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TESTIMONY.

For Complainants.

For Defendant.

EXHIBITS.

BILL OF COMPLAINT.

Filed November 12, 1926.

In Chancery of New Jersey

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

The complainants, Tobias Grunt and Joseph Grunt, residing in the City of Newark, in the County of Essex and State of New Jersey, say that,

1. On June 10, 1926, the complainants entered into an agreement in writing with the defendants, Carl Olsan and Clara K. Olsan, his wife, whereby the defendants agreed to sell and convey to complainants, and the complainants agreed to buy of the defendants certain premises located in the Township of Springfield, County of Union and State of New Jersey. Copy of said agreement is annexed hereto, and the original will be produced at the hearing in this cause.

Upon the execution of said agreement, complainants paid a deposit of $1,000 in cash as therein stated.

2. In said agreement it was provided as follows:

> "Conveyance shall be made subject to reservation in Deed Book No. 178, page 358, it being understood, however, that same does not make the title to the premises hereinto conveyed unmarketable and is not considered an encumbrance against the said premises."

3. The aforesaid reservation contained in Deed Book 178, page 358, actually provides as follows:

> "Excepting and reserving however all water rights, water privileges, mill rights and privileges with the right of using and keeping in repair all raceways either tail race or other race with the right of access thereto and the right of maintaining and keeping in repair the dam at the Pond supplying said Race, the right of maintaining said pond with the right of pondage and flowage of every nature name and kind whatsoever which have ever been enjoyed by the owners of said land above conveyed or appertained thereto by virtue of any grant deed or conveyance or which may belong to said Robert J. Coghlan in the Township of Springfield and being the same water privileges, etc., described in a deed from R. J. Coghlan and wife to Frederick Crane dated November 14, 1885."

4. The language thereof made and makes the title unmarketable and constitutes an encumbrance against the said premises, in this, the said premises are vacant land and are fit for use for development and for the division thereof into building plots. The covenants aforesaid quoted result in furnishing a right of way over said lands and prevent the absolute use and enjoyment thereof on the part of the owners thereof.

5. By said agreement it was further provided as follows:

> "All assessments, either confirmed or unconfirmed for all improvements now installed and constructed on said premises are to be paid for by seller."

6. The purpose of said provision was in order to assure complainants that water mains and gas pipes had been constructed in the public road in front of said premises, and had been paid for by the sellers. As a matter of fact the said improvements had not been installed and constructed and had not been paid for by the sellers. The sellers did expressly represent to the complainants that the said improvements were in and paid for, and said representations induced complainants to enter into and make the contract. Complainants would not have made the contract had they known that said statements were untrue.

7. Complainants complied with all the terms and conditions binding upon them and were ready, willing and able to consummate said agreement, provided, the defendants made no default or breach therein.

8. Complainants have applied to the defendants to make a conveyance of said lands free and discharged of the reservation contained in book deed 178, page 358 aforesaid, and have the assessment hereinbefore referred to, installed and constructed and paid for or to make allowance therefor to complainants. Defendants have neglected and refused to do so.

9. The reservation contained in said deed aforesaid made and make the title unmarketable and constitute an encumbrance thereon, and the failure to install or pay for the improvements aforesaid by the sellers constitute a breach of the agreement on the part of the defendants.

Complainants are, therefore, entitled to the return of their deposit of $1,000 and their costs and expenses of the examination of title, which amount to the further sum of $250, and the defendants are in duty bound to return the same, but have wholly refused to do so.

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

1. That the said Carl Olsan and Clara K. Olsan, his wife, the defendants in this suit, may answer this bill of complaint, but without oath, and each statement herein made.

2. That a decree may be made directing the defendants to repay the said sum of $1,000 paid on account of the purchase price of said property with interest, together with search fees and expenses, and that the entire sum be impressed as a lien upon the lands and premises above described in favor of the complainants, and in the event that the defendants do not pay the same to complainants, that the property be sold to raise and satisfy the amount thereof.

3. That, in the meantime, the defendants be enjoined and restrained from disposing of or encumbering in any way the said lands and premises.

4. That a writ of subpoena may issue, commanding the said defendants, Carl Olsan and Clara K. Olsan, his wife, to answer this bill of complaint, and to abide by such decree as this court may make in the premises.

5. And that complainant may have such further or other relief in the premises as the

nature of the case may require, and as shall be agreeable to equity and good conscience.

And complainant will ever pray, etc.

MILTON M. UNGER,
Solicitor for and of Counsel
with Complainants.

ANSWER.

Filed December 20, 1926.

The defendants, Carl Olsan and Clara K. Olsan, residing in the Town of Irvington, County of Essex and State of New Jersey, answering the bill of complaint, say:

1. They admit the statements contained in paragraph 1.

2. They admit the statements contained in paragraph 2.

3. They admit the statements contained in paragraph 3.

4. They deny the statements contained in paragraph 4.

5. They admit the statements contained in paragraph 5.

6. They deny the statements contained in paragraph 6, except that they admit that water mains and gas pipes have not been installed and constructed and have not been paid for by the sellers.

7. They deny the statements contained in paragraph 7.

8. They deny the statements contained in paragraph 8.

Replication.

9. They deny the statements contained in paragraph 9.

10. Further answering the bill defendants say that the complainants at the time of the execution of the contract had full knowledge of the reservation contained in deed book No. 178, page 358, and the purpose of inserting in the contract the provision stated in paragraph 2 of the bill was to make it clear that the purchasers were to take the proprety subject to the reservation.

11. That the complainants have defaulted upon said contract in that they did not on the 1st day of September, 1926, appear to take title to said lands and premises, although notified so to do and although the defendants were prepared to give them a deed in accordance with the terms and conditions of said contract.

12. Complainants further say that the bill of complaint does not set forth a cause of action cognizable in equity; that there is no equity in the bill and that this court is without jurisdiction to grant the relief prayed for.

MERRITT LANE,
Solicitor of Defendants.

REPLICATION.

Filed December 20, 1926.

The complainants, replying to the answer of the defendants, say that:

1. They deny paragraphs 10, 11 and 12 of the answer and join issue thereon.

MILTON M. UNGER,
Solicitor of Complainants.

Benjamin Singer, direct.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

June 6, 1927.

Between

TOBIAS GRUNT and JOSEPH GRUNT,
Complainants,
and
CARL OSLAN and CLARA K. OSLAN,
Defendants.

Transcript of shorthand notes of testimony taken in the above entitled matter before his Honor, Alonzo Church, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Milton Unger, for complainants; Merritt Lane for defendants.

Mr. Unger: I offer in evidence agreement dated June 10, 1926, made by Carl Olsan and wife, with Tobias and Joseph Grunt, covering the sale-purchase of property in the Township of Springfield, Union County, New Jersey.

(Agreement marked Exhibit C. 1.)

BENJAMIN SINGER, sworn for complainants.

Direct examination by Mr. Unger.

Q Mr. Singer, you are a member of the Bar?
A I am.

Q And you are the subscribing witness to this contract which has been marked C. 1? A I am.

Q Was it prepared in your office? A No; in the office of Murray Apfelbaum, real estate broker—yes, Murray Apfelbaum, real estate broker.

Q Were you present when it was prepared? A Yes, sir.

Q And you represented whom? A The complainants, both the Mr. Grunts.

Q They were the purchasers? A Yes, sir.

Q And Carl Olsan and his wife were the sellers? A Yes.

Q Now, prior to the time when the agreement was signed, was there any expression about the existence or non-existence of any assessments or improvements upon the property? A Yes, sir.

Q With particular reference to what?

Mr. Lane: I object.

A Gas and water.

Mr. Unger: Just a minute.

Mr. Lane: I object to all this on the ground that the purpose is apparently to alter a written contract.

Mr. Unger: I admit that objection to be perfectly good, if there were nothing more in the case, but in our complaint we say that there was a representation with respect to this clause and that this representation induced the making of the contract.

The Court: Well, I will receive the testimony.

(Last question and answer read.)

Q Who was present? Who were present when that conversation took place? A Mr. Olsan, Mr. Pollack, an agent, Mr. Apfelbaum, an agent, Mr. Tobias Grunt, Mr. Joseph Grunt and myself.

Q Yes. Well, what was said about it? A Why, I came over to that office on a telephone call I found that clients of mine were purchasing some land from Mr. Olsan, the defendant, and I inquired as to what the terms and conditions of that sale were, because I had learned that Mr. Olsan had already started to dictate the agreement, and I was told by my client to make sure that they put in there a clause to the effect that water and gas had been installed and was paid for, and I says to Mr. Olsan, whom I referred to as Carl, I said, "Carl, what do you say to that?" He said, "It is all taken care of already in the part where I dictated." I says to my client, "All right. I will see the agreement when it comes back typewritten and I will look it over."

Q Now, when the agreement was produced in typewriting, what happened? A It took several hours until that agreement was produced. I guess we were there until about seven thirty or eight o'clock that evening, and when it came back, in my examination of it I read that clause and I interpreted it to include gas and water.

Mr. Lane: I move to strike out the interpretation.

Mr. Unger: Yes.

The Court: Yes.

Q Just tell us what you said, if anything? A No. I just read it over.

Q All right. A Although several times while the contract was being prepared by the girl, Mr. Grunt said to me, "Make sure there is a clause in there the water and gas is paid for." Each time Mr. Olsan—his attention was called to it.

Q What did he say? A He said, "It is taken care of in the contract."

Q Before the contract had been produced to you, had your client or you mentioned specifically the water and gas assessments? A Yes.

Q Improvements. To Mr. Olsan? A They —he asked me to make sure that there is a clause in the agreement that the water and gas is installed and has been paid for.

Q Then was it your idea that the language of all assessments as herein stated included that? A Yes.

Q Now, after that contract was delivered, did you make any inquiry about whether or not there were any gas and water improvements? A While I was making my search about six weeks after Mr. Grunt came into my office and informed me that there was no gas and water there, and I went up to the water company with him to verify it.

Q Did you find that to be true? A I did verify it.

Q Did you take that up with Mr. Olsan? A I did.

Q What did you say to him? A I went over to Mr. Olsan's office and I says, "Carl, the place up there has no water and gas." And he says, "Why, sure, they got water and gas." He says, "Every time they lay a street down or repave a street, they always make sure to put water and gas there, because otherwise you

can't dig it up." I said, "Well, we verified it. There is no water and gas there." He says, "I think you are wrong, there is water and gas there, but I will investigate and I will let you know."

Q Did you hear from him after that? A Then I saw him a second time. He says, "Well, if there is no water and gas there," he says, "I had a purpose in putting the clause in there the way it is there."

Q Did he say there was no water and gas? A He says there was no water and gas.

Q Did he tell you at that time why he had not so informed you prior to that? A No.

Q Make any explanation of it other than that? A No. He just says, "There was a purpose" in him putting the clause that way.

Q Now, you had an examination made of this title? A I did.

Q And the agreement refers to a water right or an easement of some kind in a prior deed in this language. "Conveyance should be made subject to reservation in Deed Book 178, page 358, it being understood, however, that the same does not make the title in the premises hereunto conveyed unmarketable and is not considered an encumbrance against the said premises." Did you inspect or examine the deed which contained the averment prior to the time title was closed or prior to the time the agreement was drawn? A Mr. Olsan turned to a page of his abstract and he says, "The conveyance will have to be made subject to this reservation." I took it and I—as soon as I started to read it, I read, "Races and tail races," and a few other words in there. I said, "What does this all mean?" Because I was unfamiliar with those expressions. He says, "I don't know what it means, but," he says, "I

had to buy it subject to it and that is the only way you can buy it, subject to it." I said, "I don't care if we take it subject to it, provided it does not make the property unmarketable or constitute an encumbrance against it." I said, "You know my client intends to split that into lots." I said, "That thing may be searched a hundred times in the next few years and everybody will be raising objections."

Q After that time was a provision drawn and put in as it actually is in this contract? A Yes, sir.

Q Now, in your examination of the title, subsequently to the making of the contract, did you form an opinion as to whether or not this made the title unmarketable? A I did; both after looking into the matter and something—(interrupted).

The Court: Isn't that a matter for the Court to determine?

Mr. Unger: Sir?

The Court: Whether or not the title was unmarketable is for the Court to determine.

Mr. Unger: Yes.

Q What induced you to come to the conclusion it was unmarketable?

Mr. Lane: I object to that.

The Court: I will sustain the objection.

Q What, in your opinion, made it unmarketable?

Mr. Lane: I object.

The Court: I will sustain the objection. It is not his opinion, it is the opinion of the Court.

Mr. Unger: Of course, sometimes titles may be good in the matter of law, but unmarketable.

The Court: That is very true, but it is for the Court to decide whether they are unmarketable or not.

Mr. Unger: And that may indicate evidence outside of the legal problems would be material.

The Court: No. We would never get through these cases if we allowed expert opinion on whether or not the title was unmarketable.

Mr. Unger: All right.

Q Now, did you upon discovery of these defects, want the money back? A I did.

Q Did you get it? A No.

Q How much did you spend for examining the title? A How much did I spend?

Q Did you make the search or have it done? A I had the search made.

Q What is the reasonable charge for services in the examination of a title? A One hundred seventy-five dollars.

Q To make the full search? A Full sixty year search.

Mr. Unger: That is all.

Cross examination by Mr. Lane.

Q How long have you been practicing law? A Seven years this July.

Q How long have you been searching titles? A About eight or nine years.

Q So that you searched titles before you started to practice law? A I made continuation searches and the like.

Q Can you tell me why, if it was understood that this conveyance, or, rather, that this contract "all assessments confirmed or unconfirmed" referred to water and gas assessments, and that your client had insisted that the contract should be clear, that water and gas was in the property, you did not insist upon having the words, "water and gas" put somewhere within the four corners of this contract? A Why, that is why we are here, because we neglected to put it in.

Q I say, you were a lawyer there protecting the rights of your clients, your clients insisting all the time that water and gas should be in the property, that you did not somewhere or other put the words "water and gas" in the agreement. A Well, I interpreted the words there, "all assessments now on the premises" to include water and gas.

Q Well, of course, it would include water and gas, and it would include other things too, wouldn't it? A Well, those things that we were talking about, water and gas.

Q Was that all it was to include? A That is all.

Q You were shown the tax search on that property, weren't you? A No, sir.

Q Are you sure of that? A Positive.

Q You know that there were other assessments on the property, don't you? A I do not.

Q Well, haven't you made a search since? A I didn't know then that there were other assessments.

Q You know now that there were? A Well, I would have to refer to my search. I haven't seen it in about eight months.

Q I show you a Federal tax search and ask you whether this paper was not there at the time this contract was made and was not shown to you? A No, sir, it was not; I don't know whether it was there, but it was not shown to me and I didn't look at it.

Mr. Lane: I ask it be marked for identification.

(Federal tax search marked D. 1 for identification.)

Q You knew that the curbing on Morris avenue had been very recently put in, didn't you? A I was informed that the street was paved very shortly before that.

Q You knew there was an assessment for that, didn't you, or would be? A No. I figured it was a County highway and there is no assessment.

Q Did you make any inquiry to find out whether it was a County highway? A I knew Morris avenue was a County highway.

Q Did you know it had been curbed recently —then recently? A I did not inquire about the curbs.

Q Well, how did you find out that it had been recently curbed? A I learned from my clients.

Q Well, didn't your client talk also about the curbing? A No.

Q You took from four o'clock until nine to complete this deal, didn't you?

The Court: Half past seven.

The Witness: About half past seven to eight o'clock, or I don't know what time they started, but I got there, it must have been after five.

Q Are you sure that there was any of this contract dictated at the time you got there? A Yes.

Q Any of it transcribed? A I don't know. No, it was not shown to me if it was, but I know Mr. Olsan was dictating it, because the girl was in the room at the time, and I didn't know how far he had gotten. I figured I would let him finish and then I would read the contract over when it came back.

Q Now, as I understand it, Mr. Olsan told you that you had to take it subject to this restriction? A Yes; and I qualified it with the remark that after I asked him what all that meant and he says he don't know, I told him as long as it didn't make the property unmarketable or constitute a lien or an encumbrance, that I would not have any objection.

Q Then what was the object of putting in your assumption— A Well, I wanted to first find out what those words meant.

Q —if it was neither a lien nor an encumbrance or didn't make the title unmarketable, then why the necessity of your taking subject to it? A Well, because it was there on the record and I suppose he wanted to protect himself in seeing that there was no loop hole from which we could back out.

Q The very fact you take it subject to something indicates there is some right against the property, doesn't it? A Well, not always. There may be something put on record that appears to be a cloud or something that does not affect the property.

Q When did you make your demand for your money back? A Around the time set for the closing.

Q Well, when? A Oh, I guess about two months, two and a half months after the date of the contract.

Q Well, the contract was to close on the first of September. Now, when, with reference to the first of September did you make your demand for the money back? A Well, now, wait. I want to change that. It was a little before— a few weeks before the first that this thing was called to Mr. Olsan's attention and he said he would look into the matter, and I also told him that we were trying to see some of the old owners of the property to see if we could not get a deed to right out this restriction, and I think we both set a month hence for the closing of it, and it was after we saw that we could not make any headway in getting a deed that I demanded the money back.

Q That was— A That must have been a little after the first of October.

Q Yes. And you saw Mr. Olsan on September the first, didn't you? A I spoke to him on the telephone.

Q Yes. You spoke to him at that time? A Yes, because he sent me a letter telling me that he was going to pass title on that day, he is going to be ready with his deed, and I called him up and explained to him that we were trying to see some of the old owners or the original grantor in the deed in which this reservation was made, and see if we couldn't get some deed to remove that clause from the records and we both set

a month later as the closing date. He said he would try to see somebody, and I told him I would work on it.

Q Now, you also went up to the Water Department, didn't you, in order to have that put in—water? A Yes. We went up there to find out what arrangements could be made to extend the water into the proposed street that was to be cut through this property.

Q When was that? A Why, some time during August, I guess.

Q In August. And who did you go to? A I think—it was somebody in the Water Company. I don't know who they are.

Q What did you find out then? A I beg pardon?

Q What did you find out there? A We found out there was no water in front of the curb, no water on Morris avenue.

Q That was in the middle of August? A Yes, sir.

Q Have you got the tax search here that you made? A I made a tax search. I am just wondering if I turned it over to Mr. Unger.

(Mr. Unger searches for paper.)

The Witness: It might be in my folder, Mr. Unger.

Q You sent a requisition for a tax search on August twenty-sixth? A Well, whatever the date is on my letter there.

Q I show you tax search and ask you whether that is the tax search that you— A (Interrupting.) I guess so.

Mr. Lane: I offer that.

(Tax search marked Exhibit D. 2.)

The Court: What is the date of that?

The Witness: September first.

Q Now, you knew that this locality is served by a private water company, didn't you? A No.

Q What? A No.

Q Well, when did you ascertain that it was served by a private water company? A After Mr. Grunt asked me to go up with him to see about the water.

Q You knew, of course, that there would not be any assessment for gas. A Well, I—I don't know whether—in some municipalities there are assessments for gas.

Q There are? A Yes.

Q Where? A Roselle Park, you make a charge for installing gas.

Q Any others? A That is as far as my knowledge goes.

Q You know that generally is supplied by private companies, don't you? A Yes, sure.

Q Well, then how in the world could the assessment of this gas have anything to do with putting gas in? A Well, I wanted to make sure if there was an assessment it would be paid.

Q Have you any other reason for not putting the words "gas and water" in that agreement, other than what you have already given? A No other reason.

Phoebe M. Quick, direct.

PHOEBE M. QUICK, sworn for defendant.

Direct examination by Mr. Lane.

Q Where do you live, Mrs. Quick? A Springfield, New Jersey.

Q How long have you lived there? A Oh, all my life.

Q Do you know— A Fifty-six years.

Q Do you know this property that is now owned by Mr. Olsan? A Yes.

Q Did you ever own it or your family? A My father owned it.

Q How many years ago did your father own it? A He died in '98, then he willed it to my nephew George Drake and he sold it about eleven years ago to Dr. Morris.

Q And have you known that property all during that period of time? A Have I owned it?

Q Have you known it, have you known it? A Oh, yes.

The Court: How many years has she known it?

Q How many years has she known the property? A All my life, fifty-six—well, I wouldn't remember quite as long as that.

Q As long as you remember? A As long as I remember.

Q Do you remember when there was a stream running through the property? A Yes.

Q Or a mill there? A Yes, sir.

Q Do you know how many years ago it was that that mill ceased to be? A That mill what?

Q Ceased to be. A Well, it was about 1904, I think, when the chemical works left it.

Phoebe M. Quick, cross.

Q And since that time has there been any mill in use there or any dam or anything of that kind? A The old dam has been crumbling away gradually.

Q Has it been used at all for the last twenty years? A Well, I don't think so.

Q Has it been used since the chemical company went away in 1904? A Not in any way.

Mr. Lane: I think that is all.

Cross examination by Mr. Unger.

Q Does the stream of water run through this property at this time? A Is there a stream now?

Q Yes. A Well, there might be like a little ditch, I don't know, a little gutter; I don't think so.

Q The same stream that always ran through? A The water runs the other way now; there might be just a little trickle, but not anything to amount to anything.

Q There is a stream of water at one end of it, is there not? A Well, that is up in the pond up above it.

Q Yes. Do you know that there ever existed a right of way over this land to reach that pond? A Right of way?

Q Yes.

The Court: To drive over?

Q To get over in any way. A I don't think so. There was always water there.

Q Had you ever heard of there being a right of way over this land from Morris avenue over

the land to reach the pond? A No; only above that.

Q Then, so far as you know you were never familiar with any provision in the deed providing any right of way over this land? A I never remember about that.

THEODORE E. SQUIRE, sworn for defendant.

Direct examination by Mr. Lane.

Q Where do you live? A Springfield.

Q How long have you lived there? A Pretty near all my life in Springfield. Up where I live now I have lived since 1878.

Q And are you familiar with this property that Mr. Olsan now owns? A Yes, sir.

Q And are you also familiar with the old mill and the old mill and the old mill pond that used to join it? A Yes, sir.

Q Will you tell me how long it has been since the dam has been up and the mill has been used? A Well, the mill pond aint been used in —oh, I don't know twenty years or over, I think; as much as twenty years.

Q And do you know how long the dam has been down or not used, rather? A Well, it has been twenty years since it has not been used. They tore away the dam, but it is about ten or twelve or fifteen years ago that they didn't use —the gate was shut down and it run over the dam but the water hasn't run down the millway in over twenty years, had no use for it, the water wheel, the last was there '84.

Mr. Unger: No cross.

CARL OLSAN, sworn for defendant.

Direct examination by Mr. Lane.

Q Mr. Olsan, where do you live and what is your profession? A I live in Irvington; practice law in Newark.

Q You are the owner of this property that is the subject matter of this dispute? A Yes, sir.

Q When was this contract made? A I believe on June tenth.

Q Where? A At the office of Murray Apfelbaum in the Firemen's Building.

Q And who were present at the time of the making of the contract? A Mr. Apfelbaum, Mr. Pollock, who was the acknowledged broker in the transaction, myself, the two Grunts and Mr. Singer.

Q Was Mr. Singer there in the beginning or did he come there later? A He was called up when I got there.

Q Did you do any dictating of any contract or agreement before Mr. Singer got there? A Absolutely not.

Q Was any thing said during the time of the drawing up of that contract about there being gas and water in the premises or at the premises? A Yes; but nothing about gas. That was not discussed at all. There was a question as to whether there was water there.

Q Well, what was said? A They asked me if there was water and I told them frankly I didn't know, that I had bought the land a short time previous and what condition it was in I didn't know, but that I did know that a little to the west of this property were a row of houses

which had water in them and that I presumed, as far as I know, there might or might not be water there. I didn't know any thing about it.

Q Was there a tax search? Was there anything said at that time as to whether the water was supplied by a private company or not? A Yes, we discussed that. We discussed the question as to whether it would be the Commonwealth Water Company or the Hartshorn Water Company. That name was mentioned in the course of the afternoon and evening.

Q Was there a tax search there? A At first there was not, but I sent to my office and had my papers brought over so we could discuss this thing intelligently.

Q I show you Exhibit D. 1 for identification and ask you whether that tax search was there and was exhibited to Mr. Singer during the course of the negotiations? A That was there before the contract was drawn.

Mr. Lane: I offer that in evidence.

(Paper originally marked D. 1 for identification now marked Exhibit D. 1.)

Q Did you make any statement at that time that there was water in the premises and did you say or was anything said about this language in the agreement, being a representation that there was water and gas on the premises? A They tried to get me to say there was water and I told them, "Gentlemen, I don't know." Now, all I did know when these papers came is that Morris has been paved, as I recall it then, within the last year or two, then, as I know the situation it is either a state highway or county highway. If a state highway there may be no assessments, if a

county highway there may be a portion of the cost of that improvement assessed by the county. How much I didn't know nor was there any way of ascertaining at the time that there was a curbing assessment and I didn't even know whether there were sidewalks there at the time and I told them there might be a sidewalk assessment and told them so far as I was concerned they should pay it and we finally agreed after a lot of wrangling that I was to pay it if there were any assessments.

Q Now, on September 13th, 1926, did you have a telephone conversation with Mr. Singer? A I did. I had sent him a letter telling him I would be prepared to close title on that day and had the papers ready. He didn't show up and I called him or he called me, I forget exactly which, and told me at that time that the day before he had just been advised by the Fidelity that they would not pass the marketability of this question, that is, they would not guarantee the title to this land because of the fact that they did not consider this easement putting the title in condition where they would consider it marketable. I told him then I knew nothing about it. If he wanted to he could run up to Springfield up there, that everybody knew this land, he would have no difficulty about it, he could straighten it out if he cared to.

Q Was there an adjournment of closing on the contract? A Yes. He asked me to give him time to get the thing straightened out. "Well," I said, "take two weeks."

Q At that time was anything said about any false representations with respect to water or gas or anything of that kind? A Absolutely no. I made a memorandum of the conversation at the time, as I always do at the office.

Cross examination by Mr. Unger.

Q Why did you make a memorandum of the conversation? A I do that every telephone conversation that is held in the office.

Q How many do you have a day? A Beg pardon?

Q How many do you have a day? A They may vary from three to thirty.

Q And you make a memorandum of what happened after every telephone conversation? A I have a pad right on the telephone receiver, write them down as they come along.

Q The whole conversation? A Oh, no, just the substance of them.

Q Now, I understand you to say that when this agreement was made with Grunt you intended only to cover the paving and the grading assessments? A And the sidewalk if there would be one. We didn't know then that there was.

Q Will you tell us why you did not definitely provide for those three things in the contract? A No; I can't tell you that. Simply it was done, I suppose.

Q Did you hear Mr. Singer's client continually refer to whether or not the gas and water were in? A No; I did not. It was not discussed except in the manner in which I spoke of and there was no continuous reminding of Mr. Singer.

Q You want us to understand that he—his client did not make any mention of the water? A Yes; they mentioned it all right.

Q To him it was all important, was it not? A No.

Q You knew he was buying this land for development purposes? A I did not. I don't know it yet.

Q You bought it for that, didn't you? A No; I bought it to hold or speculate with if I felt like it.

Q Were you then aware that this land was not served with any water connections at all? A No. The first I knew was from Mr. Singer in October.

Q You made no inquiry of that when you bought the property? A Never did, no.

Q So at the time when you sold it to Mr. Grunt you were not familiar—you didn't know whether or not water service, in fact, existed? A No; I didn't know it.

Q And did you have that in mind when you provided that part of the contract which provided that all assessments either confirmed or unconfirmed or for all improvements now installed and constructed on said premises are to be paid for by the seller? A You say, did I have that in mind? I don't know just what you mean by that.

Q (Question read as follows): "And did you have that in mind when you provided that part of the contract which provided that all assessments either confirmed or unconfirmed or for all improvements now installed and constructed on said premises are to be paid for by the seller?") A I don't understand it.

The Court: I don't understand it, either.

Mr. Lane: I don't know what he means either.

Q I mean this: When you provided, Mr. Olsan, for all assessments as you did in this

contract to be paid whether confirmed or unconfirmed, did you intend thereby to pay for a water assessment if it was, in fact, in? A I will answer it No and immediately volunteer this information—

Q No; I don't want you to volunteer.

The Court: No, don't volunteer anything. Just answer the question.

Mr. Lane: He answered "No."

Q Then, as a matter of fact, you did not intend to pay for the water assessment?

Mr. Lane: I object on the ground that there is no evidence to that effect.

(Discussion.)

Mr. Lane: I object to that on the ground it hypothecates there was a water assessment.

The Witness: I knew then that there could not be one. I owned other property in Springfield.

Q You have not answered the question.

The Court: Just answer the question.

The Witness: You will have to read it to me again.

Q (Question read as follows: "Then, as a matter of fact, you did not intend to pay for the water assessment?")

Mr. Lane: If there should be one.

A If there should be one and that contract said I was to pay for all assessments, I would pay for the assessment.

Q Let us not quibble about what the contract said. Give me a direct answer. A My answer to that is that I knew there would be no assessment because I knew the properties had to be served with private water companies.

Q A moment ago you said you didn't know whether there was a water service. A You didn't ask me that.

Mr. Lane: I object to that.

The Witness: You said as to this land.

Q Now you say you knew there could not be one? A Yes, sir; I knew that.

Q Which of your statements is true?

The Court: No, Mr. Unger, he said he didn't know whether there was any water installed, now he says that if any water had been installed, it would have been installed by a private company. That is what he is trying to say apparently.

Mr. Unger: All right. I will assume then—

Q I will ask you whether—assuming that it had been installed by private contract that you would have had to pay for it? A Would not have to.

Q In other words, if the water assessment had been in there and had been installed by private contract, you did not intend to pay for it? A Let me understand you correctly. You say "water assessments,"—

Q Water improvement. A I knew I would not have to pay for any such improvement.

Q You knew, as a matter of fact, don't you, that where private corporations install water improvements they have to be met or paid for by the owners? A Under some conditions, yes.

Q Under all conditions. A No; not under all. They don't demand it always.

Q In large municipalities you assess against the property? A In neighborhoods where the water is furnished by the municipality either directly or by contract that sometimes is done, not always.

Q Did Mr. Singer come to you after this contract had been prepared some time later and inquire of you about the water and gas? A Yes; about the first of October.

Q And were you then surprised to learn that the improvements were not in? A I was.

Q You disputed that with him, didn't you? A No; I didn't dispute. I told him I didn't know. I told him the same thing I told him before that I didn't know, and I had never made any inquiries about it.

Q And told him he was mistaken, didn't you? A No, I did not.

Q With regard to what you told him after, he reported it to you, did you make some inquiry on your own account to determine whether or not his statement was true? A Never.

Q Did you tell him afterwards that although you had learned that, that you had covered it by the contract? A No, no.

Q Now, prior to the time when you made this agreement, you had not made any inquiry from the old residents, inhabitants, to determine whether or not this easement was still in force? A No. I had not, but I have a memorandum and an old search which told me that these dams had

not been used for years, and speaking to Dr. Morris, the man from whom I bought, who lived in Springfield for many, many years, who gave me the information on which I took or I based my judgment that this title was good enough for me because of that fact.

Q You considered that the easement was still in force, do you not? A I do not, sir.

Q Why did you put it in the contract, then? A We put in the contract and I told them at the time that—and the contract then by the way was drawn, it was an afterthought on my part, along about seven or eight o'clock in the evening and I told them then, "Now, gentlemen, we have gone over this water right proposition; it is up to you to take this title subject to that and I don't want any question afterwards raised as to the marketability of this title, whether it is not marketable because of this old recital in the deed." We discussed the question that this recital was not representative and that Dr. Morris' deed had gone through that thing. I gave them all the information I had as to the fact it had not been used, that the dams were down, that they had inspected the premises up and down the brook and had seen that they were down; they knew the condition at the time; we drew this contract; we agreed it would be taken subject to that and there would be no question raised as to whether this easement did or did not make this title marketable or unmarketable.

Q You wanted the purchaser to understand—you represented, didn't you, as a matter of fact, that it was not unmarketable? A I did not, sir. He was to take it subject to that and not raise the question of marketability at all. That was the intent.

Q That was the intent of this language? A Yes, sir.

Q And was that the intent when it came to setting forth in the agreement that it was not considered an encumbrance against the premises? A That was the intent; that was not then considered after that long discussion.

Q Well, who did you mean it would not be considered by? A By the purchaser.

Q You wanted the purchaser to represent that he did not consider it to be an encumbrance? A No. I wanted him to agree to the fact that we had both agreed that it was not then an encumbrance.

Q In other words, that was your idea as well as the purchaser's? A Yes; we had agreed on that.

Q You intended that he should rely on your assurance in that respect? A He didn't have to. He was represented by attorney. The facts were given him. He could have taken or left it at the time.

Q Then, why put in all the rest of the language, whether it was or was not? A If it had been put properly, we wouldn't have been there. Unfortunately it was not put in as it was intended.

Q You drew the contract? A We both drew the contract, Mr. Singer and I.

Q You mean, it was put in solely for the purpose of satisfying both purchaser and seller? A Yes; that was the intent.

Q Didn't you intend by that language to convey the impression that as a matter of law it was not an encumbrance, and did not, as a matter of law make a title unmarketable? A No; the intent at the time was not whether as a matter

of law it was unmarketable or not. They were going to waive it; they knew the conditions and were familiar with it and were going to waive them. That was the intent at the time Singer came to me in September and told me the Fidelity would not guarantee it. I told him to go up there to Springfield and simply get the corroborative facts as to information I had already given.

Q You knew the Fidelity then considered it unmarketable? A Only from Mr. Singer. I don't know anything about the Fidelity; I never got in touch with them.

Q Did Mr. Singer ask you for an explanation as to what tail races and other courses meant? At the time of drawing the contract? A Yes, sir.

Q He didn't understand, did he? A Well, he said he didn't know as much as he should know about it, yes, sir.

Q Did you know? A I think I do; I don't know.

Q What is a tail race? A What is a tail race? That is the end—not the end, but that portion of a stream of water which runs from the mill pond to the actual water wheel—at least that is my contention of it. I may be wrong.

Q And the pond is still there? A There is a brook there; there is no pond there.

Q And this easement gave the right of access over this land to that pond? A Yes; it has never been exercised as a matter of fact.

Mr. Unger: That is all.

Re-direct examination by Mr. Lane.

Q Mr. Olsan, I show you an old survey. Do you know when this survey was made? A I think the date is on it. There is a copy of it in my papers, Mr. Lane, a blueprint.

Q It hasn't any date on it. Have you any idea when this was made? A I think it was made around 1915 when Dr. Morris bought the land. That is the impression I have been under all along.

Q No part of this so-called pond was ever on this land, was it? A No; and it is not now. It is just off the southwest corner of the land within five feet of our line. It doesn't touch our line exactly, just runs by the corner and makes an abrupt turn away from the land at that corner.

Q How long have you known the property? A How long have I owned it?

Q Known it. A About two years now.

Mr. Lane. That is all.

Re-cross examination by Mr. Unger.

Q Although the pond is not physically in the property, the right of access over the land is good, is it not? A In the deed, yes, there is a right of access given in the deed.

Q And that provision is in your deed, is it not? A Not in my deed, no, sir.

Q By reference? A No. No, we don't refer to it at all. It simply appears in the chain of title. That it all.

The Court: The contract says it is to be taken subject to this?

Mr. Unger: Yes, sir.

Q And isn't it in your deed? A No.

Q You did not take it subject to that? A No, did not at all.

Q How did you discover it? A By my search.

Q Then why did you impose it if it was not in your deed? A Because I did not want the question afterwards raised as to marketability.

Q You did consider the question? A We did; we questioned it for hours; no question about that.

Examined by Mr. Lane.

Q This deed Dr. Morris produced from Mr. and Mrs. Brook? A George Milford Brooks.

Q On September, 1915, and in that deed there is no question of reservations? A No.

The Court: What is the date?

The Witness: 1885. That is the only recital of it in that one deed.

Q November 20, 1885. And the deed from Brooks to Morris, 1915, does not recite it and your deed, and the deed from Morris to you does not recite it? A Does not recite it.

Mr. Lane: I think that is all.

JOSEPH GRUNT, sworn for complainant.

Direct examination by Mr. Unger.

Q Mr. Grunt, were you one of the purchasers of this property? A Yes, sir.

Q And did you attend at the office of Murray Apfelbaum at the time when the contract was prepared? A Yes.

Q Prior to the time when the agreement was signed, the four of you signed, did you in the presence of Mr. Olsan say anything about encumbrances or—improvements against the property?

Mr. Lane: I object to this, this is not re-direct. I don't know what counsel is doing. It is part of his main case.

Mr. Unger: I think counsel is probably right about that. I will ask my question in a different way.

Q Did, at that time, Mr. Olsan say that he did not know whether or not there were any water service improvements in the street? A When we promised—

Mr. Lane: (Interrupting.) I say that calls for a catergorical answer.

The Court: Yes. Yes or No.

Mr. Unger: Well, then, may I by leave of the Court examine him as if on direct exanimation?

Mr. Lane: Well, I think it is unfair. Counsel had his opportunity and he had his witnesses here, and what the reason for calling only one witness, Mr. Singer, to make his case and then wait until we put on our case, and then try to go back to the re-direct examination and reopen the whole case, I don't know.

The Court: If you object, I will have to sustain the objection, because this certainly is not re-direct.

Mr. Unger: It is discretionary with the Court, I think.

The Court: I won't allow it over the objection.

(Question read as follows: "Did, at that time, Mr. Olsan say he did not know whether or not there were any water service improvements in the street?")

A Mr. Olsan said positive, "There is water and gas right to the curb and it is paid for, if not I won't talk about it."

The Court: That it all.

The Witness: Because I told Mr. Olsan I am going to start to build there and I have to have the water and gas on the premises and he promised us positive water and gas in the place and it is paid for.

Mr. Unger: That is all.

Cross examination by Mr. Lane.

Q Did you go up to the Water Company? A Yes, sir.

Q What? A Yes, sir.

Q And put water in? A I wanted to find out if I can bring the water into the premises and I will start to build.

Q When did you do that? A About August the twenty-fifth or some time in the later part of August.

Q You found there was not any water there at all, didn't you? A Yes, sir.

Joseph Grunt, re-direct—re-cross.

Re-direct examination by Mr. Unger.

Q Did you go up there for the purpose of finding out whether there was not any water there or for the purpose of— A (Interrupting.) No, no, I went down there to find out how much it would cost me to bring the water into the lot.

Q Bring the water in from where? A From the grade to the lot.

Q You mean from the main line? A I mean from the curb, I mean, because Mr. Olsan promised me the water is right in the premises and I thought I would start building in back of the lot and I wanted to find out how much it would cost me to bring water into the end of the lot, and then I found there was no water on the place —on Morris avenue.

Re-cross examination by Mr. Lane.

Q You went up later, too, didn't you? You went to the Water Company again, didn't you, in September? A I went up after with Mr. Singer to prove it to Mr. Singer, because Mr. Singer told me—

Q (Interrupting.) Never mind that. Did you go up there with Mr. Apfelbaum and Mr. Pollock? A No, sir; positive not.

Mr. Lane: That is all.

Mr. Unger: That is all.

The Court: Is that the case?

Mr. Unger: That is our case.

Mr. Lane: We rest.

The Court: I have read over this reservation and it says "The right of access thereto and the right of maintaining and keeping in repair, and so on." Isn't that a right of way in this property to the mill race, or whatever it is?

Mr. Unger: We think so.

Mr. Lane: I am assuming it is.

The Court: Well, it is. And, of course, your defense is that the right has ceased by nonuser, adverse possession.

(Discussion.)

The Court: Well, I will take the papers, and you can hand me in a memorandum of the cases, if you will.

OPINION OF VICE-CHANCELLOR.

Filed October 21, 1927.

CHURCH, *V.-C.*

The bill of the complainants sets forth a breach by the defendants of a written contract to convey and prays for the return of the deposit and expenses.

The clause in the contract which is in dispute is as follows: "Conveyance shall be made subject to reservation in deed book 178, page 358, it being understood, however, that same does not make the title to the premises hereinto conveyed unmarketable and is not considered an encumbrance against the said premises."

The reservation mentioned is "Excepting and reserving, however, all water rights and privileges, mill rights and privileges, with the right of using and keeping in repair all raceways, either tail race or other race with the right of maintaining and keeping in repair the dam at the pond supplying said race, the right of maintaining said pond with the right of pondage and flowage of every nature, name and kind whatsoever, which have been enjoyed by the owners of said land above conveyed or appertained thereto by virtue of any grant, deed or conveyance, or which may belong to said Robert J. Coghlan in the Township of Springfield, and being the same water privileges, and so forth, described in a deed from R. J. Coghlan and wife to Frederick Crane, dated November 14, 1885."

Two points are made by counsel for the complainant:

1st. The vendee in executory contract to convey lands may rescind the contract for the failure of the vendor to tender a marketable title and,

2nd. The title to the premises in question is doubtful and unmarketable.

The first proposition is undoubtedly true as a general rule, where it is agreed to convey good title or where, by implication, the intention to so convey is presumed. But here we are dealing with a different situation. The contract specifically states that the conveyance shall be made subject to the reservation and as it is signed by both parties the complainant must have known of the reservation and must have agreed to accept title subject to it.

In Pomeroy on Specific Performance of Contracts (third edition, 1926) Section 201, page 516, note, it is stated "That the purchaser, *in the absence of stipulations to the contrary,* cannot be forced to accept a title unless it is marketable. See the following cases," citing numerous decisions.

From this it follows that if it appear that there *are* stipulations to the contrary, the purchaser can be compelled to accept a title encumbered as stipulated in the agreement of sale.

In the case of *Bowen* v. *Vickers, et al.,* 2 New Jersey Equity 520, Chancellor Pennington said at page 526:

"The true rule in this court on this subject is well expressed by Chancellor Walworth in Bates *v.* Delevan, 5 Paige, 307.

He says 'As a general rule a court of equity will not decree the specific performance of a contract of sale, if the vendor cannot make a good title, although the contract has made no provision as to covenants of warranty to be inserted in the conveyance. An exception, however, to the rule exists where by the contract of sale the vendee expressly assumes the risk as to the title or agrees to take such a title as the vendor is able to give.' ''

In *Lounsberry* v. *Locander,* 25 New Jersey Equity 554, the Court of Errors and Appeals held at page 556:

"In every contract for the sale of lands, an agreement is implied to make good title unless that liability is expressly excluded. 1 Sugden on Vendors, 8 Am. ed. 24 (16). The estate which the purchaser bargained for, whether in fee simple or for a lesser interest, will be ascertained from the terms of the agreement, or if the agreement be silent in that respect, from the circumstances attending the transaction. For such estate, whatever it be, the purchaser has a right to good title, unless he has expressly assumed the risk of the title, or agreed to take such title as the vendor is able to give." And at page 577, "As a rule an agreement to convey means the conveyance in fee *unless it appears the parties intended to contract on the basis of a lesser estate.*"

In *Newark Savings Institution* v. *David Jones,* Ex. 37, Equity, 449 (affirmed on the opinion below, 38 Equity 299), the Court went a step further and held, "Where an agreement for

the sale of lands does not mention the character of the title to be given, an implication ordinarily arises that the title to be conveyed is to be a good one, free from encurbrances. But such implication may be rebutted by parol proof of the vendee's notice of the existence of encumbrances on the lands at the time of the agreement."

The main question discussed in this case was whether under the contract the defendants were entitled to a title clear of an encumbrance of taxes and assessments. Nothing was said relative thereto in the agreement. The Court, however, admitted testimony to prove that it was understood that the property was to be taken subject to the liens, and compelled the purchaser to pay the full consideration and assume the liens. This case is cited in *Behr* v. *Hurwitz,* 90 New Jersey Equity 110, page 117. But in the case at bar it is not necessary to resort to parol evidence. The agreement specifically states that "conveyance shall be made subject to reservation, etc."

We then come to the final paragraph of the clause which reads, "It being understood, however, that same does not make the title unmarketable and is not considered an encumbrance against the said premises."

Complainants' contention appears to be that it means that if they or their advisers decide on further consideration that the reservation makes the title unmarketable, then they can rescind the contract. In other words, if they decide to take title, defendant must convey, but if they decide they do not want it, they do not have to take it.

To so decide would, it seems to me, be tantamount to holding that there was in the contract no mutuality of obligation, which the courts hold to be essential in cases of this character.

Ten Eyck v. *Manning,* 52 New Jersey Equity 47. Again, the paragraph says "and is not considered an encumbrance against the said premises." Considered by whom? Surely not by some specific arbiter or he would have been designated. Just as surely not by complainants and their advisers, because then the whole clause is meaningless. If the encumbrance mentioned in the reservation makes the title unmarketable, then there was no need whatever for the reservation. This is so because if there had been no clause in the contract providing that the vendee should take subject to the reservation, then under the cases the vendee would not have been obliged to take, because the duty to convey a good title would be presumed.

It is obvious that the parties intended this clause to mean something, and it is the duty of the Court to construe it in such a manner, after considering the whole clause as to reach a reasonable conclusion.

The parties knew of the so-called encumbrance, and agreed specifically to take subject to it. The paragraph that follows means clearly, I think, in plain English that they knew about the encumbrance, agreed to take subject to it, and further agreed mutually that it did not constitute a defect affecting the marketability of the title and that for the mentioned consideration complainants would take subject to it.

Having arrived at these conclusions, it is unnecessary to discuss the second point raised by complainants' counsel, viz, whether or not the

encumbrance mentioned in the reservation is in reality an encumbrance.

I will advise a decree dismissing the bill.

FINAL DECREE.

November 9, 1927.

This cause coming on to be heard before the Chancellor, in the presence of Milton Unger, of counsel with the complainants, and Merritt Lane, of counsel with the defendants, on the bill, answer and replication, and the proofs offered by the respective parties having been submitted, and argument of counsel having been heard, and the Court having considered the pleadings, proofs and arguments of counsel, and being of the opinion that by the proper construction of the contract between the parties the complainants were obliged to take title to set lands and premises subject to the reservations contained in Book 178 of Deeds for Essex County, page 358, and that there were no fraudulent or misleading statements made by the defendant to induce the complainants to enter into the contract, and that complainants breached their contract with defendant, and that the complainants are not entitled to the relief prayed for in the bill of complaint;

It is, thereupon, on this 9th day of November, 1927, by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED, and the said Chancellor doth by virtue of the power and authority of this court hereby ORDER, ADJUDGE and DECREE, that the complainants' bill be and the same is

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hereby dismissed with costs to the defendants against the complainants to be taxed, in which said costs shall be included a counsel fee of $250, and that the said complainants pay such costs, and in case of their failure so to do that execution issue.

E. R. WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

NOTICE OF APPEAL.

Filed January 3, 1928.

To Merritt Lane, Esq., solicitor for and of counsel with defendant.

SIR:

PLEASE TAKE NOTICE, that Tobias Grunt and Joseph Grunt, the complainants in the above-entitled cause, hereby appeal from the final decree made in this cause by the Chancellor on the advice of Vice-Chancellor Alonzo Church, in the above-stated cause, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

MILTON M. UNGER,
Solicitor of Complainants.

I conceive that there is a good cause for appeal in this suit.

MILTON M. UNGER,
Of Counsel with Complainant.

PETITION OF APPEAL.

Filed February 10, 1928.

To the Honorable Court of Errors and Appeals, in the last resort in all causes:

The petition of Tobias Grunt and Joseph Grunt, the appellants in the above-entitled cause, respectfully shows that:

1. Petitioners find themselves aggrieved by a certain final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice-Chanclelor Alonzo Church, on November 9, 1927, in a certain cause in said Court of Chancery, wherein your petitioners were complainants, and Carl Olsan was the defendant.

2. The said decree orders that the complainants-appellants' bill be dismissed with costs to the defendant-respondent, in which costs should be included a counsel fee of $250.

3. Petitioners appealed from the decree of the Chancellor upon the grounds that the same is erroneous in the following respects:

(a) The Court below erred in dismissing the bill of the complainants.

(b) The Court below erred in failing and refusing to find that the title to the lands and premises which were the subject matter of the suit was unmarketable.

(c) The Court below erred in failing and refusing to find that the complainants-appellants were entitled to rescind the agreement between the parties to this cause and to recover their deposit moneys upon the ground that the title

Petition of Appeal.

to the lands and premises which were the subject of the suit, was unmarketable.

(d) The Court below erred in failing and refusing to find that the contract between the parties to this cause provided that if a reservation referred to in such contract rendered the lands and premises unmarketable or constituted an encumbrance thereon the complainants-appellants had a right to rescind such contract and recover their deposit moneys.

(e) The Court below erred in failing and refusing to find that a certain reservation referred to in the contract between the parties to this cause created an easement encumbering the premises which were the subject of this suit, thereby rendering the title unmarketable.

(f) The Court below erred in refusing to grant the complainants-appellants the relief prayed for in the bill of complaint.

MILTON M. UNGER,
Solicitor for and of Counsel
with Complainants-Appellants.

Due, legal and timely service of the within petition of appeal and copy is hereby acknowledged this 9th day of February, A. D. 1928.

MERRITT LANE,
Solicitor of Defendant-Respondent.

Formal answer filed.

EXHIBIT C. 1.

THIS AGREEMENT, made the tenth day of June, in the year of our Lord One Thousand Nine Hundred and Twenty-six, BETWEEN Carl Olsan and Clara K. Olsan, his wife, of the Town of Irvington, in the County of Essex and State of New Jersey, party of the first part; AND Tobias and Joseph Grunt of the City of Newark, in the County of Essex and State of New Jersey, party of second part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Twenty-four Thousand Five Hundred Dollars ($24,500.00) to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they the said party of the first part, will well and sufficiently convey to the said party of the second part, their heirs and assigns, by Deed of Warranty free of all encumbrances except as hereinafter stated on or before the first day of September next ensuing the date hereof, ALL that certain lot, tract, or parcel of land and premises, hereinafter particularly described situate, lying and being in the Township of Springfield in the County of Union and State of New Jersey.

BEGINNING at a button ball tree standing on the northeast side of Daniel Coghlan's Mill Pond; thence (1) south fifty-four and one-half degrees east five chains twenty links; thence (2) north forty-two and one-half degrees east eight chains thirty links along line of Sylvannus Bonnell, dec'd., (now lands of Stewart Hartshorn) to the

Exhibit C. 1.

middle of the road leading from Springfield to New Providence, now called Morris Avenue; thence (3) up the middle of said road north sixty-two and one-half degrees west three chains fifty-five links to the property referred to in the next course; thence (4) in a southwest course to a corner of lands deeded by Thomas J. Coghlan to Rev. Bishop Baylery for Church purposes November 30, 1854 and recorded in Essex County Clerk's Office in Book 212-239, and from said corner and along the line of said Church lot in the same course three chains fifty and one-half links to a corner; thence (5) west along the line of said church lot three chains three links to a corner on line of lands of Elias R. Bruen, formerly R. Rands; thence (6) south thirty-one degrees west along the line of said Elias R. Bruen, four chains six links to the place of BEGINNING.

Being the same premises conveyed to the said Watson B. Morris by George Mulford Briggs et ux by deed dated September 25, 1915 and recorded in the Union County Register's office in book 669 of Deeds, page 386. Being the same premises conveyed by the said Watson B. Morris to Clara K. Olsan by deed recorded in Book 1021 page 324, etc.

AND the said party of the second part, for themselves, their heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of Twenty-four Thousand Five Hundred Dollars ($24,500.00) as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

Exhibit C. 1.

On Execution of this agreement for which this is also a receipt	$1,000.00
On delivery of deed, cash	9,000.00
By assuming the mortgage at present a lien on the premises, and paying the same according to the terms thereof	7,500.00
It is expressly represented that the said first mortgage is due in approximately two and one-half (2½) years from date hereof and that same contains release clauses providing for the release of premises covered on the basis of Eight ($8.00) Dollars per front foot. It is understood that the second mortgage mentioned herein below shall contain a pre-payment clause.	
On second Bond and Mortgage, same containing usual interest, tax, assessment, insurance and installment default clauses, and an agreement not to claim credit on the interest payable on bond and mortgage, by reason of any tax assessed, or to be assessed against the premises, with interest at 6% payable semi-annually for five years	7,000.00
	$24,500.00

It is stipulated and agreed that releases shall be granted by the parties of the first part from the second mortgage hereinabove mentioned, on the payment of Nine ($9.00) Dollars per front foot. It being agreed, however, that street or streets, not more than three (3) streets cut through said tract and accepted by the Township will be released from the lien of this mortgage without the payment of any consideration.

Exhibit C. 1.

Conveyance shall be made subject to reservation in Deed Book #178—page 358, it being understood, however, that same does not make the title to the premises hereinto conveyed unmarketable and is not considered an encumbrance against the said premises.

All assessments, either confirmed or unconfirmed for all improvements now installed and constructed on said premises are to be paid for by seller.

Parties of the first part are to subrogate the second mortgage they are to receive to a new first mortgage not exceeding Seven Thousand Five Hundred Dollars ($7,500.00). In the event the new first mortgage shall exceed Seven Thousand Five Hundred Dollars, then the over-plus if any, to be paid to the parties of the first part on account of the principal of their second mortgage. It is understood that said new first mortgage shall contain the identical terms and conditions as the present first mortgage now on the premises. It is also agreed that in the event that said new first mortgage for $7500.00 shall contain different terms and conditions, then in that event, the sum of Fifteen Hundred ($1500.00) Dollars must be paid on account of the second mortgage; and in the event that the new mortgage shall be Six Thousand Dollars or less and shall contain different terms and conditions no payment shall be required to be made on account of the second mortgage.

The said bond and mortgage is to be drawn by the party of the first part and the expenses paid by the parties of the second part and shall contain the usual tax interest and prior mortgage and lien default clauses.

Exhibit C. 1.

This Contract is entered into upon the knowledge of the parties as to the value of the land and whatever buildings are upon the same, and not on any representations made as to character or quality.

And the said party of the part hereby agrees to pay to the licensed and authorized agent a commission of % on the purchase price aforesaid.

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

AND IT IS FURTHER AGREED, by the parties hereto, that the said deed shall be delivered and received at office of Carl Olsan, 1028 Federal Trust Company Building, 24 Commerce Street, Newark, N. J., between the hours of 9:00 o'clock in the forenoon and 4:00 o'clock in the afternoon on the said first day of September next ensuing the date hereof.

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

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

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

Exhibit C. 1.

It is understood and agreed that there are no encroachments thereon.

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

The premises above described are sold subject to restrictions appearing of record, and zoning ordinance, if any.

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

And it is hereby agreed by and between the parties hereto that in case any street improvements are made, or have been made, upon which the property mentioned herein is located, up to the time of the delivery of deed, but not assessed, such assessment shall be borne by the party of the first part, their heirs, executors, administrators and assigns.

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;

Exhibit C. 1.

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 hereunto interchangeably set their hands and seals the day and year first above mentioned.

CARL OLSAN (L. S.)
CLARA K. OLSAN (L. S.)
TOBIAS GRUNT (L. S.)
JOSEPH GRUNT (L. S.)

Signed, sealed and delivered
in the presence of

Benjamin Singer.

EXHIBIT D. 1.

TAX OFFICE
Township of Springfield
Union County, N. J.

OFFICIAL TAX SEARCH

No. 420

For Carl Olsan, Attorney, 185 Market St., Newark, N. J.

Owner, Watson B. Morris.

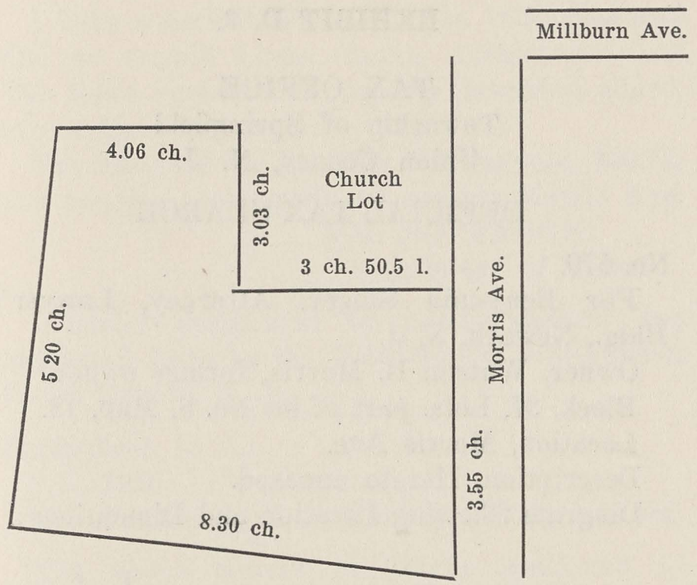
Block, 37, Lots, part of lot No. 8, Map, 18.

Location, Southerly side of Morris Ave.

Description,

BEGINNING at a button hole tree standing on the northeast side of Danield Coghlan's Mill Pond; thence (1) south 54½° East 5 chains 20 links; thence north 42½° east 8 chains 30 links along line of Sylvannus Bonnell dec'd (now lands of Stewart Hartshorn) to the middle of the road leading from Springfield to New Providence, now called Morris Ave.; thence (3) up the middle of said road north 62½° west 3 chains 55 links to the property referred to in the next course; thence (4) in a southwest course to a corner of lands deed by Thos. J. Coghlan to Rev. Bishop Baylery for Church purposes; Nov. 30, 1854 and recorded in Essex County Clerk's Office in Book 212-239 and from said corner and along the line of said Church lot in the same course 3 chains 50½ links to a corner; thence (5) west along the line of said Church lot 3 chains 3 links to a corner on line of lands of Elias R. Bruen, formerly R. Rands; thence (6) south 31° west along the line of Elias R. Bruen, 4 chains 6 links to the place of BEGINNING.

Exhibit D. 1.



I have searched the records in this office and find no unpaid Liens, Taxes, Assessments nor Tax Sales against the property described above, except the following:

Pending assessment for curbing Morris Ave., the amount of which is not yet determined.

WM. HOPPAUGH,
Collector of Taxes.

Officially designated to make searches for municipal liens in the Township of Springfield, Union County, N. J.

Springfield, N. J.,
Oct. 28, 1925.

Fee for Search, $2.00, Paid, 10/28, 1925, by check.

The above Search is hereby continued to ....., 19.., at which date.....
.....

Fee for Continuing, fifty cents per year; paid ....., 19..., ...

EXHIBIT D. 2.

TAX OFFICE
Township of Springfield
Union County, N. J.

OFFICIAL TAX SEARCH

No. 579.

For Benjamin Singer, Attorney, Lawyer's Bldg., Newark, N. J.

Owner, Watson B. Morris, former owner.

Block, 37, Lots, part of lot No. 8, Map, 18.

Location, Morris Ave.

Description, Hereto annexed.

Diagram Showing Location and Dimensions:

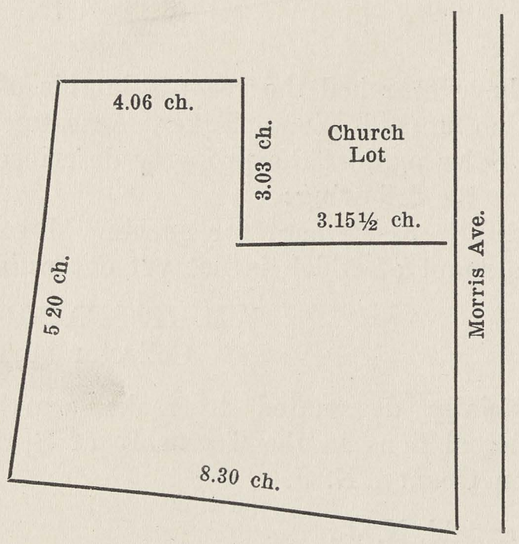


Exhibit D. 2.

I have searched the records in this office and find no unpaid Liens, Taxes, Assessments nor Tax Sales against the property described above, except the following:

Tax assessed for the year 1926 unpaid, $30.72, and pending assessment for curbing Morris Ave.

WM. HOPPAUGH,
Collector of Taxes.

Officially designated to make searches for municipal liens in the Township of Springfield, Union County, N. J.

Springfield, N. J.,
9/1, 1926.

Fee for Search, $2.00, Paid 9/1, 1926, by check.

The above Search is hereby continued to ....., 19..., at which date there are no unpaid Liens, Taxes, Assessments nor Tax Sales against the property described, except.....
.....

Fee for Continuing, at 50c. per year, $.....; paid....., 19...

New Jersey Court of Errors and Appeals

Between TOBIAS GRUNT and JOSEPH GRUNT, *Complainants-Appellants,* *and* CARL OLSAN, *Defendant-Respondent.*	*On Bill, etc.*

BRIEF ON BEHALF OF COMPLAINANTS-APPELLANTS.

History of the Cause.

The appellants filed a bill in the Court of Chancery in which they sought to rescind a contract for the purchase by them of certain lands, and prayed for the return of a deposit of $1,000. paid on account of the purchase price, together with interest, search fees and expenses.

A decree was made in that court dismissing the bill and thereupon this appeal was taken.

Statement of Facts.

The parties to this suit entered into a written contract by the terms of which the respondent agreed to convey to the appellants certain lands in the Township of Springfield, Union County, New Jersey. The contract contained a clause which provided as follows:

> "Conveyance shall be made subject to reservation in Deed Book 178, page 358, it being understood, however, that same does not make the title to the premises hereunto con-

veyed unmarketable and is not considered an encumbrance against the said premises."

The reservation contained in Book 178, page 358, is in the following language:

> "Excepting and reserving however all water rights, water privileges, mill rights and privileges with the right of using and keeping in repair all raceways either tail race or other race with the right of *access* thereto and the right of maintaining and keeping in repair the dam at the Pond supplying said race, the right of maintaining said pond with the the right of pondage and flowage of every nature, name and kind whatsoever which have ever been enjoyed by the owners of said land above conveyed or appertained thereto by virtue of any grant deed or conveyance or which may belong to said Robert J. Coghlan in the Township of Springfield and being the same water privileges, etc., described in a deed from R. J. Coghlan and wife to Frederick Crane dated November 14, 1885."

The appellants refused to take the title to the premises in their burdened condition with this easement imposed upon them, and upon the failure of the parties to otherwise dispose of the matter they filed a bill for rescission upon the grounds that the reservation set forth above constituted an encumbrance, rendering the title to the premises unmarketable.

The tract contracted for is a vacant plot of land suitable for development purposes and for division into building lots, and it was the contention of the appellants at the hearing of this cause in the Court of Chancery that the reservation has the effect of establishing upon the land an easement of a very broad nature, and thereby prevents the beneficial use of it. In the Court below it was contended on behalf of the appellants that

the vendee in an executory contract to convey lands, may rescind the contract for the failure of the vendor to tender a marketable title, and that the title to the premises in question is in fact unmarketable.

The learned Vice-Chancellor, in his opinion, in which he advised that the Bill of Complaint be dismissed, found that the appellants agreed to take the premises in question subject to the encumbrance set forth hereinabove, and therefore, did not decide whether or not the title to the premises in question is doubtful and unmarketable, and whether or not the reservation is in reality an encumbrance.

The question therefore, on this apppeal is: May the vendee in an executory contract to convey lands, rescind the contract for failure of the vendor to tender a marketable title, where the encumbrance alleged to make the premises unmarketable was set forth in the written contract, as in this case. In discussing this question it will be contended by the appellants that the contract should have been rescinded under a true construction of the terms of the contract, and that the reservation referred to in the contract was in fact an encumbrance warranting the relief prayed for by the appellants.

POINT ONE.

The vendee in a executory contract to convey lands may rescind the contract for the failure of the vendor to tender a marketable title, and the vendee is entitled to receive such a title under the provisions of the contract in this cause, unburdened by the easement.

The learned Vice-Chancellor stated that the appellant's proposition that the vendee in an exec-

utory contract to convey lands may rescind the contract for the failure of the vendor to tender a marketable title, is undoubtedly true as a general rule where it is agreed expressly or by implication, to convey good title.

In support of his conclusions of law, the Vice-Chancellor quoted from two opinions; *Bowen* v. *Vickers,* 2 N. J. E. 520, and *Lonsberry* v. *Locander,* 25 N. J. E. 554. In both of them the rule is stated to be that a marketable title is not essential where the vendee expressly assumes the risk as to the title, or agrees to take such a title as the vendor is able to give him. This is the utmost which these cases hold. The statements in the two opinions cannot be extended to embrace any other situations.

In the case at bar there is no express assumption of the risk as to the title, nor is there an agreement in clear terms that the vendee will take such a title as the vendor shall be able to give. Certainly the language in the clause under consideration cannot be construed to furnish either of these situations. Its purport is antithetical to any such idea. It would have been easy enough to have said that the vendee assumes the risk of finding the easement to be an encumbrance or to take such a title, having in mind the encumbrance, that the vendor could proffer. Instead, it was agreed that the conveyance should be made subject to the reservation, subject to the understanding that it does not make the title to the premises unmarketable.

We do not find a state of facts which will fall within either of the exceptions to the general rule relating to marketable titles, in this controversy.

The learned Vice-Chancellor went on to state, in the absence of stipulations to the contrary, a

purchaser cannot be forced to accept an unmarketable title, and thereupon construed the language of this contract respecting the reservation to be a stipulation to the contrary. A careful perusal of the entire contract, having in mind the nature of the land contracted for, its location and the purposes for which it may be used to best advantage, would indicate that this clause was inserted for the convenience of the parties and to avoid litigation and to make clear the fact that the reservation of the water rights was a record encumbrance against the property.

This provision was made in order that it might be understood between the parties that the vendees did not require the vendor to secure the cancellation of this encumbrance or to secure a quitclaim deed or some other instrument to wipe it out, if the vendees upon a full consideration of the matter found out that the reservation was not a valid subsisting encumbrance, sufficient to render the title to the premises unmarketable. It was inserted for no other purpose.

If it was agreed that the conveyance should be made subject to the reservation it would have been sufficient for the parties to have said: "Conveyance shall be made subject to reservation in Deed Book 178, page 58." It would have been unnecessary to have gone any further. Instead, the language already set forth above was added to this statement. It must be given effect, and where it is ambiguous or doubtful it must be construed against the vendor who used it.

An examination of the testimony will disclose that it was at the instance of the vendor that this clause was inserted. Its subject matter was first mentioned by the vendor. All the knowledge in connection with it resided with him and his attorney.

Thus, Mr. Singer testified (S. C., p. 11):

"Q Now, you had an examination made of this title? A I did.

Q And the agreement refers to a water right or an easement of some kind in a prior deed in this language. 'Conveyance should be made subject to reservation in Deed Book 178, page 358, it being understood, however, that the same does not make the title in the premises hereunto conveyed unmarketable and is not considered an encumbrance against the said premises.' Did you inspect or examine the deed which contained the averment prior to the time title was closed or prior to the time the agreement was drawn? A Mr. Olsan turned to a page of his abstract and he says, 'The conveyance will have to be made subject to this reservation.' I took it and I—as soon as I started to read it, I read, 'Races and tail races,' and a few other words in there. I said, 'What does this all mean?' Because I was unfamiliar with those expressions. He says, 'I don't know what it means, but,' he says, 'I had to buy it subject to it and that is the only way you can buy it, subject to it.' I said, 'I don't care if we take it subject to it, provided it does not make the property unmarketable or constitute an encumbrance against it.' I said, 'You know my client intends to split that into lots.' I said, 'That thing may be searched a hundred times in the next few years and everybody will be raising objections.' "

Mr. Olsan, who represented the vendor at the closing, testified on cross examination (S. C., p. 33):

"Q Did Mr. Singer ask you for an explanation as to what tail races and other courses meant? At the time of the drawing the contract? A Yes, sir.

Q He didn't understand, did he? A Well, he said he didn't know as much as he should know about it, yes, sir.

Q Did you know? A I think I do; I don't know."

It is evident that the respondent is chargeable with any doubts which may arise from the language employed by the parties.

In 13 *C. J.* 545, it is said:

"Where a contract is ambiguous it will be construed most strongly against the party preparing it or employing the words concerning which doubt arises, the reason for the rule being that a man is responsible for ambiguities in his own expression and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the Court will adopt a construction by which they would mean another thing more to his advantage."

In *Administrators of Stone* v. *United States Casualty Company*, 34 N. J. L. 371, Chief Justice Beasley, speaking for the Supreme Court, said:

"If the terms used are imperfect or ambiguous it is the fault of the defendants; it is their contract, and the construction of it must be most strongly against them—*contra proferentes.*"

The learned Vice-Chancellor, in his opinion, stated that to construe the contract in this manner would be to hold that there was no mutuality of obligation, which the courts, he stated, hold to be essential in cases of this character. It is to be borne in mind, however, that this is not a bill for specific performance, where mutuality of obligation is ordinarily requisite, but a bill for rescission and the question of mutuality does not control the right of the court to grant relief.

It is quite true that if this clause were not inserted and it was found later on that this reservation constituted an encumbrance under the decisions, the vendee would not have been obliged to take the title, because the duty to convey a good title would be presumed. But this course

would not have the effect of letting it be known that the reservation was known to both parties, and the attitude of the vendees in desiring to be protected. It would not have the same force and effect as a definite statement in written form, of the existence of this reservation. The provision was inserted *ex abundati cautela.* The vendees were interested in making it certain that they would not be compelled to take a title encumbered by this easement, and therefore secured from the vendor a definite written understanding to that effect. This is the only purpose which can be seen for inserting the disputed language. The vendee did not desire that the vendor be required to go to the trouble and expense of discharging of record this reservation, if in fact it was not an encumbrance.

The testimony clearly discloses this.

That rescission will ordinarily be granted by the Court of Chancery where premises are encumbered so as to render them unmarketable as in the instant case, is a principle well established by the decisions of this court and the Court of Chancery.

A recent pronouncement on this phase of the law of rescission in equity is contained in *Security Bond and Mortgage Company* v. *Weiss,* 4 N. J. A. R. 2048, a decision by Vice-Chancellor Church. It appeared that the defendants contracted to sell to the complainant a lot of land, the contract containing a clause to the effect that the buildings upon the premises were all within the boundary lines of the property, as described in a deed therefor. Complainant sought to rescind the contract on account of encroachments. At the hearing he produced two surveyors, who testified that there were encroachments, the defendant producing a surveyor who testified to the contrary. The Court said:

> "The question, therefore, is: Is this a marketable title, which defendants can compel complainant to take?"
>
> "Applying the law as above cited to the facts in the present case, we find that two surveyors say there are encroachments, and one says there are none. The weight of the evidence is therefore in favor of the existence of the encroachments. Moreover, there is clearly such a doubt in the matter as under the cases makes the title unmarketable.
>
> I will advise a decree denying the prayer for specific performance and allowing the prayer for rescission with a return of the deposit and such reasonable search and survey fees as complainant may have expended."

In *Goldstein* v. *Ehrlich,* 96 N. J. E. 52, Vice-Chancellor Backes advised a decree for the complainant, a vendee, for the return of his deposit, upon the ground that the premises encroached one and one-half inches on one street and two and five-eighths inches on another; and upon the further ground that padlock proceedings, under the National Prohibition Act, were pending in the Federal Court against one of the properties, a saloon, the tenant being under injunction to refrain from violation of the Act. The Vice-Chancellor said,

> "The complainant is entitled to rescind and a return of his money. He is not obliged to take the title with the encroachments. *They are slight, but nevertheless, substantial,* and specific performance would not be decreed against him. Doutney *v.* Lambie, 78 N. J. E. 277; Herring *v.* Esposito, 119 Atl. Rep. 765, *The padlock proceedings are a cloud upon the title sufficient to prevent the enforcement of the contract.* Debbs *v.* Norcross, 24 N. J. Eq. 327; Van Riper *v.* Rickersham, 77 N. J. Eq. 232; Kohlrepp *v.* Ram,

79 N. J. Eq. 386. *A valid reason for refusing specific performance, such as a defect in the title, warrants a rescission of the contract.*"

Goldstein v. *Ehrlich* was cited in *Security Bond and Mortgage Company* v. *Weiss, supra.*

In *Herring* v. *Esposito*, 94 N. J. E. 348; 119 Atl. 765, it appeared that to a bill for the specific performance of a contract to purchase lands, the defendant counter-claimed for the return of his deposit, upon the ground that the property encroached upon adjoining premises. The Court, after finding that the question of encroachment was surrounded with sufficient doubt to oblige it to find as a fact that an encroachment existed, said:

> "A court of equity, of course, would not permit a vendee to break his contract for some immaterial defect, or one that can be properly compensated against, in the absence of express stipulation or agreement. Griggs *v.* Landis, 19 N. J. Eq. 350. This, however, presents the difficulty to compliance with the complainants' prayer, because the covenant against encroachments was expressly contained in the agreement. To disregard the clause of the contract quoted above would be to draw a new contract for the parties, upon which their minds have never met, and that is a policy that courts have universally refrained from acting upon."
>
> "I feel that under the often-stated rule the contract in this case cannot be properly read without the clause mentioned, and that the complainant is unable to perform his part of the agreement, and will therefore advise a decree dismissing the bill and directing the complainant to return to the defendant her deposit of $1,000."

In *Cleveland* v. *Bergen Building and Improvement Company*, 55 Atl. 117 (not officially reported), Vice-Chancellor Pitney held that a vendee in an executory contract for the purchase of lots, shown by a map to lie adjacent to a certain street, was entitled to rescind, where, as a matter of fact, the street was not a public thoroughfare.

The rule is quite universal that upon the offer by a vendor of an unmarketable title, the vendee is entitled to rescind the contract and to recover his deposit and other expenses.

In *Black on Rescission and Cancellation*, Sec. 427, it is said:

> "When a vendor of land who has bound himself to convey at a given time or on performance of stipulated conditions, is unable to give a good title to the property when called upon to do so, either because he never held the title or because he has failed to acquire a title which he expected to acquire or because he has been unable to clear the title from clouds or hostile claims, the purchaser will be entitled * * * if he has made a partial payment * * * to rescind the contract and recover back what he has given. And in the absence of an explicit agreement on the point, *the vendor is bound to tender a good and marketable title*, within a reasonable time, and on his failure to do so *the vendee is entitled to rescind.*"

Decisions of many jurisdictions support the doctrine set forth above. *Green* v. *Ditch*, 143 Mo. 1; *Tudor* v. *Raudabaugh*, 278 Fed. 254; *Robinson* v. *Campbell*, 222 Mich. 111; *Gilbert* v. *Peteler*, 38 N. Y. 165; *Caston* v. *Zimmerman*, 183 N. Y. Supp. 615, 233 N. Y. 578; *Witte* v. *Hobolth*, 224 Mich. 286; *Davis* v. *Heard*, 44 Miss. 50; *Bullitt* v. *Eastern Kentucky Land Company*, 99 Kent. 324, 36 Southwestern 16; *Taft* v. *Kissel*, 16 Wisc. 273; *Torrance* v. *Bolton*, L. R. 14 Eq. 124; *Rose* v. *Watson*, 11 Eng. Reprint, 1187.

POINT TWO.

The title to the premises in question is doubtful and unmarketable.

Various cases in this state which have served to establish the New Jersey rule concerning the marketability of titles are reviewed in *Security Bond and Mortgage Company* v. *Weiss, supra,* where it is said:

> "In the case of Doutney *v.* Lambie, 78 N. J. E. 277, the court of errors and appeals, speaking through Mr. Justice Parker, said: 'Specific Performance of a contract to purchase real estate will not be decreed if the marketability of the title depends on the establishment of a fact and that fact is in reasonable doubt.' The learned justice cited Barger *v.* Gery, 64 N. J. E. 263, and Potter *v.* Ogden, 68 N. J. E. 409. In the latter case the Court said (at p. 412): 'I think that any decision of mine in this cause is controlled by my decision in the case of Barger *v.* Gery, 64 N. J. E. 263. The rule which I found supported by the authorities in that case is that a title dependent on a fact must be regarded as marketable when— (1) The fact is so conclusively proved in the suit for specific performance that a verdict against the existence of the fact would not be allowed to stand in a court of law; and (2) there is no reasonable ground for apprehending that the same fact cannot be in like manner proved if necessary at any time thereafter for the protection of the purchaser.' In the case of Herring *v.* Esposito, 94 N. J. E. 348, a clause similar to the one in the present case was considered. Two surveyors testified that there was an encroachment and two that there was not. Vice-Chancellor Bentley said (at p. 349): 'I feel that under the elementary rule, there is at least such a doubt created in my mind that I am obliged to find as a fact that an encroachment exists.' "

> "In Pasternack *v.* Alter, 95 N. J. E. 377, Vice-Chancellor Lewis follows the rule laid down in Doutney *v.* Lambie, *supra.* He quoted (at p. 378) Tillotson *v.* Gesner, 33 N. J. E. 313, as follows: 'The purchaser should have a title which shall enable him not only to hold his land but to hold it in peace, and if he wishes to sell it, be reasonably sure that no flaw or doubt will come up to disturb its marketable value.' "
>
> "The learned Vice-Chancellor (at p. 379) quoted as follows from the case of Van Riper *v.* Wickersham, 77 N. J. E. 232 (at p. 237): 'The principle adopted by courts of equity in matters of specific performance is that they will not compel a purchaser to take a title of which there is a reasonable doubt, and such doubt is held to exist if the purchaser desiring to sell the lands would be adversely affected by such doubt * * * so it is the uniform rule in this state to decline to decree performances where such doubt exists though rested on grounds merely debatable, but which might visit upon the purchaser litigation in that regard, and that, too, where at law the title might, in fact, be declared good.' "

It is interesting to note several instances in which the Court of Chancery has held a title to be unmarketable for very slight reasons.

In *Goldstein* v. *Ehrlich, supra,* Vice-Chancellor Backes stated that slight but substantial reasons warranted the denial of specific performance in the case before him. It appeared that the premises encroached one and one-half inches on one street and two and five-eighths inches on another, and that padlock proceedings were pending against one of the properties.

In *Potter* v. *Ogden,* 68 N. J. E. 409, Vice-Chancellor Stevenson advised a decree dismissing a bill for specific performance, where it appeared that the vendor acquired title from a married

woman who executed a deed as if she were unmarried. It was shown that her husband had been absent seven years at the date of the deed, whereby a presumption of death arose. It also appeared that she was eighty-six years of age and that her children possibly controlled, to a large extent, the evidence on which the rebuttable presumption was founded.

In the case now before the Court, the reservation in the deed creates a continuing right of access to the premises. The language of the reservation does not make this right of access dependent upon the use or maintenance of any race-way, but is a general one. In addition, the reservation, in broad language, provides for the enjoyment of all water rights, water privileges and mill rights and privileges. These also are entirely independent of and disconnected with the maintenance or user of any race-way, and constitutes easements of considerable importance and large burden. The reservation of all water rights, for example, gives the right to take all surface waters, percolating waters, channel waters and underground channel waters.

Should the complainant attempt to develop the premises in accordance with the purpose for which they would be best adapted, in their encumbered condition, the Court of Chancery would restrain them from proceeding, in a proper case, equity regarding the existence of an easement as a sufficient interest to warrant a restraint.

In 19 *C. J.* 939, it is said:

> "One who purchases land with notice, actual or constructive, that it is burdened with an existing easement takes the estate subject to the easement and will be restrained from doing any acts which will interfere with the benefit and enjoyment of the easement to the full extent to which the party having a right thereto, who has not parted with or impaired the same, was entitled at the time when such purchaser bought. He has no greater right than his grantor to prevent or obstruct the use of the easement. The rule applies whether the sale is voluntary or involuntary. Frequent applications of the rule are found in the case of private rights of way, stairways, and water rights."

Testimony was adduced on behalf of the defendant and the contention was raised by counsel to the effect that the easement in question had not been used for more than twenty years. It was sought in this manner to convince the Court that it had been extinguished by adverse possession.

By the express terms of the contract between the parties to this appeal, the appellants are not required to take a title which rests in whole or part upon adverse possession. In addition to this consideration, it is to be noted that a mere non-user is not sufficient to bring to an end a servitude such as rests upon these premises.

Counsel for the respondents also advanced the contention that there was present more than a non-user, and relied upon the destruction of the mill which existed formerly upon the premises, in support of this claim.

As already noted, however, the particular burdens to which these lands are subject, are entirely disconnected from, and independent of, the maintenance or user of any mill. The rights of access to the premises are independent as are the rights to the waters. There is an utter absence of anything which indicates an attempt to abandon the rights created under this easement. Adverse possession such as is recognized by the courts of this State, must be actual, visible, ex-

clusive, hostile and continued during the time necessary to create a bar under the Statute of Limitations.

In 2 *C. J.* 50, the rule is well stated as follows:

> "No matter in what jurisdiction the determination of what constitutes adverse possession may arise, the decisions and textbooks are unanimous in declaring that the possession must be actual, visible, exclusive, hostile, and continued during the time necessary to create a bar under the Statute of Limitations. Whenever any of these elements, or any other element required by statute, is lacking, no title by adverse possession can ripen. It is, however, often a matter of some difficulty to determine from the facts of any particular case when these elements exist."

In this State it has been enunciated in *Foulke* v. *Bond*, 41 N. J. L. 527; *Cornelius* v. *Gibberson*, 25 N. J. L. 1, and *Yard* v. *Ocean Beach Association*, 49 N. J. E. 306.

If the Court is unwilling to go so far as to hold that the reservation under consideration creates a sufficient outstanding interest so as to make the title unmarketable, it is submitted that the least that can be said is that there is very much doubt as to whether or not such is the effect of the reservation. Such a doubt warrants a finding that the easement exists as an encumbrance upon the premises as a matter of fact. This is all, under the cases, which need be shown in order to hold a title to be unmarketable.

In *Dobbs* v. *Norcross*, 44 N. J. E. 327, it was said:

> "That may be a good title in law which a court of equity in the exercise of its discretionary power will not force on an unwilling purchaser. Every purchaser should have a title which shall enable him not only

> to hold his land, but to hold it in peace, and if he wishes to sell it, *to be reasonably sure that no flaws or doubt will come up to disturb its marketable value.*"

In *Doutney* v. *Lambie*, 78 N. J. E. 277, Justice Parker, speaking for the Court of Errors and Appeals, said:

> "Having examined the evidence, we are satisfied that to say the very least the question of encroachment is a doubtful one, and might well lead to troublesome and vexatious litigation in the future, which might be decided adversely to the owner and compel a substantial alteration of a large apartment building. This is sufficient to render the title unmarketable and to justify, if not require, a court of equity to refuse specific performance to a vendor."

In *Lippincott* v. *Wikoff*, 54 N. J. E. 107, Vice-Chancellor Emery stated:

> "The leading case is that of Pyrke *v.* Waddingham, 10 Hare 1 (44 Eng. Ch.), in which Vice-Chancellor Turner, stating that it has been for a long time the settled rule of the courts of equity not to compel a purchaser to accept a doubtful title, examined the question as to what titles are to be considered as doubtful within the rule, and whether the rule applies only in cases in which the court itself entertains doubts upon the title, or whether it extended to cases in which, although the court itself may entertain an opinion in favor of the title, it is satisfied that that opinion may fairly and reasonably be questioned by other competent persons. He concludes that the cases show that it is the duty of the court not to have regard to its own opinion only, but to take into account what the opinion of the other competent persons may be. As to the scale by which the courts are to be guided in measuring their doubts under this rule, he says, also (at p. 8), that the cases throw some light upon this question; that if the doubts were upon a

question connected with the general law, the court is to judge whether the general law upon the question is or is not settled, enforcing specific performance in the one case and refusing to enforce it in the other. *If the doubts arise upon the construction of particular instruments, and the court is itself doubtful upon the points, specific performance must be refused, and even though the court may lean in favor of the title, its duty is either to consider whether it would trust its own money upon the title or, at least, to weigh whether the doubt is so reasonable and fair that the property would be left in the purchaser's hands not marketable.''*

It is therefore respectfully submitted that the denial of relief to the complainants in this case was entirely in opposition to the established doctrines of the Court of Chancery.

Respectfully submitted,

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Solicitor for and of Counsel with
Complainants-Appellants.

LEONARD J. EMMERGLICK,
On the Brief.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between	*On Bill.*
TOBIAS GRUNT and JOSEPH GRUNT, *Complainants-Appellants,*	*On Appeal from Court of Chancery.*
and	*Sat Below:* CHURCH, *V.-C.*
CARL OLSAN, *Defendant-Respondent.*	*Bill for Rescission.*
	Decree for Defendant. Complainants' Appeal.

BRIEF OF DEFENDANT-RESPONDENT.

(Italics, etc., mine except where otherwise noted.)

Statement of the Case.

The bill (p. 1) is for rescission of a contract for sale of land made June 10, 1926, between Carl Olsan, as vendor, and Tobias Grunt and Joseph Grunt, as vendees (Exhibit C. 1, p. 49). The bill counted upon two grounds of rescission—(a) That false representations had been made by the vendor to the vendees that water mains and gas pipes had been constructed in the public road in front of the premises; (b) That the lands were subject to the reservation of an easement of access which made the title unmarketable.

Complainants sought to prove the alleged false representations with respect to water mains and gas pipes but wholly failed.

The Court filed an opinion (p. 40), which resulted in a decree dismissing the bill (p. 45) from which an appeal was taken by complainants (Notice of appeal, p. 46; petition of appeal, p. 47). The basis of the decision of the Court was that under the contract, properly construed, complainants agreed to take the property subject to the reservation claimed to make the title unmarketable.

The decree may be sustained upon either one of two grounds—

(a) That complainants, by the contract of sale, agreed to take the property subject to the reservation, as found by the Court of Chancery.

(b) That the reservation was not an encumbrance and did not make the title unmarketable.

PRELIMINARY.

To warrant rescission there must be an encumbrance or the title must be unmarketable. Doubt as to title is not sufficient.

Complainants argued below and argue here, under their Point II, that they are entitled to rescind and to recover the deposit made if there is *doubt* as to the title. They assume that, because the Court of Chancery will *not grant* specific performance if the title be in substantial doubt, the rule is the same in rescission, *i. e.*, that the Court of Chancery will *grant* rescission if there is a doubt as to the title.

I submit that there is no such discretion lodged in the Court of Chancery to *grant* rescission as there is to *deny* specific performance. The reason why the Court of Chancery will not enforce specific performance, if there be doubt,

is that specific performance is a discretionary remedy.

Brown v. *Brown,* 33 N. J. E. 650;
Blake v. *Flatley,* 44 N. J. E. 228, at p. 231;
Brisbane v. *Sullivan,* 86 N. J. E. 411;
Pyatt v. *Lyon,* 51 N. J. E. 308.

The discretion in a court of equity in cases of specific performance does not mean that it may exercise discretion and *grant* relief if there be doubt. It means that it has discretion to *withhold* relief. There is no discretion in the Court in an action of rescission, certainly no discretion to *grant* rescission in a doubtful case. If there *were* any discretion, it would be discretion to deny the remedy in a doubtful case.

There is no equity involved in the determination of the question as to whether rescission shall or shall not be granted. That is a purely *legal* question which a court of equity is called upon to determine only because it has jurisdiction of the cause for the reason that the vendee is entitled to a lien upon the property contracted to be sold for the amount of the deposit, and also is entitled to have the parties put in *status quo.* This, of course, in the absence of any purely equitable ground such as fraudulent representations, &c.

In the case at bar the allegation was made in the bill of fraudulent representation and so, when the case started the Court of Chancery had jurisdiction upon that ground.

But the case on final hearing came down to whether there is such a *defect in the title* as that there has been a breach of the contract by respondent, and *that* depends wholly upon *legal,* and *not* equitable, principles, and the question must be determined in this cause precisely

the same as if a suit had been brought at law by complainants to recover of respondent the moneys they have paid to him. If at law they would be permitted to recover, then equity will grant rescission. If at law they would not be permitted to recover, equity, I submit, must deny rescission.

The matter is not open to debate, I submit since the decision of this Court, in *Meyer* v. *Madreperia*, 68 N. J. L. 258. In that case suit was brought to recover moneys paid upon a contract to purchase land. The existence of the alleged defect depended upon whether a man, who had been absent for more than seven years, was presumed to be dead, and whether that *presumption* of death could be considered upon the matter of title. Were it not for the presumption the title would have been defective.

This Court said (p. 265):

> "The unmarketable quality of the title is supposed to result from the fact that the death of Patrick in September, 1886, is established by *statutory presumption,* which would afford no protection to the purchaser if Patrick should hereafter appear to have been living."

The Court recognized the rule in equity of reasonable doubt (p. 266):

> "When, *upon bills for the enforcement of the performance of contracts for the sale of lands,* the title to the lands was questioned, the Court of Chancery was originally accustomed to determine whether the title was good or bad, and to enforce the contract or dismiss the bill accordingly. But there grew up the practice of considering upon such bills, not merely the question whether the title was good or bad, but also whether it was free from *reasonable doubt.*"
>
> * * * * * * *

> "This practice has, from the earliest times, been pursued in our Court of Chancery. Upon bills for specific performance of such contracts a bad title would afford a complete defence. An adjudication that the title was bad, upon such a contest, would probably settle the question as between the parties. But the court has, *in its discretion,* when there appeared debatable grounds for a doubt that could not be settled without litigation, or which would expose the purchaser to the hazard of litigation, *declined to compel him to perform.* Chancellor Runyon pointed out this distinction when he declared that there *might be a good title at law* which a court of equity would not *force* on an unwilling purchaser."
>
> "Whether a bill by defendants praying that plaintiffs should be decreed to specifically perform this contract would have been dismissed upon the conceded facts of this case *is open to question.* The alleged flaw in the title consists in the possibility—it can hardly be called a probability—that Patrick may appear, or be shown to have been alive so as to have become interested in the share of Michael under the terms of the will. In respect to the doctrine that a purchaser will not be compelled to take a doubtful title, Lord Hardwicke observed that the '*court must govern itself by a moral certainty, for it is impossible, in the nature of things, that there should be a mathematical certainty of a good title.*' And Mr. Sugden declared that a purchaser would not be permitted to object to a title on account of a mere probability, 'because a court of equity, in carrying agreements into execution, governs itself by a moral certainty; it being impossible, in the nature of things, there should be a mathematical certainty of a good title.' * * * In all deductions of title there are possibilities of error. * * *"
>
> "Whether specific performance would have been decreed upon the facts disclosed in the bill of exceptions *need not be decided.* In

actions at law the implied agreement for title in such a contract *will be satisfied by a title good at law, upon the proofs under the rules of evidence. To recover at law for a breach of such a contract it must be shown that the title tendered was not a title good at law.* The discretionary power of a court of equity with respect to a title which is doubtful, though good, is not within the province of a court of law, or a jury therein."

The Court affirmed a directed verdict for the plaintiff.

Upon somewhat similar facts (involving the presumption of death) the Court of Chancery *denied* specific performance. *Potter* v. *Ogden,* 68 N. J. Eq. 409, hereafter referred to.

This Court in *Eisler* v. *Halperin*, 89 N. J. L. 278, cited *Meyer* v. *Madreperia,* 68 N. J. L. 258, 266, and said:

"We have in this state a line of cases holding that equity will not decree the specific performance of such a contract if it will result in compelling the purchaser to take a doubtful title. * * * There may be some cases where equity would refuse relief to a vendor on account of doubtful features of title that *nevertheless would not support a rescission by vendee and a suit for recovery back of purchase money paid,* but if there *be a substantial defect,* the vendee may rescind and recover back his payments and interest if the title has not passed."

In *Eisler* v. *Halperin,* 89 N. J. L. 278, the Court held that there was a substantial defect in the title. The third headnote of the decision in *Eisler* v. *Halperin*

"3. When the sufficiency of a real estate title is in question in a court of law, that court may receive and consider evidence tending to show that the title is vulnerable in equity."

may be misleading. When we come to consider the facts of the case we find that the Court was not there referring to any application of the doctrine of equity that it will not force upon an unwilling purchaser, in a specific performance suit, a doubtful title but was referring to the question as to whether the title *itself* was vulnerable in equity such as that it was subject to attack in equity to establish a trust or whatnot. The Court said at p. 281:

"As to the propriety of the testimony about the parol trust, or the deed as a mortgage, the question under investigation by the District Court was whether the title was one which the purchaser was entitled to reject in its then state, and in solving that it was entitled to receive any evidence that tended to show the openings for attack on the title, whether at law or in equity."

Potter v. *Ogden*, 68 N. J. E. 409, referred to by appellants is a case illustrating the distinction between an action for specific performance and an action for rescission. There was a bill for specific performance. It appeared that title to the land had been obtained under a warranty deed made by one Sarah L. Brown described in the deed as a widow. It appeared that, at the time of the making of the deed, Mrs. Brown was living in a state of separation from her husband and had been living in such a state of separation for upwards of fifteen years, and that he had been absent for more than seven years and that the statute with respect to the presumption of death applied—precisely the same situation with this court was concerned with in *Meyer* v. *Madreperia,* 68 N. J. L. 258. The Vice-Chancellor said:

"I do not feel obliged to discuss the facts of this case, or even to determine whether the presumption created by our statute ap-

plies to this case. I think the point is well taken, on behalf of the defendant, that *even if the statute does apply,* and in this suit between these parties it must be presumed that Mr. Brown was dead when Mrs. Brown made the conveyance to the complainant, still the complainant is not entitled to a decree *forcing his title, thus resting upon a rebuttal presumption of fact, upon the defendant.*"

We, therefore, have this court in *Meyer* v. *Madreperia*, 68 N. J. L. 258, holding that, when a suit is brought to recover a deposit, the alleged defect being that the title depends upon a presumption of death, the presumption of death applies and the deposit cannot be recovered, and the Court of Chancery holding that on a bill for specific performance, where the title depends upon the application of the presumption of death there can be no specific performance.

If there can be no recovery at law for the deposit, there can be no rescission in equity and recovery of the deposit.

None of the cases cited by appellants hold that there may be rescission in case of doubt.

The rule is conceded that, in case of doubt, there can be no specific performance.

In *Security Bond and Mortgage Co.* v. *Weiss*, 100 N. J. E. 156, opinion by Vice-Chancellor Church, the contract contained a *specific provision* that buildings were within the boundary lines. Two surveyors were produced who said that the buildings were not within the boundary line. One surveyor was produced who said that the buildings were within the boundary lines. The bill was for rescission. It is quite true that the Vice-Chancellor referred to the equitable rule (p. 2049) that specific performance can-

not be enforced against an unwilling purchaser if there be doubt with respect to the title. But he held (p. 158):

> "Applying the law as above cited to the facts in the present case, we find that two surveyors say there are encroachments and one says there are none. *The weight of the evidence is therefore in favor of the existence of the encroachments.* Moreover, there is clearly such a doubt in the matter as under the cases makes the title unmarketable."

The Vice-Chancellor was *obliged* to consider the law applicable to specific performance cases because there was a counter-claim for specific performance. When he spoke of the doubt on p. 158 he was referring to the specific performance end of the case and not to the rescission end of it. He granted rescission because, as he states: "*The weight of the evidence is therefore in favor of the existence of the encroachments.*"

In other words, he held as a fact that the encroachments existed. The encroachments existing there was a defect in the title and, under *those* circumstances, there was nothing to do but to grant rescission.

And, so in *Goldstein* v. *Ehrlick*, 96 N. J. E. 52, the contract provided that the buildings should be all within the building line. They encroached. There was also padlock proceedings which the Court held to be a cloud on the title. The vendee was entitled to rescind and to a return of the money paid for the title was found by the Court to be, *in fact, defective.* The matter of doubt did not arise.

Reliance is placed by appellants upon the language of the Vice-Chancellor (Backes), p. 53: "A valid reason for refusing specific performance, *such as a defect in the title* warrants a

rescission of the contract." The Vice-Chancellor could not have meant that in every case where specific performance would be denied there could be rescission, for, if he did, he would have overruled *Meyer* v. *Madreperia*, 68 N. J. L. 258, and he would have applied, to a case of rescission, the doctrine of discretion in the granting of specific performance. He was dealing with the case before him which involved a *defect* in the title, and his language should be taken in connection with the facts which were before him and should be read thusly; "A valid reason for refusing specific performance *such as a defect in the title* warrants a rescission of the contract."

And, so, in *Herring* v. *Esposito*, 94 N. J. E. 348, there was a defect in the title found by the Court.

I do not intend to consider all of the cases cited by the appellants. All of them involved actions for specific performance and the application in *those* actions of the rule that the Court will not force upon the unwilling purchaser a title which is doubtful. The rule rests upon the discretion which resides in the Court to grant specific performance and as Pomeroy on Specific Performance, 3rd Ed., 1926, Sec. 37, says:

> "It is very obvious that, in describing the equitable jurisdiction, and characterizing it as a discretionary one, the courts are always contrasting the right to the legal remedy of damages upon the breach of a contract, with the right to the equitable remedy of specific performance. If the contract is valid and admits of no legal defense in law, the right of the injured party to the remedy at law is absolute, and is not affected by the circumstances. * * *
>
> Although in certain cases there may be a denial of specific performance at the suit of the vendor the vendor may sue at law and recover *damages* for the breach of the contract."

No one of the cases cited by appellants is one where it has been held that, in an action for *rescission,* the equitable doctrine applies.

POINT I.

Under the contract, properly construed, appellants agreed to take the title charged with the alleged easement.

This is the ground upon which the Vice-Chancellor dismissed the bill (p. 40).

The alleged easement is referred to in the contract in the following language (Exhibit C. 1, p. 52):

> "Conveyance shall be made subject to reservation in Deed Book #178, page 358 it being understood, however, that same does not make the title to the premises hereinto conveyed unmarketable and is not considered an encumbrance against the said premises."

The easement is contained in a deed dated November 20, 1885, made by Robert J. Coghlan and wife to George Mulford, and is set forth in the bill of complaint (p. 2).

> "Excepting and reserving however all water rights, water privileges, *mill rights* and privileges with the right of using and keeping in repair all *raceways either tail race or other race with* the right of access thereto and the right of maintaining and keeping *in repair the dam at the Pond supplying said Race*, the right of maintaining *said pond with the right of pondage* and flowage of every nature name and mind whatsoever *which have ever been employed by the owners of said land above conveyed or appertained thereto by virtue of any grant deed or conveyance or which may belong to said Robert J. Coghlan in the* Township of Springfield and being the same water

privileges, etc. described in a deed from R. J.Coghlan and wife to Frederick Crane dated November 14, 1885.''

No reference is made of the reservation in the deed into respondents (p. 34). Appellants insist that the language of the contract, with respect to this reservation, is to be construed most strongly against the vendor upon the theory that the language is that of the vendor. But that does not appear. This provision of the contract was inserted at a meeting attended by complainants in person, defendant in person, two real estate agents and Mr. Singer, attorney for appellants, at the office of Murray Apfelbaum, a real estate agent (pp. 8, 9). The meeting lasted for several hours (p. 9). The insertion of a provision with respect to the reservation was insisted upon by respondent (p. 12), (p. 31). The language used was the joint effort of respondent and Mr. Singer, representing appellants (p. 32).

Almost immediately after arguing that the language is to be construed most strongly against the vendor because he used it, appellants say ''The provision was inserted *ex abundanti cautela.* The *vendees* were *interested* in making it certain that they would not be compelled to take a title encumbered by this easement, and therefore secured from the vendor *a definite written understanding* to that effect. This is the only purpose which can be seen for inserting the disputed language clause.''

Appellants would construe the language as if it read: ''Provided, however, that if said reservation makes the title to the property unmarketable, or is an encumbrance upon the premises the vendees shall be under no obligation to take the title.''

But if this is what the provision means, then the insertion of the entire clause in the instrument *is wholly* without force or effect.

And this is certainly true if, as appellants contend, any doubt makes the title unmarketable and if the Court of Chancery has no power to determine whether, in fact, there is a defect.

If the reservation makes the title to the property unmarketable or if it constitutes an encumbrance upon the land, then, if there were *no* express provision in the contract providing that the vendees should take title subject to the reservation, the vendees would not be obliged to take title. And, so, also, if this is what the provision means, then the words, that the ''conveyance shall be made *subject* to the reservation,'' are meaningless for, without the words, the vendees *would not* be obliged to take title, and, if appellants' contention be correct, with the words the vendees *are not* required to take title.

On the other hand, if the reservation does not make the title to the property unmarketable, the vendee would not be justified in rejecting the title, even if there were no reference to the reservation in the contract.

Upon no hypothesis is the language of any meaning unless it be construed as it was by the Court of Chancery.

Appellants, while conceding that it is true that if the clause were not inserted and it was found later that the reservation constituted an encumbrance the vendee would not have been obliged to take title states that the purpose for inserting the discussed language was that the vendees desired to secure from the vendors a definite understanding to *that* effect and ''The vendee did

not desire that the vendor be required to go to the trouble and expense of discharging of the record this reservation, if in fact it was not an encumbrance."

But if the reservation were not an encumbrance and there was no language in the contract referring to it, the vendor would *not* be required to go to the trouble and expense of "discharging of the record this reservation."

It is a presumtion that when parties use language they use it for some useful purpose, and words in an instrument will be interpreted, if possible, to make sense.

The provision *may* be so interpreted as to make sense and yet leave the provision with some force and effect, and, in interpreting the words, we may consider the circumstances surrounding the parties at the time the contract was made.

We start out with the admitted fact that *all* parties *knew* of this reservation and that the contract specifically mentions it, and, in the first words of the provision of the contract having reference to the reservation, the vendees are obliged to take title *subject to the reservation.* Then follow the words "it being understood, however, that same does not make the title to the premises hereunto conveyed unmarketable and is not considered an encumbrance against the said premises."

This may well mean that the *parties* had considered the reservation at the time of making the contract and had determined, at the time, that the reservation was of such a nature as that, under the circumstances, they would *not* consider it as making the title to the property

unmarketable or as an encumbrance against the said premises.

In other words, the latter part of the clause was a mere explanatory expression indicating that the parties had duly considered the matter at the time the vendees agreed to take *subject to the reservation.* It is as easy to construe these words in this manner as it is in the manner in which appellants construe them. There is *this* difference. If they are construed in the way appellants construe them, *the entire clause does not mean a thing,* whereas, if they are construed in this manner the clause remains operative and *all* of the words are permitted to have a meaning.

Even if the statement that it was "understood * * * that same (the reservation) does not make the title * * * unmarketable," etc., can be said to be a statement by the *vendor,* still, the vendees *are bound,* even if this expression of opinion with respect to the law on the part of the *vendor* is unsound, for the vendees make the contract with knowledge, or, as Pom. Eq. Jur. Prud. Sec. 601, p. 1131, states the rule:

> "When, however, the grantor, vendor, or mortgagor admits that his title was defective or encumbered, or that there was some outstanding claim upon or equity in the property, or makes any other communication which, unexplained, would constitute an actual notice, but adds a further declaration to the effect that such defect has been cured, or encumbrance removed, or claim or equity rescinded and destroyed, *the purchaser,* according to the weight of authority, *is not warranted in accepting and relying upon this explanation or contradiction;* the information obtained under such circumstances and from such a source is sufficient to put a prudent man *upon an inquiry.*"

Here the purchasers were fully advised on the existence of this reservation. They expressly agreed to take the title subject to the reservation. They cannot escape responsibility on their contract, which was signed with full knowledge of the reservation, merely beacuse there is a statement of *opinion* in the contract that the reservation is not considered an encumbrance upon the property, etc. In contemplation of law they had as much knowledge as had the vendor at the time the contract was signed.

If appellants' theory of the case be correct then the vendees and the vendor went through a perfectly futile performance when they signed this contract, for both the vendees and the vendor knew that there was this reservation, which, *in fact,* so far as the record went, at that time, *constituted an encumbrance upon the property,* and although the vendees signed the contract and agreed to take *subject to the reservation, they could have repudiated their contract the moment after signing it, refused to be bound by it.*

This is what the Vice-Chancellor refers to when he says that if the contract be construed as contended for by appellants there would be no mutuality of obligation (p. 44).

Appellants say that the oral testimony favors the construction of the clause put upon it by them.

On the contrary, I submit that the oral testimony favors the construction put upon the clause by the Vice-Chancellor.

Respondent testified with respect to the construction of the clause when questioned by counsel for appellants on cross examination. He testified to nothing on direct upon that subject as

I assumed such testimony would be incompetent (p. 31).

> "Q Why did you put it (the clause) in the contract, then? A We put in the contract and I told them at the time that—and the contract then by the way was drawn, it was an afterthought on my part, along about seven or eight o'clock in the evening and I told them then, 'Now, gentlemen, *we have gone over this water right proposition;* it is up to you to take this title *subject to that* and *I don't want any question afterwards raised as to the marketability of this title, whether it is not marketable because of this old recital in the deed.'* We discussed the question that this recital was not representative and that Dr. Morris' deed had gone through that thing. *I gave them all the information I had as to the fact it had not been used, that the dams were down, that they had inspected the premises up and down the brook and had seen that they were down; they knew the condition at the time;* we drew this contract; we agreed that it would be taken subject to that *and there would be no question raised as to whether this easement did or did not make this title marketable or unmarketable.*
>
> Q You wanted the purchaser to understand—you represented, didn't you, as a matter of fact, that it was not unmarketable? *A I did not, sir. He was to take it subject to that and not raise the question of marketability at all. That was the intent.*
>
> Q That was the intent of this language? A Yes, sir.
>
> * * * * * * *
>
> Q Didn't you intend by that language to convey the impression that as a matter of law it was not an encumbrance, and did not, as a matter of law make a title unmarketable? A No; the intent at the time was not whether as a matter of law it was unmarketable or not. *They were going to waive it; they knew the conditions and were familiar*

with it and were going to waive them. That was the intent at the time Singer came to me in September and told me the Fidelity would not guarantee it. I told him to go up there to Springfield and simply get the corroborative facts as to information I had already given.''

Mr. Singer, who represented appellants at the drawing of the contract, on direct examination by appellants' counsel, testifies a little differently:

> ''Q And the agreement refers to a water right or an easement of some kind in a prior deed in this language. 'Conveyance should be made subject to reservation in Deed Book 178, page 358, it being understood, however, that the same does not make the title in the premises hereunto conveyed against the said premises.' Did you inspect or examine the deed which contained the averment prior to the time title was closed or prior to the time the agreement was drawn? A Mr. Olsan turned to a page of his abstract and he says, '*The conveyance will have to be made subject to this reservation.*' I took it and I—as soon as I started to read it, I read, 'Races and tail races,' and a few other words in there. I said, 'What does this all mean?' Because I was unfamiliar with those expressions. He says, 'I don't know what it means, but,' he says, 'I *had to buy it subject to it and that is the only way you can buy it, subject to it.*' I said, 'I *don't care if we take it subject to it, provided it does not make the property unmarketable or constitute an encumbrance against it.*' I said, 'You know my client intends to splits that into lots.' I said, 'That thing may be searched a hundred times in the next few years and everybody will be raising objections.
>
> Q After that time was a provision drawn and put in as it actually is in this contract? A Yes, sir.''

On cross examination, by counsel for respondent, he said (p. 16):

> ''Q Now, as I understand it, Mr. Olsan told you that you had to take it subject to this restriction? A Yes; and I qualified it with the remark that after I asked him what all that meant and he says he don't know, I told him as long as it didn't make the property unmarketable or constitute a lien or an encumbrance, that I would not have any objection.
>
> Q Then what was the object of putting in your assumption— A Well, I wanted to first find out what those words meant.
>
> Q —if it was neither a lien nor an encumbrance or didn't make the title unmarketable, then why the necessity of your taking subject to it? A Well, because it was there on the record and I suppose he wanted to protect himself in seeing that there was no loop hole from which we could back out.
>
> Q The very fact you take it subject to something indicates there is some right against the property, doesn't it? A Well, not always. There may be something put on record that appears to be a cloud or something that does not affect the property.''

If the oral testimony is to be considered as bearing upon the construction to be put upon the clause, the matter was one of fact for the Vice-Chancellor and, in considering the oral testimony, the probabilities are to be taken into account. Both respondent and the attorney for appellants, who participated in the drawing of the contract, agreed that the existence of this reservation was brought up by respondent and, to quote the language of the attorney for appellants, ''He (respondent) says, '*I don't know what it means,* but' he says, '*I had to buy it subject to it and that is the only way you can buy it, subject to it*' '' (pp. 11, 12).

The fact is that the deed to respondent does not contain any reference to this reservation.

Respondent says that the language with respect to the reservation not making the title unmarketable was inserted so that it would be clear that the matter of unmarketability of the title was before the parties at the time and that it had been agreed that appellants would take subject to the reservation and would not consider that reservation as an encumbrance on the property or as making the title unmarketable within other provisions of the contract.

Mr. Singer insists that the language was inserted so as to make it clear that, if, in fact, the reservation made the title unmarketable or constituted an encumbrance against the property, appellants would not be obliged to take, or, in other words, the effect of this latter clause was to destroy the effect of the preceding language, "subject to reservation," and, on cross examination (pp. 16, 17), he can give no logical reason why, if *that* were the intent, the clause was inserted at all. Upon the weight of the evidence the Vice-Chancellor saw the witnesses and came to the conclusion which he did. The burden was on appellants.

POINT II.

The reservation does not make the title unmarketable nor is it a defect in or encumbrance upon the title.

The reservation which is claimed to constitute a defect in the present title is in a deed made in 1885—42 years ago. The reservation must be construed in the light of the conditions existing at the time made. The burden was on appellants to show that this reservation was an

encumbrance or made the title unmarketable—But first—what is the reservation. It is of certain rights which have ever been employed by the owners of said land by virtue, etc. and being the same water privileges, etc. described in a deed made, etc. But no proof was offered of the deed describing the rights nor was proof offered as to what rights had even been employed by the owners of the land. It was the duty of appellants to offer such proof. Without it the court cannot say that the rights constituted an encumbrance or made the title unmarketable. Appellants failed, therefore, to prove an essential element of their case.

At the time of the making of the deed there was a mill adjoining the lands and *appurtenant to that mill* there was a pond and dam (pp. 20, 21, 22, 34). The reservation, construed in the light of the conditions existing if we may *guess* as to what it meant, was of the right of access to keep raceways, etc., in repair (it so states). The mill is no longer in existence. It has been out of existence more than twenty years (pp. 20, 21, 22). The raceways are out of existence and they have been out of existence more than twenty years. Conditions have entirely changed and they changed more than twenty years ago. There is no dam and no pond.

At the most (again guessing) there was created by the reservation an easement with respect to water rights and access for the purpose of making effective the use of the water rights appurtenant to the mill.

Appellants seem to conceive that extinguishment of this easement must be due, if at all, to *adverse possession* and they state that there is some doubt as to whether or not there was hos-

tile possession, as to whether or not there was continued possession, as to whether or not there was a visible, exclusive and actual possession. I submit that, under the testimony in this case, there is *no* doubt as to any one of these elements, but appellants, I submit, are mistaken in their view that, to extinguish the easement, it is necessary that there should be an adverse possession for twenty years.

It is true that in some of the cases in this State the statement is made that non-user of an easement created by grant will not work an abandonment, but when the cases are carefully examined it will be found that, in each of them, elements were present which indicated that there was *no intent* to abandon although there might have been non-user. There has been more in this case than *mere* non-user. The case is quite different than it would be *if the mill had been permitted to stand, but left unused, for a period of 20 years, although kept in a fair state of repair.*

From the testimony and the language of the reservation there is no question but that the right was appurtenant to the use of the mill. If there be doubt it is the fault of appellants, for the burden was on them to prove what the reservation included, and they failed. Not only has there been *non-user* of the easement for a period of more than 20 years, but the mill has not been in existence for a period of much more than 20 years, and the pond has also disappeared, and been in disappearance upwards of 20 years. The condition of the surrounding territory has changed. At the time of the granting of the easement the property was farm land, a country village; today the property in the immediate vicinity is being and has been for a long period

of time, improved by the building of houses, and its nature as farm land territory has completely disappeared. At the present day, and for more than 20 years last past it would have been perfectly futile to think for a moment of establishing a mill upon the lands to which the water rights are appurtenant.

Non-user, plus permitting the mill to disappear, and the pond to disappear more than 20 years ago, in view of the changed condition of the territory which would make it an absurd thing to re-establish the mill, are conclusive proofs of an intent to abandon.

The owner of the property to which the water rights are appurtenant could not now have and could not have had for the past 20 years, any use whatsoever for these water rights.

Were the elements of adverse possession completely out of this case, still the easement would, I submit, be *extinguished by abandonment.*

The Supreme Court, in *Bergen Turnpike Co., et al.* v. *North Bergen Township, et als.,* 95 N. J. L. 369, (Supreme Court of N. J. Nov. 24, 1920) said:

> "The Supreme Court of the United States in the case of Given *v.* Wright, 117 U. S. 648, 6 Sup. Ct. 907; 29 L. Ed. 1021, said: an easement may be lost by non-user, in 20 years, and even in a less time if it is affected by positive acts of invasion. A franchise may be lost in the same way; non-user being one of the common grounds assigned as a cause of forfeiture."

The statute, Sec. 16 of "An Act for the Limitation of Actions," 3 Comp. Stat. of N. J., p. 3169, which provides that:

> "No person who now hath, or hereafter may have, any right or title of entry into

> any lands, tenements or hereditaments, shall make any entry therein, but within twenty years next after such right or title shall accrue; and such person shall be barred from any entry afterwards * * *."

Appellants in their brief refer to the fact that the contract does not require them to take a title which is "*derived* * * * by adverse possession." In the first place, the easement, in the case at bar, is not extinguished only by adverse possession but by abandonment, and, in the second place, the *title* is *not* derived by adverse possession. All that adverse possession is used for is to *extinguish* a supposed encumbrance upon the title.

If the language of the clause providing that appellants should take the title subject to the reservation, etc., is to be construed most favorably to appellants, or in the way claimed by them, it clearly implies that *some court* should determine whether this reservation does, in fact, constitute an encumbrance or if it makes the title unmarketable, and if a court is called upon to determine that issue, the Court must take into consideration *any* evidence which goes to the fact as to whether the encumbrance exists at the present time.

Still assuming a construction of the language most favorable to appellants, the parties knew that, upon the face of the record, there *was* this reservation, and there *was* this encumbrance, so far as the record was concerned. All parties knew that such encumbrance could only be removed by evidence either of adverse possession or of non-user. To say that appellants cannot be obliged to take the title because the easement is to be destroyed by evidence of abandonment or of adverse possession, is to say that *all parties*

knew that the contract meant nothing at the time it was signed.

POINT III.

Even if the rule applicable to specific performance that the Court will not force upon an unwilling purchaser a doubtful title applies to rescission so as to permit a rescission in case of a doubtful title, there is no such doubt in the case at bar as to warrant relief to appellants.

It is not every doubt, even in cases of specific performance, which will prevent the Court from granting relief.

The Court said, in *Meyer* v. *Madreperia*, 68 N. J. L. 258, at page 267:

> "In respect to the doctrine that a purchaser will not be compelled to take a doubtful title, Lord Hardwicke observed that the 'court must govern itself by a moral certainty for it is impossible, in the nature of things, that there should be a mathematical certainty of a good title.' "

A case illustrating that in specific performance actions, the Court of Chancery will settle questions of title is

> *Ambruster* v. *Own Your Own Home Association*, 97 N. J. E. 69.

In that case, a bill for specific performance, the question arose on the construction of a will as to whether the complainant had good title. The matter was arguable as appears by the opinion of Vice-Chancellor Backes, who decided the case, yet he construed the will and held that the complainant had good title and decreed specific performance.

Two cases more nearly in point with that at bar are *Standard Realty Co.* v. *Gates,* 99 N. J. E.

271, a decision by Vice-Chancellor Berry, and *Fort* v. *Field,* 2 N. J. Misc. Reports 333, an opinion by Vice-Chancellor Fielder.

In *Standard Realty Co.* v. *Gates,* 99 N. J. E. 271, it was contended that the defect was an *encumbrance* in the nature of a lease. The City of Asbury Park held the lease and there was a controversy between the city and the complainant "as to the city's lease, the officials claiming that the city had a three-year lease and the complainant alleging that the lease was for one year only." The determination as to whether the lease was for one year or three years rested upon a mixed question of fact and law. For eight pages of the report the Vice-Chancellor considers the facts and the law, and comes to the conclusion that the tenancy of the city is of such a nature as that it might be terminated on the date at which the contract of sale represented it could be terminated.

Notwithstanding the fact that the determination of this question rested upon a mixed question of fact and law the Vice-Chancellor said (p. 279):

> "But it is contended that, because of the city's contention that its tenancy does not expire until April 1, 1928, the acceptance of title by the defendant will force upon him a lawsuit, and that he is not obliged to purchase a lawsuit. That statement, as a general proposition, is correct, but, in the language of Vice-Chancellor Stevenson, in Barger *v.* Gery, 64 N. J. E. 263: 'When the authorities speak of the hazard of litigation, to which the purchaser must not be subjected * * * they must refer to a hazard *which is to be determined by the chance of successful attack, as viewed by the court in the suit of specific performance.*' "

And the Vice-Chancellor then uses language particularly applicable to the case at bar:

> "Considerable space is taken up in the brief of counsel for defendant by the argument on the question of the right of the complainant in a specific performance suit to force a defective title upon an unwilling defendant. *But here there is no defect in title.* There is not even a suggestion anywhere that the complainant's title is not perfect. The only objection which has been made is based upon the existence of a lease held by the City of Asbury Park for a longer term of years than that specified in the contract. I have already determined that the city's lease does not extend beyond the time mentioned in the contract; but even if it did, it would constitute merely an encumbrance upon the property, and not a defect in the title, and an encumbrance for which there might, under the circumstances of this case, be compensation to the vendee for deficiency."

In the case at bar there is no defect in the title. Complainants' title is *perfect.* The only question is as to whether there is an encumbrance upon the property in the nature of a right of access under the reservation contained in the deed referred to. Counsel for appellants has throughout treated the matter as if it were one of defective title. It is not.

Vice-Chancellor Berry cited from Professor Pomeroy on Specific Performance, Sec. 204, p. 524, as follows:

> "Whatever be the cause from which the doubt arises, whether from an unsettled principle of the general law, or from the difficulty of construing instruments, or from past facts and events, it must be something more than a mere speculation, theory or possibility. A court of justice, in all its investigations, deals with arguments more or less based upon a balance of probabilities, and in

rendering its decisions must be satisfied if it reaches a conclusion which is morally certain. To admit of objections which were purely speculative, or mere possibilities, would destroy the practical efficacy of all judicial proceedings. A doubt covering the vendor's title, therefore, which can avail to defeat his remedy of specific performance, must be reasonable, and so far as it depends upon contingent events or uncertain facts, their occurrence or existence must be fairly probable."

In the note to this section he quotes Alderson, *B.*, in *Cottell* v. *Corrall,* 4 Y. & C. Ex. 237, as saying: "There must be a reasonable, decent probability of litigation."

Further quoting from cases there cited:

"But a threat, or *even the possibility* of a contest, will not be sufficient. The doubt must be considerable and rational, such as would or ought to induce a prudent man to pause and hesitate, and not based upon captious, frivolous and astute niceties, but such as to produce real bona fide hesitation in the mind of the Chancellor."

"As stated before, there is here no claim of defective title, but merely a claim of the existence of an additional encumbrance in the form of a lease. The possibility of successful litigation establishing this lease as claimed by the city, and, indeed, the probability of any litigation at all, is to my mind, so remote that any further consideration of the question is unnecessary."

In *Fort* v. *Field,* 2 N. J. Misc. 333, there was a question as to whether the property was encumbered by *restrictive covenants.* There was no doubt but that the covenants were in existence. It was claimed by the complainant in the specific performance case that the restrictions had become unenforceable because they had been

violated from time to time. Whether they had or not depended upon a question of fact, and Vice-Chancellor Fielder for five pages of the report considers the facts and comes to the conclusion *upon the facts* that the restrictions had been violated and that they were, therefore, unenforceable although still in existence, and he said (p. 337):

"I conclude that the admitted facts disclose an intent on the part of Vose and those claiming under him, for whose benefit the restrictive covenant in question was made, not to observe the spirit and intent of the covenant and to abandon it, and to generally acquiesce in its violation, and that it would be inequitable, under such conditions and because of the departure from the neighborhood scheme or plan as originally contemplated, to now enforce it, and that such covenant, insofar as it restricts the use of that part of the Durbrow lot which is described in the contract in this suit to the erection of a single dwelling house, is a nullity, and unenforceable." * * * "Defendant's contention that because of the covenant as applied to the number of dwelling houses to be erected upon the Jewett and Durbrow lots the title tendered to her is not marketable, is without force and she will be decreed to specifically perform her contract."

The admitted facts in the case at bar just as clearly shown an intent on the part of the persons for whose benefit the reservation of access was inserted in the deed to *abandon* their rights under that reservation as, in the case before Vice-Chancellor Fielder, the admitted facts showed that there had been an abandonment of the restrictive covenants. There is no more possibility of an assertion of the right under the reservation in the case at bar or of litigation with respect thereto than there was the possi-

bility of litigation with respect to the restrictive covenants in the case before Vice-Chancellor Fielder.

Again, if the language of the covenant is to be construed most favorably to appellants and in the manner they desire it to be construed, it must mean that the Court is to determine whether the reservation *now constitutes an encumbrance,* not whether there be doubt as to whether it is an encumbrance in fact, and this brings us back to what was stated under Point I of this brief, *i. e.,* that what the parties to the contract actually meant when they used the language— "it being understood, however, that same (the reservation) does not make the title to the premises hereinto conveyed unmarketable and is not considered an encumbrance against the premises," was to each express an opinion that they did not consider that the existence of the reservation made the title unmarketable, or constituted an encumbrance, and that it was not to be so construed, and if that is what the language means, as the Vice-Chancellor held it did, appellants are bound by their contract. But I repeat the question—what does this reservation mean?

Finally.

This case is in reality nothing but an action for the recovery of a deposit. Its solution depends solely upon legal, not equitable principles. The action should have been at law, but even if properly in equity, because of the right of appellants to follow the deposit into the land, it must be determined by legal and not equitable principles, and *Meyer* v. *Madreperia,* 68 N. J. L. 258, applies.

It is respectfully submitted that the decree should be affirmed.

Respectfully submitted,

MERRITT LANE,
Of Counsel—Respondent.