INDEX

BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY.

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

Complainant, A. Mildred Murphy, of the City of Margate City, County of Atlantic and State of New Jersey, respectfully shows that:

1. On the 31st day of March, 1926, she, as a single woman, entered into an agreement of sale with one Joseph K. Marshall, under the terms of which she agreed, in consideration of the sum of $10,000, to convey unto said Joseph K. Marshall premises known as Lots 38, 39 and 40 in Block 174, as shown on map of Ventnor Heights, by W. I. Risley, showing property owned by St. Leonard's Park, Inc., a copy of which agreement is attached hereto and made a part hereof and marked Exhibit A, and for the particulars of which reference is made thereto.

2. Said contract provided, among other things, as follows:

> "Settlement to be made at the office of the Chelsea Title and Guaranty Company on July 1, 1926, provided, however, that the within mentioned lots be filled to grade. If said lots were not filled to grade, the party of the second part shall pay to the party of the first part the sum of $1000, and the balance at any such time that the City Engineer of Ventnor City shall certify to the party of the second part that said lots have been filled to grade.

It is understood and agreed between the parties hereto that the St. Leonard's Park, Inc., developers of Ventnor Heights, are to pay all costs in connection with bringing said property to grade, gravel streets, sidewalks and curbing.

Time is the essence of this agreement and all its conditions."

3. One Joseph D. Farrington, a real estate broker of the City of Atlantic City, having an office in Margate City, was the agent for complainant in procuring said sale, and in attending to all matters in connection therewith; that on June 17th, 1926, defendant, Marshall, through his agent, wrote a letter to complainant's agent, Farrington, a copy of which is annexed hereto and made a part hereof, and marked Exhibit B.

4. To said letter the said Farrington replied, stating that settlement would not be due on July 1st, 1926, by reason of the fact that the improvements were not completed, to which the agent of the said defendant, Marshall, replied by letter dated June 23rd, 1926, a copy of which is annexed hereto and made a part hereof and marked Exhibit C;

5. On June 28th, 1926, complainant's agent, Joseph D. Farrington, wrote to defendant a letter bearing that date, a copy of which is annexed hereto and made a part hereof and marked Exhibit D;

6. That on July 1st, 1926, said lots were not filled to grade and, accordingly, the said defendant, Marshall, paid to complainant the sum of $1000 and complainant delivered unto the said defendant, Marshall, an extension agreement in the form set out

in Exhibit E, which is attached hereto and made a part hereof;

7. Complainant is advised and believes, and therefore expressly charges, that the said Joseph D. Farrington had also acted as agent for one Clifton Shinn and one Frank Redman in the sale to the said Marshall of other parcels of land in the same tract; that reference is made to that fact merely because certain of the correspondence hereto annexed between the said Farrington and the said defendant, Marshall, relates to all three parcels of land, and confusion might result in the understanding of the said correspondence, if this fact was not set before the Court.

8. Complainant is advised and believes, and therefore expressly charges that said other two agreements of sale contain the same general provision as to the necessity for fill being completed prior to the time when the defendant should be obliged to settle.

9. On July 29th, 1926, complainant's agent, Farrington, wrote a letter to said defendant, Marshall, a copy of which is attached hereto and made a part hereof and marked Exhibit F.

10. That on July 30th, 1926, the defendant, Marshall, wrote a letter to said Farrington, a copy of which is attached hereto and made a part hereof and marked Exhibit G.

11. That on July 31st, 1926, the said Farrington replied to said Marshall, a copy of which letter is annexed hereto and made a part hereof and marked Exhibit H.

12. That on August 3rd, 1926, the said defendant, Marshall, wrote a letter to said Farrington, a copy of which is attached hereto and made a part hereof and marked Exhibit I.

13. That on August 5th, 1926, the said Farrington replied to the said defendant, Marshall, a copy of which letter is attached hereto and made a part hereof and marked Exhibit J.

14. Complainant, in consideration of one dollar, again extended the time of settlement, in accordance with the terms of an extension agreement dated August 26th, 1926, a copy of which is annexed hereto and made a part hereof and marked Exhibit K.

15. The land in question, which complainant was selling unto the said defendant, Marshall, was a part of a tract of meadow land, which was being developed by St. Leonard's Park, Inc., by filling, laying out of streets, building of sidewalks, curbs, etc.; that at the time complainant entered into the said agreement with the said defendant, Marshall, she had an agreement for the purchase of said land from the said St. Leonard's Park, Inc.; that said St. Leonard's Park, Inc., was, at the time complainant entered into the agreement with the said Marshall, engaged in filling said land and making the improvements thereon that are called for by the aforesaid agreement, and continued so to do; that all of said work was being done by St. Leonard's Park, Inc., and complainant had no control over the same, as the defendant well knew at the time he entered into the contract aforesaid;

16. That the city engineer never certified that the above-described land had been filled to grade until

June 18th, 1927; that on July 13th, 1927, complainant's agent, Farrington, was notified by St. Leonard's Park, Inc., that Block 174 was up to grade and that all streets and sidewalks around it were completed; thereupon complainant caused a notice to be sent to the said defendant, Marshall, advising him that said lots were filled to grade, and had been so certified by the city engineer.

17. Complainant stands ready, willing and able to settle with the defendant, in accordance with the terms of said contract, and in all things to perform her contract with defendant.

18. That on or about August 20th, 1927, complainant was served with a summons and complaint in an action at law instituted by Joseph K. Marshall in the New Jersey Supreme Court against complainant, for the return of his deposit money, a copy of which complaint, without the exhibits therein referred to, is attached hereto and made a part hereof and marked Exhibit L.

Complainant is without adequate remedy in the courts of law and therefore prays:

1. That Joseph K. Marshall, who is the defendant in this suit, may answer this bill of complaint, and each statement herein made, without oath;

2. That the defendant, his servants, agents and attorneys be restrained from prosecuting said action at law.

3. That defendant be decreed to specifically perform his contract aforesaid.

And for such other and further relief as may be equitable and just.

THOMPSON & HANSTEIN,
Solrs. for and of counsel with complainant.

EXHIBIT A.

ARTICLES OF AGREEMENT made this thirty-first day of March, in the year of our Lord one thousand nine hundred and twenty-six (1926) BETWEEN A. MILDRED MURPHY, Single Woman, of the City of Margate City, County of Atlantic, and State of New Jersey, party of the first part, and JOSEPH K. MARSHALL, of the City of Philadelphia, County of Philadelphia, and State of Pennsylvania, party of the second part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of TEN THOUSAND DOLLARS ($10,000), to be paid and satisfied as hereinafter mentioned and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, does agree to and with the said party of the second part, that she, 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 special warranty, free from all encumbrance, except as hereinafter mentioned, on or before the first day of July, 1926, all that lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Ventnor City, in the county of Atlantic and State of New Jersey, BEING known and desig-

nated as Lots No. 38, 39 and 40, Block 174, as shown on Map of Ventnor Heights, by W. I. Risley, showing property owned by St. Leonard's Park, Inc., FREE AND CLEAR of all restrictions.

AND the said party of the second part, for himself, his heirs, executors and administrators, does covenant, promise and agree to and with the said party of the first part, her heirs 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 TEN THOUSAND DOLLARS ($10,000), as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

$1,000.00 One thousand dollars in cash upon the signing of this agreement, the receipt whereof is hereby acknowledged;

3,612.50 Thirty-six hundred and twelve dollars and fifty cents by the assumption by the party of the second part of mortgage in like amount, said mortgage to be dated July 1, 1926, and to be payable at any time within one year from the date thereof, with interest at the rate of six per cent. per annum, payable semi-annually;

637.50 Six hundred and thirty-seven dollars and fifty cents by the assumption by the party of the second part, of mortgage in like amount, said mortgage to be dated July 1, 1926, and to be payable at any time within one year from the date thereof, with interest at the rate of six per cent. per annum, payable semi-annually.

750.00 Seven hundred and fifty dollars by the party of the second part giving back to the party of the first part, a purchase money mortgage in like amount, together with

his Bond, said mortgage to be payable at any time within one year from the date of final settlement and to bear interest at the rate of six per cent. per annum, payable semi-annually, and

4,000.00 Four thousand dollars in cash on the day of final settlement, hereinafter mentioned.

Settlement to be made at the office of the Chelsea Title and Guaranty Company on July 1, 1926, provided, however, that the within mentioned lots be filled to grade. If said lots are not filled to grade, the party of the second part shall pay to the party of the first part, the sum of $1,000 and the balance at any such time that the City Engineer of Ventnor City shall certify to the party of the second part that said lots have been filled to grade.

It is understood and agreed between the parties hereto that the St. Leonard's Park, Inc., Developers of Ventnor Heights, are to pay all costs in connection with bringing said property to grade, gravel streets, sidewalks and curbing.

Time is the essence of this agreement and all its conditions.

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 first day of July, 1926, and from thence take the rents, issues and profits to his and their use.

And for the performance of all and singular the covenants and agreement aforesaid, the said parties do bind themselves, and their respective heirs, executors and administrators; and they hereby agree to pay upon failure to perform the same the sum of

which they hereby fix and settle as liquidated damages therefor.

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

(SEAL) (Signed) A. MILDRED MURPHY
(SEAL) JOS. K. MARSHALL

Signed, sealed and delivered
in the presence of
(Signed) J. D. Farrington

STATE OF NEW JERSEY }
COUNTY OF ATLANTIC } SS.

BE IT REMEMBERED that on this 31st day of March, in the year of our Lord one thousand nine hundred and twenty-six, before me, the subscriber, a Notary Public in and for the State of New Jersey, personally appear A. Mildred Murphy, single woman, who I am satisfied is the vendor mentioned in the above deed or conveyance, and I having first made known to her the contents thereof, she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed.

JOSEPH D. FARRINGTON,
Notary Public of N. J.

EXHIBIT B.

JOSEPH K. MARSHALL
REALTOR
8 South Fifty-second Street
Philadelphia, June 17th, 1926

Mr. J. D. Farrington
Douglas & Atlantic Aves.
Margate City, New Jersey.
Dear Sir:

Will you kindly inform us if settlement will be due July 1st, according to Agreements, for the land purchased in Ventnor Heights. There is a stipulation relative to grading, etc., that makes the settlement at that time conditioned upon performance of contract. In the event that we go through with the settlement on that date kindly prepare papers in the name of Joseph K. Marshall, Widower, and advise us of the hour.

Very truly yours,
MARSHALL & MALNEY,
Per J. M. Maloney.

JHM/P

EXHIBIT C.

Philadelphia, June 23rd, 1926

Mr. J. D. Farrington
Douglas & Atlantic Aves.,
Margate City, N. Jersey
Dear Sir:

We duly received your favor of the 18th inst. advising us that settlement schedule for July 1st, on

Ventnor Heights ground, will be postponed because of improvements not being completed.

Will you kindly send us a letter setting forth that the dates of the mortgages will be the date settlement is made, instead of July 1st. We think the intent is clear in Agreements, but it does not so state specifically.

Very truly yours,
MARSHALL & MALONEY,
JHM/P Per J. M. Maloney.

EXHIBIT D.

June 28, 1926.

Mr. Joseph K. Marshall,
8 So. 52nd St.,
Philadelphia, Pa.

Attention of J. H. Maloney.

Dear Mr. Marshall:

Replying to your letter of June 25th, with reference to the dating of the mortgages as covered in three Agreements of Sale covering properties purchased in Ventnor Heights, please be advised that all mortgages will date as of date of final settlement. Just as soon as I receive your check in the amount of Five Thousand Dollars, I will forward you three extension agreements, acknowledging receipt of your additional deposit covering the extension until such time as all improvements are completed.

Awaiting your early reply, I remain

Yours very truly,
Jos. D. Farrington.

JDF:HK

EXHIBIT E.

June 30, 1926.

For and in consideration of the sum of One Thousand Dollars ($1,000.) to me in hand paid, I, Mildred Murphy, of the City of Margate City, County of Atlantic and State of New Jersey, do hereby agree to extend unto Joseph K. Marshall, of the City and County of Philadelphia, State of Pennsylvania, final settlement on lots nos. 38, 39 and 40 in Block 174, Ventnor Heights, Ventnor City, New Jersey, to September 1, 1926, or to such prior time that the City Engineer of Ventnor City, New Jersey, shall certify to Joseph K. Marshall that said lots have been filled to grade.

It is understood that the mortgages mentioned in the within agreement of sale are to be dated as of the day of final settlement.

(Signed) Mildred Murphy

WITNESS: Helen M. Kerstetter

EXHIBIT F.

JOSEPH D. FARRINGTON
REALTOR
MARGATE CITY, N. J.

July 29, 1926.

Mr. Joseph K. Marshall
8 S. 52nd St.
Philadelphia, Pa.

Dear Mr. Marshall:

Your letter of July 27th with reference to ground

purchased through this office, please be advised as follows:

The settlement which is scheduled to take place August 1st will, in accordance with Agreement of Sale, be extended similar to the other two parcels until such time as the fill and improvements are completed. I would, therefore, request that you send the additional payment of One Thousand Dollars on this parcel.

With reference to the other two parcels, I am sending you, herewith, extension agreements on both, and please be advised that I was under the impression that these extensions had been forwarded to you, as they have been in my hands for some time. I know of nothing along this Boulevard adjoining the corner of Dorset and Wellington Avenue which can be bought for less than $300. per foot and further down Wellington Avenue, where the other two pieces are, there is nothing less than $150. per front foot.

Undoubtedly you are thoroughly familiar with the general situation in Real Estate which exists now almost everywhere, and it is the opinion of everybody here who seems to be real posted on Real Estate that when fill and improvements are in on your parcels, you will be able to make a nice profit. Immediately upon receipt of the additional payment, I will forward extension covering the lots in Block 173, Ventnor Heights.

Yours very truly,
Jos. D. Farrington.

JDF:HK Enc.

EXHIBIT G.

Philadelphia, July 30, 1926

Mr. Joseph D. Farrington
Douglas & Atlantic Avenues,
Margate City, New Jersey.

Dear Mr. Farrington:

I am in receipt of your favor of the 29th inst. and contents noted.

Enclosed please find check to your order for $1,000 to cover additional payment on Ventnor Heights lots, due August 1st. I note what you say in reference to the price at which ground is being held adjacent to our lots, and hope same will be realized.

I am returning the extension agreements for the two parcels upon which we made additional payments a month ago, and beg to call your attention to an error in setting forth the period of extension. It states that settlement shall be September 1st, or such prior time, etc., whereas, settlement is to take place only at such as the City Engineer shall certify, etc. Will you please have the extension agreements corrected; also cover the same in the agreement for the third parcel.

Very truly yours,
JOSEPH K. MARSHALL.

JHM/P

EXHIBIT H.

JOSEPH D. FARRINGTON
REALTOR
MARGATE CITY, N. J.

July 31, 1926

Mr. Joseph K. Marshall
8 South 52nd St.
Philadelphia, Pa.

Dear Mr. Marshall:

We received your letter of the 30th instant in which you take exception to the wording of the extension sent you in a previous letter. The reason we wrote our extension to read, September 1, 1926, or to such prior time that the City Engineer of Ventnor City shall certify to you that said lots have been filled to grade, is because we wish to extend our Agreement to a definite date. If the lots were filled to grade prior to September 1, settlement would have been made at that time. It is our understanding that extension shall be given from time to time for a definite term, until these lots are filled to grade to meet the approval of the City Engineer.

We are enclosing herewith the extensions executed by Mr. and Mrs. Shinn, Miss Murphy and Mr. Redman for the three parcels of ground purchased by you in Ventnor Heights.

Trusting everything will be satisfactory, I remain

Very truly yours,
Settlement Department.

WEB:MM
Enc.

EXHIBIT I.

Philadelphia, August 3, 1926

Mr. Joseph D. Farrington
Douglas & Atlantic Avenues,
Margate City, New Jersey.

Re-Ventnor Heights Lots.

Dear Sir:

We are in receipt of the three Agreements of Extension, two of which you returned after we had sent them to you declining to accept terms mentioned therein; the third phrased in exactly the same way as the two prior Agreements of Extension. We are also in receipt of your letter in which you explain that you want a definite date for settlement. Now, in this connection I desire to say that we do not accept, and we desire to be on record as not accepting the terms mentioned in these Agreements of Extension, but we do adhere strictly to the terms of our original Agreements in which it distinctly states that the settlement is not to take place until such time as the City Engineer has certified that the lots have been filled to grade.

We are attaching to our agreement a copy of this letter, and will expect a confirmation of it in a reply from you.

Very truly yours,
JOSEPH K. MARSHALL.

JKM/P

EXHIBIT J.

August 5, 1926.

Mr. Joseph K. Marshall
8 S. 52nd St.
Philadelphia, Pa.
Dear Mr. Marshall:

I am very sorry there has been a misunderstanding in regard to the extension agreements on the parcels of ground which you purchased in Ventnor Heights, through this office.

This letter is to acknowledge receipt of your letter of August 3, 1926, with reference to the terms as set forth in the Extension Agreement and I wish to advise that it is the understanding, on the part of each of the individual sellers, that the terms will be adhered to, as set forth in the original agreement of sale. Although each extension calls for a specific date, it is intended that the extensions are to be renewed at each date set forth for settlement, until such time as the City Engineer certifies that the fill and improvements are completed.

I trust this will be satisfactory to you and I am very sorry that I did not set forth clearly in my letter to you, the exact intention of the extensions.

Yours very truly,
JOS. D. FARRINGTON.

JDF:HK

EXHIBIT K.

August 26, 1926

For and in consideration of the sum of One Dollars ($1) to me in hand paid I, Mildred Murphy, of the City of Margate City, County of Atlantic and State of New Jersey, do hereby agree to extend unto Joseph K. Marshall, of the City and County of Philadelphia, State of Pennsylvania, final settlement on lots no. 38, 39 and 40, in Block 174, Ventnor Heights, Ventnor City, New Jersey, to November 1, 1926, or to such prior time that the City Engineer of Ventnor City, New Jersey, shall certify to Joseph K. Marshall that said lots have been filled to grade. It is understood that the Mortgages mentioned in the within Agreement of Sale are to be dated as of the day of final settlement.

Mildred Murphy.

WITNESS: Walter E. Beyer.

EXHIBIT L.

NEW JERSEY SUPREME COURT
Atlantic County.

JOSEPH K. MARSHALL,
Plaintiff,
v.
A. MILDRED MURPHY,
Defendant.

On Contract.
COMPLAINT.

Plaintiff, Joseph K. Marshall, brings this suit against defendant, A. Mildred Murphy, and says:

1. That on the 31st day of March, 1926, defendant, A. Mildred Murphy, entered into an agreement in writing wherein and whereby she agreed to convey to plaintiff, Joseph K. Marshall, on or before the 1st day of July, 1926, Lots 38, 39 and 40 in Block 174, as shown on Map of Ventnor Heights, by W. I. Risley, showing property owned by St. Leonard's Park, Inc., as will more fully appear by reference to a copy of said agreement hereto annexed and made a part hereof.

2. That time was the essence of said agreement and all its conditions.

3. That plaintiff paid upon the signing of said agreement to the said A. Mildred Murphy, the sum of One thousand dollars ($1,000.00) in cash.

4. That settlement was not made on the 1st day of July, 1926, as provided in said agreement, but thereafter the payment of the further sum of One thousand dollars ($1,000.00), as provided in said agreement, was paid by plaintiff to defendant, A. Mildred Murphy.

5. That on the 30th day of June, 1926, the said defendant, realizing that said lots had not been filled as provided in said agreement of sale, sent to this plaintiff an extension agreement, in consideration of extending the time for delivery of the title thereof until the 1st day of September, 1926, as appears by an agreement signed by the said A. Mildred Murphy on said June 30th, 1926, a copy of which is hereto annexed and made a part hereof.

6. That defendant was unable to deliver said lots to plaintiff upon the 1st of September, 1926, as pro-

vided in said extension agreement, and upon the 26th day of August, 1926, forwarded to this plaintiff a further extension agreement in consideration of plaintiff continuing said agreement and refraining from demanding payment of the moneys by him theretofore paid, extending the time of final settlement until the 1st day of November, 1926, a copy of which agreement is hereto annexed and made a part hereof.

7. That upon the 1st day of November, 1926, the said defendant, A. Mildred Murphy, was still unable to perform her said agreement and convey said lots to plaintiff in the condition provided in said agreement of sale.

8. That plaintiff entered into said agreement of sale for the purpose of re-selling said lots, there being on said 31st day of March, 1926, and on the 1st day of July, 1926, a ready market for the sale thereof.

9. That following the 1st day of July, 1926, the real estate market slumped, and by the 1st of November, 1926, there was no sale for said lots.

10. That plaintiff thereupon demanded a return of the moneys by him paid to the said defendant, A. Mildred Murphy, which she refused to do.

11. That plaintiff thereupon rescinded said contract, and demanded a repayment of the moneys, together with interest thereon, of the said defendant, A. Mildred Murphy, which demand was refused.

Wherefore, plaintiff demands of defendant, A. Mildred Murphy, payment of the said sum of $2,000, together with interest on the sum of $1,000 from the 31st day of March, 1926, and on the sum of $1,000 from the 1st day of August, 1926.

BOURGEOIS & COULOMB,
Attorneys of Plaintiff.

ANSWER AND COUNTER-CLAIM.

IN CHANCERY OF NEW JERSEY.

Between A. Mildred Murphy, *Complainant,* and Joseph K. Marshall, *Defendant.*	On Bill, &c. Answer and Counter-Claim.

Defendant, Joseph K. Marshall, answering complainant's bill of complaint filed in the above-stated cause, says:

1. He admits the allegations contained in paragraph 1.

2. He admits the allegations contained in paragraph 2.

3. He admits the allegations contained in paragraph 3.

4. He admits the allegations contained in paragraph 4.

5. He admits the allegations contained in paragraph 5.

6. He admits the allegations contained in paragraph 6.

7. He denies that confusion can arise from the correspondence mentioned in paragraph 7.

8. He neither admits nor denies the allegations contained in paragraph 8, and says that the matter is wholly irrelevant and immaterial.

9. He admits the allegations contained in paragraph 9.

10. He admits the allegations contained in paragraph 10.

11. He admits the allegations contained in paragraph 11.

12. He admits the allegations contained in paragraph 12.

13. He admits the allegations contained in paragraph 13.

14. He admits the allegations contained in paragraph 14.

15. He neither admits nor denies the allegations contained in paragraph 15, and leaves complainant to prove the same, if she shall be so advised.

16. He neither admits nor denies the allegations contained in paragraph 16, and leaves complainant to prove the same, if she shall be so advised.

17. He denies the allegations contained in paragraph 17.

18. He admits the allegations contained in paragraph 18.

19. Further answering, this defendant says that after the making of said agreement, complainant A. Mildred Murphy, in consideration of the payment of $1,000, executed an agreement in the following language, concerning the purchase of the lots mentioned in complainant's bill of complaint:

"June 30, 1926.

"For and in consideration of the sum of One Thousand Dollars ($1,000) to me in hand paid, I, Mildred Murphy, of the City of Margate City, County of Atlantic and State of New Jersey, do hereby agree to extend unto Joseph K. Marshall, of the City and County of Philadelphia, State of Pennsylvania, final Settlement on Lots Nos. 38, 39 and 40, in Block 174, Ventnor Heights, Ventnor City, New Jersey, to September 1, 1926, or to such prior time that the City Engineer of Ventnor City, New Jersey, shall certify to Joseph K. Marshall that said lots have been filled to grade. It is understood that the mortgages mentioned in the within Agreement of sale are to be dated as of the day of final settlement.

(Signed) MILDRED MURPHY.

Witness:

(Signed) HELEN M. KERSTETTER."

and that prior to the 1st day of September, 1926, to wit: on August 26th, 1926, said lots still being in an unfilled condition and complainant being unable to make conveyance thereof, pursuant to the terms of said contract, in consideration of the sum of $1.00, complainant executed a further agreement touching and concerning said lots, which is in the following language:

"August 26, 1926.

"For and in consideration of the sum of One Dollar ($1), to me in hand paid, I, Mildred Murphy, of the City of Margate City, County of Atlantic and State of New Jersey, do hereby agree to extend unto Joseph K. Marshall, of the City and County of Philadelphia, State of Pennsylvania, final settlement on Lots Nos. 38, 39 and 40, in Block 174, Ventnor Heights, Ventnor City, New Jersey, to November 1, 1926, or to such prior time that the City Engineer of Ventnor City, New Jersey, shall certify to Joseph K. Marshall that said lots have been filled to grade. It is understood that the mortgages mentioned in the within Agreement of Sale are to be dated as of the day of final settlement.

(Signed) Mildred Murphy.

Witness:

(Signed) Walter E. Beyer."

20. Defendant, further answering, says that complainant was unable to deliver said lots or parcels of land, pursuant to the terms of the agreement between complainant and defendant, either on the 1st day of July, 1926, or on or before the 1st day of November, 1926, pursuant to the terms of said subsequent agreement bearing date August 26th, 1926.

21. Defendant, further answering, says that he entered into said agreement to purchase for the pur-

pose of re-selling said lots at a profit, and that between the 1st day of July, 1926, and the 1st day of November, 1926, the real estate market slumped, and on and after the 1st day of November, 1926, there was no sale for said lots, at even the price defendant had contracted to give for them, and none at a price in excess thereof; and defendant thereupon wrote to said complainant, demanding a return of the payments made to complainant, thereby rescinding said contract.

22. That complainant neglected and refused to return said moneys.

23. That for the purpose of recovering the payments so made on account of said lots, this defendant instituted suit referred to in complainant's bill of complaint.

Defendant tenders to complainant the agreement between the parties herein mentioned, which agreement is unrecorded, and prays:

1. That complete relief be done between the parties in this cause.

2. That complainant be decreed to return to defendant the payments made by this defendant to complainant, together with interest thereon.

COUNTER-CLAIM.

By way of counter-claim, this defendant says:

1. That on the 31st day of March, 1926, complainant, A. Mildred Murphy, entered into an agreement

in writing wherein and whereby she agreed to convey to this defendant, on or before the 1st day of July, 1926, Lots 38, 39 and 40 in Block 174, as shown on the map of Ventnor Heights, by W. I. Risley, showing property owned by St. Leonard's Park, Inc., as will more fully appear by reference to copy of said agreement which is annexed to and made a part of complainant's bill of complaint, and marked "Exhibit A."

2. That time was the essence of said agreement and all its conditions.

3. That this defendant paid upon the signing of said agreement to the said complainant, A. Mildred Murphy, the sum of one thousand dollars ($1,000.00) in cash.

4. That settlement was not made on the 1st of July, 1926, as provided in said agreement, but thereafter the payment of the further sum of one thousand dollars ($1,000.00), as provided in said agreement, was paid by this defendant to complainant, A. Mildred Murphy.

5. That on the 30th day of June, 1926, the said complainant, A. Mildred Murphy, realizing that said lots had not been filled, as provided in said agreement of sale, sent to this defendant an extension agreement, in consideration of extending the time for delivery of the title thereof until the 1st day of September, 1926, as appears by an agreement signed by the said complainant, A. Mildred Murphy, on said June 30th, 1926, a copy of which appears in paragraph 19 of the above answer.

6. That complainant, A. Mildred Murphy, was unable to deliver said lots to plaintiff upon the 1st of September, 1926, as provided in said extension agreement, and upon the 26th day of August, 1926, forwarded to this defendant a further extension agreement, in consideration of this defendant continuing said agreement and refraining from demanding payment of the moneys by him theretofore paid, extending the time of final settlement until the 1st day of November, 1926, a copy of which said agreement appears in paragraph 19 of the above answer.

7. That upon the 1st day of November, 1926, the said complainant, A. Mildred Murphy, was still unable to perform her said agreement and convey said lots to this defendant in the condition provided in said agreement of sale.

8. That this defendant entered into said agreement of sale for the purpose of re-selling said lots, there being on said 31st day of March, 1926, and on the 1st day of July, 1926, a ready market for the sale thereof.

9. That following the 1st day of July, 1926, the real estate market slumped, and by the 1st of November, 1926, there was no sale for said lots.

10. That this defendant thereupon demanded a return of the moneys by him paid to the said complainant, A. Mildred Murphy, which she refused to do.

11. That this defendant thereupon rescinded said contract, and demanded a repayment of the moneys,

together with interest thereon, of the said complainant, A. Mildred Murphy, which demand was refused.

Defendant therefore prays:

1. That the said complainant, A. Mildred Murphy, be decreed to pay to this defendant the moneys heretofore paid to her, to wit: the sum of $2,000, together with interest on the sum of $1,000 from the 31st day of March, 1926, and on the sum of $1,000 from the 30th day of June, 1926.

2. That the said complainant, A. Mildred Murphy, answer this counter-claim, and stand to and abide by such decree as the Court shall make herein.

BOURGEOIS & COULOMB,
Solicitors for and of Counsel with Defendant.

REPLICATION, ANSWER TO COUNTER-CLAIM AND NOTICE.

IN CHANCERY OF NEW JERSEY.

Between A. MILDRED MURPHY, *Complainant,* and JOSEPH K. MARSHALL, *Defendant.*	On Bill, &c. Replication, Answer to Counter-Claim and Notice.

Complainant, A. Mildred Murphy, replying to the answer of defendant, says that:

1. Replying to paragraph 19 of defendant's answer, she says that the extension agreements referred to in said paragraph were entered into as alleged; that the interpretation and construction that the parties put on said agreements as to the time of settlement is set forth in the correspondence between the parties, copies of which are annexed to the bill of complaint in this cause.

2. Replying to paragraph 20 of defendant's answer she says that she was in a position to convey said premises, but said premises were not filled at that time, and the defendant refused to accept settlement until said lots should be filled.

3. Complainant denies paragraph 21.

4. Complainant admits paragraph 22 of said answer and says that she is ready and willing to convey said property as alleged in the bill of complaint.

5. Complainant admits paragraph 23 of defendant's answer.

NOTICE.

To Messrs. Bourgeois & Coulomb, Solicitors of Defendant:

Take notice that on, or prior, to the trial of this cause complainant reserves the right to move to strike the counter-claim, on the ground that the same fails to set up an equitable cause of action.

Complainant, further replying to the answer of defendant, says that:

1. The extension agreements were entered into by the parties thereto in accordance with the understanding of the parties thereto, as expressed in the correspondence between said parties, copies of which are annexed to the bill of complaint, and the same are to be construed in accordance with the correspondence and understanding of the parties.

THOMPSON & HANSTEIN,
Solrs. of Complt.

ORDER TO AMENDED.

IN CHANCERY OF NEW JERSEY.

Between
A. MILDRED MURPHY,
Complainant,
and
JOSEPH K. MARSHALL,
Defendant.

On Bill, &c.
Order to Amend.

Upon motion of Thompson & Hanstein, solicitors of complainant;

It is, on this 21st day of March, 1929, ordered that the bill of complaint filed in the above-entitled cause be, and the same is hereby amended by inserting a paragraph therein to be known as 17a, to read as follows:

"17a. That by letter dated March 24th, 1927, the defendant, Joseph K. Marshall, rescinded the contract of sale herein referred to, and demanded the return of his said money; that at that time said lots were not filled, as called for in the agreement of sale, and as referred to in the correspondence between the parties hereinbefore referred to; that by certificate dated June 18th, 1927, the City Engineer of Ventnor City certified that the premises were filled to grade; thereafter the complainant notified the defendant of that fact, and delivered unto the

defendant, by letter dated August 12th, 1927, a certificate of the City Engineer certifying that fact, and calling for settlement at the Chelsea Title and Guaranty Company on August 26th, 1927, at 11 A. M., and further advising the defendant that if the time fixed was not agreeable to the defendant, that the complainant would endeavor to meet the defendant's convenience, but that if the defendant did not object to the time fixed for settlement, the complainant would assume that the same was agreeable to him; that the defendant did not object to the time and place fixed for settlement, and the complainant appeared ready, willing and able to settle under said agreement, but the defendant failed to appear.

THOMPSON & HANSTEIN,
Solrs. of Complt.

We hereby consent to the entry of the above order.

BOURGEOIS & COULOMB,
Solrs. of Deft.

BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY.

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

Complainant, Frank Redman, of the City of Atlantic City, County of Atlantic and State of New Jersey, respectfully shows that:

1. On the 31st day of March, 1926, he entered into an agreement of sale with one, Joseph K. Marshall, under the terms of which he agreed, in consideration of the sum of $10,000, to convey unto said Joseph K. Marshall premises known as Lots 38, 39 and 40 in Block 173, as shown on map of Ventnor Heights, by W. I. Risley, showing property owned by St. Leonard's Park, Inc., a copy of which agreement is attached hereto and made a part hereof and marked Exhibit A, and for the particulars of which reference is made thereto.

2. Said contract provided, among other things, as follows:

> "Settlement to be made at the offices of the Chelsea Title and Guaranty Company on July 1, 1926, provided, however, that the within mentioned lots be filled to grade. If said lots were not filled to grade, the party of the second part shall pay to the party of the first part the sum of $1,000 and the balance at any such time that the City Engineer of Ventnor City shall certify to the party of the second part that said lots have been filled to grade.

It is understood and agreed between the parties hereto that the St. Leonard's Park, Inc., developers of Ventnor Heights, are to pay all costs in connection with bringing said property to grade, gravel streets, sidewalks and curbing.

Time is the essence of this agreement and all its conditions."

3. One Joseph D. Farrington, a real estate broker of the City of Atlantic City, having an office in Margate City, was the agent for complainant in procuring said sale, and in attending to all matters in connection therewith; that on June 17th, 1926, defendant, Marshall, through his agent, wrote a letter to complainant's agent, Farrington, a copy of which is annexed hereto and made a part hereof, and marked Exhibit B.

4. That to said letter the said Farrington replied, stating that settlement would not be due on July 1st, 1926, by reason of the fact that the improvements were not completed, to which the agent of the said defendant, Marshall, replied by letter dated June 23rd, 1926, a copy of which is annexed hereto and made a part hereof, and marked Exhibit C;

5. On June 28th, 1926, complainant's agent, Joseph D. Farrington, wrote to defendant a letter bearing that date, a copy of which is annexed hereto and made a part hereof and marked Exhibit D;

6. That on July 1st, 1926, said lots were not filled to grade and, accordingly, the said defendant, Marshall, paid to complainant the sum of $1,000 and complainant delivered unto the said defendant, Marshall, an extension agreement in the form set out in

Exhibit E, which is annexed hereto and made a part hereof;

7. Complainant is advised and believes, and therefore expressly charges, that the said Joseph D. Farrington had also acted as agent for one Clifton Shinn, and one, A. Mildred Murphy, in the sale to the said Marshall of other parcels of land in the same tract; that reference is made to that fact merely because certain of the correspondence hereto annexed between the said Farrington and the said defendant, Marshall, relates to all three parcels of land, and confusion might result in the understanding of the said correspondence, if this fact was not set before the Court.

8. Complainant is advised and believes, and therefore expressly charges, that said other two agreements of sale contain the same generl provision as to the necessity for fill being completed prior to the time when the defendant should be obliged to settle.

9. On July 29th, 1926, complainant's agent, Farrington, wrote a letter to said defendant, Marshall, a copy of which is attached hereto and made a part hereof and marked Exhibit F.

10. That on July 30th, 1926, the defendant, Marshall, wrote a letter to said Farrington, a copy of which is attached hereto and made a part hereof and marked Exhibit G.

11. That on July 31st, 1926, the said Farrington replied to said Marshall, a copy of which letter is annexed hereto and made a part hereof and marked Exhibit H.

12. That on August 3rd, 1926, the said defendant, Marshall, wrote a letter to said Farrington, a copy of which is attached hereto and made a part hereof and marked Exhibit I.

13. That on August 5th, 1926, the said Farrington replied to the said defendant, Marshall, a copy of which letter is attached hereto and made a part hereof, and marked Exhibit J.

14. Complainant, in consideration of one dollar, again extended the time of settlement, in accordance with the terms of an extension agreement dated August 26th, 1926, a copy of which is annexed hereto and made a part hereof and marked Exhibit K.

15. The land in question, which complainant was selling unto the said defendant, Marshall, was a part of a tract of meadow land, which was being developed by St. Leonard's Park, Inc., by filling, laying out of streets, building of sidewalks, curbs, etc.; that at the time complainant entered into the said agreement with the said defendant, Marshall, he had an agreement for the purchase of said land from the said St. Leonard's Park, Inc.; that said St. Leonard's Park, Inc., was, at the time complainant entered into the agreement with the said Marshall, engaged in filling said land and making the improvements thereon that are called for by the said agreement, and continued so to do; that all of said work was being done by St. Leonard's Park, Inc., and complainant had no control over the same, as the defendant well knew at the time he entered into the contract aforesaid;

16. That the City Engineer never certified that the above described land had been filled to grade

until June 18th, 1927; that on July 13th, 1927, complainant's agent, Farrington, was notified by St. Leonard's Park, Inc., that Block 173 was up to grade and that all streets and sidewalks around it were completed; thereupon complainant caused a notice to be sent to the said defendant, Marshall, advising him that said lots were filled to grade, and had been so certified by the City Engineer.

17. Complainant stands ready, willing and able to settle with the defendant, in accordance with the terms of said contract, and in all things to perform his contract with defendant.

18. That on or about August 20th, 1927, complainant was served with a summons and complaint in an action at law instituted by Joseph K. Marshall in the New Jersey Supreme Court against complainant, for the return of his deposit money, a copy of which complaint, without the exhibits therein referred to, is attached hereto and made a part hereof and marked Exhibit L.

Complainant is without adequate remedy in the courts of law and therefore prays:

1. That Joseph K. Marshall, who is the defendant in this suit, may answer this bill of complaint, and each statement herein made, without oath;

2. That the defendant, his servants, agents and attorneys be restrained from prosecuting said action at law.

3. That defendant be decreed to specifically perform his contract aforesaid.

And for such other and further relief as may be equitable and just.

THOMPSON & HANSTEIN,
Solrs. for and of counsel with complainant.

EXHIBIT A.

ARTICLES OF AGREEMENT made this thirty-first day of March, in the year of our Lord one thousand nine hundred and twenty-six (1926) BETWEEN FRANK REDMAN and PLACIDAS, his wife, of the City of Margate City, County of Atlantic and State of New Jersey, parties of the first part, and JOHN K. MARSHALL, of the City of Philadelphia, County of Philadelphia and State of Pennsylvania, party of the second part;

WITNESSETH, That the said parties of the first part, for and in consideration of the sum of TEN THOUSAND DOLLARS ($10,000), to be paid and satisfied as hereinafter mentioned and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, do agree to and with the said party of the second part, that they, the said parties of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns by deed of special warranty, free from all encumbrance, except as hereinafter mentioned, on or before the first day of August, 1926, all that lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Ventnor City, in the County of Atlantic and State of New Jersey, being known and desig-

nated as Lots Nos. 38, 39 and 40, Block 173, as shown on map of Ventnor Heights, by W. I. Risley, showing property owned by St. Leonard's Park, Inc., FREE AND CLEAR of all restrictions.

AND the said party of the second part, for himself, his heirs, executors and administrators, does covenant, promise and agree to and with the said parties of the first part, their heirs 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 TEN THOUSAND DOLLARS ($10,000), as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

$1,000. One thousand dollars in cash upon the signing of this agreement, the receipt whereof is hereby acknowledged;

2,975. Twenty-nine hundred and seventy-five dollars by the assumption by the party of the second part, of mortgage in like amount, said mortgage to be dated August 1, 1926, and to be payable at any time within one year from the date thereof, with interest at the rate of six per cent. per annum, payable semi-annually.

535. Five hundred and thirty-five dollars by the assumption by the party of the second part, of mortgage in like amount, said mortgage to be dated August 1, 1926, and to be payable at any time within one year from the date thereof, with interest at the rate of six per cent. per annum, payable semi-annually;

1,490. Fourteen hundred and ninety dollars by the party of the second part giving back to the party of the first part, a purchase money mortgage in like amount, said mort-

gage to be accompanied by his Bond, and to be payable at any time within one year from the date of final settlement and to bear interest at the rate of six per cent. per annum, payable semi-annually, and the balance of

4,000. Four thousand dollars in cash on the day of final settlement hereinafter mentioned.

$10,000.

Settlement to be made at the office of the Chelsea Title and Guaranty Company on August 1, 1926, provided, however, that the within-mentioned lots be filled to grade. If said lots are not filled to grade, the party of the second part shall pay to the party of the first part the sum of $1,000, and the balance at any such time that the City Engineer of Ventnor City shall certify to the party of the second part that said lots have been filled to grade.

It is understood and agreed between the parties hereto that the St. Leonard's Park, Inc., Developers of Ventnor Heights, are to pay all costs in connection with bringing said property to grade, gravel streets, sidewalks and curbing.

Time is the essence of this agreement and all its conditions.

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 first day of August, 1926, and from thence take the rents, issues and profits to his and their use.

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

to pay, upon failure to perform the same, the sum of which they hereby fix and settle as liquidated damages therefor.

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

(Signed) FRANK REDMAN (SEAL)
(Signed) PLACIDAS REDMAN (SEAL)
(Signed) JOS. K. MARSHALL (SEAL)

Signed, sealed and delivered
in the presence of
(Signed) J. D. FARRINGTON

STATE OF NEW JERSEY }
COUNTY OF ATLANTIC } SS.

BE IT REMEMBERED that on this 31st day of March, in the year of our Lord one thousand nine hundred and twenty-six, before me, the subscriber, a Notary Public in and for the State of New Jersey, personally appeared Frank Redman and Placidas, his wife, who I am satisfied are the vendor mentioned in the above deed or conveyance, and I having first made known to them the contents thereof, they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed.

JOSEPH D. FARRINGTON,
Notary Public of N. J.

EXHIBIT B.

Philadelphia, June 17th, 1926

Mr. J. D. Farrington
Douglas & Atlantic Ave.,
Margate City, New Jersey.

Dear Sir:

Will you kindly inform us if settlement will be due July 1st, according to agreements, for the land purchased in Ventnor Heights. There is a stipulation relative to grading, etc., that makes the settlement at that time conditioned upon performance of contract. In the event that we go through with the settlement on that date kindly prepare papers in the name of Joseph K. Marshall, Widower, and advise us of the hour.

Very truly yours,
MARSHALL & MALONEY,
JHM/P Per: J. M. Maloney.

EXHIBIT C.

Philadelphia, June 23rd, 1926

Mr. J. D. Farrington
Douglas & Atlantic Aves.,
Margate City, N. Jersey.

Dear Sir:

We duly received your favor of the 18th inst. advising us that settlement scheduled for July 1st, on Ventnor Heights ground, will be postponed because of improvements not being completed.

Will you kindly send us a letter setting forth that

the dates of the mortgages will be the date settlement is made, instead of July 1st. We think the intent is clear in Agreements, but it does not so state specifically.

Very truly yours,
MARSHALL & MALONEY,
PER: J. H. MALONEY

JHM/P

10

EXHIBIT D.

June 28, 1926

Mr. Joseph K. Marshall
8 S. 52nd St.
Philadelphia, Pa. 20

Attention of J. H. Maloney.

Dear Mr. Marshall:

Replying to your letter of June 25th, with reference to the dating of the mortgages as covered in three Agreements of Sale covering properties purchased in Ventnor Heights, please be advised that all mortgages will date as of date of final settlement. Just as soon as I receive your check in the amount of Five thousand dollars, I will forward you three extension agreements, acknowledging receipt of 30 your additional deposit covering the extension until such time as all improvements are completed.

Awaiting your early reply, I remain

Yours very truly,

JDG:HK JOS. D. FARRINGTON.

EXHIBIT E.

August 1, 1926.

For and in consideration of the sum of One Thousand dollars ($1,000), to me in hand paid, I, Frank Redman, of the City of Margate City, County of Atlantic and State of New Jersey, do hereby agree to extend unto Joseph K. Marshall, of the City and County of Philadelphia, State of Pennsylvania, final settlement on Lots Nos. 38, 39 and 40, Block 173, Ventnor Heights, Ventnor City, New Jersey, to September 1, 1926, or to such prior time that the City Engineer of Ventnor City, New Jersey, shall certify to Joseph K. Marshall that said lots have been filled to grade. It is understood that the mortgages mentioned in the within Agreement of Sale are to be dated as of the day of final settlement.

Frank Redman.

WITNESS: Walter E. Beyer.

EXHIBIT F.

July 29, 1926.

Mr. Joseph K. Marshall
8 S. 52nd St.
Philadelphia, Pa.

Dear Mr. Marshall:

Your letter of July 27th with reference to ground purchased through this office, please be advised as follows:

The settlement which is scheduled to take place August 1st, will, in accordance with Agreement of

Sale, be extended similar to the other two parcels, until such time as the fill and improvements are completed. I would therefore request that you send the additional payment of One thousand dollars on this parcel.

With reference to the other two parcels, I am sending you, herewith, extension agreements on both, and please be advised that I was under the impression that these extensions had been forwarded to you as they have been in my hands for some time. I know of nothing along this Boulevard adjoining the corner of Dorset and Wellington Avenue which can be bought for less than $300. per foot and further down Wellington Avenue, where the other two pieces are, there is nothing less than $150. per front foot.

Undoubtedly you are thoroughly familiar with the general situation in Real Estate which exists now almost everywhere and it is the opinion of everybody here who seems to be real posted on Real Estate that we will have a good fall market, for there are numerous inquiries being made at this time, and it is my opinion that when fill and improvements are in on your parcels, you will be able to make a nice profit. Immediately upon receipt of the additional payment, I will forward extension covering the lots in Block 173, Ventnor Heights.

Yours very truly,

JOS. D. FARRINGTON.

JDF:HK Enc.

EXHIBIT G.

Philadelphia, July 30, 1926

Mr. Joseph D. Farrington
Douglas & Atlantic Avenues,
Margate City, New Jersey.

Dear Mr. Farrington:

I am in receipt of your favor of the 29th inst. and contents noted.

Enclosed please find check to your order for $1,000. to cover additional payment on Ventnor Heights lots, due August 1st. I note what you say in reference to the price at which ground is being held adjacent to our lots, and hope same will be realized.

I am returning the extension agreements for the two parcels upon which we made additional payments a month ago, and beg to call your attention to an error in setting forth the period of extension. It states that settlement shall be September 1st, or such prior time, etc., whereas, settlement is to take place only at such as the City Engineer shall certify, etc. Will you please have the extension agreements corrected; also cover the same in the agreement for the third parcel.

Very truly yours,
JOSEPH K. MARSHALL.

JHM/P

EXHIBIT H.

July 31, 1926

Mr. Joseph K. Marshall
8 South 52nd St.
Philadelphia, Pa.
Dear Mr. Marshall:

We received your letter of the 30th instant in which you take exception to the wording of the extension sent you in a previous letter. The reason we wrote our extension to read, September 1, 1926, or to such prior time that the City Engineer of Ventnor City shall certify to you that said lots have been filled to grade, is because we wish to extend our agreement to a definite date. If the lots were filled to grade prior to September 1, settlement would have been made at that time. It is our understanding that extension shall be given from time to time for a definite term, until these lots are filled to grade to meet the approval of the City Engineer.

We are enclosing herewith the extensions executed by Mr. and Mrs. Shinn, Miss Murphy and Mr. Redman, for the three parcels of ground purchased by you in Ventnor Heights.

Trusting everything will be satisfactory, I remain

Very truly yours,
Settlement Department.

WEB:MM ENC.

EXHIBIT I.

Philadelphia, August 3, 1926

Mr. Joseph D. Farrington
Douglas & Atlantic Avenues,
Margate City, New Jersey.

Re: Ventnor Heights Lots.

Dear Sir:

We are in receipt of the three Agreements of Extension, two of which you returned after we had sent them to you declining to accept terms mentioned therein; the third phrased in exactly the same way as the two prior Agreements of Extension. We are also in receipt of your letter in which you explain that you want a definite date for settlement. Now, in this connection I desire to say that we do not accept, and we desire to be on record as not accepting the terms mentioned in these Agreements of Extension, but we do adhere strictly to the terms of our original Agreements in which it distinctly states that the settlement is not to take place until such time as the City Engineer has certified that the lots have been filled to grade.

We are attaching to our agreement a copy of this letter, and will expect a confirmation of it in a reply from you.

Very truly yours,
JOSEPH K. MARSHALL.

JKMP

EXHIBIT J.

August 5, 1926

Mr. Joseph K. Marshall
8 South 52nd St.
Philadelphia, Pa.
Dear Mr. Marshall:

I am very sorry there has been a misunderstanding in regard to the extension agreements on the parcels of ground which you purchased in Ventnor Heights, through this office.

This letter is to acknowledge receipt of your letter of August 3, 1926, with reference to the terms as set forth in the Extension Agreement, and I wish to advise that it is the understanding, on the part of each of the individual sellers, that the terms will be adhered to, as set forth in the original agreement of sale. Although each extension calls for a specific date, it is intended that the extensions are to be renewed at each date set forth for settlement, until such time as the City Engineer certifies that the fill and improvements are completed.

I trust this will be satisfactory to you and I am very sorry that I did not set forth clearly in my letter to you, the exact intention of the extensions.

Yours very truly,
JOS. D. FARRINGTON.

EXHIBIT K.

August 26, 1926

For and in consideration of the sum of One Dollars ($1.), to me in hand paid, I, Frank Redman, of

the City of Margate City, County of Atlantic and State of New Jersey, do hereby agree to extend unto Joseph K. Marshall, of the City and County of Philadelphia, State of Pennsylvania, final settlement on Lots Nos. 38, 39 and 40 in Block 173, Ventnor Heights, Ventnor City, New Jersey, to November 1, 1926, or to such prior time that the City Engineer of Ventnor City, New Jersey, shall certify to Joseph K. Marshall that said lots have been filled to grade. It is understood that the mortgages mentioned in the within Agreement of Sale are to be dated as of the day of final settlement.

Frank Redman.

WITNESS: Walter E. Beyer.

EXHIBIT L.

NEW JERSEY SUPREME COURT
Atlantic County.

JOSEPH K. MARSHALL,
Plaintiff,
v.
FRANK REDMAN,
Defendant.

On Contract.
COMPLAINT.

Plaintiff, Joseph K. Marshall, brings this suit against defendant, Frank Redman, and says:

1. That on the 31st day of March, 1926, defendant, Frank Redman, entered into an agreement in

writing wherein and whereby he agreed to convey to plaintiff, Joseph K. Marshall, on or before the 1st day of July, 1926, Lots 38, 39 and 40 in Block 173, as shown on the map of Ventnor Gardens, by W. I. Risley, showing property owned by St. Leonard's Park, Inc., as will more fully appear by reference to a copy of said agreement hereto annexed and made a part hereof.

2. That time was the essence of said agreement and all its conditions.

3. That plaintiff paid upon the signing of said agreement to the said Frank Redman, the sum of One thousand dollars ($1,000.00) in cash.

4. That settlement was not made on the 1st day of July, 1926, as provided in said agreement, but thereafter the payment of the further sum of one thousand dollars ($1,000) as provided in said agreement, was paid by plaintiff to defendant, Frank Redman.

5. That on the 30th day of June, 1926, the said defendant, realizing that said lots had not been filled as provided in said agreement of sale, sent to this plaintiff an extension agreement, in consideration of extending the time for delivery of the title thereof until the 1st day of September, 1926, as appears by an agreement signed by the said Frank Redman on said June 30th, 1926, a copy of which is hereto annexed and made a part hereof.

6. That defendant was unable to deliver said lots to plaintiff upon the 1st of September, 1926, as provided in said extension agreement, and upon the

26th day of August, 1926, forwarded to this plaintiff a further extension agreement, in consideration of plaintiff continuing said agreement, and refraining from demanding payment of the moneys by him theretofore paid, extending the time of final settlement until the 1st day of November, 1926, a copy of which agreement is hereto annexed and made a part hereof.

7. That upon the 1st day of November, 1926, the said defendant, Frank Redman, was still unable to perform his said agreement and convey said lots to plaintiff in the condition provided in said agreement of sale.

8. That plaintiff entered into said agreement of sale for the purpose of re-selling said lots, there being on said 31st day of March, 1926, and on the 1st day of July, 1926, a ready market for the sale thereof.

9. That following the 1st day of July, 1926, the real estate market slumped, and by the 1st of November, 1926, there was no sale for said lots.

10. That plaintiff thereupon demanded a return of the moneys by him paid to the said defendant, Frank Redman, which he refused to do.

11. That plaintiff thereupon rescinded said contract, and demanded a repayment of the moneys, together with interest thereon, of the said defendant, Frank Redman, which demand was refused.

Wherefore, plaintiff demands of defendant, Frank Redman, payment of the said sum of $2,000, to-

gether with interest on the sum of $1,000 from the 31st day of March, 1926, and on the sum of $1,000 from the 1st day of August, 1926.

BOURGEOIS & COULOMB,
Attorneys of Plaintiff.

ANSWER AND COUNTER-CLAIM.

IN CHANCERY OF NEW JERSEY.

Between FRANK REDMAN, *Complainant,* and JOSEPH K. MARSHALL, *Defendant.*	On Bill, &c. Answer and Counter-Claim.

Defendant, Joseph K. Marshall, answering complainant's bill of complaint filed in the above-stated cause, says:

1. He admits the allegations contained in paragraph 1.

2. He admits the allegations contained in paragraph 2.

3. He admits the allegations contained in paragraph 3.

4. He admits the allegations contained in paragraph 4.

5. He admits the allegations contained in paragraph 5.

6. He admits the allegations contained in paragraph 6.

7. He denies that confusion can arise from the correspondence mentioned in paragraph 7.

8. He neither admits nor denies the allegations contained in paragraph 8, and says that the matter is wholly irrelevant and immaterial.

9. He admits the allegations contained in paragraph 9.

10. He admits the allegations contained in paragraph 10.

11. He admits the allegations contained in paragraph 11.

12. He admits the allegations contained in paragraph 12.

13. He admits the allegations contained in paragraph 13.

14. He admits the allegations contained in paragraph 14.

15. He neither admits nor denies the allegations contained in paragraph 15, and leaves complainant to prove the same, if he shall be so advised.

16. He neither admits nor denies the allegations contained in paragraph 16, and leaves complainant to prove the same, if he shall be so advised.

17. He denies the allegations contained in paragraph 17.

18. He admits the allegations contained in paragraph 18.

19. Further answering, this defendant says that after the making of said agreement, complainant, Frank Redman, in consideration of the payment of $1,000, executed an agreement in the following language concerning the purchase of the lots mentioned in complainant's bill of complaint:

"August 1, 1926.

"For and in consideration of the sum One Thousand Dollars ($1,000.), to me in hand paid, I, Frank Redman, of the City of Margate City, County of Atlantic and State of New Jersey, do hereby agree to extend unto Joseph K. Marshall, of the City and County of Philadelphia, State of Pennsylvania, final settlement on Lots Nos. 38, 39 and 40, Block 173, Ventnor Heights, Ventnor City, New Jersey, to September 1, 1926, or to such prior time that the City Engineer of Ventnor City, New Jersey, shall certify to Joseph K. Marshall that said lots have been filled to grade. It is understood that the mortgages mentioned in the within Agreement of Sale are to be dated as of the day of final settlement.

(Signed) Frank Redman.

Witness:

(Signed) Walter E. Beyer."

and that prior to the 1st day of September, 1926, to wit: on August 26th, 1926, said lots still being in an unfilled condition and complainant being unable to make conveyance thereof, pursuant to the terms of said contract, in consideration of the sum of $1.00, complainant executed a further agreement touching and concerning said lots, which is in the following language:

"August 26, 1926.

"For and in consideration of the sum of One Dollar ($1.), to me in hand paid, I, Frank Redman, of the City of Margate City, County of Atlantic and State of New Jersey, do hereby agree to extend unto Joseph K. Marshall, of the City and County of Philadelphia, State of Pennsylvania, final settlement on Lots Nos. 38, 39 and 40, Block 173, Ventnor Heights, Ventnor City, New Jersey, to November 1, 1926 or to such prior time that the City Engineer of Ventnor City, New Jersey, shall certify to Joseph K. Marshall that said lots have been filled to grade. It is understood that the mortgages mentioned in the within Agreement of Sale are to be dated as of the day of final settlement.

(Signed) FRANK REDMAN.

Witness:

(Signed) WALTER BEYER."

20. Defendant, further answering, says that complainant was unable to deliver said lots or parcels of land, pursuant to the terms of the agreement between complainant and defendant, either on the 1st day of August, 1926, or on or before the 1st day of November, 1926, pursuant to the terms of said subsequent agreement bearing date August 26th, 1926.

21. Defendant, further answering, says that he

entered into said agreement to purchase for the purpose of re-selling said lots at a profit, and that between the 1st day of July, 1926, and the 1st day of November, 1926, the real estate market slumped, and on and after the 1st day of November, 1926, there was no sale for said lots, at even the price defendant had contracted to give for them, and none at a price in excess thereof; and defendant thereupon wrote to said complainant, demanding a return of the payments made to complainant, thereby rescinding said contract.

22. That complainant neglected and refused to return said moneys.

23. That for the purpose of recovering the payments so made on account of said lots, this defendant instituted suit referred to in complainant's bill of complaint.

Defendant tenders to complainant the agreement between the parties herein mentioned, which agreement is unrecorded, and prays:

1. That complete relief be done between the parties in this case.

2. That complainant be decreed to return to defendant the payments made by this defendant to complainant, together with interest thereon.

COUNTER-CLAIM.

By way of counter-claim, this defendant says:

1. That on the 31st day of March, 1926, complain-

ant, Frank Redman, entered into an agreement in writing wherein and whereby he agreed to convey to this defendant, on or before the 1st day of August, 1926, Lots 38, 39 and 40, in Block 173, as shown on map of Ventnor Heights, by W. I. Risley, showing property owned by St. Leonard's Park, Inc., as will more fully appear by reference to copy of said agreement which is annexed to and made a part of complainant's bill of complaint, and marked "Exhibit A."

2. That time was the essence of said agreement and all its conditions.

3. That this defendant paid upon the signing of said agreement to the said complainant, Frank Redman, the sum of one thousand dollars ($1,000.00) in cash.

4. That settlement was not made on the 1st day of August, 1926, as provided in said agreement, but thereafter the payment of the further sum of one thousand dollars ($1,000.00), as provided in said agreement, was paid by this defendant to complainant, Frank Redman.

5. That on the 1st day of August, 1926, the said complainant, Frank Redman, realizing that said lots had not been filled, as provided in said agreement of sale, sent to this defendant an extension agreement, in consideration of extending the time for delivery of the title thereof until the 1st day of September, 1926, as appears by an agreement signed by the said complainant, Frank Redman, on said 1st day of August, 1926, a copy of which appears in paragraph 19 of the above answer.

6. That complainant, Frank Redman, was unable to deliver said lots to plaintiff upon the 1st of September, 1926, as provided in said extension agreement, and upon the 26th day of August, 1926, forwarded to this defendant a further extension agreement, in consideration of this defendant continuing said agreement and refraining from demanding payment of the moneys by him theretofore paid, extending the time of final settlement until the 1st day of November, 1926, a copy of which said agreement appears in paragraph 19 of the above answer.

7. That upon the 1st day of November, 1926, the said complainant, Frank Redman, was still unable to perform his said agreement and convey said lots to this defendant in the condition provided in said agreement of sale.

8. That this defendant entered into said agreement of sale for the purpose of re-selling said lots, there being on said 31st day of March, 1926, and on the 1st day of August, 1926, a ready market for the sale thereof.

9. That following the 1st day of August, 1926, the real estate market slumped, and by the 1st of November, 1926, there was no sale for said lots.

10. That this defendant thereupon demanded a return of the moneys by him paid to the said complainant, Frank Redman, which he refused to do.

11. That this defendant thereupon rescinded said contract, and demanded a repayment of the moneys, together with interest thereon, of the said complainant, Frank Redman, which demand was refused.

Defendant therefore prays:

1. That the said complainant, Frank Redman, be decreed to pay to this defendant, the moneys heretofore paid to him, to wit: the sum of $2,000, together with interest on the sum of $1,000 from the 31st day of March, 1926, and on the sum of $1,000 from the 1st day of August, 1926.

2. That the said complainant, Frank Redman, answer this counter-claim, and stand to and abide by such decree as the Court shall make herein.

BOURGEOIS & COULOMB,
Solicitors for and of Counsel with Defendant.

REPLICATION, ANSWER TO COUNTER-CLAIM AND NOTICE.

IN CHANCERY OF NEW JERSEY.

Between
FRANK REDMAN,
Complainant,
and
JOSEPH K. MARSHALL,
Defendant.

On Bill, &c. Replication, Answer to Counter-Claim and Notice.

Complainant, Frank Redman, replying to the answer of defendant, says that:

1. Replying to paragraph 19 of defendant's answer he says that the extension agreements referred to in said paragraph were entered into as alleged; that the interpretation and construction that the parties put on said agreements as to the time of settlement is set forth in the correspondence between the parties, copies of which are annexed to the bill of complaint in this cause.

2. Replying to paragraph 20 of defendant's answer he says that he was in a position to convey said premises, but said premises were not filled at

that time, and the defendant refused to accept settlement until said lots should be filled.

3. Complainant denies paragraph 21.

4. Complainant admits paragraph 22 of said answer and says that he is ready and willing to convey said property as alleged in the bill of complaint.

5. Complainant admits paragraph 23 of defendant's answer.

NOTICE.

To Messrs. Bourgeois & Coulomb, Solicitors of Defendant:

Take notice that on, or prior, to the trial of this cause complainant reserves the right to move to strike the counter-claim, on the ground that the same fails to set up an equitable cause of action.

Complainant, further replying to the answer of defendant, says that:

1. The extension agreements were entered into by the parties thereto in accordance with the understanding of the parties thereto, as expressed in the correspondence between said parties, copies of which are annexed to the bill of complaint, and the same are to be construed in accordance with the correspondence and understanding of the parties.

THOMPSON & HANSTEIN,
Solrs. of Complt.

ORDER TO AMEND.

IN CHANCERY OF NEW JERSEY.

Between
FRANK REDMAN,
Complainant,

and

JOSEPH K. MARSHALL,
Defendant.

On Bill, &c.
Order to Amend.

Upon motion of Thompson & Hanstein, solicitors of complainant;

It is, on this 21st day of March, 1929, ordered that the bill of complaint filed in the above-entitled cause be, and the same is hereby amended by inserting a paragraph therein to be known as 17a, to read as follows:

"17a. That by letter dated March 24th, 1927, the defendant, Joseph K. Marshall, rescinded the contract of sale herein referred to, and demanded the return of his said money; that at that time said lots were not filled, as called for in the agreement of sale, and as referred to in the correspondence between the parties hereinbefore referred to; that by certificate dated June 18th, 1927, the City Engineer of Ventnor City certified that the premises were filled to grade; thereafter the complainant notified

the defendant of that fact, and delivered unto the defendant, by letter dated August 12th, 1927, a certificate of the City Engineer certifying that fact, and calling for settlement at the Chelsea Title and Guaranty Company on August 26th, 1927, at 11 A. M., and further advising the defendant that if the time fixed was not agreeable to the defendant, that the complainant would endeavor to meet the defendant's convenience, but that if the defendant did not object to the time fixed for settlement, the complainant would assume that the same was agreeable to him; that the defendant did not object to the time and place fixed for settlement, and the complainant appeared ready, willing and able to settle under said agreement, but the defendant failed to appear.

On motion of

THOMPSON & HANSTEIN,
Solrs. of Complainant.

We hereby consent to the entry of the above order.

BOURGEOIS & COULOMB,
Solrs. of Deft.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

BETWEEN:

A. MILDRED MURPHY,
Complainant,

and

JOSEPH K. MARSHALL,
Defendant.

On Bill, &c.

FRANK REDMAN,
Complainant,

and

JOSEPH K. MARSHALL,
Defendant.

On Bill, &c.

APPEARANCES:

THOMPSON & HANSTEIN, ESQS., WALTER HANSTEIN, ESQ., for complainants;

BOURGEOIS & COULOMB, ESQS., GEORGE A. BOURGEOIS, ESQ., for defendant.

March 21, 1929.

LEAMING, V. C.

The Court: Are counsel ready in today's case?

Mr. Hanstein: Yes, sir.

The Court: I make it a practice to read the pleadings before coming into court but this morning I haven't had the opportunity to do so, and I will ask the complainant to state the contents of his bill.

Mr. Hanstein: May it please the Court, these are two suits that because they are so closely related in their facts and law I think they can be safely tried together.

The Court: I have the pleadings in one case, that is A. Mildred Murphy v. John K. Marshall.

Mr. Hanstein: There is another companion case to that, Frank Redman v. the same defendant, and the facts and the law are entirely the same in regard to them, and that case was also referred to your Honor, and if I am not mistaken was set down for hearing on March 26th, this case being set down for March 21st.

The Court: I have it here that counsel consent that the two cases be heard together.

Mr. Bourgeois: Yes, sir.

The Court: Can we get along without the pleadings in the other case?

Mr. Hanstein: Yes. The bill is in each case a bill for specific performance and for the restraint

of an action at law by the defendant against the complainant in each case.

The Court: A vendor's bill?

Mr. Hanstein: Yes, and restraint of an action by the vendee against the vendor for the return of the deposit money. The situation is that on the 31st day of March, 1926, which is the same date in both cases, agreements of sale were entered by the complainants in these cases with the defendant under which the complainants were to sell to the defendant certain lots in a development then being under progress of development in Ventnor Heights, which was known as St. Leonard Tract ——

The Court: Why are you chased up here?

Mr. Hanstein: This matter was taken up especially by Mr. Bourgeois and myself with Chancellor Walker and he considered it advisable that the matter be referred to your Honor rather than Vice-Chancellor Ingersoll because there were other tracts that affect specifically Vice-Chancellor Ingersoll's sergeant-at-arms, which were identical with the relationship they created as these contracts. Now, the contract itself, in each case, provided that settlement was to be made at the office of the Chelsea Title & Guaranty Company on July 1, 1926, provided, however, that the within mentioned lots are filled to grade. If said lots were not filled to grade, the party of the second part shall pay to the party of the first part, the sum of $1,000 and the balance at any such time that the City Engineer of Ventnor City shall certify to the party of the second part that said lots have been filled to grade. It is under-

stood and agreed between the parties hereto that the St. Leonard's Park, Inc., developers of Ventnor Heights, are to pay all costs in connection with bringing said property to grade, gravel streets, sidewalks and curbing. Time is the essence of this agreement and all its conditions. Now, Mr. Joseph D. Farrington, a realtor in Atlantic City, was the agent of the vendors in both of these cases, and as the time for settlement approached the fill was not in and there was correspondence between the vendee and Mr. Farrington, on behalf of the vendor, in which the vendee raised the point that the fill was not in and therefore he was not called upon to settle, but he was permitted to pay the additional $1,000 for an extension, as provided. Now, extension agreements in each case were prepared and sent to the vendee. The extension agreement, I think, because of the sequence of things, should be read now. The extension agreement was substantially in this form in each case, "For and in consideration of the sum of one thousand dollars ($1,000) to me in hand paid, I, Mildred Murphy, of the City of Margate City, County of Atlantic and State of New Jersey, do hereby agree to extend unto Joseph K. Marshall, of the City and County of Philadelphia, State of Pennsylvania, final settlement on Lots Nos. 38, 39 and 40 in Block 174, Ventnor Heights, Ventnor City, New Jersey, to September 1, 1926, or to such prior time that the City Engineer of Ventnor City, New Jersey, shall certify to Joseph K. Marshall that said lots have been filled to grade. It is understood that the mortgages mentioned in the within agreement of sale are to be dated as of the day of final settlement." And then the bill continues and the proof will show—and I might say here I don't think there is much dispute as to the facts, and Mr. Bourgeois and I will probably be able to agree on most of the

facts—upon the receipt of that extension agreement Mr. Marshall wrote back letters to Mr. Farrington, the agent of the vendors, and said in effect, "I don't want to accept this extension agreement in the form in which you give it to me, I want it definitely clear that there is to be no settlement if on the date specified here the fill is not up to grade." There are several letters that bear on the point. By letter of July 30, 1926—and copies of these letters are annexed to the bill—Mr. Marshall wrote to Mr. Farrington, "I am in receipt of your favor of the 29th inst. and contents noted. Enclosed please find check to your order for $1,000 to cover additional payment to Ventnor Heights lots, due August 1st. I note what you say in reference to the price at which ground is being held adjacent to our lots, and hope same will be realized. I am returning the extension agreements for the two parcels upon which we made additional payments a month ago, and beg to call your attention to an error in setting forth the period of extension. It states that settlement shall be September 1st, or such prior time, etc., whereas, settlement is to take place only at such time as the City Engineer shall certify, etc. Will you please have the extension agreements corrected; also cover the same in the agreement for the third parcel." Now, the bill makes reference to the fact there was a third tract of land where the vendee was a defendant party, which is in the identical situation that these two parcels are, and the explanation has to be made because there is now reference in this correspondence to a third parcel. Then there is another letter from Mr. Marshall to Mr. Farrington, dated August 3, 1926. "We are in receipt of the three agreements of extension, two of which you returned after we had sent them to you declining to accept terms mentioned therein; the third

phrased in exactly the same way as the two prior agreements of extension. We are also in receipt of your letter in which you explain that you want a definite date for settlement. Now, in this connection I desire to say that we do not accept, and we desire to be on record as not accepting the terms mentioned in these agreements of extension, but we do adhere strictly to the terms of our original agreements in which it distinctly states that the settlement is not to take place until such time as the city engineer has certified that the lots have been filled to grade. We are attaching to our agreement a copy of this letter, and will expect a confirmation of it in a reply from you."

The Court: This is Marshall's letter?

Mr. Hanstein: Yes. Now, there are other letters that we will be able to produce in evidence, all of which show a fixed determination by Marshall, although the agreement said there should be a settlement at such and such a time, and time was to be of the essence of the contract, by this course of correspondence he impressed upon us the fact he did not propose to make any settlement until the city engineer would certify the ground was filled to grade. Now, the contracts were dated the 31st of March, 1926, and they called for settlement in one case in July, 1926, and in the other case in August, 1926, and there were extensions entered into and letters which amplify the intention of the parties in regard to the extension, and in March, 1927, Mr. Marshall wrote a letter to Mr. Farrington in which he repudiates the contract, and that letter will be offered in evidence, and denies there is any further liability on his part under it. That letter is March 24, 1927, addressed to Mr. Farrington ——

The Court: That is the following year?

Mr. Hanstein: Yes, sir. "Dear Sir: Referring to agreements for the purchase of certain lots of ground in Ventnor Heights, dated March 31, 1926, I desire to say that after waiting more than a reasonable time (one year on March 31st) I consider that the contract has not been lived up to on the part of the sellers, and therefore make a demand for the return of the monies paid, viz.: $10,000. The delivery of two parcels was to have been made by July 1st, and a third parcel by August 1st, 1926, and it was specifically stated that time was the essence of the contract. While a provision was made in event that the lots were not ready for delivery July 1st and August 1st, respectively, I was to make an additional deposit, and this was requested and complied with, the intent thereof could not be interpreted otherwise than the assurance of early delivery thereafter. This was not done, the period of reasonable expectation has been greatly exceeded, and I can see no other view of the situation than that we are entitled to the return of the money and the cancellation of the agreements. I hope that you will give this your immediate attention and advise me of your attitude in this matter at an early date. Very truly yours, Joseph K. Marshall." To which Mr. Farrington by letter replied he would take the matter up with his clients and ascertain their view. The land at that time was not filled to grade and the city engineer had not certified that it was filled to grade for a considerable period of time after that.

The Court: In the correspondence with reference to having the agreement distinctly specify, rather than by inference, that the payment was not to be

due until the lots were filled to grade, what was the reply on the part of Farrington?

Mr. Hanstein: That was all agreeable to Farrington. The last letter that I read with respect to that, the letter in which Mr. Marshall said he would attach to his agreement a copy of the letter of August 3rd, which I read, Mr. Farrington replied, under date of August 5th, "Dear Mr. Marshall: I am very sorry there has been a misunderstanding in regard to the extension agreements on the parcels of ground which you purchased in Ventnor Heights, through this office. This letter is to acknowledge receipt of your letter of August 3, 1926, with reference to the terms as set forth in the extension agreement, and I wish to advise that it is the understanding, on the part of each of the individual sellers, that the terms will be adhered to, as set forth in the original agreement of sale. Although each extension calls for a specific date, it is intended that the extensions are to be renewed at each date set forth for settlement, until such time as the city engineer certifies that the fill and improvements are completed. I trust this will be satisfactory to you and I am very sorry that I did not set forth clearly in my letter to you the exact intention of the extensions." And there are other letters bearing on this which show an acquiescence on the part of Mr. Farrington in Mr. Marshall's proposition there should be no settlement until the fill was certified to by the engineer. Mr. Marshall, as I say, out of a clear sky, wrote his letter of March, 1927, repudiating the contract. Now, after that there were efforts to settle the matter through Mr. Bourgeois, Mr. Marshall's counsel, made by Mr. Farrington and representatives of the St. Leonard's Park Company, which was the company engaged in

developing this tract, and which was the corporation selling to the people from whom Mr. Farrington's clients were purchasing. On June 18, 1927, the city engineer, by a certificate bearing that date, certified that the lots in question were filled to grade, and these were delivered to Mr. Farrington by the St. Leonard's Park Company by letter dated August 10, 1927, and Mr. Farrington then wrote two special delivery letters to Mr. Marshall advising him—I must correct that—the letters were in each instance signed by the vendors directing Mr. Marshall's attention to the fact the land had been filled to grade and the city engineer had now so certified, enclosing a certificate of the city engineer, and stating they would like Mr. Marshall to perform his contract, and fixing as a date for settlement a date some two weeks off in the Chelsea Title Company in Atlantic City, and stating to Mr. Marshall if that date was not agreeable some agreeable date would be fixed, and if we didn't hear from Mr. Marshall we would assume that date was agreeable. We heard nothing whatever from Mr. Marshall; we attended the settlement and Mr. Marshall failed to appear, and we were there ready, willing and able to settle. Now, the law suit was then started by Mr. Bourgeois within a day or two after that letter. Those letters to Mr. Marshall were dated August 12th, and being mailed from Atlantic City undoubtedly reached Mr. Marshall on August 13th, or certainly thereabouts, and Mr. Bourgeois started an action at law on the 19th of August for the return of the deposit money in each case, and we then filed the bill in Chancery that is now before your Honor.

The Court: Mr. Bourgeois, will you state the defense?

Mr. Bourgeois: The defense is, if the Court please, that Mr. Marshall purchased this property for the purpose of speculating, and then he went along until the day for settlement ——

The Court: First came the extension to September, or to such time as the lots should be filled, and then what?

Mr. Bourgeois: Until September, or such prior time as the lots should be filled, and then there was a letter followed between the two that modified them somewhat, that letter was written in August. Following that extension there was another extension to November 1, 1926 ——

The Court: Written?

Mr. Bourgeois: Oh, yes, and that provided it should be extended to that time or such prior time as the lots should be filled, but nothing about after that time. They didn't settle in September or November and they went along until the following March and then they demanded their money back and after a little time they got a reply they wouldn't give the money back. At the time the lots were agreed to be sold they were in great demand, there was an opportunity of selling these properties at a good profit, but the real estate market dwindled and finally collapsed, and before March came in 1927 there wasn't any sale for them at all, and they demanded their money back and they didn't get it, so at the present time the lots are worth practically nothing, and they failed in view of the fact they were to have these on the 1st of November, or some prior time, and they didn't get them at all, they

didn't offer until along in August when Mr. Farrington wrote the letter the lots were filled in and spoke about some certificate, but there wasn't any certificate enclosed, and when they couldn't come to any arrangement they simply brought suit to get the money back, and this suit was brought to stay the suit at law, and was referred to you.

The Court: May it not be all this controversy will be solved, or at least partly solved, by the November written agreement? Have you got that?

Mr. Bourgeois: Yes.

The Court: What does it say?

Mr. Bourgeois: This is dated August 26, 1926. "For and in consideration of the sum of one dollar to me in hand paid, I, Frank Redman, of the City of Margate City, County of Atlantic and State of New Jersey, do hereby agree to extend unto Joseph K. Marshall of the City and County of Philadelphia, State of Pennsylvania, final settlement on Lots Nos. 38, 39 and 40 in Block 173, Ventnor Heights, Ventnor City, New Jersey, to November 1, 1926, or to such prior time that the City Engineer of Ventnor City, New Jersey, shall certify to Joseph K. Marshall that said lots have been filled to grade. It is understood that the mortgages mentioned in the within agreement of sale are to be dated as of the day of final settlement."

The Court: That is identical with the original one, apparently identical with the original one, which occasioned the subject of correspondence as to what it meant.

Mr. Bourgeois: Now this, I think, is the same language as the one dated in July. Our thought is, if the Court please, that here is a case where a court of equity will not enforce specific performance because of the peculiar dealings between these people and the fact that the market collapsed so that these people get nothing whatever for their money if they are compelled to take the property, and in view of that fact, and in view of the fact the agreement itself said it was to be strictly performed, time was the essence of the contract, the original agreement provided that ——

The Court: The time essence with reference to that contract provided for settlement when the filling should be done, didn't it?

Mr. Bourgeois: No. I have got the contract here, and I have the clause here, that particular clause having no regard to anything else, reads as follows: "Settlement to be made at the office of the Chelsea Title and Guaranty Company on August 1, 1926, provided, however, that the within mentioned lots be filled to grade. If said lots are not filled to grade, the party of the second part shall pay to the party of the first part, the sum of $1,000 and the balance at any such time that the City Engineer of Ventnor City shall certify to the party of the second part that said lots have been filled to grade." Now, the question comes up as to what that means, just what effect that had upon the terms of this agreement, whether the property was to be settled for at that time or whether they were to take the title at that time and only the giving of the mortgage was postponed until after the settlement was made.

The Court: I see the difficulties that are present.

The first impressions are somewhat against you, but I wouldn't like to rely on first impressions.

Mr. Bourgeois: I think we can stipulate most of it.

Mr. Hanstein: Yes, I think, Mr. Bourgeois, we ought to put all these things in. Here is the agreement in the Redman case.

Mr. Bourgeois: It is stipulated between counsel that Joseph D. Farrington was the agent for Mildred Murphy and Frank Redman and all the transactions between the complainants and defendant, on the part of complainants, were performed by Farrington.

Mr. Hanstein: It may be there have been some letters that were signed by the parties themselves.

Mr. Bourgeois: I don't mean that, I mean the negotiations.

Mr. Hanstein: We acknowledge the authority of Mr. Farrington to do whatever he did in the matter.

Mr. Bourgeois: Can we stipulate Mr. Marshall purchased this property for the purpose of speculation? I have him here to show it. You have a letter here which seems to indicate it.

Mr. Hanstein: I don't see why it is important whether he bought them for speculation.

Mr. Bourgeois: Well, it is important; at least, it is material.

The Court: Do you concede that?

Mr. Hanstein: We knew he was buying it for speculation.

Mr. Bourgeois: Will you stipulate Mr. Marshall is a builder engaged in the developing of lots?

Mr. Hanstein: He is also a real estate man, isn't he?

Mr. Bourgeois: I don't know. Are you?

A Voice: Yes.

Mr. Bourgeois: Real estate agent and builder?

Mr. Hanstein: I don't know anything about the building part.

A Voice: Yes.

Mr. Bourgeois: Will you stipulate he purchased this property for the purpose of development and sale?

Mr. Hanstein: I don't see that that is material.

The Court: He can testify to that.

Mr. Bourgeois: Will you stipulate when the time for performance came on the 1st of July that Mr. Marshall went to Atlantic City prepared to make settlement?

Mr. Hanstein: No, sir.

Mr. Bourgeois: I will prove that then. Are you prepared to stipulate that Mr. Marshall never received any certificate from the engineer?

Mr. Hanstein: We are standing, so far as that is concerned, on our letter of August 12, 1927, which is the letter sending him the certificate.

Mr. Bourgeois: That is the date of the letter, Mr. Hanstein, but I don't know whether you want to stipulate that or not.

Mr. Hanstein: The letter says so, Mr. Bourgeois.

Mr. Bourgeois: I know it does. I thought Mr. Farrington will recall it was neglected. All right, we will prove that.

Mr. Hanstein: Now, I think we should go in an orderly way here. I suppose it is going to be difficult to keep these two cases separate in the way of marking exhibits because much of the correspon-

The Court: Well, one is the Marshall case and dence relates to both.
the other is ——

Mr. Hanstein: One is Murphy and the other is Redman; Marshall is the defendant in each case.

The Court: Let the exhibits be marked, "Murphy, No. 1" and "Redman, No. 1."

Mr. Hanstein: We will first offer the agreement of sale in each case. Murphy will be M-1 and Redman R-1. The only difference between the two is

one month's difference in time of settlement. Now, in the Murphy one I have got an extension agreement dated June 30th, extending the time to September 1st, or to such prior time, and so forth. That will be M-2. Then another extension agreement by Mildred Murphy, dated August 26th, extending the time to November 1, 1926, or to such prior time, and so forth. That will be M-3. In the Redman case I have got an extension extending the time to September 1st, or to such prior time, and so forth, dated August 1st. That will be R-2. And then another Redman exhibit dated August 26th extending the time to November 1, 1926, or such prior time, and so forth. That will be R-3. I have asked Mr. Bourgeois to produce various original letters and I presume there is no objection to the copies.

The Court: I think you had better read them as you go, I may dispose of the case at the conclusion of the hearing without taking it under advisement.

Mr. Bourgeois: I would like to have an opportunity to send you a memorandum, because I haven't had much time on that.

The Court: I wouldn't object to that, but the only thing is it often necessitates my ordering a transcript and reading it over.

Mr. Bourgeois: I mean, if I should have tomorrow I would have it up by Saturday night.

The Court: If you would file briefs in a day or two ——

Mr. Bourgeois: I could have one up here for you on Monday.

The Court: And Mr. Hanstein's answer how soon?

Mr. Hanstein: It depends on what he says in the brief. I am personally prepared to argue the case today.

Mr. Bourgeois: I am prepared in a way, but I haven't had the time to look it up.

The Court: Briefs will be of service to me. The only thing I am trying to avoid is the fading of memory touching the facts.

Mr. Bourgeois: So far as I am concerned I will finish it tomorrow and I will get it to you Monday morning.

The Court: And you will answer it as quickly as possible?

Mr. Hanstein: I certainly will. Here is a letter dated June 17, 1926, from Marshall & Maloney, signed by Maloney, addressed to Mr. Farrington, and I presume you will stipulate Mr. Maloney was a partner of Mr. Marshall and was authorized to write this letter?

Mr. Bourgeois: I don't know. Are you? I knew Mr. Maloney was acting for Mr. Marshall, but I didn't know what the relationship was.

Mr. Hanstein: I want to show the authority to write. This is June 17, 1926. I think this is an exhibit that would apply to both cases. Mark it M. & R-4. The letter is addressed to Mr. Farrington.

"June 17th, 1926. Will you kindly inform us if settlement will be due July 1st, according to agreements, for the land purchased in Ventnor Heights. There is a stipulation relative to grading, etc., that makes the settlement at that time conditioned upon performance of contract. In the event that we go through with the settlement on that date kindly prepare papers in the name of Joseph K. Marshall, widower, and advise us of the hour. Very truly yours, Marshall & Maloney, per J. M. Maloney." The letter was written on the letterhead of Joseph K. Marshall, realtor.

(Said letter marked Exhibit M. & R-4.)

Mr. Hanstein: Now, under date of June 23, 1926

Mr. Bourgeois: This is the reply to the letter you just put in.

Mr. Hanstein: This is a letter dated June 18, 1926.

The Court: From whom to whom?

Mr. Hanstein: Farrington to Maloney, c/o J. K. Marshall. "Dear Mr. Maloney: Replying to your favor of June 17th regarding settlement scheduled for July 1, 1926, on properties purchased in Ventnor Heights, please be advised that the developers of this ground have not yet completed their improvements. The grade is not finished although the sidewalks and curbing have been placed, on all your parcels along Wellington Avenue. In accordance with agreement, it will be necessary to have settle-

ment extended and I would suggest that you have the additional deposit as covered by the agreement in my hands on or before July 1, 1926. Thanking you, I remain, Yours very truly, J. D. Farrington."

The Court: Suppose you mark that as a defendant's exhibit and put it right in with the others.

Mr. Bourgeois: I would like to have it in order to prepare my brief.

(Said letter marked Exhibit D1.)

Mr. Hanstein: Letter from Joseph K. Marshall —no, it is on Joseph K. Marshall, realtor, letterhead, from Marshall & Maloney, per Maloney, addressed to J. D. Farrington.

The Court: Dated?

Mr. Hanstein: June 23, 1926. "We duly received your favor of the 18th inst. advising us that settlement scheduled for July 1st, on Ventnor Heights ground, will be postponed because of improvements not being completed. Will you kindly send us a letter setting forth that the dates of the mortgages will be the date settlement is made, instead of July 1st. We think the intent is clear in agreements, but it does not so state specifically." That is applicable to both.

(Said letter marked Exhibit M. & R5.)

Mr. Hanstein: Now, letter dated June 28, 1926, from Farrington to Marshall. "Dear Mr. Marshall: Replying to your letter of June 25th, with reference

to the dating of the mortgages as covered in three agreements of sale covering properties purchased in Ventnor Heights, please be advised that all mortgages will date as of date of final settlement. Just as soon as I receive your check in the amount of five thousand dollars I will forward you three extension agreements, acknowledging receipt of your additional deposit covering the extension until such time as all improvements are completed. Awaiting your early reply, I remain, Yours very truly." I am relying on a copy here, but I assume that was signed by Mr. Farrington, wasn't it? These apply to both cases.

Mr. Bourgeois: I think so.

(Said letter marked Exhibit M & R6.)

Mr. Hanstein: Letter from Joseph Marshall, and signed by him, to Mr. Farrington, dated July 27, 1926. "Dear Sir: Will you kindly advise us relative to the ground purchased at Ventnor Heights: 1. The third parcel is due for settlement August 1st, with a further payment if postponed. Is it in order to send the additional deposit? 2. The two parcels upon which we made additional deposits July 1st we have not as yet received extension agreements upon. When may we expect them? 3. Is there any inquiry for this ground, and what would seem a fair price for same at this time? Awaiting your early reply, we are, Very truly yours." That relates to both cases.

(Said letter marked Exhibit M & R7.)

Mr. Hanstein: This is a letter dated July 29, 1926, addressed to Marshall, signed Farrington.

"Dear Mr. Marshall: Your letter of July 27th with reference to ground purchased through this office, please be advised as follows: The settlement which is scheduled to take place August 1st, will, in accordance with agreement of sale, be extended similar to the other two parcels, until such time as the fill and improvements are completed. I would therefore request that you send the additional payment of one thousand dollars on this parcel. With reference to the other two parcels, I am sending you, herewith, extension agreements on both, and please be advised that I was under the impression that these extensions had been forwarded to you as they have been in my hands for some time. I know of nothing along this boulevard adjoining the corner of Dorset and Wellington Avenue which can be bought for less than $300 per foot, and further down Wellington Avenue, where the other two pieces are, there is nothing less than $150 per front foot. Undoubtedly you are thoroughly familiar with the general situation in real estate which exists now almost everywhere and it is the opinion of everybody here who seems to be real posted on real estate that we will have a good fall market, for there are numerous inquiries being made at this time and it is my opinion that when fill and improvements are in on your parcels, you will be able to make a nice profit. Immediately upon receipt of the additional payment, I will forward extension covering the lots in Block 173, Ventnor Heights."

(Said letter marked M & R8.)

Mr. Hanstein: Mr. Bourgeois, there is a letter of July 30th that I don't think I have a copy of.

Mr. Bourgeois: From Mr. Farrington?

Mr. Hanstein: No, from Marshall to Farrington. I do have it, Mr. Bourgeois, beg pardon. Letter from Joseph K. Marshall, signed by him, to Mr. Joseph D. Farrington, dated July 30, 1926. "Dear Mr. Farrington: I am in receipt of your favor of the 29th inst. and contents noted. Enclosed please find check to your order for $1,000 to cover additional payment on Ventnor Heights lots, due August 1st. I note what you say in reference to the price at which ground is being held adjacent to our lots, and hope same will be realized. I am returning the extension agreements for the two parcels upon which we made additional payments a month ago, and beg to call your attention to an error in setting forth the period of extension. It states that settlement shall be September 1st, or such prior time, etc., whereas, settlement is to take place only at such time as the city Engineer shall certify, etc. Will you please have the extension agreements corrected; also cover the same in the agreement for the third parcel."

(Said letter marked Exhibit M & R9.)

Mr. Hanstein: July 31st, letter from Farrington's office to Marshall. "Dear Mr. Marshall: We received your letter of the 30th instant in which you take exception to the wording of the extension sent you in a previous letter. The reason we wrote our extension to read, September 1, 1926, or to such prior time that the City Engineer of Ventnor City shall certify to you that said lots have been filled to grade, is because we wish to extend our agreement to a definite date. If the lots were filled to grade prior to September 1, settlement would have been made at that time. It is our understanding

that extensions shall be given from time to time for a definite term, until these lots are filled to grade to meet the approval of the city engineer. We are enclosing herewith, the extensions executed by Mr. and Mrs. Shinn, Miss Murphy and Mr. Redman, for the three parcels of ground purchased by you in Ventnor Heights. Trusting everything will be satisfactory, I remain."

(Said letter marked Exhibit M & R10.)

The Court: Does that send a re-executed extension agreement or depend on the letter to cover it?

Mr. Hanstein: It concludes, "We are enclosing herewith the extensions executed by Mr. and Mrs. Shinn, Miss Murphy and Mr. Redman, for the three parcels of ground purchased by you in Ventnor Heights." The only extensions given were those offered here.

The Court: Simply an explanation of the modifications are found in the correspondence?

Mr. Hanstein: Yes. On August 3, 1926, Mr. Marshall wrote to Farrington, by letter signed by Mr. Marshall, saying, "We are in receipt of the three agreements of extension, two of which you returned after we had sent them to you declining to accept terms mentioned therein; the third phrased in exactly the same way as the two prior agreements of extension. We are also in receipt of your letter in which you explain that you want a definite date for settlement. Now, in this connection I desire to say that we do not accept, and we desire to be on record as not accepting the terms mentioned in these agree-

ments of extension, but we do adhere strictly to the terms of our original agreements in which it distinctly states that the settlement is not to take place until such time as the city engineer has certified that the lots have been filled to grade. We are attaching to our agreement a copy of this letter, and will expect a confirmation of it in a reply from you."

(Said letter marked Exhibit M & R11.)

Mr. Hanstein: Now, the reply to that, dated August 5, 1926, from Farrington to Marshall: "Dear Mr. Marshall: I am very sorry there has been a misunderstanding in regard to the extension agreements on the parcels of ground which you purchased in Ventnor Heights, through this office. This letter is to acknowledge receipt of your letter of August 3, 1926, with reference to the terms as set forth in the extension agreement and I wish to advise that it is the understanding, on the part of each of the individual sellers, that the terms will be adhered to, as set forth in the original agreement of sale. Although each extension calls for a specific date, it is intended that the extensions are to be renewed at each date set forth for settlement, until such time as the city engineer certifies that the fill and improvements are completed. I trust this will be satisfactory to you and I am very sorry that I did not set forth clearly in my letter to you the exact intention of the extensions."

(Said letter marked Exhibit M & R12.)

Mr. Hanstein: Now, on September 2nd, a letter from Farrington to Mr. Marshall: "Dear Mr. Marshall: I am enclosing herewith new extensions on

Lots 38 to 40, Block 173, Lots 38 to 40, Block 174 and Lots 25 to 31, Block 170, Ventnor Heights, Ventnor City, New Jersey. Trusting you will find these in good order, I remain, Yours truly, J. D. Farrington."

The Court: That enclosed a new extension?

Mr. Hanstein: Yes, sir, apparently. The previous correspondence had related to the first extension in each case, as I understand it.

The Court: Have you a copy of the new extension that was enclosed?

Mr. Hanstein: I have offered the two extensions in evidence.

(Said letter marked Exhibit M & R13.)

The Court: The first is dated in June and the one in August, is that the one that is enclosed?

Mr. Hanstein: I take it so. Now, I think the next letter ——

The Court: Was there any answer to that?

Mr. Hanstein: To that letter enclosing the extension?

The Court: Yes.

Mr. Hanstein: No, sir.

The Court: Nothing more transpired in the way of correspondence until March?

Mr. Hanstein: No, sir, and then there was a repudiation. That letter to which I now refer is letter of Joseph K. Marshall to Joseph D. Farrington, dated March 24, 1927. "Dear Sir: Referring to agreements for the purchase of certain lots of ground in Ventnor Heights, dated March 31, 1926, I desire to say that after waiting more than a reasonable time (one year on March 31st) I consider that the contract has not been lived up to on the part of the sellers, and therefore make a demand for the return of the monies paid, viz.: $10,000. The delivery of two parcels was to have been made by July 1st, and a third parcel by August 1st, 1926, and it was specifically stated that time was the essence of the contract. While a provision was made in event that the lots were not ready for delivery July 1st and August 1st, respectively, I was to make an additional deposit, and this was requested and complied with, the intent thereof could not be interpreted otherwise than the assurance of early delivery thereafter. This was not done, the period of reasonable expectation has been greatly exceeded, and I can see no other view of the situation than that we are entitled to the return of the money and the cancellation of the agreements. I hope that you will give this your immediate attention and advise me of your attitude in this matter at an early date. Very truly yours, Joseph K. Marshall."

(Said letter marked Exhibit M & R14.)

Mr. Hanstein: Do you have our reply to that, Mr. Bourgeois? I have got what may be a copy, Mr. Bourgeois, but we are not very certain about it. On the following day, March 25th, Mr. Farrington wrote to Mr. Marshall: "Dear Mr. Marshall:

I wish to acknowledge receipt of your letter of March 24th, in which you ask the return of the deposit made by you in the amount of ten thousand dolars ($10,000) for property in Ventnor Heights, purchased through this office. Please be advised that I have forwarded copies of your letter to the parties who are the owners of this ground and from whom you purchased the property, and I will communicate with you just as soon as I receive word from them. I might mention at this time that all of these parties are in a position to give you a good marketable title, and the only reason for the delay has been because of the cold weather, during which time it was not advisable to lay sidewalks and curbing. At the same time this has been beneficial to you, as you did not have to pay interest on the mortgage, nor taxes on the ground. Please be assured that I will communicate with you just as soon as I receive word from the owners. Very truly yours, J. D. Farrington."

(Said letter marked Exhibit D2.)

Mr. Hanstein: Now, the next in the way of correspondence ——

Mr. Bourgeois: I have another letter, if you want it.

Mr. Hanstein: Yes. May 19th, from Farrington to Marshall ——

The Court: 1927?

Mr. Hanstein: 1927. "In my former letter to you I advised you I would take up the contents of

your letter of March 24th with my clients; I have done this and have ascertained from my clients they are unwilling to cancel the agreement and return you your money. They take the position that they are in no way at fault and that they will look to you for the performance of the rest of the contract. Very truly yours."

(Said letter marked Exhibit D3.)

Mr. Hanstein: Now, the next correspondence that I have ——

The Court: What was the date of that letter?

Mr. Hanstein: That was May.

Mr. Bourgeois: May 19th.

The Court: Didn't Murphy reply to that letter of March 24th until May?

Mr. Hanstein: We acknowledged receipt of the March 24th letter.

The Court: He said he would submit it and then there was no answer made until May?

Mr. Hanstein: I think I will be able to show that some of the parties interested in this proposition were in Europe.

The Court: It would seem to me it was a long time.

Mr. Hanstein: The next letter is August 12th, 1927; is that correct, Mr. Bourgeois?

Mr. Bourgeois: August 12th?

Mr. Hanstein: 1927.

Mr. Bourgeois: I have that.

Mr. Hanstein: I have copies of them.

Mr. Bourgeois: I want to show there was no certificate with them.

Mr. Hanstein: Here is the letter from Frank Redman to Mr. Marshall, dated August 12, 1927, enclosed in a registered letter to Mr. Marshall, and received by Mr. Marshall.

The Court: Dated?

Mr. Hanstein: August 12, 1927. "Dear Mr. Marshall: Referring to that agreement made on the 31st day of March, 1926, between you and the undersigned, under the terms of which you agreed to purchase Lots 38, 39 and 40, in Block 173 as shown on map of Ventnor Heights, by W. I. Risley, showing property owned by St. Leonard's Park, Inc., the undersigned does hereby advise you that said lots are now filled to grade, and a certificate of the engineer certifying that fact to you is enclosed herewith. All streets, sidewalks and curbing referred to in the agreement have been completed. Under the terms of said contract, and the agreements extending the same, settlement is now due. The undersigned does hereby fix the Chelsea Title and Guaranty Company as the place for settlement, and the 26th day of August, 1927, at eleven A. M., as the time for said settlement. The undersigned would

thank you to be present at that time to comply with your part of the agreement. If the time fixed is not agreeable to you, please advise the undersigned and the undersigned will endeavor to meet your convenience. If no objection as to the time is made by you, the undersigned will assume that the same is agreeable to you, and will be present at the above time and place prepared to perform the agreement above referred to. Yours truly, Frank Redman."

(Said letter marked Exhibit D4.)

Mr. Hanstein: The other letter, without reading that, is identical in its phraseology and bears the same date, and is addressed to Mr. Marshall, and is signed by A. Mildred Murphy.

(Said letter marked Exhibit D5.)

Mr. Hanstein: I will have mine marked. This is the Redman case.

(Said letter marked Exhibit R15.)

Mr. Hanstein: This is the Murphy case.

(Said letter marked Exhibit M15.)

Mr. Hanstein: Mr. Bourgeois, will you stipulate now that on March 24th, the date when Mr. Marshall wrote his letter, March 24, 1926, the fill had not yet been completed?

The Court: 1927, you mean.

Mr. Bourgeois: I don't know anything about the

fill. I will stipulate he had never been served with any certificate from the engineer.

Mr. Hanstein: You won't stipulate when the fill was completed?

Mr. Bourgeois: I don't know when it was completed.

———

JOSEPH D. FARRINGTON, sworn.

By Mr. Hanstein:

Q. Now, Mr. Farrington, you are the Farrington referred to throughout this correspondence?
A. Yes.

Mr. Hanstein: Can we stipulate that this was a tract of meadow land which was being developed by the St. Leonard Park, Inc.?

Mr. Bourgeois: Yes, I will stipulate that.

Mr. Hanstein: And also stipulate that both Redman and Murphy were buying this property from vendees of the St. Leonard Park Company, the developers?

Mr. Bourgeois: Not from them direct?

Mr. Hanstein: I will show it.

Mr. Bourgeois: What Mr. Farrington says about it I will stipulate to, I don't know myself.

Q. With whom did Redman and Murphy enter into agreements for the purchase of this land?

A. Mr. Harry Kretchmer and Anna Blum.

Q. They were not jointly, but as two separate parcels?

A. Two separate parcels.

Q. When Redman and Murphy made settlement do you recall the date when settlement was made?

A. I have the settlement certificates there, I could tell from them.

Q. When settlement was made, with whom was it made?

A. Made direct with the St. Leonard Park Company. Do you want me to find those?

Q. Yes. Testify to the date when you made the settlement.

A. Miss Murphy made settlement July 1, 1926, with Harry Kretchmer.

Mr. Bourgeois: With what?

The Witness: July 1, 1926, with Harry Kretchmer, and settlement was made August 2, 1926, with the Blum party, but they came through Kretchmer also.

Q. The deed was taken directly from the St. Leonard Park Company?

A. Yes.

Q. After the receipt of the letter of March 24, 1926, to which you replied on March 25, 1926, the March 24th letter being the letter from Mr. Marshall canceling the contract—1927, that is—there was a considerable delay between March and May when you wrote to Mr. Marshall stating your parties would not accept his canceling the contract.

What was it that took place over that period of time?

A. I went to the St. Leonard's Company to see Mr. Jeffers, who is the secretary, and explained to him the situation ——

Q. You can't tell what you said to him, you can tell what you and he did.

A. All right. And Jeffers took it up with Mr. Gill as to whether they would be willing to rescind the contracts to these purchasers, which they said no, and a few days later I believe Mr. Bourgeois communicated with Mr. Jeffers—Mr. Maloney had been to Atlantic City to see Mr. Bourgeois ——

Mr. Bourgeois: In relation to March ——

Mr. Hanstein: I want to show some of these delays arose by reason of conferences these folks had with you.

Mr. Bourgeois: My recollection is that was much later. I don't think I was in this case until after May. They had done the whole thing before they came to me.

Q. Go on.

A. There was a delay about arranging a conference between Mr. Bourgeois, Mr. Jeffers and Mr. Gill. A conference was finally arranged which I was not present at. About three weeks after that there was another conference at which I was present and Mr. Bourgeois went over the real estate situation and offered to make a compromise settlement. At that conference Mr. Jeffers was present, Mr. Bourgeois and myself, and Mr. Bourgeois suggested that they would be willing to settle for fifty cents on the

dollar, and I told them that was ridiculous because these people had paid $8,000 for these lots and they were mortgaged up to fifty per cent.

Q. The thing I am trying to get at is whether or not because of these negotiations and conversations with Mr. Bourgeois some of this delay in replying is accounted for?

A. The delay in the reply was due to that delay in arranging a conference through the solicitor of Mr. Marshall.

Q. Mr. Farrington, when did you receive a certificate certifying these lots were filled to grade, do you recall?

A. On August 10th.

Q. August 10, 1927, is that correct?

A. That is right.

Q. Is this the letter transmitting that to you?

A. Yes, it is.

Mr. Hanstein: I don't know whether your Honor wants to be cluttered up with this or not. It merely confirms his recollection as to the date when he got the engineer's certificate, which was two days before our letter calling for settlement.

The Court: Haven't you the certificate here?

Mr. Hanstein: Yes, sir.

Q. Now, do you know what it was you sent up in your letter to Mr. Marshall, whether it was ——

A. It was copies of this.

Q. Copies of this?

A. They were given to my girl to enclose in the letter.

Mr. Hanstein: Mr. Bourgeois, I want to offer these two certificates. These are what we say we included in our letter of August 12th.

The Court: Read one of them. "E. D. Rightmire, Civil Engineer and Surveyor. Guarantee Trust Building. City Engineer, Ventnor City, Margate City. Borough Engineer, Longport. Atlantic City, N. J., June 18, 1927. St. Leonard's Park, Inc., Atlantic City, N. J. Dear Sirs: This certifies that the block bounded on the north by Marshall Avenue, on the east by Surrey Avenue, on the south by Wellington Avenue, and on the west by Suffolk Avenue, known as Block 174, is filled to grade Yours very truly, E. D. Rightmire, City Engineer.

I, W. Lindley Jeffers, do hereby certify the foregoing to be a true copy of a letter received by St. Leonard's Park, Inc., from E. D. Rightmire, City Engineer of the City of Ventnor City, New Jersey. W. Lindley Jeffers, Secretary St. Leonards Park, Inc."

Mr. Hanstein: And a similar letter as to the other block, and I also want to offer the originals of the Rightmire certificates of which copies have just been referred to.

(Said papers marked Exhibits M17 & R17.)

Q. Now, after you sent off your letter of August 12th did you hear anything from ——

The Court: May I ask this witness whether copies of that certificate were enclosed in these two letters of August 12th? You stated copies were enclosed.

The Witness: Your Honor, I did not mail the letters myself, I dictated the letter to my secretary and Mr. Redman came in, and Miss Murphy, and signed the letters before my secretary, so to the best of my knowledge they were mailed. They were made in triplicate original and I have only two copies at this time. I couldn't swear they were in there. Our letter says they were enclosed.

Q. Did you, after writing that letter, hear anything from Mr. Marshall?

Mr. Bourgeois: Which letter is that?

Mr. Hanstein: These letters of August 12, 1927.

The Witness: No, but Mr. Bourgeois filed a suit immediately after.

Q. Yes, but did Mr. Marshall communicate with you in any way?

A. No way whatsoever.

Q. Was the ground in fact filled to grade at that time?

A. Yes, it was.

Q. On the date fixed in your letter as being the date for settlement did you attend the Chelsea Title Company?

A. I did at the time specified.

Q. At the time specified?

A. Yes, sir.

Q. Did you have with you the deeds from the complainants in these suits?

A. Yes, sir, I had them with me.

Q. Executed?

A. Yes, sir.

Mr. Hanstein: Shall I offer them in evidence, Mr. Bourgeois, or do you make no point about that?

Mr. Bourgeois: I make no claim about that.

Q. You were prepared to settle at that time?
A. Yes.
Q. And Mr. Marshall made no appearance?
A. There was no one on the other side.

Cross-examination.

By Mr. Bourgeois:

Q. What day was that, Mr. Farrington, you went there?
A. I think the letter from the Chelsea Title Company tells the date and says that I appeared. August 26th.
Q. August 26th?
A. Yes.
Q. Mr. Farrington, about this settlement that was had in our office when you were there—you say there were two settlements there?
A. Two conferences. One I attended and one I did not.
Q. You were there the last conference?
A. Yes, sir.
Q. Now, wasn't that after the suit had been instituted at law?
A. No, sir.
Q. Are you sure about that?
A. We had not received any bill on it, nothing had been served.
Q. When was it? If it was not after the suit was instituted when was it that those conferences were held?

A. Prior to that.

Q. How long prior to it?

A. I couldn't say exactly.

Q. You can give me some notion.

A. I imagine it was around—it was in May or the early part of June.

Q. May or June. Are you sure about that?

A. The only thing that recollects this to me is the city engineer's certificate is dated June 18th and I believe at that conference Mr. Jeffers had this with him.

Q. Aren't you conscious of the fact he did not have these certificates with him?

A. No, sir, I am not.

Q. Mr. Farrington, did we come to any arrangement?

A. You talked about making settlement for fifty cents on the dollar, and I said that couldn't be done because these people had paid $8,000 apiece for these properties.

Q. You think that was in May or June?

A. Yes, sir.

Q. And the certificates were furnished June 19th?

A. June 18th.

Q. And you kept them until August 12th?

A. No, sir, they weren't turned over to me until August 10th.

Q. Who did have them?

A. Mr. Jeffers.

Q. What has he got to do with it?

A. He is secretary of St. Leonard's Park, Inc., and in adjusting this matter you have under suit with Mr. Clifton Shinn that was trying to be worked out.

Q. I have no other suit.

A. A claim, then.

Q. Mr. Farrington, the contract provides that the

engineer or you representing your clients was to send the engineer's certificate ——

Mr. Hanstein: I object to that, it doesn't say that.

Q. We will see what it does say, then. "If said lots are not filled to grade the party of the second part shall pay to the party of the first part the sum of $1,000 and the balance at any such time that the City Engineer of Ventnor City shall certify to the party of the second part that said lots have been filled to grade." If you knew he had made the certificate why didn't you have that certificate ——

A. The whole thing was held up pending the outcome of this conference with you; nothing was done until it reached the point that we couldn't agree as to the settlement of this.

Q. Mr. Farrington, the suit hadn't been begun; why did you retain the certificate from June 19th to August 12th?

A. I didn't have them.

Q. Why didn't you get them if they were done?

A. We were still waiting for you to solve the thing out.

Q. Why would that have anything to do with it? If the certificates were ready why didn't you deliver them?

A. We were working with you and you were representing Mr. Marshall at the time; you knew the certificates were in existence.

Mr. Bourgeois: No, they were not in existence as far as I knew.

Mr. Bourgeois: Can we stipulate when the agreements were entered into, and on the 1st of July and

August, 1926, there was an active real estate market for that land?

Mr. Hanstein: Whatever Mr. Farrington says. On March 31, 1926, when the contracts were made, you want me to stipulate there was an active market, and on the 1st of July and the 1st of August that year, there was an active market? Is that true?

Mr. Farrington: Yes, sir.

Mr. Bourgeois: On the 24th of March and from that time on there has been no real estate market at all for that land?

Mr. Hanstein: 24th of March, 1927?

Mr. Farrington: All land in Atlantic City?

Mr. Hanstein: Was the real estate market dead on March 24, 1927?

Mr. Farrington: It wasn't as good as it was in 1926 when the property was bought.

Mr. Bourgeois: What?

Mr. Hanstein: It wasn't as good.

Mr. Bourgeois: I want to know if you can stipulate it was flat and dead from the 1st of February, 1927, on?

Mr. Farrington: I wouldn't say so, no.

SAMUEL BADER, JR., sworn.

By Mr. Bourgeois:

Q. Mr. Bader, you live in Ventnor?
A. Yes, sir.
Q. And you are a real estate agent?
A. Yes, sir.
Q. How many years' experience have you had in the real estate business?
A. Eight years.
Q. Are you familiar with land out on the St. Leonard's Park tract?
A. Yes, sir.
Q. And were you familiar with it in 1927?
A. Yes, sir.
Q. Will you tell me whether there was any market for that land from the 1st of March—rather, the 1st of February, 1927, on?

Mr. Hanstein: If the Court please, I take the position that it is absolutely immaterial in this case.

The Court: I will let it in subject to your objection.

The Witness: Whether there was anything doing from February 1st, on?

Q. Yes.
A. There were some sales over there.
Q. When?
A. During 1927.
Q. How many?
A. I had about half a dozen myself, but things were very quiet compared to 1926.

Q. What were the prices in 1927 as compared with 1926?

Mr. Hanstein: I object to that, Vice-Chancellor.

The Court: I will let the testimony go in.

The Witness: The change really hadn't started in the early part of 1927, it was in the latter part of 1927 that prices fell, there was no market for stuff, that is all.

Q. That is when?

A. About the middle of 1927, the latter part of 1927 and 1928.

Q. What was there in the way of prices in 1927, the early part of the year?

A. Things were pretty good the early part of the year.

Q. Did you sell any of that land there then?

A. Yes.

Q. How much did you sell?

A. Probably half a dozen parcels.

Q. How did that half dozen parcels compare with the business that had been done the year before?

A. There wasn't any comparison then; of course, it wasn't as active.

Q. Were those sales you made sales that had been contracted during the spring of 1927, or had they held over from the previous year?

A. No, they were new sales.

Q. What prices did you get for them?

Mr. Hanstein: I want to state my objection on the record.

The Court: I will let it go in.

The Witness: I don't recall the exact prices. There were different parcels scattered around, some in the old section and some in the new.

Q. Did you get prices that were on the basis ——

A. In several cases we sold lots for people who were anxious to get rid of them for less than they had paid for them.

Q. Much less?

A. Possibly half in a couple of cases I know of, but they were really forced to dispose of them.

Q. What was there in the way of sales after June, 1927, after June 19th?

A. June, 1927?

Q. Yes.

A. There hasn't been much since the middle of 1927 in that section.

Q. What about the prices?

A. There hasn't been anything selling, so I couldn't say.

Q. Can you sell them at the price of the first mortgage?

A. I guess it would be a pretty hard job to sell anything today in the way of unimproved property.

Q. I don't mean today, I mean in 1927?

A. In the latter part of 1927 it was about the same as it is today.

Q. Flat?

A. Yes. It is getting a little better, though, it is showing some improvement.

By the Court:

Q. When would you say that the bottom of the market fell out on these Ventnor lots that are now here in controversy?

A. I would say the latter part of 1927. From the middle of 1927 things started to get worse.

Q. When did prospective purchasers show a marked diminution?

A. When did they show what?

Q. Prospective purchasers begin to grow scarce, when was that observable?

A. That was the latter part of 1926, in the fall of 1926.

By Mr. Bourgeois:

Q. Approximately how many sales did you make on that tract of land in 1926?

A. I sold about five blocks, either four or five blocks, consisting of 30 or 40 lots in a block.

Q. That would be 150 or 200 lots?

A. Yes, sir.

Q. How many lots did you sell in 1927?

A. 1927?

Q. Yes.

A. About half a dozen parcels altogether, individual pieces.

Cross-examination.

By Mr. Hanstein:

Q. Mr. Bader, the condition is not anything peculiar to Ventnor Heights, is it?

A. No, not at all.

Q. It was a general slump throughout all Atlantic City and adjacent real estate, wasn't it?

A. Right.

Q. You say you sold five blocks in 1926?

A. When the development was opened in 1926, yes.

Q. Were they sold at the St. Leonard's Park Company's list price?

A. Yes.

Q. And was that price low in comparison with the increased prices at which similar land was selling later?

A. Yes, that stuff was turned over to individuals at a higher price later.

Q. Is the stuff you sold still worth the list price, in your judgment?

A. I can't say that. It has been offered for less money.

Q. You spoke about some sales for less money. A good many of these sales were by people who merely held them on a shoestring, weren't they?

A. They had contracted to pay for these lots on monthly payments over a period of, I think it was a year, twelve months.

Q. Some of those sales at a very much reduced price were by people who were forced to sell?

A. Yes, sir.

Q. You don't know of any sales by people who are in a financial position to hold on, do you?

A. No.

Q. What is your judgment as to the prospects for the future of this tract?

A. I think they are very good.

Q. You think that somebody who takes hold of this and holds it will come out all right?

A. It will be quite some time yet, but I think they will turn out all right.

By Mr. Bourgeois:

Q. How long do you think it will have to be held before there will be a sale for it?

A. There are about 2500 lots over there, I should

judge, unimproved lots, in the new section. It is hard to tell. It will take a long time.

Q. What improvements have been made on that property since 1926 in the way of buildings?

A. Buildings?

Q. Yes, how many buildings are erected on those 2500 lots?

A. I should imagine 15 or 20.

Q. How many were erected in 1927, any?

A. Well, I think 1927 and 1928 I imagine there must have been 10 to 15 houses in 1927.

Q. How many in 1926, any?

A. I don't think it was completed in 1926, the fill wasn't finished in 1926.

Q. Oh, wasn't it?

A. No, I don't think so.

By Mr. Hanstein:

Q. Mr. Bader, these lots being boulevard lots, are more attractive, aren't they, than the stuff that lies away from the boulevard?

A. Yes.

Q. If these lots were in the hands of a developer and builder who would improve them, there would be a good likelihood of them being moved reasonably soon?

A. It is hard to tell, Mr. Hanstein. The place is open out there, I don't think all the improvements are in, that is, water and sewerage—it may be.

Q. What say?

A. I don't think the municipal improvements are in.

Q. If that is material, I can say they are all in. Do you know where these lots are located?

A. Not exactly. I know Wellington Avenue.

Q. Do you know whether there is anything in the way of improvements?

A. Nothing on Wellington Avenue except in the way of some real estate offices.

Q. Isn't there a gasoline station there?

A. Yes, on the corner of Dorset and Wellington.

By Mr. Bourgeois:

Q. Mr. Bader, Mr. Hanstein talked about the boulevard being better, that boulevard is how far from the beach thorofare, about 2,000 feet?

A. It must be 1,000 or 1500 feet.

Q. And it is about how far from the bay, about 2,000 feet?

A. Beach thorofare, do you mean the second beach thorofare all the way in the rear?

Q. Yes.

A. You don't mean the inside thorofare?

Q. What do you call the inside thorofare?

A. Where the bridge runs over. I should judge that is three to four thousand feet.

Q. How far from the bay thorofare?

A. About 2,000.

Q. This boulevard you are talking about lies right in the middle?

A. That is right.

Q. The least desirable of any of these places?

A. Wellington Avenue?

Q. Yes.

A. I wouldn't say that, because it connects up with the Albany Avenue Boulevard.

Q. The only thing that makes it desirable is it is a little wider and connects with Albany Avenue?

A. It is unrestricted, too, I understand.

Mr. Hanstein: This is a map of this district; will you admit it is?

Mr. Bourgeois: If it is I will admit it.

Mr. Hanstein: If it wasn't I wouldn't ask you to. The premises in question are 173 and 174.

Mr. Bourgeois: Point it out and let me see it somewhere. Where is the boulevard?

Mr. Hanstein: Going out here. You say Wellington Avenue, on which these lots are located, extends over to the Albany Avenue Boulevard?

The Witness: Yes.

By Mr. Bourgeois:

Q. That is about a mile and a quarter or a mile and a half from these lots until you come to the Albany Avenue Boulevard?

A. Yes.

By Mr. Hanstein:

Q. And it is three blocks until you come to the Dorset Avenue Boulevard leading from Ventnor City over into this area?

A. It is a little more than that.

Q. It is two blocks off the Dorset Avenue Boulevard?

A. Yes, sir.

Q. And a new bridge is being built on Dorset Avenue crossing that thorofare?

A. They are to start there shortly, I understand.

Mr. Hanstein (to stenographer): Will you mark this, please?

(Said paper marked Exhibit M & R18.)

JOSEPH J. MARSHALL, sworn.

By Mr. Bourgeois:

Q. Mr. Marshall, you are one of the defendants—or you are the defendant in this suit?

A. Yes.

Q. Will you tell me whether or not, when the date for the payment for these lots came, July 1, 1926, you were ready to make settlement?

A. Absolutely we were.

Q. And also when the settlement date came for settlement on August 1st were you prepared for settlement?

A. Ready and prepared, yes, sir.

Q. Were you prepared November 1st?

A. We were prepared November 1st, yes, sir.

Q. I show you an envelope and letter marked D4, which recites the engineer's certificate is enclosed. Look at that.

A. I recall the letter very well and there was no enclosure in it.

Q. Have you ever seen any engineer's certificate?

A. We have never seen one.

Q. I show you Exhibit D5, also a letter stating there is an engineer's certificate enclosed, and ask whether there was one enclosed in that?

A. No, there was no enclosure in this; I recall the letter very well.

Q. I show you Exhibit R17 which purports to be a certificate from E. D. Rightmire, and ask if you saw that certificate, or a certificate like that, before?

A. That is the first I ever have seen it.

Q. M17, which also purports to be a certificate

from the engineer, and ask whether you ever saw that before?

A. No, sir, never saw it before.

The Court: Nor a copy of it?

The Witness: Nor a copy of it, no, sir.

Q. Mr. Marshall, you are in the real estate business?

A. Yes.

Q. When did the real estate boom collapse with regard to these lots?

Mr. Hanstein: Well, now ——

Q. If you know?

Mr. Hanstein: Just a moment. I think you ought to qualify him as an expert with knowledge of the subject in Atlantic City.

Q. You were the purchaser of these lots?

A. Yes, sir.

Q. Did you sometimes go down there?

A. Mr. Maloney and my son went down and found out the condition of them.

Q. You yourself didn't go?

A. No. That is, not at that time; I have been down since.

Q. Were you down there in the latter part of the fall of 1926?

A. The fall of 1926?

Q. Yes.

A. No, Mr. Maloney was down there.

Q. In March, 1927, or the spring of 1927, were you down there?

A. No.

Q. You don't know what time the real estate boom collapsed in Jersey?

A. Except the reports we got all over in the real estate business.

Cross-examination.

By Mr. Hanstein:

Q. Mr. Marshall, when you got this letter of August 12th, these two registered letters, did you open them yourself?

A. I did.

Q. And did it occur to you at once that these certificates had been omitted?

A. It did.

Q. What was your disposition at that time, that you wouldn't have settled even though they had been included, is that so?

A. Prior to that time?

Q. Your disposition was even if they had been included you wouldn't have settled?

A. We had made a claim for the money prior to that and we wouldn't have settled.

Q. So the omission to include these in the letters didn't affect your attitude in the matter at all?

A. The omission occurred earlier than that, they should have been sent while the agreement was still alive.

Q. That was the attitude you took when you got the letter?

A. Yes, sir.

Q. And accordingly, by reason of the fact you had made a claim for the money and had taken the position in March of that year that the contract was

dead, you accordingly did nothing when you got these letters in August?

A. We didn't get the certificates, we haven't got them yet, so there is no use arguing on that point.

Q. But by reason of the fact you had cancelled the contract in March you didn't even notify Mr. Farrington that the certificates were not included?

A. Yes, it wasn't necessary, apparently.

Q. You said you were prepared to settle for this land on certain specified dates as to which Mr. Bourgeois asked you. You weren't prepared to settle for that land unless you had the engineer's certificate?

A. That was one of the conditions.

Q. You wouldn't have settled on those dates if you hadn't had the certificates?

A. Naturally I presume I would not.

Q. Isn't it a fact your son was employed by Mr. Farrington in 1926?

A. Well, he was living in Atlantic City, and I think he received no salary from Mr. Farrington, and I hardly think you could call that employment. He was trying to sell some real estate for Mr. Farrington for which, I understand, if he had succeeded, which he did not, Mr. Farrington would have paid him a commission.

Q. He was working as an agent in Mr. Farrington's office, isn't that true?

A. I believe it is. I never was down there.

Q. You know Mr. Farrington had an office right out on this tract of land, didn't he?

A. I was at the office when we signed the agreement.

Q. You signed the agreement right at the office and these lots are right down the street from Mr. Farrington's office?

A. Yes.

Q. When did you put this matter into Mr. Bourgeois' hands, Mr. Marshall?

A. Sometime in May after we received Mr. Farrington's letter stating that the owners would not consent to the return of the deposit, it was after that we put it into Mr. Bourgeois' hands.

JAMES H. MALONEY, sworn.

By Mr. Bourgeois:

Q. Mr. Maloney, I show you a letter of August 12th, marked D4, in which it speaks of engineer's certificate being enclosed, and ask whether or not you were present when that letter was received?

A. I was.

Q. Do you know whether or not there was any certificate enclosed?

A. It was not enclosed.

Q. Have you ever seen that certificate?

A. No, sir.

Q. I show you also a letter marked D5 which recites that there was a certificate enclosed, and ask you if there was a certificate enclosed there?

A. There was not.

Q. I show you a certificate marked M17 signed by E. D. Rightmire and ask whether you ever saw that before, or a copy of it?

A. Never have.

Q. I show you Exhibit R17, also a certificate from Mr. Rightmire, and ask whether you ever saw that before, or a copy of it?

A. No, or a copy.

Q. Mr. Maloney, when was it you first came to my office and retained me in this matter?

A. That was after we received Mr. Farrington's letter in May, 1926, stating that his clients would not cancel the contract.

Q. 1927, you mean?

A. 1927, pardon me, yes, sir.

Q. Mr. Maloney, when was it that you were in my office in negotiation with Mr. Gill and Mr. Farrington, when was that with relation to the letters that you had received dated August 12, 1927? These letters, Exhibits 4 and 5, were dated August 12, 1927, and suit was brought by Mr. Marshall on the 19th of August, 1927; now, when was the conference that was had with Mr. Gill and Mr. Jeffers, and another conference with Mr. Farrington?

A. I know it was after the time I first saw you following the receipt of the letter from Mr. Farrington in May, and it was during the summer, my impression is it was in July. It was while the matter was progressing in your hands that this took place.

Q. Now, at that time you were in the conference was there anything said about the engineer having given a certificate?

A. No, sir, nothing whatever.

Q. Do you know anything about the real estate market there in 1927, the spring of it?

A. Not intimately, I wasn't there.

Cross-examination.

By Mr. Hanstein:

Q. Mr. Maloney, you say when the matters were progressing you put this matter into Mr. Bourgeois' hands in May, and then you had a conference perhaps in July when the matters were progressing in

Mr. Bourgeois' hands. What did Mr. Bourgeois do in connection with this matter between May and July?

A. Mr. Bourgeois investigated and examined the agreements, studied them, and investigated the standing of the owners on the ground, I suppose, determining who they were, and I judge he sent for them, or called to see them, and also Mr. Farrington. It was a matter of seeing whether some settlement could be reached.

Q. You don't know, apparently?

A. No, except we instructed Mr. Bourgeois to proceed in a proper legal form.

Q. And undertake to effect some sort of settlement?

A. Yes.

Mr. Bourgeois: We rest.

Mr. Hanstein: Mr. Bourgeois, do you also stipulate here you never made any demand in this case on the complainants in this suit, the first demand was the institution of the suit by you?

Mr. Bourgeois: I can't stipulate that, Mr. Hanstein.

The Court: Wasn't there a letter in which he demanded his money back in May?

Mr. Hanstein: None from Mr. Bourgeois, there was only that March letter from Mr. Marshall himself. I will call Mr. Farrington.

JOSEPH D. FARRINGTON, recalled.

By Mr. Hanstein:

Q. Did you receive any letter from Mr. Bourgeois demanding the return of this money?

A. No, I did not.

Q. Any letters at all from Mr. Bourgeois?

A. No.

Q. When you went to the conference in Mr. Bourgeois' office—how many conferences did you attend?

A. One.

Q. Who was present at that time?

A. Mr. Jeffers.

Q. Was Mr. Maloney present?

A. Mr. Maloney wasn't present at the conference I was at.

Q. What initiated that conference, Mr. Farrington?

A. Mr. Jeffers arranged that conferecne. There was considerable delay in arranging it because Mr. Bourgeois was out of town a great deal at that time, and when we had that conference it was along in July.

(No cross-examination.)

Mr. Hanstein: Now, I don't know what shape we are in right now.

The Court: Both sides rest? I think counsel had better outline their arguments, at least, now, and then you can file briefs.

(After arguments.)

The Court: I will not dispose of the case at this time. I will invite from counsel briefs, if they are promptly forwarded to me, so I can depend upon my memory of the facts without ordering a transcript and taking the time to read it.

It seems to me there are some features of the case, however, that might be considered reasonably clear and possibly beyond the field of dispute, although I will not undertake to so determine at this time. Obviously the contract contemplates the possibility of delay in the completion of filling and grading, and the provision is therefore inserted that the settlement shall not be made—the final installment or the delivery of the deed—until such time that the city engineer shall certify to the party of the second part that the lots have been filled to grade. The certificate of the engineer does not seem to me to be an especially important element from an equitable standpoint; it is the circumstance that the land has been filled, but I apprehend the purchaser would be entitled to the asusrance which the contract calls for, if he desired it, which would be the certificate of the engineer; but the equitable obligation appears to arise from the completion of the filling and the satisfaction of the purchaser that it has been done.

Now, as to the extensions, it doesn't seem to me there is any serious question which can arise there as to what the parties intended. When the first written extension was made it expressed a certain date, September 1st, I think it was, as the time limit of the extension, and the purchaser objected to that because he said he was not required by the contract to settle until the filling was completed and he insisted that that element should be more clearly em-

bodied in the extension, and accordingly it was so embodied by the correspondence—both parties agreed to that—that was the understanding of both of them, although the written extension did not expressly so provide. The second written extension was essentially in the same language, and it can only appropriately be read in the same way in ascertaining how the parties understood it. They understood it exactly the same as the first extension, although the date of November 1st, I think it was, was fixed. There was to be no obligation on the part of the purchaser to pay the balance and take title until the improvements were completed and the fill was finished. The idea was to carry on by extensions until that was done.

Now, it seems to me, the question that then arises, and perhaps one of the controlling questions of the case, perhaps the only question in the case, is what duty arose upon the part of the purchaser, if any, before he would be privileged to rescind his contract by reason of the fill not being made as promptly as it probably should have been, or by reason, if you chose, of the fact that a certificate was not supplied to him as promptly as it should have been, or at all. My first impression is strongly to the effect, as I suggested at the beginning of the trial, that if the purchaser desired to repudiate that contract and declare a rescission and procure the return of his money, some notice of some kind was due to the seller of dissatisfaction upon the part of the purchaser. September 1st arrived—November 1st, I think it was, the date fixed for the settlement, conditioned of course on the fill being completed at that time, if not it was to be further extended. The correspondence in effect says the dates fixed in the extensions shall be tentative and if the filling is not then completed there shall be further extensions.

The date of November 1st had arrived, the fill was not completed, no certificate had been issued, and time moved on. Now, if the purchaser wanted the time for filling, which was running from day to day and month to month, tolled off and wanted a definite time limit, hadn't he a duty to perform to apprise the seller of such a wish on his part and to apprise him that unless within a reasonable time or, if you chose, within a fixed time to be specified by him, that filling was completed he would withdraw from and rescind his contract? Wasn't it reasonable in the circumstances for the seller to believe that his purchaser was content? Would he be equitably entitled, without some notice to the effect that he was dissatisfied, to declare, like a bolt from a clear sky: "I rescind this contract and will not stand for past delay; I will give you no time to recoup notwithstanding I have not told you I was dissatisfied with the time you were taking to fill those lots."

Upon that feaure of the case I think I shall ask counsel to be very specific in his brief. The right of rescission, under the doctrines of the law, is a right that must be exercised with some recognized restrictions, it should be exercised promptly, it must be exercised equitably, conversely it cannot be exercised inequitably; and is it equitable to exercise the right of rescission while time is running on by apparent mutual assent, by what appears to have been a mutual understanding of the parties there were to be continued or successive postponements of settlement until the fill was made. Obviously those postponements were for the benefit of the purchaser in one aspect; he wasn't obliged to carry the property, wasn't obliged to pay taxes or the interest on the mortgage. It was detrimental to him, no doubt, in another aspect. He ran the risk of losing a favorable market in case of a recession of the market.

That is what did happen, apparently. Along in the forepart or middle of the next year the market appears to have fallen off and he may have been injured thereby; but if he saw fit to avail himself of the extension of time, and being relieved of the carrying charges, wasn't he reasonably taking a chance in having a possible recession of price, assuming, as it is asserted, that he had purchased for speculative purposes?

I make these suggestions only because they enter my mind and I would like to have them cleared up. I do not make them as at all conclusive. I shall retain an open mind until final consideration of the case.

CONCLUSIONS.

IN CHANCERY OF NEW JERSEY.

Between
A. Mildred Murphy,
Complainant,
and
Joseph K. Marshall,
Defendant.

Frank Redman,
Complainant,
and
Joseph K. Marshall,
Defendant.

Final Hearing on Bills for Specific Performance and to Restrain Actions at Law.

Conclusions.

Thompson & Hanstein, Esqs., for complainant.
Bourgeois & Coulomb, Esqs., for defendant.

Leaming, V. C.:

These two cases are essentially identical except as to the land to which they relate and the amounts to be paid. They have been heard together by consent of the respective solicitors.

Complainants, as vendors, seek specific performance by their vendee of contracts for the sale of real estate and also restraint of pending actions at

law which have been brought by the vendee for the return of money which has been paid by him on account of the purchase price.

I am convinced that complainants are entitled to the relief sought. A decree of specific performance will be advised in each case. Should the respective solicitors be unable to agree as to the balance due on either contract a reference may be made to a Master.

The defense is based upon a claim that delay of complainants' contractor in filling the tract of land to grade released defendant from the obligation of performance.

The provisions of the contracts touching the time for final settlement clearly contemplate the possibility of the lots not being filled to grade at the times named for settlement, and protect the respective parties in that event by providing that final settlement need not be made until the lots are filled to grade. This provision suggests that the parties probably contemplated at the time the contract was made that the filling would be completed at an early date: but it also discloses that they contemplated the possibility of unexpected delay and provided against that contingency without limitation of time for completion of the fill. Also their subsequent conduct touching the contract adequately discloses their mutual understanding of the contract in that respect, and created a situation in which defendant was not justified in repudiating his obligations under the contract, as he did by his letter of March 24, 1927. The situation so created is fully disclosed by the written extensions of time and the correspondence touching those extensions.

Settlement was first postponed to September 1, 1926, "or to such prior time" as the fill might be completed. The correspondence touching that ex-

tension fully discloses that the date of September 1st, 1926, was named as merely tentative with a distinct understanding of the parties that extensions of time for performance would be made from time to time thereafter until the lots should be filled to grade. On September 2, 1926, new extensions to November 1, 1926, were sent to defendant in the same form as the former ones. These extensions of time necessarily embodied the same idea which the parties had already fully considered and understood in connection with the former similar extensions, that is, an understanding to the general effect that settlement was to be postponed from time to time until the fill should be completed. There can be no doubt of that mutual understanding and intent of all the parties. For some reason further written extensions were not prepared; they were clearly unnecessary so long as it was well understood by the parties that settlement was to be made when and not until the fill should have been completed. After the extensions to November 1, 1926, no intercourse or correspondence between the parties occurred until March 24, 1927, when by letter of that date defendant repudiated further obligaitons under his contracts and demanded the return of the money theretofore paid by him. That act of defendant, in my judgment, was wrongful, unjust and violative of complainants' rights in the circumstances then existing.

Up to that time defendant had made no objection to the delay in filling the lots; his attitude up to that time had at all times indicated his satisfaction with the understanding that settlement day should be deferred from time to time until the filling should be completed. As suggested in one of complainants' letters the postponements of settlement were in part favorable to defendant since he escaped the burden

of the purchase mortgages he was to execute and the mortgages he was to assume and these carrying charges were to be borne by complainants until the settlement should be made. As against that advantage there was, of course, a possibility of loss to defendant by the delay in case he had found a purchaser at a favorable price. Those or other elements of gain or possible loss defendant could and possibly did well consider and gave no intimation to complainants of his dissatisfaction with the existing understanding between the parties. Then, without warning, came his letter of rescission of March 24, 1927.

There can be little doubt that defendant's sudden repudiation of the obligation of his contracts arose from his then becoming dissatisfied with the prospective market for the lots; had the market conditions improved it cannot be doubted that complainants would have been required to perform and could not have escaped their obligation to do so. The testimony discloses that defendant's enterprise was purely speculative; he did not need possession of the lots.

In the circumstances it seems clear that defendant's rescission of his contract was wholly without justification. Complainants had no reason to believe defendant in any way was dissatisfied with the delay in filling or with the arrangement for the settlement day to be postponed from time to time until filling should be completed. Equitably complainants were entitled to some notice of defendant's change of attitude in the matter. But no such notice was given. Had notice been given to complainants, as it justly should have been, of defendant's requirement that the lots be filled at an early date, an opportunity would have been afforded complainants to complete the fill before the date so specified. But

in the absence of such notice, or some notice of that nature, the rescission was without equitable right.

Negotiations then arose between the solicitors of the respective parties in an unsuccessful effort to adjust differences. June 18, 1927, the city engineer certified to the completion of the fill and on August 12, 1927, complainants wrote to defendant to that effect and demanded settlement at a specified time and place. In that letter the certificates of the engineer were referred to as enclosed, but defendant has testified that they were not enclosed, although he did not inform complainants of their obvious oversight. The neglect of complainants to enclose the certificates of the engineer can in no way defeat complainants' remedy of specific performance. Defendant's obligations under the contract had been repudiated by him and service of the certificates would have been a vain and fruitless act. Nor could defendant now be heard to complain that the certificates were not enclosed in the letter after failing to apprise complainants of that mistake, which mistake was alone within the knowledge of defendant.

A decree will be advised pursuant to the prayer of the bill.

Submitted: March 25, 1929.
Determined: March 28, 1929.

CONCLUSIONS.

IN CHANCERY OF NEW JERSEY.

Between FRANK REDMAN, *Complainant,* and JOSEPH K. MARSHALL, *Defendant.*	Final Hearing on Bill for Specific Performance and to Restrain Action at Law. Conclusions.

MESSRS. THOMPSON & HANSTEIN, for complainant.
MESSRS. BOURGEOIS & COULOMB, for defendant.

LEAMING, V. C.:

This cause was heard with the case of A. Mildred Murphy v. Joseph K. Marshall, and the conclusions filed in that cause are controlling in this.

Submitted: March 25, 1929.
Determined: March 28, 1929.

FINAL DECREE.

IN CHANCERY OF NEW JERSEY.

Between
A. MILDRED MURPHY,
Complainant,

and

JOSEPH K. MARSHALL,
Defendant.

On Bill, &c.
Final Decree.

This cause coming on to be heard in the presence of Walter Hanstein, of the firm of Thompson & Hanstein, solicitors of complainant, and George A. Bourgeois, Esquire, of the firm of Bourgeois & Coulomb, solicitors of 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, A. Mildred Murphy, is seized in fee simple of all that certain lot, tract or parcel of lands and premises, situate, lying and being in the City of Ventnor City, County of Atlantic and State of New Jersey, bounded and described as follows:

BEING known and designated as lots no. 38, 39 and 40 in block 174 as shown on map of Vent-

nor Heights, by W. I. Risley, showing property owned by St. Leonard's Park, Inc.

And that on the 31st day of March, 1926, the said complainant, A. Mildred Murphy, single woman, entered into an agreement in writing with the defendant, Joseph K. Marshall, wherein and whereby said complainant agreed to convey the said lands and premises, by deed of special warranty to defendant, on July 1st, 1926, provided that said land was filled to grade on that date. Said agreement further provided that if said lots were not filled to grade, on that date, the defendant would pay to the complainant, A. Mildred Murphy, the further sum of $1,000 on account of the contract, and the balance at such time that the City Engineer of Ventnor City should certify to the defendant that the said lots had been filled to grade. The parties to said agreement agreed thereafter, to extend the time of settlement from time to time, until said lots should be filled to grade, and the City Engineer of Ventnor City should certify to the defendant that the lots had been filled to grade; and the defendant agreed to pay for said land and premises the sum of $10,000, to be paid as follows:

$1000 on the signing of the agreement, which was paid;

3612.50 by the assumption by the defendant of a mortgage in that amount to be dated July 1st, 1926, and payable at any time within one year thereafter, with interest at 6% payable semi-annually;

637.50 by the assumption by the defendant of a mortgage in that amount to be dated July 1st, 1926, and payable at any time within one year thereafter, with interest at 6% payable semi-annually;

750.00 by the defendant giving unto the complainant a purchase money mortgage in that amount, accompanied by the defendant's bond, and to be payable at any time within one year from the date of final settlement, to bear interest at the rate of 6%, payable semi-annually, and the balance of 4,000.00 to be paid in cash on the date of final settlement;

By reason of the extension aforesaid, the defendant paid an additional $1,000 on account of the purchase price, leaving $3,000 as the amount of cash due under the terms of the contract on the date of final settlement;

Under a subsequent agreement between the parties to said agreement, it was agreed that the mortgages to be assumed by the defendant, and the mortgage to be made by the defendant, should all be dated the date of final settlement;

And it further appearing to the satisfaction of the Court that on March 24th, 1927, the defendant rescinded his contract without justification, and without equitable right, and that the defendant refused and failed to perform the agreement on her part, and that the complainant had always been, and still is ready and willing in all things to comply with the terms of her said agreement;

And the Court being of the opinion that the complainant is entitled to the specific performance of the aforesaid agreement, as prayed for by her in her bill of complaint filed herein, and is also entitled to the restraint of the defendant's action at law against the complainant for the return of the deposit money paid under the agreement herein referred to;

It is, on this 18th day of April, 1929, ordered, adjudged and decreed that the said agreement be in all things specifically performed by the defendant, and that the defendant, on the 20th day of May, 1929, at the hour of ten o'clock in the forenoon, at the office of G. Arthur Bolter, Esq., Law Bldg., in the City of Atlantic City, County of Atlantic, State of New Jersey, pay to the complainant the sum of $3750, with interest thereon from March 27th, 1924, together with the taxed costs of this suit, as hereafter allowed, upon the delivery, at the same time, and place, by the complainant to the defendant, of a special warranty deed, duly executed and acknowledged by the complainant, A. Mildred Murphy, conveying to the said defendant, Joseph K. Marshall, said lands and premises, in fee, free and clear of all restrictions, subject, however, to the assumption by the said defendant, Joseph K. Marshall, of two certain mortgages, one in the sum of $3,612.50, bearing date March 24, 1927, payable at any time within one year from the date thereof, with interest at the rate of 6% per annum, payable semi-annually, and the other in the sum of $637.50, bearing date March 24, 1927, payable at any time within one year from the date thereof, with interest at the rate of 6% per annum, payable semi-annually;

It is further ordered, adjudged and decreed, that if, at the time and place hereinbefore mentioned, the said defendant shall fail, or neglect, to pay the said sum of $3,750, with interest as hereinbefore mentioned, together with said taxed costs, upon the tender of said deed, the aforesaid sum of $3,750, with interest from March 24th, 1927, until said date of settlement, being a total of $4,234 00/100, together with taxed costs of this suit, as hereinbefore mentioned, shall be and become, and are hereby impressed as a lien upon the lands and premises in

favor of the complainant, to the end that the 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 shall arise upon such sale, the said defendant may be ordered by this Court to pay such deficiency;

It is further ordered, adjudged and decreed that the said defendant pay to the said complainant the costs of this suit to be taxed, including a counsel fee of $150.00 which is hereby allowed to said complainant.

It is further ordered, adjudged and decreed that true, but uncertified copy, of this decree and of said taxed costs be served on the solicitor of said defendant within 5 days from the date hereof.

It is further ordered, adjudged and decreed that the complainant may be at liberty to apply to this Court for execution, and such further directions as may be advised.

E. R. Walker,
C.

(Copy)

Respectfully advised:
E. B. Leaming, *V. C.*
(Copy)

A true copy.

Thompson & Hanstein.

FINAL DECREE.

IN CHANCERY OF NEW JERSEY.

Between
FRANK REDMAN,
Complainant,

and

JOSEPH K. MARSHALL,
Defendant.

On Bill, &c.
Final Decree.

This cause coming on to be heard in the presence of Walter Hanstein, of the firm of Thompson & Hanstein, solicitors of complainant, and George A. Bourgeois, Esquire, of the firm of Bourgeois & Coulomb, solicitors of 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, Frank Redman, is seized in fee simple of all that certain lot, tract or parcel of lands and premises, situate, lying and being in the City of Ventnor City, County of Atlantic and State of New Jersey, bounded and described as follows:

BEING known and designated as Lots no. 38, 39 and 40 in Block 173, as shown on Map of

Ventnor Heights, by W. I. Risley, showing property owned by St. Leonard's Park, Inc.

And that on the 31st day of March, 1926, the said complainant, Frank Redman, and Placidas, his wife, entered into an agreement in writing with the defendant, Joseph K. Marshall, wherein and whereby said complainant and his wife agreed to convey the said lands and premises, by deed of special warranty to defendant, on August 1st, 1926, provided that said land was filled to grade on that date. Said agreement further provided that if said lots were not filled to grade, on that date, the defendant would pay to the complainant, Frank Redman, the further sum of $1,000 on account of the contract, and the balance at such time that the City Engineer of Ventnor City should certify to the defendant that the said lots had been filled to grade. The parties to said agreement agreed thereafter, to extend the time of settlement from time to time, until said lots should be filled to grade, and the City Engineer of Ventnor City should certify to the defendant that the lots had been filled to grade; and the defendant agreed to pay for said land the sum of $10,000, to be paid as follows:

$1000. on the signing of the agreement, which was paid;

2975. by the assumption by the defendant of a mortgage in that amount to be dated August 1st, 1926, and payable at any time within one year thereafter, with interest at 6% payable semi-annually;

535. by the assumption by the defendant of a mortgage in that amount to be dated August 1st, 1926, and payable at any time within one year thereafter, with interest at 6% payable semi-annually;

1490. by the defendant giving unto the complainant a purchase money mortgage in that amount, accompanied by the defendant's bond, and to be payable at any time within one year from the date of final settlement, to bear interest at the rate of 6%, payable semi-annually, and the balance of
4000. to be paid in cash on the date of final settlement;

By reason of the extension aforesaid, the defendant paid an additional $1,000 on account of the purchase price, leaving $3,000 as the amount of cash due under the terms of the contract on the date of final settlement.

Under a subsequent agreement between the parties to said agreement, it was agreed that the mortgages to be assumed by the defendant, and the mortgage to be made by the defendant, should all be dated the date of final settlement.

And it further appearing to the satisfaction of the Court that on March 24th, 1927, the defendant rescinded his contract without justification, and without equitable right, and that the defendant refused and failed to perform the agreement on his part, and that the complainant had always been, and still is ready and willing in all things to comply with the terms of said agreement on his part;

And the Court being of the opinion that the complainant is entitled to the specific performance of the aforesaid agreement, as prayed for by him in his bill of complaint filed herein, and is also entitled to the restraint of the defendant's action at law against the complainant for the return of the deposit money paid under the agreement herein referred to;

It is, on this 18th day of April, 1929, ordered, adjudged and decreed that the said agreement be in all things specifically performed by the defendant,

and that the defendant, on the 20th day of May, 1929, at the hour of ten o'clock in the forenoon, at the office of G. Arthur Bolte, Esq., Law Bldg., in the City of Atlantic City, County of Atlantic, State of New Jersey, pay to the complainant the sum of $4,490, with interest thereon from March 24th, 1927, together with the taxed costs of this suit, as hereafter allowed, upon the delivery, at the same time, and place, by the complainant to the defendant, of a special warranty deed, duly executed and acknowledged by the complainant, Frank Redman and Placidas Redman, his wife, conveying to the said defendant, Joseph K. Marshall, said land and premises, in fee, free and clear of all restrictions, subject, however, to the assumption by the said defendant, Joseph K. Marshall, of two certain mortgages, one in the sum of $2,975 bearing date March 24, 1927, payable at any time within one year from the date thereof, with interest at the rate of 6% per annum, payable semi-annually, and the other in the sum of $535, bearing date March 24, 1927, payable at any time within one year from the date thereof, with interest at the rate of 6% per annum, payable semi-annually.

It is further ordered, adjudged and decreed, that if, at the time and place hereinbefore mentioned, the said defendant shall fail, or neglect, to pay the said sum of $4,490, with interest as hereinbefore mentioned, together with said taxed costs, upon the tender of said deed, the aforesaid sum of $4,490, with interest from March 24th, 1927, until said date of settlement, being a total of 5070.00, together with taxed costs of this suit, as hereinbefore mentioned, shall be and become, and are hereby impressed as a lien upon the lands and premises in favor of the complainant, to the end that the lands and premises may be sold, pursuant to law, and under the direc-

tion of this Court, to satisfy such lien, and that in case a deficiency shall arise upon such sale, the said defendant may be ordered by this Court to pay such deficiency.

It is further ordered, adjudged and decreed that the said defendant pay to the said complainant the costs of this suit to be taxed, including a counsel fee of $150.00 which is hereby allowed to said complainant.

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

It is further ordered, adjudged and decreed that the complainant may be at liberty to apply to this Court for execution, and such further directions as may be advised.

E. R. Walker,
C.

(Copy)

Respectfully advised.
E. B. Leaming, *V. C.*
(Copy)

A true copy.

Thompson & Hanstein.

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

Between
A. MILDRED MURPHY,
Complainant,

and

JOSEPH K. MARSHALL,
Defendant.

On Bill, &c.
Notice of Appeal.

The defendant, Joseph K. Marshall, hereby appeals from the final decree of the Court of Chancery of New Jersey, advised by Vice-Chancellor Edmund B. Leaming, made in this court, in the above-entitled cause, on the 18th day of April, 1929, and from the whole and every part thereof, to the Court of Errors and Appeals, the last resort in all causes.

BOURGEOIS & COULOMB,
Solicitors for Defendant.
H. R. COULOMB,
Of Counsel with Defendant.

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

H. R. COULOMB,
Of Counsel with Defendant.

Dated: June 5, 1929.
To THOMPSON & HANSTEIN, ESQS.,
Solicitors for and of Counsel with Complainant.

[ENDORSED]

Service of the within notice of appeal is hereby acknowledged this 7th day of June, 1929.
Thompson & Hanstein,
Solrs. for Complainant.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
A. MILDRED MURPHY,
Complainant-Respondent,

and

JOSEPH K. MARSHALL,
Defendant-Appellant.

On Bill, etc.
Petition of Appeal.

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

The petition of Joseph K. Marshall, defendant-appellant, respectfully shows, that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery of the State of New Jersey, advised by Vice-Chancellor Edmund B. Leaming on the 18th day of April, 1929, and the whole and every part of said decree, in this respect, to wit:

The bill of complaint should have been dismissed because the complainants had failed to perform the terms, covenants and conditions of said agreement within the time limited by the terms of said agreement and in accordance with the terms thereof.

The bill of complaint should have been dismissed

because the complainant was not entitled to the relief prayed for.

The complainant was not entitled to the relief prayed for in the bill of complaint for the reason that the land, which was the subject-matter of said contract, under the terms thereof, was to be filled in to the grade of the City of Ventnor as furnished by the city engineer, and a certificate produced, and such grading and filling in had not been done within the time limited in said agreement or any extension thereof.

Time was of the essence of the performance of said agreement and said extensions, and the complainant had not performed the terms and conditions of said agreement within the time limited thereon.

The Court of Chancery erred that time was not of the essence of said agreement and the extensions thereof.

Your petitioner, therefore, prays that the said decree and the whole and every part thereof, be reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

BOURGEOIS & COULOMB,
Solicitors for Defendant-Appellant.
HARRY R. COULOMB,
Of Counsel.

[ENDORSED]

Service of the within petition of appeal is hereby acknowledged this 12th day of June, 1929.

Thompson & Hanstein,
Solrs. of Complainant-Respondent.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
A. MILDRED MURPHY,
Complainant-Respondent,

and

JOSEPH K. MARSHALL,
Defendant-Appellant.

On Appeal.
Answer to Petition of Appeal.

The answer of the above-named respondent, A. Mildred Murphy, to the petition of appeal of the appellant, says that this respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, for answer thereto, nevertheless, says and admits that on the 18th day of April, 1929, a final decree was allowed and filed in the Court of Chancery of New Jersey, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced.

And this respondent is advised and believes that the said final decree is just and prays that the same may be affirmed, with costs to be adjudged to this respondent.

THOMPSON & HANSTEIN,
Solrs. for and of Counsel with Complainant-Respondent.

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

Between
FRANK REDMAN,
Complainant,

and

JOSEPH K. MARSHALL,
Defendant.

On Bill, &c.
Notice of Appeal.

The defendant, Joseph K. Marshall, hereby appeals from the final decree of the Court of Chancery of New Jersey, advised by Vice-Chancellor Edmund B. Leaming, made in this court, in the above-entitled cause, on the 18th day of April, 1929, and from the whole and every part thereof, to the Court of Errors and Appeals, the last resort in all causes.

BOURGEOIS & COULOMB,
Solicitors for Defendant.
H. R. COULOMB,
Of Counsel with Defendant.

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

H. R. COULOMB,
Of Counsel with Defendant.

Dated: June 5, 1929.
To THOMPSON & HANSTEIN, ESQS.,
Solicitors for and of Counsel with Complainant.

[ENDORSED]

Service of the within notice of appeal is hereby acknowledged this 7th day of June, 1929.
Thompson & Hanstein,
Solrs. for Complainant.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
FRANK REDMAN,
Complainant-Respondent,

and

JOSEPH K. MARSHALL,
Defendant-Appellant.

On Bill, etc.
Petition of Appeal.

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

The petition of Joseph K. Marshall, defendant-appellant, respectfully shows, that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery of the State of New Jersey, advised by Vice-Chancellor Edmund B. Leaming on the 18th day of April, 1929, and the whole and every part of said decree, in this respect, to wit:

The bill of complaint should have been dismissed because the complainants had failed to perform the terms, covenants and conditions of said agreement within the time limited by the terms of said agreement and in accordance with the terms thereof.

The bill of complaint should have been dismissed

because the complainant was not entitled to the relief prayed for.

The complainant was not entitled to the relief prayed for in the bill of complaint for the reason that the land, which was the subject-matter of said contract, under the terms thereof, was to be filled in to the grade of the City of Ventnor as furnished by the city engineer, and a certificate produced, and such grading and filling in had not been done within the time limited in said agreement or any extension thereof.

Time was of the essence of the performance of said agreement and said extensions, and the complainant had not performed the terms and conditions of said agreement within the time limited thereon.

The Court of Chancery erred that time was not of the essence of said agreement and the extensions thereof.

Your petitioner, therefore, prays that the said decree and the whole and every part thereof, be reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

BOURGEOIS & COULOMB,
Solicitors for Defendant-Appellant.
HARRY R. COULOMB,
Of Counsel.

[ENDORSED]

Service of the within notice of appeal is hereby acknowledged this 7th day of June, 1929.

Thompson & Hanstein,
Solrs. for Complainant.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
FRANK REDMAN,
Complainant-Respondent,

and

JOSEPH K. MARSHALL,
Defendant-Appellant.

On Appeal.
Answer to Petition of Appeal.

The answer of the above-named respondent, Frank Redman, to the petition of appeal of the appellant, says that this respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, for answer thereto, nevertheless, says and admits that on the 18th day of April, 1929, a final decree was allowed and filed in the Court of Chancery of New Jersey, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced.

And this respondent is advised and believes that the said final decree is just and prays that the same may be affirmed, with costs to be adjudged to this respondent.

THOMPSON & HANSTEIN,
Solrs. for and of Counsel with Complainant-Respondent.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

A. Mildred Murphy,
Complainant-Respondent,

and

Joseph K. Marshall,
Defendant-Appellant,

and

Frank Redman,
Complainant-Respondent,

and

Joseph K. Marshall,
Defendant-Appellant.

On Appeal from Decree of Chancery.

BRIEF OF BOURGEOIS & COULOMB, SOLICITORS FOR AND OF COUNSEL WITH APPELLANT.

The appeals in these cases bring here for review, two decrees similar in form and effect, perpetually

restraining the appellant from prosecuting his respective suits at law to recover down monies paid by him under the respective contracts in each case, and awarding to the complainants-respondents, specific performance of the contracts in question.

Both suits involve the same question of law and fact. They were tried together in the Court below, and will be argued together here.

STATEMENT.

The suits arise out of contract for the sale of real estate, in an undeveloped part of Ventnor City. The contracts may be found at p. 6, of the State of the Case, as Exhibit A of the Murphy bill of complaint, and at p. 38, as Exhibit A of the Redman bill of complaint. The provision of the contracts upon which the litigation arose is as follows:

> "Settlement to be made at the office of the Chelsea Title and Guaranty Company on July 1, 1926, provided, however, that the within mentioned lots be filled to grade. If said lots are not filled to grade, the party of the second part shall pay to the party of the first part, the sum of $1,000 and the balance at any such time that the City Engineer of Ventnor City shall certify to the party of the second part that said lots have been filled to grade.
>
> It is understood and agreed between the parties hereto that the St. Leonard's Park, Inc., developers of Ventnor Heights, are to pay all costs in connection with bringing said property to grade, gravel streets, sidewalks and curbing.

Time is the essence of this Agreement and all its conditions."

The land in question, at the time of the making of the contracts, was unfilled, etc., and this work was to be done before the appellant was required to make settlement. Settlement was to be had on July 1, 1926, provided the lots were filled to grade by that time. It will be observed, however, that time was made the essence of the contract, and of all of the provisions therein, which would, of course, apply to the provision concerning filling.

By virtue of this clause, the parties agreed that there should be an extension if the engineer's certificate were not procured prior to July 1st, 1926. The engineer's certificate was not furnished before the 1st of July, and on June 30, an extension agreement was prepared as follows:

"For and in consideration of the sum of One Thousand Dollars ($1,000) to me in hand paid, I, Mildred Murphy, of the City of Margate City, County of Atlantic and State of New Jersey, do hereby agree to extend unto Joseph K. Marshall, of the City and County of Philadelphia, State of Pennsylvania, final settlement on Lots Nos. 38, 39 and 40, in Block 174, Ventnor Heights, Ventnor City, New Jersey, to September 1, 1926, or to such prior time that the City Engineer of Ventnor City, New Jersey, shall certify to Joseph K. Marshall that said Lots have been filled to grade. It is understood that the mortgages mentioned in the within Agreement of Sale are to be dated as of the day of final settlement" (p. 23, S. C., l. 17).

By that agreement, it clearly appears that the seller having in mind the clause that time is of the

essence of the contract, specifically provided for the termination of that agreement on the 1st of September, 1926, excepting only that the purchaser would not be required to date the mortgages until the day of final settlement.

According to that agreement, the day of final settlement was September 1st, 1926, and that was the date for the executing of the mortgages.

Mr. Marshall's letter under date of August 3rd, 1926, was as follows (p. 48, S. C.):

> "We desire to be on record as not accepting the terms mentioned in these agreements of extension, but we do adhere strictly to the terms of our original agreements, in which it distinctly states that the settlement is not to take place until such time as the City Engineer has certified that the lots have been filled to grade."

Mr. Farrington wrote (p. 47, S. C.):

> "If the lots were filled to grade and certified by the City Engineer prior to September 1st, settlement would have been made at that time. It is our understanding that extension shall be given from time to time for a definite term until these lots are filled to grade to meet the approval of the engineer."

On August 26th, the seller, desiring to further protect themselves in writing, forwarded another agreement, as follows (p. 2, S. C., l. 10):

> "For and in consideration of the sum of One Dollars ($1), to me in hand paid, I, Mildred Murphy, of the City of Margate City, County of Atlantic and State of New Jersey, do hereby agree to extend unto Joseph K. Marshall, of the City and County of Philadelphia, State of Penn-

sylvania, final settlement on Lots Nos. 38, 39 and 40, in Block 174, Ventnor Heights, Ventnor City, New Jersey, to November 1, 1926, or to such prior time that the City Engineer of Ventnor City, New Jersey, shall certify to Joseph K. Marshall that said lots have been filled to grade. It is understood that the mortgages mentioned in the within agreement of sale are to be dated as of the day of final settlement."

Again, the clause, "Time is the essence of the contract" has been by the seller strictly construed. This agreement expires by its own terms on the 1st day of November, 1926, unless the certificate is given prior to that date, and the mortgages become due on November 1st, 1926.

ARGUMENT.

The original agreement provided for one extension, and Mr. Marshall's letter and Mr. Farrington's letter concerning that first extension were in exact keeping with the original agreement.

The second agreement of November 1st, 1926, was not within the terms of the original agreement, and it has no qualifying letter or letters concerning it. If the letters qualifying the first agreement had been variant from the provisions of the original agreement, those letters might possibly be extended to influence the second agreement, but in view of the fact that the first agreement provided for one extension, and that extension was made within the terms of the original agreement, and the fact that there were qualifying letters touching that one ex-

tension, which were likewise within the terms of the original agreement, forms no basis for applying those letters to a subsequent extension not provided for in the original agreement, and that the sellers so understood there can be no doubt.

The first day of November came—nothing whatever was done. The lots had not at that date been filled to grade, nor was any certificate of the city engineer furnished as required by the terms of the original agreement, above referred to. If they had considered this extension to November 1st, 1926, to be within the original agreement and in the same light that they had considered the first agreement, they would have forwarded another extension agreement continuing the negotiations from time to time, as they had suggested in their letter concerning the first agreement.

But complainants realized that the original agreement provided for only one extension, and regarded the second extension as a new contract, which was that the settlement was to be made on the 1st of November, unless the engineer's certificates were procured sooner, and that the mortgages should be dated as of that date of settlement.

At that time, the seller neither tendered a deed nor demanded settlement—he did nothing.

At that time, the real estate marked was at a stand-still. The seller knew that the purchaser had gone into the negotiations as an investment. He knew that for years and years to come, there would be no investment in that land for the purchaser, and did nothing. It is our contention that the last extension, containing no clause that time should be of the essence of the contract, presented a situation, in view of the collapse of the market, in which it was the duty of the seller to act promptly. He could not, if he sought specific performance, allow that

situation to continue without acting, and yet he did nothing for four and a half months, at which time the purchaser, being convinced that the matter was closed, demanded the return of his money (p. 71, S. C., l. 3). He was at once advised that Mr. Farrington would make inquiry (p. 71, S. C., l. 27). Two months later, he was advised that they would not return the deposit moneys (p. 91, S. C., l. 30). The excuse was that one of them had been in Europe, or some place else, but no excuse was made for the other, and the answer of both came at the same time, to wit: In May, or two months after demand was made for the return of the money.

It now seems that the engineer gave a certificate of completion in June (p. 98, S. C., l. 11). The seller made no effort to get that certificate to the purchaser's attention.

Two months later than that, to wit; in August, the seller wrote the purchaser that the certificate had been received and was enclosed (p. 93, S. C., l. 19), but no certificate was in fact enclosed (p. 113, S. C., ll. 20-30).

Suit was then brought by the purchaser to recover the deposit money, and then the seller, on August 30, 1927, sought to enforce specific performance, which was a delay of ten months in a falling market, because the testimony was that in 1926 the market was brisk (p. 108, S. C., l. 13), in the first part of 1927 it was very inactive (p. 105, S. C., ll. 31-36), and in the latter part of 1927, it was absolutely flat (p. 107, S. C., ll. 21-30).

Time was of the essence of the original contract. The extension agreement, extending the time of performance to September 1, made September 1 the date for final settlement, and that date was, by virtue of the original contract, the final date on which settlement could be made, time being of the essence of

the contract as extended. We further contend that there never was an acceptance by the appellant of the agreement extending the time of performance to November first; and, assuming for the purpose of argument that this agreement did have the effect of extending the time to November first, that time was again of the essence of the contract. Assuming, but not conceding, that the time fixed by the last extension, to wit, November first, was not of the essence of the contract, we submit that a reasonable time began to run on the 1st day of November, 1926, and if not then, it would begin to run from the 17th day of March, 1927, when purchaser demanded repayment of the monies.

At that time, the seller must have known that it was incumbent upon him, in view of the four months that had elapsed since the expiration of the extension in November of 1926, to proceed promptly, if he desired to take any steps to complete that sale, and yet he did nothing; and it is submitted that in a falling market, from the 17th day of March to the 30th day of August, nearly six months, is an unreasonable time for a man to stand idly by and then come into a court of equity and seek specific performance.

It is submitted that in view of the falling market, complainants were in laches in not acting promptly on the 1st of November, 1926, and were in laches in permitting defendant's demand for return of the money to go for two months without reply; also that complainants were in laches in allowing the engineer's certificate to go from June until August, without notification.

The following cases are in point:

In the case of *King v. Ruckman* (20 N. J. Eq. 316), it was held:

> "Time may become essential from the subject matter or object of the contract; e. g. Where

the value of the subject-matter necessarily fluctuates and changes with the mere lapse of time."

Agens v. Koch (74 N. J. Eq. 528).

Pomeroy says (5 Pomeroy on Equity, Sec. 2234):

"Although time is not ordinarily essential yet it is as a general rule material. In order that a default may not defeat a party's remedy, the delay which accounted for it must be explained and accounted for, the doctrine is fundamental that a party seeking the remedy of specific performance and also the party who desires to maintain an objection founded upon the other's laches, must show himself to have been ready, desirous, prompt and eager to perform."

Hubbell v. Von Schoening (49 N. Y. 326);
Pennsylvania Min. Co. v. Martin (210 Pa. 53; 59 Atl. 436);
McQuary v. Missouri Land Co. (230 Mo. 342; 130 S. W. 325);
Hertford v. Boore (5 Ves. Jr. 719).

In the case of *Merritt v. Brown* (19 N. J. Eq. 286), Chancellor Zabriskie in considering this same point, in a similar case held:

"That time is frequently considered not of the essence of an agreement to convey lands, and in such case, a delay will not bar the right to specific performance, but where the value of the property has materially changed, or where great financial changes have materially altered the relative value of money and land, time will be considered material and a party will not be allowed to lie by until the change sets in his favor, and then have specific performance."

In the case of *Bishop v. Jackson* (29 N. Y. S. 287), it was held:

> "Where a stipulation for performance at a particular time has been waived, the party in whose favor the waiver operates is thereafter bound only to perform within a reasonable time, except in cases where there has been a specific extension of time, in which case it is held that the new time fixed becomes of the essence, as was the case in the original contract."

In the case of *Young v. Rathbone* (16 N. J. Eq. 224), it appeared that between the time of the making of the contract and its execution the value of the land in question had greatly decreased due to the Civil War. At the original time set for the performance by the terms of the contract the vendee was ready, able and willing to purchase, but the vendor was unable to make a conveyance. The Court held:

> "Where the time fixed for the delivery of a deed has passed and circumstances have materially changed, a vendee acting in good faith will not be compelled to accept a deed against his will, which he was ready and willing to accept at the time fixed for the performance of the contract."

In the case of *Texas Company v. Herring* (19 Fed. 2nd Series 56), the plaintiff by written contract agreed to sell to the defendant his interest in an oil and gas lease. Plaintiff did not tender performance until 9½ months after the execution of the contract and more than 30 days after he acquired title, during which time the value of the lease fell from high point to nearly zero. The Court held (in reversing

the lower Court) that the plaintiff did not tender performance within a reasonable time and was not entitled to specific performance; laying down the rule (p. 59) that:

> "A great decrease in the value of the land during the delay was an important element to be considered in determining whether specific performance shall be granted to the party responsible for the delay." *Holgate v. Eaton* (116 U. S. 3; 29 Law Ed. 538).

The learned Vice-Chancellor apparently gave no force or effect whatever to that part of the contract providing that time should be of the essence, the language of which is as follows:

> "Time is the essence of this agreement and all its conditions."

Among the conditions of the original contract, was one providing for extension. How it can be said that time ceased to be of the essence of the contract, as soon as the extension was made, is inconceivable, in view of the very forceful language used as above quoted.

In the case of *King v. Ruckman* (20 N. J. Eq. 316), Chancellor Zabriskie said, at page 354:

> "If it clearly appear to be the intention of the parties to an agreement that time shall be deemed of the essence of the contract, it must be so considered in equity. * * * It will be so held when such intention appears from the nature of the subject-matter, or the object of the parties, or by parol proof that it was so considered at the time of making the contract. * * * *A new agreement, extending the time, is evidence that the parties considered time material*" (Italics ours.)

This case was reversed, but the above quotation was not criticized or commented upon by the Court of Errors and Appeals.

The learned Vice-Chancellor proceeded upon the theory that the condition respecting the filling to grade was not one of the provisions of the original contract of which time was the essence, and apparently based his conclusion upon that portion of the contract which reads as follows:

> "If said lots are not filled to grade, the party of the second part shall pay to the party of the first part, the sum of $1,000, and the balance at any such time that the city engineer of Ventnor City shall certify to the party of the second part that said lots have been filled to grade."

The contract must, of course, be construed against the maker, *i. e., the respondents.* Now, having in mind the provision that "time is of the essence of the contract and all of its conditions, it is our contention that the appellant had the option, on the first of July, 1926, either to insist upon performance at that time, or to consent to an extension of performance, and that if he consented to an extension of performance, then the time limited in such extension became the limit, and time was of the essence. To construe the contract otherwise, would be to permit an unlimited time within which the respondents could satisfy the provision of the original contract that the lots should be brought to grade, etc. This was a most important element of the contract, and it could not reasonably be argued that time was of the essence of all of the other conditions, and not of the condition to grade, in view of the fact that the contract did not have to be performed until the lots were graded. It will be observed, further, that

it was a provision for the making of only one extension, for the making of which the appellant was to pay a thousand dollars. The contract did not provide for any other extension, nor for the payment of any additional monies as a consideration for other extensions. As we have pointed out, if time was not of the essence of the condition to bring the lots to grade, then time was not of the essence of all of the conditions of the contract, and yet the contract itself plainly and explicitly says that time is of the essence of all of its conditions. The Vice-Chancellor leaned strongly upon the following provision in Mr. Marshall, the appellant's letter, with respect to the first extension agreement, to wit:

> "We desire to be on record as not accepting the terms mentioned in these agreements of extension, but we do adhere strictly to the terms of our original agreements, in which it distinctly states that the settlement is not to take place until such time as the City Engineer has certified that the lots have been filled to grade" (p. 48, S. C.).

From an examination of the extension agreement (p. 44, S. C.), it will be seen that a strict interpretation requires settlement to be made on September 1, whether or not the land was then filled to grade. As this was not in accordance with the terms of the original contract, the appellant naturally protested. He did not intend to convey the meaning that if the lots were not graded on September 1, the settlement day should be postponed, but merely that settlement was not to be had on that day unless the lots were graded.

In view of the fluctuation in the real estate market, it was necessary that the lots should be avail-

able for the market as promptly as possible. They were not available unless filled to grade; hence, the requirement that they should be filled to grade, and that the filling should be done by the first of July under the original agreement, and by the first of September under the extension agreement. In passing, it will be observed that the appellant did not agree to the extension to November 1, 1926. Therefore, the appellant had a right to insist that the lots be filled to grade by September 1, 1926, and furthermore, had a right to insist that unless they were filled to grade, he was not required to make settlement. It is true he did not say in his letter that if the lots were not filled by that time he would not accept the bargain, but he was not required to do so, because time was plainly of the essence of all of the conditions. If we assume that not having dissented from the second extension agreement, whereby November 1 was made the time for settlement, he was bound by that extension agreement, then November 1 became the final date for grading, which was, as we have pointed out a condition precedent to settlement, and time was likewise of the essence. It is noteworthy in this particular, that no further extension agreement was sent by the respondents to the appellant, although they had prepared and sent to him the first and second extension agreements. We think it a fair inference from this significant fact, that these respondents, not having performed their contract at the time fixed in the second extension agreement, abandoned any effort to extend further the original agreement.

The learned Vice-Chancellor commented that if the market had taken an upward turn instead of a downward turn the appellant would, no doubt, have insisted upon the performance at any subsequent day. That was a moot question, and it might all

very well be, and yet not have any bearing upon the appellant's present position in these cases. The duty to grade the lots was upon the respondents. The appellant had the right to insist upon performance at the time designated. The respondents, however, could not, by failing to perform at that time, evade their obligation under the contract. The argument that they could evade the contract by failing to perform their obligation to grade the lots at the time designated, is contrary to the law as established by our Courts. In the case of *Vickers v. Electrozone Com. Co.* (66 N. J. L. 9), it was held:

> "That the right to rescind for the failure of the parties of the second part to perform their contract, was conferred on the party of the first part, and did not include the right of the parties of the second part to work a rescission by their own breach of contract."

Chief Justice Depue, in delivering the opinion in the above case, said, at page 13:

> "The argument of the defendant is that when the year ended and the breach became apparent, the buyer's liability at once terminated, and he ceased to be liable to answer for his breach in the past, and ceased to be bound to perform the contract in the future. The contract does not admit of such a construction. The right to rescind is conferred on the party of the first part, and does not include the right of the party of the second part to work a rescission by his own breach of contract."

On the same page, in citing the case of *Doe v. Bancks* (4 Barn. & Ald. 401), he quotes Mr. Justice Bayley as follows:

> "The true construction of the proviso in this lease is that it shall be voidable only at the option of the lessor, and it does not lie in the mouth of the lessee, who has been guilty of a wrongful act in omitting to work in pursuance of his covenant, to avail himself of that wrongful act, and to insist that thereby the lease has become void to all intents and purposes."

We respectfully submit that the appellant's position in this case cannot be disparaged, by the fact that he would have had a legal right to have held the respondents to their contract, notwithstanding they would not fill the property to grade on or before the day designated in the original contract, or in either of the extension agreements. He had a right, either to compel the performance of the obligation to grade, or, if the grading were not done at the time designated, rescind the contract. The respondents could not avoid their obligation to convey by refusing or neglecting to fill the lots to grade at the appointed time.

We respectfully submit that the decree of the Court of Chancery should be reversed.

BOURGEOIS & COULOMB,
Solicitors for and of Counsel with Appellant.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

Between

A. Mildred Murphy,
Complainant-Respondent,

and

Joseph K. Marshall,
Defendant-Appellant.

and

Frank Redman,
Complainant-Respondent,

and

Joseph K. Marshall,
Defendant-Appellant.

On Appeal from Decree of Chancery.

BRIEF OF COMPLAINANTS-RESPONDENTS.

The two cases brought up by this appeal are identical in their facts, and law, and were tried together, resulting in a similar decree in favor of the complainant in each case.

Each complainant was the vendor named in a contract for the sale of real estate, and filed his and her respective bill in each case to restrain the prosecution of an action at law by the defendant against the respective complainants for the return of the deposit money paid under the agreement, and for the specific performance of the contracts in question. The defendant was the vendee named in each of the contracts. The two suits were tried together before Vice-Chancellor Leaming, and resulted, in each case, in a decree of specific performance and a restraint of the respective actions at law.

FACTS.

Each of the complainants had a contract for the purchase by the complainants of the land in question, and each of them entered into an individual contract of sale with the defendant, Marshall. The contract of sale in the Murphy case appears on page 6 of the State of the Case; the contract of sale in the Redman case appears on page 38 of the State of the Case. The contracts are identical in form.

Each of the contracts provides for the giving by Marshall to the vendor, of a purchase money mortgage, to be payable one year from the date of final settlement, and the contracts provided that settlement is to be made, in the Murphy case on July 1st, 1926, and in the Redman case on August 1st, 1926. Each contract also provides with respect to settlement as follows:

> "If said lots are not filled to grade, the party of the second part shall pay to the party of the first part the sum of $1,000., and the

balance at any such time that the City Engineer of Ventnor City shall certify to the party of the second part that the lots have been filled to grade. It is understood and agreed between the parties hereto that St. Leonard's Park, Inc., developers of Ventnor Heights, are to pay all costs in connection with bringing said property to grade, gravel, streets, sidewalks and curbing.''

It should be noted that the complainants did not have the legal title to the land which they were selling, nor were the complainants doing the developing work; that work was being done by St. Leonard's Park, Inc., the developers of the tract, who were to do it at their own expense.

The lots, not being filled to grade on July 1st, 1926, and August 1st, 1926, respectively, extension agreements were signed by the respective complainants, and sent to the defendant. In the Murphy case the extension agreement, dated June 30, 1926, was mailed to the defendant extending time for settlement to September 1st, 1926, ''or to such prior time that the City Engineer of Ventnor City shall certify to Joseph K. Marshall that the lots have been filled to grade.'' (S. C., p. 12; also see p. 80.)

In the Redman case an extension agreement dated August 1st, 1926, was mailed to the defendant, Joseph K. Marshall, extending time of settlement to September 1st, 1926, ''or to such prior time that the City Engineer of Ventnor City, N. J., shall certify to Joseph K. Marshall that the lots have been filled to grade.'' (Exhibit E; S. C., p. 44; also see p. 80.)

In the Murphy case another extension agreement

dated August 26th, 1926, was mailed to the defendant extending the time for settlement to November 1st, 1926, "or to such prior time that the City Engineer of Ventnor City, New Jersey, shall certify to Joseph K. Marshall that the lots have been filled to grade." (S. C., pp. 18 and 80.)

In the Redman case another extension agreement dated August 26th, 1926, was mailed to the defendant extending the time for settlement to November 1st, 1926, "or to such prior time that the City Engineer of Ventnor City, N. J., shall certify to Joseph K. Marshall that the lots have been filled to grade." (S. C., p. 48; p. 80.)

By letter dated June 17th, 1926, the defendant wrote to Mr. Farrington, who is the agent for the two complainants, as follows:

> "June 17, 1926.
>
> Will you kindly inform us if settlement will be due July 1st, according to agreements, for the land purchased in Ventnor Heights. *There is a stipulation relative to grading, etc., that makes the settlement at that time conditioned upon performance of contract.* In the event that we go through with the settlement on that date kindly prepare papers in the name of Joseph K. Marshall, widower, and advise us of the hour.
>
> Very truly yours,
> Marshall & Maloney
> Per J. M. Maloney."
> (S. C., p. 82.)

On June 18th, 1926, Mr. Farrington replied as follows:

> "Dear Mr. Maloney:
>
> Replying to your favor of June 17th regarding settlement scheduled for July 1, 1926, on

properties purchased in Ventnor Heights, please be advised that the developers of this ground have not yet completed their improvements. The grade is not finished although the sidewalks and curbing have been placed, on all your parcels along Wellington Avenue. In *accordance with agreement, it will be necessary to have settlement extended* and I would suggest that you have the additional deposit as covered by the agreement in my hands on or before July 1, 1926.

Thanking you, I remain

Yours very truly,

J. D. Farrington."

(S. C., pp. 82-83.)

By letter dated June 23rd, 1926, the defendant, Marshall, again wrote to Farrington, as follows:

"June 23, 1926

We duly received your favor of the 18th inst. advising us that settlement scheduled for July 1st, on Ventnor Heights ground, will be postponed because of improvements not being completed. Will you kindly send us a letter setting forth that the dates of the mortgages will be the date settlement is made, instead of July 1st. We think the intent is clear in agreements, but it does not so state specifically.

Marshall & Maloney

per Maloney"

(S. C., p. 83.)

On June 28th, 1926, Farrington wrote to defendant, Marshall, as follows:

"Dear Mr. Marshall:

Replying to your letter of June 25th, with reference to the dating of the mortgages as cov-

ered in three agreements of sale covering properties purchased in Ventnor Heights, please be advised that all mortgages will date as of date of final settlement. Just as soon as I receive your check in the amount of five thousand dollars I will forward you three extension agreements acknowledging receipt of your additional deposit covering the extension until such time as all improvements are completed. Awaiting your early reply, I remain

Yours very truly
Jos. D. Farrington."
(S. C., pp. 82 and 83.)

On July 27th, 1926, defendant, Marshall, wrote to Mr. Farrington, as follows:

"Dear Sir:

Will you kindly advise us relative to the ground purchased at Ventnor Heights: 1. The third parcel is due for settlement August 1st, with a further payment if postponed. Is it in order to send the additional deposit? 2. The two parcels upon which we made additional deposits July 1st we have not as yet received extension agreements upon. When may we expect them? 3. Is there any inquiry for this ground, and what would seem a fair price for same at this time?

Awaiting your early reply, we are

Very truly yours
Jos. Marshall"
(S. C., p. 84.)

On July 29th, 1926, Mr. Farrington replied to Mr. Marshall, as follows:

"Dear Mr. Marshall:

Your letter of July 27th with reference to

ground purchased through this office, please be advised as follows: The settlement which is scheduled to take place August 1st will, in accordance with agreement of sale, be extended similar to the other two parcels, until such time as the fill and improvements are completed. I would, therefore, request that you send the additional payment of one thousand dollars on this parcel. With reference to the other two parcels, I am sending you, herewith, extension agreements on both, and please be advised that I was under the impression that these extensions had been forwarded to you as they have been in my hands for some time. I know of nothing along this boulevard adjoining the corner of Dorset and Wellington Avenue which can be bought for less than $300 per foot and further down Wellington Avenue, where the other two pieces are, there is nothing less than $150 per front foot.

Undoubtedly you are thoroughly familiar with the general situation in real estate which exists now almost everywhere and it is the opinion of everybody here who seems to be real posted on real estate that we will have a good fall market, for there are numerous inquiries being made at this time and it is my opinion that when fill and improvements are in on your parcels, you will be able to make a nice profit.

Immediately upon receipt of the additional payment, I will forward extension covering the lots in Block 173, Ventnor Heights.

Jos. D. Farrington."

(S. C., p. 85.)

On July 30th, 1926, Mr. Marshall wrote to Mr. Farrington, as follows:

"July 30th, 1926

Dear Mr. Farrington:

I am in receipt of your favor of the 29th inst. and contents noted. Enclosed please find check to your order for $1,000 to cover additional payments on Ventnor Heights lots, due August 1st. I note what you say in reference to the price at which ground is being held adjacent to our lots, and hope same will be realized.

I am returning the extension agreements for the two parcels upon which we made additional payments a month ago, and beg to call your attention to an error in setting forth the period or extension. It states that settlement shall be September 1st, or such prior time, etc. whereas, settlement is to take place only at such time as the city Engineer shall certify, etc.

Will you please have the extension agreements corrected; also cover the same in the agreement for the third parcel.

Jos. K. Marshall"

(S. C., pp. 85-86.)

Mr. Farrington replied to Marshall on July 31st, 1926, as follows:

"Dear Mr. Marshall:

We received your letter of the 30th instant in which you take exception to the wording of the extension sent you in a previous letter. The reason we wrote our extension to read September 1, 1926, or to such prior time that the City Engineer of Ventnor City shall certify to you that said lots have been filled to grade, is because we wish to extend our agreement to a definite date. If the lots were filled to grade prior to September 1, settlement would have been made at that time. It is our understand-

ing that extensions shall be given from time to time for a definite term, until these lots are filled to grade to meet the approval of the city engineer. We are enclosing herewith, the extensions executed by Mr. and Mrs. Shinn, Miss Murphy and Mr. Redman, for the three parcels of ground purchased by you in Ventnor Heights.

Trusting everything will be satisfactory, I remain

Jos. D. Farrington"
(S. C., pp. 86-87.)

On August 3rd, 1926, Mr. Marshall wrote to Mr. Farrington, as follows:

"We are in receipt of the three agreements of extension, two of which you returned after we had sent them to you declining to accept terms mentioned therein; the third phrased in exactly the same way as the two prior agreements of extension.

We are also in receipt of your letter in which you explain that you want a definite date for settlement. *Now, in this connection I desire to say that we do not accept, and we desire to be on record as not accepting the terms mentioned in these agreements, of extension, but we do adhere strictly to the terms of our original agreements in which it distinctly states that the settlement is not to take place until such time as the city engineer has certified that the lots have been filled to grade.*

We are attaching to our agreement a copy of this letter, and will expect a confirmation of it in a reply from you.

Jos. K. Marshall"
(S. C., pp. 87-88.)

Mr. Farrington replied to the above letter under date of August 5th, 1926, as follows:

"Dear Mr. Marshall:

I am very sorry there has been a misunderstanding in regard to the extension agreements on the parcels of ground which you purchased in Ventnor Heights, through this office.

This letter is to acknowledge receipt of your letter of August 3, 1926, with reference to the terms as set forth in the extension agreement and I wish to advise that it is the understanding, on the part of each of the individual sellers, that the terms will be adhered to, as set forth in the original agreement of sale.

Although each extension calls for a specific date, it is intended that the extensions are to be renewed at each date set forth for settlement, until such time as the city engineer certifies that the fill and improvements are completed.

I trust this will be satisfactory to you and I am very sorry that I did not set forth clearly in my letter to you the exact intention of the extensions.

Jos. D. Farrington"

(S. C., p. 88.)

Mr. Farrington wrote Mr. Marshall again on September 2nd, 1926, as follows:

"Dear Mr. Marshall:

I am enclosing herewith new extensions on lots 38 to 40, block 173; lots 38 to 40 block 174 and lots 25 to 31 block 170, Ventnor Heights, Ventnor City, New Jersey.

Trusting you will find these in good order, I remain,

Yours truly

J. D. Farrington"

(S. C., pp. 88-89.)

From September 2nd, 1926, to March 27th, 1927, there was no further correspondence between the parties. On July 1st, 1926, the complainant, Murphy, made settlement with her vendor for her land; and complainant, Redman, made settlement with his vendor for his land on August 2nd, 1926, each party taking a deed directly from St. Leonard's Park, Inc.

By letter dated March 24th, 1927, without any previous notice, the defendant, Marshall, repudiated both contracts on the ground that the contracts had not been lived up to on the part of the sellers, and he made a demand for the return of his money. His letter follows:

"Dear Sir:

Referring to agreements for the purchase of certain lots of ground in Ventnor Heights, dated March 31, 1926, I desire to say that after waiting more than a reasonable time (one year on March 31st) I consider that the contract has not been lived up to on the part of the sellers, and therefore make a demand for the return of the money paid, viz: $10,000.

The delivery of two parcels was to have been made by July 1st, and a third parcel by August 1st, 1926, and it was specifically stated that time was the essence of the contract. While a provision was made in the event that the lots were not ready for delivery July 1st and August 1st respectively, I was to make an additional deposit, and this was requested and complied with, the intent thereof could not be interpreted otherwise than the assurance of early delivery thereafter.

This was not done, the period of reasonable expectation has been greatly exceeded, and I can see no other view of the situation than that we

are entitled to the return of the money and the cancellation of the agreements.

I hope that you will give this your immediate attention and advise me of your attitude in this matter at an early date.

Very truly yours,
Joseph K. Marshall"
(S. C., p. 90.)

On the next day Farrington replied as follows:

"Dear Mr. Marshall:

I wish to acknowledge receipt of your letter of March 24th, in which you ask the return of the deposit made by you in the amount of ten thousand dollars ($10,000) for property in Ventnor Heights, purchased through this office.

Please be advised that I have forwarded copies of your letter to the parties who are the owners of this ground and from whom you purchased the property, and I will communicate with you, just as soon as I receive word from them. I might mention at this time that all of these parties are in a position to give you a good marketable title, and the only reason for the delay has been because of the cold weather, during which time it was not advisable to lay sidewalks and curbing.

At the same time this has been beneficial to you, as you did not have to pay interest on the mortgage, nor taxes on the ground. Please be assured that I will communicate with you just as soon as I receive word from the owners.

Very truly yours,
J. D. Farrington."
(S. C., p. 91.)

All that transpired in the meantime appears in

the testimony of Mr. Farrington, which is as follows:

"Q. What was it that took place over that period of time?

A. I went to the St. Leonard's Company to see Mr. Jeffers, who is the secretary and explained to him the situation ——

Q. You can't tell what you said to him, you can tell what you and he did.

A. All right. And Jeffers took it up with Mr. Gill as to whether they would be willing to rescind the contracts to these purchasers, which they said no, and a few days later I believe Mr. Bourgeois communicated with Mr. Jeffers —— Mr. Maloney had been to Atlantic City to see Mr. Bourgeois ——

Mr. Bourgeois: In relation to March ——

Mr. Hanstein: I want to show some of these delays arose by reason of conferences these folks had with you.

Mr. Bourgeois: My recollection is that was much later. I don't think I was in this case until after May. They had done the whole thing before they came to me.

Q. Go on.

A. There was a delay about arranging a conference between Mr. Bourgeois, Mr. Jeffers and Mr. Gill. A conference was finally arranged which I was not present at. About three weeks after that there was another conference at which I was present and Mr. Bourgeois went over the real estate situation and offered to make a compromise settlement. At that conference Mr. Jeffers was present, Mr. Bourgeois and myself, and Mr. Bourgeois suggested that they would be willing to settle for fifty cents on the dollar, and I told them that was ridiculous

because these people had paid $8,000 for these lots and they were mortgaged up to fifty per cent.

Q. The thing I am trying to get at is whether or not because of these negotiations and conversation with Mr. Bourgeois some of this delay in replying is accounted for?

A. The delay in the reply was due to that delay in arranging a conference through the solicitor of Mr. Marshall."

(S. C., p. 97, l. 1; p. 98, l. 10.)

After the various conferences with Mr. Bourgeois, Mr. Farrington wrote, under date of May 19th, 1927, as follows:

"In my former letter to you I advised you I would take up the contents of your letter of March 24th with my clients; I have done this and have ascertained from my clients they are unwilling to cancel the agreement and return you your money. They take the position that they are in no way at fault and that they will look to you for the performance of the rest of the contract.

Very truly yours,
J. D. Farrington."
(S. C., pp. 91-92.)

On August 10th, 1927, Mr. Farrington received the certificates of the engineer, certifying that the land was filled to grade:

"A. No, sir, they weren't turned over to me until August 10th." (S. C., p. 102, l. 27.)

And on August 12th, 1927, Mr. Redman, one of the complainants, wrote to Mr. Marshall as follows:

"Dear Mr. Marshall:

Referring to that agreement made on the 31st day of March, 1926, between you and the undersigned, under the terms of which you agreed to purchase lots 38, 39 and 40 in block 173, as shown on map of Ventnor Heights, by W. I. Risley, showing property owned by St. Leonard's Park, Inc., the undersigned does hereby advise you that said lots are now filled to grade and a certificate of the engineer certifying that fact to you is enclosed herewith.

All streets, sidewalks and curbing referred to in the agreement have been completed. Under the terms of said contract, and the agreements extending the same, settlement is now due. The undersigned does hereby fix the Chelsea Title and Guaranty Company as the place for settlement, and the 26th day of August, 1927, at eleven A. M., as the time for said settlement.

The undersigned would thank you to be present at that time to comply with your part of the agreement. If the time fixed is not agreeable to you, please advise the undersigned and the undersigned will endeavor to meet your convenience. If no objection as to the time is made by you, the undersigned will assume the same is agreeable to you, and will be present at the above time and place prepared to perform the agreement above referred to.

Yours truly
Frank Redman."
(S. C., pp. 93-94.)

A similar letter of the same date, and identical in phraseology, signed by complainant, Murphy,

was sent to defendant, Marshall. (S. C., p. 94, l. 12.)

The testimony is undisputed that on August 12th, 1927, the ground was filled to grade. (S. C., p. 100, l. 22.)

The complainants appeared at the Chelsea Title Company at the time specified for settlement, with executed deeds, ready for delivery, ready, willing and able to settle, but the defendant, Marshall, did not appear.

There is some testimony in the case by Mr. Marshall that the engineer's certificates referred to in the August 12th letters, as being enclosed, were not, in fact, enclosed. However, Mr. Marshall testified that he did not call the omission to the attention of Mr. Farrington, because the omission was not material to him, inasmuch as he had, at that time, already definitely concluded that he would not have settled, even though the certificates had been enclosed. (S. C., p. 115, l. 10 to p. 116, l. 8.)

Thereafter the defendant instituted an action at law for the return of the deposit money, and the complainants filed the two bills in Chancery that are the pleadings in this suit.

ARGUMENT.

The decrees in this case are eminently proper. The defendant was in the real estate business, and was an experienced operator and developer. He bought the land in question for speculation. Possession was of no importance to him. He knew the condition of the land at the time he bought it, namely, that it was unfilled meadow land, and he

necessarily knew of the uncertainties as to the time when such developments are completed. He knew that he did not have to settle for the land until it was filled to grade, and that his purchase money mortgages would be dated as of the date of settlement. He knew that he could himself enter into an agreement for the sale of the land, as is frequently done, or he could assign the agreement of sale.

The provision relieving him of the duty of settlement until the land was filled to grade was there for his protection, and he guarded it jealously. When the extension agreements above referred to were delivered to him, fixing a specific date for settlement, he wrote his numerous letters, all set out in detail above, emphasizing the fact that he had no obligation to settle until the fill was in, and in his August 3rd, 1926, letter, even stated that he was attaching to his agreement a copy of that letter, and demanded a confirmation of that letter, which letter was a reiteration of his previously expressed view, that the settlement was not to take place until such time as the city engineer certified that the fill was in.

Having contracted with that in view, and having evidenced a determination throughout to stick to the very letter of his rights in that respect, he was without the least right, or justification, in undertaking to cancel the contract, as he did by his letter of March 24th, 1927.

The fact that the contract recited that time was of the essence, was in no sense controlling, in view of the intention of the parties, as evidenced by their correspondence. The right of the parties to construe their own contract is supreme.

In the very recent case of *Kerney v. Johnson*, not yet officially reported (7 A. R. No. 10, p. 419; 144 Atl. Reporter 808), the Court of Errors and Appeals held as follows:

"The defense interposed was that time was of the essence of the contract, and that Johnson was ready and willing to perform, but that Kerney failed to perform his part of the agreement.

The learned Vice-Chancellor fully and adequately discusses this factual situation in his opinion, namely, that the improvements were to be made and that title was not to be passed before such improvements had been made; and we agree with his finding in that respect.

It is true that the contract provides in a printed clause that time shall be of the essence of the contract; but as the learned Vice-Chancellor very properly held, such a statement is not conclusive where it appears from the evidence and the conduct of the parties that they did not in fact so treat the contract, and did not in fact consider that time should be of the essence of the contract, but in reality waived by their own conduct that defense which they now urge as a barrier to recovery in the case. In such an eventuality, where the parties themselves have practically construed their own contract, such a clause does not control the situation, but the circumstances and the equities of the case as defined by the conduct of the parties present the best interpretation as to the meaning of such a clause; for concededly, under the settled construction of the law upon this subject, the acts of the parties in dealing with the subject-matter of their contract afford the best indication of their intention either to execute it or to annul it. *Acta exteriora indicant interiora secreta.* 8 Coke Rep. 291."

The defendant took the position that upon the sending of his letter of cancellation, the contract was at an end. The cases are uniform in holding that a rescission cannot be brought about under these circumstances in that manner.

In *Brown v. Ely*, decided by Vice-Chancellor Leaming, and reported in 92 N. J. Equity 487, a similar running contract was involved. In that case the vendor had given the buyer the right to believe that the buyer was not obliged to pay his installments promptly. Suddenly the sellor served notice that the purchaser was in default, and the installments already paid forfeited. The Vice-Chancellor held:

> "In these circumstances complainant was at least entitled to notice from defendant of a change of attitude on his part or a notice that his rights would be terminated unless he should promptly make payment of the then small final balance due. But without warning to complainant the letter of defendant of November, 1919, notified complainant that his rights had been forfeited. Even should it be assumed that complainants received the warning letter of February, 1919, the payment by him of $36 and its acceptance by defendant on the day named in that letter—a payment of less than the amount then due—appropriately justified complainant's belief that the old relations and course of dealings were re-established. It seems impossible to doubt the truth of complainant's statement, to the effect that had he been apprised of a change of attitude of defendant touching his requirements under the contract he would have raised the small final amount due; and it seems equally impossible to doubt that the change of attitude of defendant touch-

ing the extension of credit and his determination to terminate or forfeit the contract in November without warning may have been stimulated by his opportunity to dispose of the property to advantage.

My conclusion is that the terms of the contract here in question, insofar as they may be said to have privileged defendant to terminate the contract without notice to complainant by reason of delinquency in payment became inoperative and unenforceable by defendant without notice to complainant by reason of the fact that the negotiations and long continued course of dealings of the parties under the contract fully justified complainant in acting under that assumption."

In *Nass v. Munzing,* 136 Atlantic Reporter, 344, affirmed by the Court of Errors and Appeals, on the opinion found in 138 Atlantic Reporter, 922, the Court held:

"Either party was entitled to fair leeway; neither could arbitrarily put an end to the contract; and before one could put the other in default and rescind, reasonable notice of time to perform was required. Orange Society v. Konski 94 N. J. Eq. 632; 121 A. 448; Id. 95 N. J. Eq. 254, 122 A. 753; Fry on Spec. Perf. (6th Ed.) 510. In this the complainants failed, and to this day. Their suit was brought before they matured their cause for action and it is not maintainable. The suit cannot be regarded as a substitute for the notice and demand; it amounts only to a gesture that the complainants regarded themselves as no longer bound; it is not founded on a right to rescind and has

not the legal effect of relieving them of liability to perform."

Orange Society v. Konski, 94 N. J. Equity 632, affirmed 95 N. J. Equity 254, held:

> "The law is that a day fixed in a contract for closing title, without more, is merely formal; but if it is stipulated that time is of the essence, or the circumstances are persuasive that that is the case, prompt performance is essential, and it is also the law that where the time fixed is regarded as a formality only, and the period has gone by, or where time is the essence and there is a waiver, that time may nevertheless be made of the essence by formal demand that the title be closed by a given day; but the time given must be reasonable."

This is even a stronger case than the pending one, in that a notice was in this case given, demanding performance within a certain length of time, and the Court held the notice was not adequate to accomplish the desired purpose, because it did not allow a long enough time for the performance. In our case no notice, or warning whatsoever, was given. We, therefore, contend that the letter of March 24th, 1927, upon which the defendant relies as his repudiation of the contract, was not sufficient for that purpose, and it did not amount to a rescission.

Complainants were entitled to accept the defendant's attempted rescission at its face value, and immediately file their bill, or they could, as they actually did, wait until the certificate of the engineer was available, and then fix a date for settlement.

The defendant contends that the decree is erroneous because, he asserts, there was a decrease in

value of the land in question. We do not think that there is testimony of a decrease in value. There is some testimony, of course, showing that there was a falling off in 1927 of the prevailing real estate fever, but it is difficult for us to see how this constitutes any defense to the defendant. There might be some merit in the defendant's position, if this was an ordinary contract of sale, and the complainants merely sat by for a long time after the date fixed for settlement and then undertook to secure a decree of specific performance after the value of the property had dropped. Of course, this case is entirely different. The complainants were not entitled to demand settlement from the defendant until the fill was in and certified to by the city engineer; that provision was in the contract for the protection of the defendant, and was re-asserted by him in every letter which he wrote to the complainants, and was the barrier which absolutely prevented the complainants from demanding a settlement from the defendant prior to the time when he did. The time for settlement did not arrive until the fill was completed.

Something might be said in favor of the defendant on that score if the complainants were to perform the work of filling. However, the contract specifically cites that the filling was to be done by St. Leonard's Park, Inc., a corporation with which the complainants had no connection, and over which filling the complainants had no control. There could be no charge against the complainants that they were dilatory in completing the fill. The defendant knew when he made the contract that the fill was to be made by the developing company, and he undoubtedly considered that it was advantageous to him that it should not be done too speedily.

It is difficult to understand how the defendant

could equitably insist that he should not be compelled to settle until the fill was completed, and then assert that the fill was not completed soon enough. We do not believe that his contention amounts to a defense.

We call the Court's attention to the defendant's letter of cancellation. He states as his reason for cancelling that he considers the contract has not been lived up to on the part of the seller. We wish to point out that there was nothing in which the sellers defaulted. The reasons contended for at the trial, as a defense to the suit, were not the reasons advanced in the defendant's letter of cancellation.

The defendant could have protected himself against a falling market by inserting a clause in the contract to the effect that if the fill was not in by a specified date, that he could then, at his option, refuse to settle. He did not do this. He understood the contract as written, and he is bound to perform the terms of it.

It is respectfully submitted that the decree should be sustained.

THOMPSON & HANSTEIN,
Solicitors for and of Counsel with Complainants-Respondents.