to public use, and after such acceptance the same may be improved and maintained by said municipality. The city is not obliged to accept the street, but the property owners may petition the city to open the street.

N. J. Junction R. W. Co. v. Jersey City,
68 N. J. L. 108; affd. 70 N. J. L. 826.

Section 4 provides as follows: "Whenever in any municipality there has been heretofore, or shall be hereafter, a dedication of lands as a public street or highway, or as a public square or public place, and the same has not been accepted or opened by the municipality, and it shall appear to the governing body that the public interests will be better served by releasing the said lands or any part thereof, from such dedication, said governing body shall have power by ordinance to release and extinguish the public right arising from said dedication as to the whole or any part of said lands, &c., provided, however, that notice of the intention of the governing body to consider any such ordinance and hearing thereon, shall be given as is herein

provided concerning ordinances for the vacation of streets."

The Legislature has made a plain distinction between vacating a street and releasing a dedicated street. The complainants in this case have not obtained a release of the dedicated street and therefore, the title is still as doubtful as it was on June 30, 1926.

Upon the settled law in this State, the defendant ought not to be compelled to take this title and be subjected to possible litigation. If other property owners on Lyons avenue should wish to have this street opened, the present ordinance would not operate to estop the city from accepting the street and opening it. Whether or not it would operate as an estoppel is a question which would have to be litigated, and the defendant ought not to be required to take the chances of such litigation. It is apparent that the very purpose of the express agreement that the property should be within the boundary lines, was to prevent any such possible disputes.

Another question arises, whether the description of the land by metes and bounds as contained in the final decree, will convey to the purchaser the legal title to the two feet of land vacated and taken out of the dedicated street. *The decree follows the description in the agreement and does not include within the boundary lines the vacated portion of the dedicated street.* The conveyance to Larkin passes the fee to the land described and the fee to the middle of the dedicated street subject to the easement of the public. The owners of land abutting upon the dedicated street are interested in the vacation of a part of the street which might permit the erection of buildings which would interfere with

their view or would cut off light or would diminish the value of their property. See *Read v. Camden*, 54 N. J. L. 347; *Newark v. Hatt*, 79 N. J. L. 548.

If the two feet is no longer a street, there should be a conveyance by boundaries including the two feet, in order to give the defendant a good title.

4. Time was of the essence by implication.

Time may be made of the essence by direct stipulation or necessary implication or by notice

Parkin v. Thoreau, 16 Beav. 59; 79 Eng. Rul. Cas. Vol. 6, p. 503;

Baldwin v. Van Vorst, 10 N. J. Eq. 577;

King v. Ruckman, 20 N. J. Eq. 316; 21 N. J. Eq. 529;

Bullock v. Adams, Excers., 20 N. J. Eq. 367;

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

And in a recent case, it was held that if the circumstances are persuasive that time was to be of the essence, prompt performance is essential.

Orange Society v. Konski, 94 N. J. Eq. 632; affd. 95 N. J. Eq. 254.

In the case last cited, Vice-Chancellor Backes stated that where it was the duty of the vendee to give the vendor a reasonable time, that time must bear some reasonable comparison to the time which has already elapsed. In that case, three months had elapsed since the date fixed for closing title and the Vice-Chancellor thought that seven days' time was insufficient, but that twenty days' time would have been reasonable. In that case, the vendee knew that the difficulties could be overcome and probably would be. On the theory of that case, if it was the vendee's

duty in this case to give the complainants any time to perfect the title, one week's time would have been sufficient. The contract was made on June 3rd, and title was to be closed on June 30th. But the complainants knew that the defendant would expect to take title on June 30th. *It was a cash sale.* The defendant could not have appeared on June 30th, and said, "*I have been unable to raise all the cash and I want a week or two weeks or longer time.*"

The defendant and his wife testified (p. 24), that he had a place of business on Court street and on (p. 25, l. 15), the defendant testified, "I went to Mr. Larkin's house; I saw this property advertised for sale; I told him the object of my visit, of my looking for a place in that neighborhood. My place down town was being sold and I had to get out and I wanted to move my business up there and I wanted to get this other store rented before this big operation was being completed." He further testified that there was a row of stores next door to this property, on Bergen street under construction.

The defendant's wife testified (p. 27; at p. 28, l. 10):

"My husband wanted the store, we had sold our place in Court street and he wanted it by the latter part of June, to move up there."

"Q You heard some talk like that there?
A Yes, I positively did."

It is clear that something was said about the defendants having to move, and he wanted to get in the new store, and he wanted to be able to rent the adjoining store before the several stores were finished in the nearby street. *This makes time of the essence by implication.* Or, to put it somewhat differently, the facts that cash

was to be paid, and that the defendant was going to move in one of the stores; and that both stores were vacant and that several new stores were being constructed around the corner on Bergen street, are persuasive that prompt performance was essential. And this is the reason that the defendant said to the complainants on June 29th: "I do not want the property. I do not want to have any difficulty about the street line." He considered that it was essential to have everything all right on June 30th; and it is submitted that the complainants also have considered that it would be essential to have the title right on June 30th.

5. The decree is unjust and inequitable because it requires the defendant to pay interest and does not require any accounting from the complainants for rents.

The decree was made upon the theory that the complainant can give a good title at the time of the decree. *This operates to change the closing from June 30, 1926, to June 27, 1927.* The defendant should only be charged with interest from the time the final payment is due and that is from the time that the complainant is able to give a good title, which is the date of the final decree.

The complainant testified (p. 32, l. 12) that the property has not been leased and stands vacant and that he had not tried to let it to anybody. The property consists of two stores and the defendant has let them stand vacant for a year without making any effort to rent them. It is not claimed that the complainant would be chargeable with rent, if any effort had been made to rent the property: "No hard and fast rule is

laid down by the authorities as to charging a vendor who remains in possession, with rental value as distinguished from rents actually received. It seems to depend on whether the vendor is responsible for the delay, or wrongfully or wilfully in default."

Seymour v. Laverty, 94 N. J. Eq. 430, at p. 432.

This is a clear case of wilfull default. The equitable disposition in this respect of the case would have been to relieve the defendant from the payment of interest.

6. The complainants were not equitably entitled to costs and counsel fees.

The complainants were not ready to give title to the land at the time agreed upon. They were not even ready to give title at the time of the final hearing and had to ask a favor of the Court to permit them to amend their bill of complaint. The defendant has not been in default at any time; why should he be punished by being compelled to pay the complainants' costs and counsel fees when the entire litigation was caused by the default of the complainants.

It is respectfully contended that there ought not to have been any costs or counsel fees allowed to the complainants.

7. The bill of complaint should have been dismissed and a decree made in favor of the defendant on the counter-claim.

The complainants would have had no defense in the action at law; they would not have been permitted to make title good at the trial. In order to facilitate the disposition of the case,

defendant's counsel consented to the injunction and the stipulation is endorsed on the back of the order to show cause, which is not printed, but it was agreed that the defendant could counterclaim not only for the deposit and interest, but for reasonable search fees, &c. The complainants having failed to prove that they were ready and able to give a good title on June 30, 1926, or within a reasonable time thereafter, the bill should have been dismissed.

Even upon the assumption that the complainants were entitled to a reasonable time to comply with the express agreement, a reasonable time would have been certainly not more than twenty-seven days, which was the time given for the performance of the contract by the terms thereof.

The defendant was entitled to a decree for the recovery of the deposit and interest and reasonable search fees to be determined by reference to a Master.

It is respectfully submitted that the decree should be reversed and the record remitted with directions to dismiss the bill and to make a decree in favor of the defendant upon his counterclaim, with costs.

FRANK E. BRADNER,
Of Counsel with Defendant.

New Jersey Court of Errors and Appeals

Between

MICHAEL LARKIN and MOLLIE
LARKIN, his wife,
Complainants-Respondents,

and

RUDOLPH A. KOETHER,
Defendant-Appellant.

*On Appeal
from Court
of Chancery.*

BRIEF FOR RESPONDENTS.

I.

On June 29, 1926, the day before the time fixed in the contract for the closing of title, the purchaser, who is the defendant-appellant herein, notified the vendors, who are the complainants-respondents, that the building upon the premises in question was not entirely within the boundary lines of the property as described in the contract and that he would not accept delivery of the deed. He repudiated the contract upon that single ground and no other, and at all times since then has persisted in his repudiation. The complainants, on the other hand, have at all times been ready and willing to perform the contract on their part and insistent upon the purchaser's going through with it.

It is covenanted in the contract "that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefor," and in the description of the premises as contained in the contract the front or street line is defined as follows:

"Beginning at a point in the southerly line of Lyons avenue therein distant 1,000

feet and $\frac{9}{100}$ of a foot westerly from the westerly line of Elizabeth avenue, as the same are laid down on a map of the property of the Weequahic Park Land and Improvement Company, revised in 1909 by George H. Gardner, surveyor, revised in 1912 by John E. Laird, surveyor, which beginning point is also the northwesterly corner of lot #900 on said map; thence running westerly along the said southerly line of Lyons avenue 30 feet and $\frac{4}{100}$ of a foot to the northeasterly corner of lot #902 on said map."

The lots were laid out and Lyons avenue was dedicated in accordance with said map. When the city actually laid out and monumented Lyons avenue a slight discrepancy occurred, with the result that the southerly line of Lyons avenue as laid out and monumented by the city did not exactly coincide with the southerly line of Lyons avenue as laid out on the map. The actual line of the street is 2.19 feet southerly from or in front of the street line as laid down on the map at a point opposite the westerly line of the described premises, and is 1.50 feet southerly from the map street line at a point opposite the easterly line of the lot in question, so that the strip between the map street line and the actual street line has a width of 1.50 feet on the southerly end of the strip and increases to a width of 2.19 feet on the westerly end. The surveyor's sketch (Exhibit D. 6, p. 36) shows that the front line of the building in question is outside of the street line as laid down on the map, but is entirely within the actual street line as laid out and accepted by the city. The exact distance by which the building runs beyond the street line as laid down on the map does not appear on the survey.

The defendant stipulated at the hearing that this condition is the only objection that exists to the title which the complainants offer to convey and the only ground upon which he bases the right which he claims to repudiate and be relieved of his contract.

If any such encroachment of the building existed on the lands of adjoining owners on any of the other three sides of the lot, a very different situation would be presented, and it can be conceded that in such case this court would not compel the purchaser to accept delivery of the deed subject to such encroachment of the building onto the lands of others, thereby forcing him into an inevitable controversy or lawsuit with his neighbor on whose land the building encroached.

In the present case, however, the encroachment is on land the fee to which is vested in the complainants and will be vested in the defendant by the complainants' deed provided for in the contract.

"It is a well established principle that the owner of land bounded on a street or highway is presumed to own the soil in front of his lot to the middle of the street, subject to the easement of the public highway. In this case, nothing appears to rebut this presumption in favor of defendant, either in the pleadings or evidence. For this suit, then, he must be considered the owner of the adjacent half of the street." *Glasby v. Morris (Zabriskie, C., 1866)* 18 N. J. Eq. 72 at 73.

"It is the accepted law of this State that as to lands on which streets and highways have been laid, the fee is in the abutting owner." *Rogers v. Warrington* (Ct. of Err. & App. 1917), 90 N. J. L. 653 at 654, citing *Hoboken, etc. Co. v. Mayor, etc.*, 36 N. J. L. 540, and *Starr v. Camden, etc. R. R.*, 24 N. J. L. 592.

Nothing could be clearer than that the parties intended that the plot described in their contract should run to the street line as the street actually exists, both parties being ignorant at the time they signed the contract of any discrepancy existing between the street line as laid down on the map and the street line as actually established by the city.

The portion of the covenant which the defendant invokes in this case is merely "that the buildings upon said premises are all within the boundary lines of the property *as described in the deed therefor.*" We submit that that means the property which the defendant thought he was buying and intended to buy bounded by "the southerly line of Lyons avenue." The defendant's first and chief contention rests upon the circumstance that in the contract "the southerly line of Lyons avenue" is referred to as "laid down on a map of the property of Weequahic Park Land & Improvement Company." It was not until June 29, 1926 (which is the date of the survey (Exhibit D. 7, p. 36), and the day before the day fixed in the contract for the closing of title) that it was known by anybody that the line as laid down on the map did not coincide with the line of the street as actually laid out, opened and monumented by the city. Defendant testified that he had looked at the property (Bk. p. 25, ll. 15-30). He saw that the building was on the street line. He intended to buy it as he saw it and intended that the description in the contract was a description of what he saw, to wit, a lot bounded by the southerly line of Lyons avenue with a building thereon that did not encroach over the southerly line of Lyons avenue.

As was said by Vice-Chancellor Pitney in *Van Blarcom v. Hopkins*, 63 N. J. Eq. 466 at 477, nothing in the evidence tends to show "that there was a particular charm" to the defendant in having the building within the line "as laid down *on the map,*" and so in this case, as in *Van Blarcom v. Hopkins*, equity will not refuse specific performance by reason of such literal and immaterial construction of the contract. The defendant here like the defendant in *Van Blarcom v. Hopkins* (*id.* p. 471) argues that unless he has precisely the thing that the contract calls for he cannot be compelled to perform the contract upon any terms, but as Vice-Chancellor Pitney said (bottom p. 471) "there is * * * but one rule of universal application in such cases, and that is, to inquire what, under the circumstances of the particular case, is equitable and just as between the parties," and he quotes Lord Selborne (top p. 472) to the effect that "specific performance is a conscious attempt, on the part of the Court, to do complete justice to both parties with respect to all judicial relations growing out of the contract between them." This is a case of "misdescription" just as *Van Blarcom v. Hopkins* was a case of misdescription, even though that case involved land area rather than the location of the building in respect to the lines as defined in the description. The question here, as in that case, is "did the misdescription go to the essence of the contract and materially alter the substance of it?" Certainly that question must be answered in favor of the complainants.

There is no encroachment on the property to be conveyed, and therefore *Herring v. Esposito*, 94 N. J. Eq. 348, upon which appellant relies is not applicable. In that case the contract for the

sale of land which was sought to be specifically enforced contained verbatim the same clause upon which defendant relies in the present case, but only that portion of it was involved which provides "that there are no encroachments thereon." The adjoining building did in fact encroach upon the lands agreed to be conveyed. It is manifest that to have compelled the vendee to accept the title subject to such encroachment (1) would have involved him in a controversy and probable litigation with the neighbor whose building encroached on the land which he was purchasing, and (2) would have been to totally disregard the express stipulation which the defendant inserted in his contract for the purpose of protecting him against such possibility. The Court refused to disregard the clause and denied specific performance. *Herring v. Esposito* is not "a parallel case" as counsel terms it for the facts were entirely different, and the grounds which led the court of equity to deny specific performance in that case are absent in this case. Here specific performance does not require the Court "to draw a new contract for the parties upon which their minds have never met," for the purchaser here is getting exactly what he intended to get and what the vendor intended to convey to him, and to specifically enforce the contract is merely to prevent the purchaser from taking advantage of an immaterial circumstance which he has discovered and which he has snatched at in the hope that he may thereby be relieved from performance of his contract.

Appellant contends that "at the time fixed by the parties for closing the title the complainants were unable to perform and the defendant said that he would not take the property, and that was his legal right * * * when he dis-

covered that the buildings were not within the lines he had the legal right to say 'I don't want the place.'" We submit that the Court below aptly disposed of this contention when it said (Bk. p. 40, l. 20 to top p. 41):

"It should be noted that immediately upon discovery of the alleged encroachment and one day before the date fixed for settlement the defendant advised complainant that he would not accept title, demanding the return of his down money and attempting to rescind the contract of sale. No opportunity was given to complainants for the removal of the title objection and the possibility of its removal is indicated by the adoption of the ordinance above referred to. Obviously this arbitrary action cannot be justified because time was not of the essence of the contract and no definite date was thereafter fixed by either of the parties for closing. *Orange Society v. Korski*, 94 N. J. E. 632, affirmed 95 N. J. Eq. 254. Where time is not of the essence, an arbitrary and sudden determination of the transaction cannot be permitted to immediately end pending disputes or negotiations as to title. The other party must be allowed a reasonable length of time in which to perform. An arbitrary notice of termination may be entirely disregarded. *Pomeroy's Specific Performance*, Sec. 396."

II.

As to appellant's contention that the complainant acquiesced in the rescission of the contract.

With the exception of the four letters (Exhibits D. 2, 3, 4 and 5, pp. 32-35) the record is silent as to the conferences and negotiations which took place between the parties or their attorneys subsequently to the defendant's attempted rescission of the contract on June 29th, and the letters themselves throw little light upon what transpired during the intervals between

them. Neither party called the respective attorneys to testify in that regard. There is nothing in the letters which in any way indicates that the complainants acquiesced in defendant's rescission, but on the contrary they do clearly establish that the defendant has at all times persisted in his rescission, and complainants on the other hand were insisting upon his going through with the deal.

Referring to the first letter (Exhibit D. 2) which defendant's attorney wrote to complainants' attorney under date of July 9, 1926, appellant's brief says that "the clear inference from that letter is that there had been some agreement made that the deposit should be returned." We submit that by no stretch of the imagination can such inference be drawn from that letter. The fact is that although defendant's attorney had orally notified complainants' attorney of defendant's rescission and of the alleged grounds therefor, he did not previously give complainants any written notice, and this letter was sent by him with the purpose of putting himself on record in writing and of confirming his oral demand for a refund of the deposit and his oral rescission of the contract and the grounds upon which he based it.

Appellant admits that the next letter dated September 7th (Exhibit D. 3) "indicates that there had been some conversation in the interim." We submit that it is a fair inference that during that interval there was not only "some conversation" but continued negotiation relative to the matter and that in the course of those conversations, the defendant's attorney was advised of the fact that application had been made on August 12th for an ordinance vacating the strip in question.

The next letter, dated September 13th (Exhibit D. 4) is nothing else than a formal acknowledgment of the receipt of the previous letter. Appellant emphasizes in italics the fact that in that letter complainants' attorney "does not say that he has any intention of making any effort to perfect the title." Why should he have mentioned that fact in a formal letter of this sort? It cannot be supposed that in his conferences with defendant's attorney he had concealed that fact, and in this formal acknowledgment of a letter there was no occasion for repeating what had been said in the conferences. Likewise in the last letter dated September 27th (Exhibit D. 5) the reason that the ordinance is not especially referred to is that it had been the subject of conversation between the attorneys, and this we submit is clearly indicated by a reading of the letter in the light of the circumstances as they existed.

But appellant insists that the fact that complainants' bill of complaint was not filed until October 29, 1926, is in itself evidence of acquiescence by complainants in defendant's rescission, and in support of this contention appellant relies upon *Faulkner v. Wassmer*, 77 N. J. Eq. 537. We submit that that case is not in point. There the bill was filed by a vendee for the purpose of rescinding a deed of conveyance upon the ground that the purchaser had been induced to take the deed and pay the purchase price by false representations made by the vendors and it was held that on July 10th, there accrued to the complainant a "right to elect" whether she would hold the sale or rescind it and that by delaying four months before filing her bill or otherwise acting to rescind she lost her right to rescind "not upon the doctrine of laches * * * but upon the

ground that the lapse of such a length of time under the circumstances afforded plenary proof of an election by her not to rescind," upon the same principle as it was held in *Dennis v. Jones*, 44 N. J. Eq. 513, "that after the appellants had knowledge of all the substantial features of the alleged fraud and were fully aware of the deceit which had been practiced upon them, they so acted as to afford plenary evidence of an election to abide by their contract," and that "their election thus made was irrevocable."

That has no bearing upon the present case. Here the defendant on the day before the time fixed for closing of title gave notice that he would not accept the deed. The complainants had the purchaser's deposit money and at all times refused to give it up, insisting upon the purchaser going through with the contract. The complainant was put to no election, but rested merely upon the contract. We take it that there is no doctrine of this Court which encourages immediate resort to litigation as against patient efforts to induce one to perform his contract. Not until the defendant instituted suit at law to recover back his down money did it become necessary or even advisable for the vendor to institute suit to compel the purchaser to perform. As was said by Vice-Chancellor Emery in *Agens v. Koch, supra*, the defendants' "delay in commencing suit (to recover the down money) might with as much reason be considered as an abandonment of his notification, as the complainants' failure to file a bill be taken as acquiescence in defendant's abandonment."

Furthermore, as was said by the Court below (Bk. p. 42, ll. 9-19):

"In view of defendant's arbitrary action of June 29th and complainant's refusal to

return the deposit money, complainants cannot be considered as having consented to a rescission. There is as much reason for saying that the defendants acquiesced in complainant's delay. In short, time was not of the essence; there was no lawful rescission; no reasonable time was given for removal of objections and time was not made of the essence by act of either of the parties subsequent to the day fixed for settlement."

III.

As to appellant's contention that the title offered at the hearing is doubtful and unmarketable.

Appellant argues that inasmuch as the city had not accepted dedication of the street so far as concerns the strip in question, the ordinance purporting to vacate the strip in question does not release and extinguish the public right arising from the dedication and "would not operate to estop the city from accepting the street and opening it."

Of course, appellant will not be heard to attack the validity of the ordinance collaterally in this suit.

None of the cases which appellant cites in support of this contention, deal with the effect of the provisions of the so-called "Home Rule Act," which we submit, now controls in this respect. Of the cases cited by appellant we make particular reference only to *Holmes v. Jersey City*, 12 N. J. Eq. 299, in which it was held that surveyors of the highway were not competent authority to make the change which had been attempted in that case, and we call attention particularly to the observation of the Chief Justice, where he says: "I come the less reluct-

antly to this conclusion, seeing that this whole subject is now under the control of the City Council and that they may in pursuance of their charter, alter this street as the public good may require or as they in their wisdom may deem meet." It thus appears that a street which had originally been dedicated to public uses could be altered so far as its lines were concerned by the city, thus indicating that this power could be exercised by public authority as far back as 1857.

Under Article 22 of the Home Rule Act (Comp. Stat. Vol. 2, pp. 22-27) the governing body of every municipality has power to make ordinances to ascertain and establish boundaries of all streets, avenues, lanes, alleys and public places. Under subdivision b, the governing body has power to vacate any street, avenue, highway, lane or alley or portion thereof. There is also a special provision under section 4 of article 22, for the release of dedicated land, and provides in substance that whenever there has been heretofore or shall be hereafter a dedication of lands as a public street or highway and the same has not been accepted or opened by the municipality and it shall appear to the governing body that the public interest will be better served by releasing said lands or any part thereof from such dedication, said governing body shall have power by ordinance to release and extinguish the public right arising from said dedication as to the whole or any part of said lands, and that thereupon the lands or the part so released shall be effectually discharged therefrom as though said dedication had not taken place.

Under this act, therefore, the city had power to establish the boundary line of Lyons avenue and by laying out and opening the street as it did it exercised that power to establish the line.

There is no question but that the title of the abutting owner runs to the centre of the street. The establishment of the building line by the city justified the owners in building to that line and if the building line varied from the original dedicated line, the line established by the city would prevail and the property owner would be justified in observing the same.

However, to make sure doubly sure the ordinance which was put in evidence was passed, formally releasing the particular strip in question from the attempted dedication so that it is now as though no dedication had taken place.

Furthermore, passage of this ordinance by the city is also a formal recognition of the line of the avenue as it had been previously established by the city.

As was said by the Court below (Bk. p. 41, ll. 25-38):

"The objections raised by the defendant having now been removed by enactment of the vacating ordinance, there is no possibility of interference by the city with the maintenance of the building in its present location. Aside from the vacating ordinance it is highly improbable that the defendant would ever have experienced any difficulty on account of the original encroachment on the street line, as it appears that the front of the building conforms to the building line as established by the city."

IV.

As to appellant's contention that time was of the essence by implication.

Appellant attempts to bring this case within the ruling of Vice-Chancellor Emery in *Agens v. Koch*, 74 N. J. Eq. 528.

In that case at the time of the filing of the bill for specific performance the title was encumbered by two judgments and also by a dedication of a proposed street across a considerable portion of the premises. These objections to the title, however, had been removed before the hearing, and "a vacation of the proposed street by the proper municipal authority was produced, and a perfect record title can now be given." The Vice-Chancellor said:

"Objection was made at the hearing to the validity of the vacation but, as I think, without sufficient ground."

(Note that the same counsel urged the objection to the validity of the ordinance in that case and no doubt made the same argument that was made by the defendant here in that respect.) The Vice-Chancellor said further:

"If time is not of the essence of the contract, it is sufficient ordinarily if clear title can be given at the time of the decree (citing authorities). The material question, therefore, is whether time was of the essence of the contract, and whether by reason of the failure to tender a perfect record title at the time stipulated, complainants have no right to specific performance.

* * * * *

There is nothing in the contract itself, however, indicating that this delivery of possession on October 15th, was of the essence of the contract and the essentiality, if it exists, must arise out of the facts proved in relation to the purpose or object of the purchasers in making the purchase, and disclosed to the vendors."

The Vice-Chancellor found that time was of the essence of the contract by implication because of all the facts and circumstances which were proved, among which were the following: that the property was vacant land on which the

defendant purchaser intended to build immediately a garage on the first floor and a skating rink on the second floor, the garage to be occupied by a young man who lived with the defendant, one object of the purchase being to have a place in which he could, without delay, start such business; that the vendors had had plans previously prepared for a garage and at the time of the signing of the contract gave these plans to the purchaser; that the vendors knew that the purchaser was in negotiation with a tenant for the skating rink, and that to this tenant it was necessary that he should have the building by January 1st; that had title been passed on October 19th, as provided by the contract, the building, as it was proved at the hearing, could probably have been ready for the skating rink within two months and for the garage within three months; that immediately after the signing of the contract the purchaser employed an architect to prepare plans for the building as a garage and skating rink, but that further work on these plans was stopped not later than October 14th, after the purchaser had been notified of the cloud on the title by reason of the proposed street; that the attention of the vendors was called to this dedication as a possible objection to the title and a four-days' extension was granted for further investigation; that the vendors declined to grant a longer extension than four days for the reason that a higher price had been offered for the property and they were not willing to keep the matter open longer; that this evidence "would tend to indicate that in fixing the time in the extension of the contract time was considered essential not only by the purchaser but by the vendors"; that upon the execution of the contract the purchaser at once continued the negotiations for renting and secured

agreements for renting with security for the rent conditioned on delivery of possession not later than January 1st. The Vice-Chancellor concludes:

“The evidence satisfies me that the object of the purchase was the immediate improvement of the premises, by building, and that possession as early as practicable to pass the title, on or as soon after October 15th or October 19th, was important if not necessary to carry out the object of the purchase. It is also clear, I think, that the vendors knew of this object, and knew also at the time of the contract of the defendant’s desire for this immediate unclouded possession.”

No such state of facts appears in the present case. Here we have nothing else than the statement of the defendant that at the time he first spoke to the complainant about buying this property “I told him the object for my looking for a place in that neighborhood, my place down town was being sold and I had to get out, and I wanted to move my business up there and I also wanted to get this other store rented before this big operation was being completed.” He did not remember anything that was said at the time the contract was signed and could not remember even where the contract was signed. His wife’s testimony is equally unconvincing.

This testimony of the defendant is flatly denied by the complainant, who in testifying of this conference said (Bk. p. 30, ll. 10-18):

“I ask him ‘what are you going to do with the stores? Are you going to move up there?’ He said, ‘No, I will keep them for an investment.’ That was all that was said, no mention of his business. He said he would stay right where he was, on Court street. He mentioned he sold his property there.”

It is significant that nowhere in the correspondence nor at any time until the defendant testified at the hearing was any mention made of time being of the essence of the contract or of the defendant’s repudiating the contract because of his need of immediate possession. He assigned no reason for repudiating the contract other than the single statement that the building was not within the line of the property as described. The fact is that he is still at his same old place of business on Court street, as the complainant testified the defendant told him in that first conference that he intended to be.

Certainly this is the slimmest sort of a thread upon which to hang a defense of “essentiality by implication.” The burden of proving that time was of the essence by implication must certainly rest upon him who asserts it, and we submit that even the facts which defendant testified to have not been proved, and that even if they were proved they are not such facts as can give rise to such implication.

The conclusions of the Court below in this respect are as follows (Bk. p. 41, l. 3):

“Defendant does not claim that time was ever expressly of the essence, but insists that it was of the essence by implication and bases this insistment upon his claim that he was purchasing the property for a specific purpose which was made known to the complainants before the contract was entered into; but the evidence on this point is meagre and sharply in conflict. It is sufficient to say that defendant has not sustained the burden of proof with respect to this point.

‘Intent to make time essential must be clearly, unequivocally and unmistakably shown.’

Pomeroy’s Specific Performance, 3d Edition, Sec. 392.

Where time is not of the essence and there has been no lawful rescission, it is sufficient if the vendor is able to perform at the time of the decree."

V.

As to appellant's objection that the decree requires the defendant to pay interest and does not require an accounting from the complainants for rents.

The defendant elected to arbitrarily rescind the contract affording no opportunity to the complainants to remove the objection which he raised to the title and offering no willingness on his part to negotiate or adjust the matter. We submit that he was properly decreed to stand by his election. The decree provides that he pay interest on the balance of the purchase price from October 1, 1926, which was three days after the letter which complainants' attorney wrote on September 27th, requesting defendant to fix a time for closing.

Under the circumstances complainants are not liable to defendant for the loss of rent. On cross examination complainant was asked "Have you tried to let it to anybody?" And he answered, "I wouldn't let it. I didn't know whether it would be right or not. I didn't know whether I had the right to let it or not." Appellant's brief says, "This is a clear case of willful default," but we submit that the willful default was on the part of the defendant. Complainants' position was constant and proper throughout—they were insisting upon the defendant performing his contract, and if defendant had done so he would have been in a position to rent the premises as he saw fit.

VI.

As to appellant's objection that complainants are not entitled to costs and counsel fee.

Appellant's brief says, "The defendant has not been in default at any time; why should he be punished by being compelled to pay complainants' costs and counsel fee when the entire litigation was caused by the default of the complainants?" We submit that by his arbitrary rescinding and subsequent persistent refusal to go through with the deal, defendant was in default and brought upon himself the costs and counsel fee of which he now complains.

We submit that even on the day set by the contract for the delivery of the deed no valid ground existed for defendant's refusal to perform. The building was entirely within the lines of the plot as the parties thought and intended the plot to be. It stood entirely upon land, the fee to which complainants were ready, willing and able to convey to defendant. The city had opened and laid out and monumented a street line and buildings had been erected accordingly. There was no one who might raise any valid objection to the building being placed as it was back of the actual street line and within the lines of the plot as the parties intended it to be.

To set the defendant's fears more completely at rest the city, by ordinance, vacated the street as laid down on the map insofar as concerned the strip in question, thereby putting itself on record as having and claiming no right of easement over that strip.

Defendant's arbitrary and unqualified rescission of the contract on the day prior to the date therein set for the closing of title indicates that he was seeking some way out of his contract

obligation, and that immediately upon receipt of the survey he snatched at the only possible objection he had been able to find and offered it as his excuse for definitely and finally rescinding the contract.

To decree the defendant to specifically perform his contract is to inflict no hardship upon him, is to involve him in no controversy, is to subject him to no loss, but is merely to compel him to accept a perfectly good and marketable title to the premises which he contracted to purchase with the building thereon entirely within the lines of the plot as he thought and intended it to be.

Respectfully submitted,

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[Faint handwritten notes on the reverse side of the page, including phrases like "Bill of Complaint", "Order of Court", and "Memo de..."]