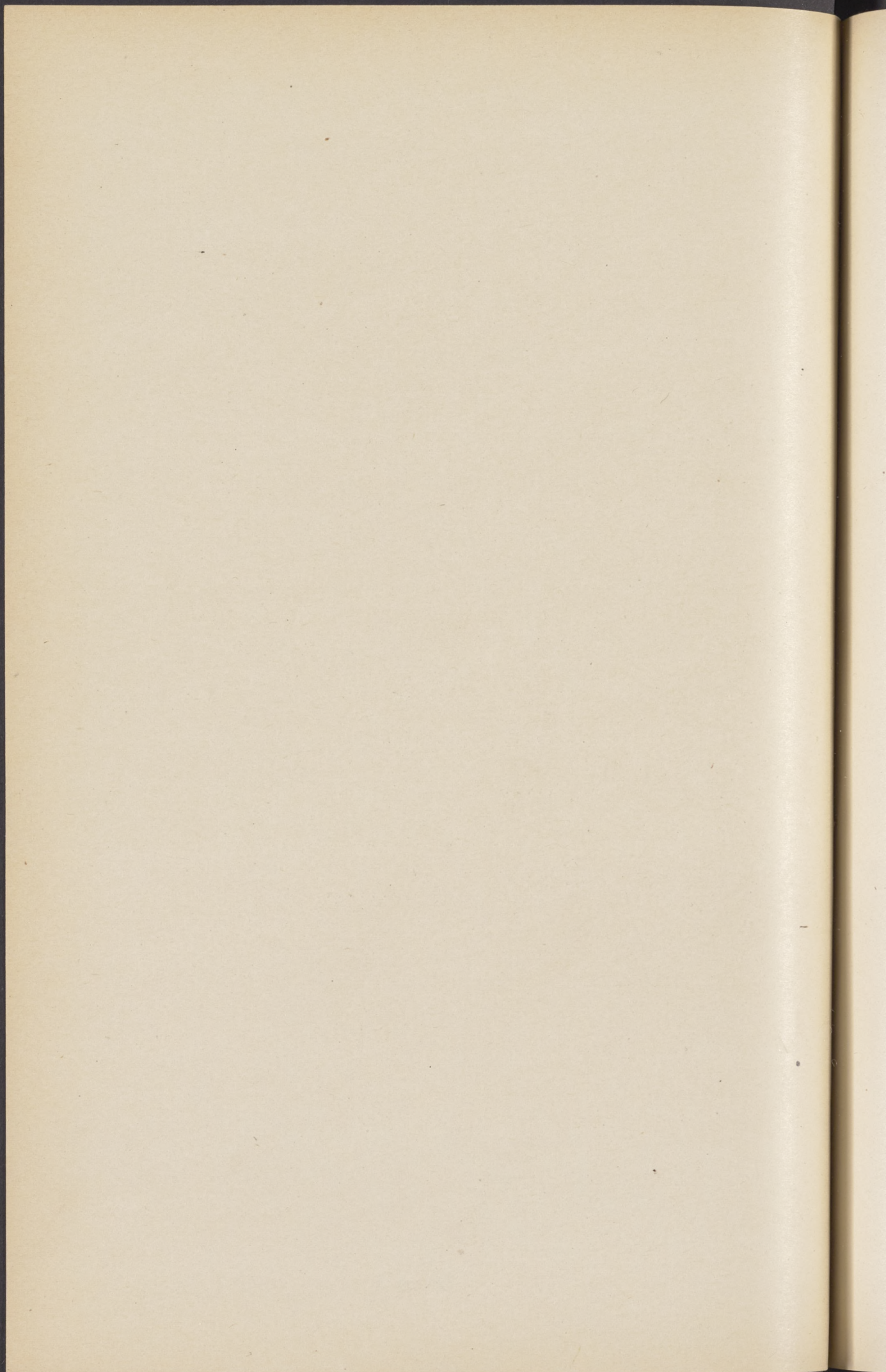


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**Bill of Complaint, Filed October 13,
1916.**

IN CHANCERY OF NEW JERSEY.

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TO THE HONORABLE EDWIN ROBERT
WALKER, CHANCELLOR OF THE STATE
OF NEW JERSEY:

The complainant, MANUEL DAVILA, of Bogota, in the Republic of Colombia, respectively shows:

1. That at all the times hereinafter mentioned, the United Fruit Company, the defendant herein, was and still is a body corporate, organized and existing under and by virtue of the laws of the State of New Jersey. 20

2. That on or about the 3rd day of November, 1911, a certain tract of land known as the Santissima Trinidad de Aracataca, situate in the Department of Magdalena in the Republic of Colombia and containing a total area, exclusive of and in addition to the lands of Santa Marta Fruit Company and the defendant of 25,580 hectares (meter system) and 5000 square meters was severally and respectively owned and controlled by the Santa Marta Fruit Company (a corporation), your complainant and several others, all of whom, excepting said corporation, made, executed and delivered good, valid and effectual powers of attorney unto your complainant, whereby said complainant was authorized to make, execute and deliver good and valid deeds for the conveyance of said lands. 30

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Bill of Complaint.

3. That the aforesaid lands are more particularly described as follows:

10 “On the North by the river Sevilla; on the East by the Valle Dupar Highway; on the South by the river Aracataca and on the West, by the swamps or inundated lands (Anegadizos) of the Cienaga Grande.”

20 4. That prior to the aforesaid date, complainant and his associates owned the Santisima Trinidad de Aracataca tract, and said complainant had entered into an arrangement with the United Fruit Company whereby a corporation was formed known as the Santa Marta Fruit Company and certain portions of the Santisima Trinidad de Aracataca tract were conveyed to said corporation, and in exchange for said lands, complainant and his associates received 2440 shares of the capital stock of the Santa Marta Fruit Company, so that, at the time aforesaid, to wit: on the 3rd day of November, 1911, the said United Fruit Company, which was then the possessor of 2560 shares of the capital stock of the Santa Marta Fruit Company, desired to procure all of the outstanding issue, consisting of the said 2440 shares of stock held by the complainant and his associates, whereby and through the acquisition of said shares, the said United Fruit Company would absolutely own and control so much of the lands of the Santasima Trinidad de Aracataca tract as was then owned by the Santa Marta Fruit Company, and for the purpose of acquiring title to all the other lands adjacent to and constituting and making the whole of said Santasima Trinidad de Aracataca tract, thereby obtaining exclusive control thereof, the said United Fruit Company, on or about the 3rd day of November, 1911, entered into

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Bill of Complaint.

an agreement with the complainant who possessed powers of attorney to sell and dispose of said lands on behalf of all the individual owners thereof, which agreement bears date as aforesaid, and wherein and whereby the complainant, for the considerations therein recited, sold and transferred to the United Fruit Company the said remaining interest in the stock in the Santa Marta Fruit Company as aforesaid and gave to the United Fruit Company an exclusive option upon such lands owned and controlled by the complainant and his associates as aforesaid; that a copy of said agreement is attached hereto, marked "Exhibit A" and made a part hereof. 10

5. That at a meeting of the Executive Committee of the United Fruit Company, duly called and held on the 7th day of November, 1911, the aforesaid agreement was in all respects duly ratified and approved by the said Committee. 20

6. That at the time of the execution of the said agreement, the United Fruit Company paid to the complainant the sum of \$25,000 as appears in said agreement, and thereafter, the said United Fruit Company paid the sum of \$225,000 as in said agreement provided, and complainant duly transferred and delivered to the United Fruit Company, the defendant herein, 2440 shares of the Santa Marta Fruit Company, all as provided by said agreement. 30

7. That thereafter and on or about the 24th day of October, 1912, the United Fruit Company, the defendant herein, by a notice in writing, addressed to the complainant, exercised and accepted the said option and the following is a true and accurate copy thereof in the Spanish language: 40

Bill of Complaint.

Santa Marta, 24 de Octubre 1912.

“MANDAVILA

BOGOTA

10 Ejerciendo opcion dada por Usted a Compa-
 nia en convenio de tres (3) noviembre and pa-
 sado, compania formalmente manifiestale com-
 pra tierras suyas sobrantes del globe Santisi-
 ma Trinidad comprendidas norte rio Sevilla,
 este camino Valle Dupar, sur rio Aracataca,
 oeste hasta anegdizos Cienaga Grande. De-
 signe apoderado hacer escritura. Afectisimo
 amigo MONTEJO.”

20 That a true and correct translation of said ac-
 ceptance is as follows:

“Santa Marta October 24th, 1912.

MANUEL DAVILA

BOGOTA

30 Exercising the option given by you to the
 Company in agreement of November 3rd of
 last year, Company formally notifies you that
 it purchases your remaining lands in the San-
 tisima Trinidad tract bounded on the North by
 the river Sevilla, on the East by the Valle
 Dupar highway, on the South by the river Ara-
 cataca, on the West to the swamp or inundated
 lands (anegadizos) of the Cienaga Grand.
 Appoint attorney to execute deed. Your af-
 fectionate friend MONTEJO.”

40 8. That the said subscriber, Manuel A. Montejo,
 agent of the said company (meaning and intend-
 ing by “the company” the United Fruit Company,

Bill of Complaint.

the defendant herein), was at the time duly authorized to accept the same; that a copy of his power of attorney, written in the Spanish language, conferred by the said United Fruit Company, is hereto attached, made part hereof and marked "Exhibit B." That an accurate translation thereof in English is hereto attached marked "Exhibit C" and made a part hereof. That the said power of attorney above referred to was registered and protocolized in the Registry office of the First Notarial Circuit in the Department of Magdalena in the City of Santa Marta in the Republic of Colombia, on the 3rd day of July, 1912, and was in full force and effect on the 24th day of October, 1912, and for a long time thereafter. 10

9. That subsequent to the acceptance of said option, the United Fruit Company consented to a transfer of a small tract of the Santisima Trinidad de Aracataca, embracing 45 hectares, to complainant's nephew, and with the exception of the 45 hectares transferred as aforesaid, the complainant individually and through his associates still is in a position to transfer and deliver title to all said lands aforesaid, except such as is owned and controlled by the Santa Marta Fruit Company, as aforesaid. 20 30

10. That on the date of the receipt of said acceptance of said option, complainant by telegraph and in writing, notified the United Fruit Company that he was ready and willing to execute a deed for the transfer of said lands in accordance with the terms of the said contract, and thereafter, complainant on numerous occasions requested the United Fruit Company to appoint a time and place for the performance of the said contract, but defendant has 40

Bill of Complaint.

failed and neglected to fix a time and place for the purpose of performing said contract, and has failed and neglected to negotiate for a time and place as requested.

10 11. That of the total area of 25,580 hectares and 5,000 square meters referred to in the option aforesaid, which was accepted by the defendant as aforesaid, 24,580 hectares and 5,000 square meters is uncultivated land and 1,500 hectares thereof is cultivated land. That the complainant has offered to submit the question of price to be paid for said cultivated land to arbitration, as in said agreement provided, but the defendant has refused to submit to arbitration and has wholly repudiated said agreement and wholly failed and refused to perform the same.

20

12. That the fair and reasonable value of said cultivated land is \$100 for each hectare thereof.

13. That between October 24th, 1912, and the date of the filing of this bill, complainant has been absent in Europe on various occasions for long intervals, but throughout the said period has been conducting negotiations with the defendant in the hope and expectation that defendant would ultimately in good faith carry out and perform the said agreement. And complainant confidently entertained this hope until on or about the 22nd day of April, 1916, at which time complainant personally appeared in the City of New York and conferred with the Vice-President of the defendant company, when the complainant offered to submit the controversy with the defendant to the Chamber of Commerce of the City of New York for arbitra-

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Bill of Complaint.

tion, to which suggestion the defendant refused to accede.

14. That your complainant is wholly without adequate relief at the common law for the grievances herein set forth and can only obtain adequate relief in this Honorable Court, where matters of this nature are cognizable and reviewable.

10

To the end, therefore, complainant prays :

(1) That the United Fruit Company, a body corporate of the State of New Jersey, which is the defendant to this suit, may answer this bill of complaint and each statement therein made;

(2) that the defendant may be directed and required to specifically perform the contract for the purchase of said land as embraced in the option and acceptance thereof, and directed and required to pay the consideration agreed;

20

(3) that the defendant may be directed and required to submit to arbitration on the question of the value of 1,500 hectares of cultivated land as referred to in said agreement, determining that part of the consideration to be paid for said land; or, in the alternative, ascertain the reasonable and fair value thereof by such proof and means as to your Honor shall seem equitable;

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(4) that the complainant may have such other and further relief in the premises as is agreeable to equity and good conscience;

(5) that a writ of subpoena may issue commanding the United Fruit Company, the defendant here-

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Exhibit "A," Attached to Bill of Complaint.

in, to answer this bill of complaint and to abide by such decree as the Court may make in the premises.

10 AUGUST C. STREITWOLF,
 Solicitor and Of Counsel
 for the Complainant,
 Office and Post Office Address,
 No. 40 Paterson Street,
 New Brunswick,
 New Jersey.

Exhibit "A."

20 AGREEMENT between the United Fruit Com-
 pany and Senor Manuel Davila P., whereby the
 said Davila agrees to sell and the United Fruit
 Company agrees to buy 2,440 shares of the Santa
 Marta Fruit Company at and for the price of
 \$250,000, payable as follows:

 \$25,000 at once.

 \$25,000 on February , 1912.

 \$100,000 in one year from date hereof, and

 \$100,000 in two years from date hereof, the de-
 ferred payments bearing interest at the rate of five
 per cent. per annum, payable semi-annually.

30 The said Davila agrees to deliver 1,790 shares at
 once and to deliver the remaining shares as soon as
 possible to the United Fruit Company or its repre-
 sentative and in any event within two months from
 date hereof.

 The said Davila further agrees to give the Unit-
 ed Fruit Company an option to purchase at any
 time within one year all the remaining lands in the
 Santisima Trinidad de Aracataca and La Concep-
 cion and other lands adjacent and owned or con-
 40 trolled by the said Davila.

Exhibit "A," Attached to Bill of Complaint.

The price to be paid for uncultivated lands shall be \$20 gold per hectare; the price to be paid for cultivated land shall be the fair value agreed by the parties or fixed by three arbitrators one chosen by each party and one by the two so chosen.

This agreement shall be binding as soon as approved by the executive committee of the United Fruit Company on or before the 8th of November, 1911. 10

3rd November, 1911.

UNITED FRUIT COMPANY,
By S. G. Schermerhorn.

M. DAVILA, P.

I, Charles A. Hubbard, Assistant Secretary of the United Fruit Company, hereby certify the following to be a true and correct copy of the records of a meeting of the Executive Committee of said company, duly called and held on the seventh day of November, 1911, to wit: 20

"The secretary presented an agreement between the United Fruit Company and Senor Manuel Davila P., dated 3rd November, 1911, signed on behalf of the United Fruit Company by S. G. Schermerhorn and by Mr. Davila in person whereof the following is a true copy: 30

"AGREEMENT between the United Fruit Company and Senor Manuel Davila P., whereby the said Davila agrees to sell and the United Fruit Company agrees to buy 2,440 shares of the Santa Marta Fruit Company at and for the price of \$250,000, payable as follows:

\$25,000 at once.

\$25,000 on February , 1912.

\$100,000 in one year from date hereof, and 40

Exhibit "A," Attached to Bill of Complaint.

\$100,000 in two years from date hereof, the deferred payments bearing interest at the rate of 5% per cent. per annum, payable semi-annually.

10 "The said Davila agrees to deliver 1,790 shares at once and to deliver the remaining shares as soon as possible to the United Fruit Company or its representative and in any event within two months from date hereof.

"The said Davila further agrees to give the United Fruit Company an option to purchase at any time within one year all the remaining lands in the Santisima Trinidad de Aracataca and La Concepcion and other lands adjacent and owned or controlled by the said Davila.

20 "The price to be paid for uncultivated lands shall be \$20 gold per hectare; the price to be paid for cultivated land shall be the fair value agreed by the parties or fixed by three arbitrators, one chosen by each party and one by the two so chosen.

"This agreement shall be binding as soon as approved by the executive committee of the United Fruit Company on or before the 8th November, 1911.

"3rd November, 1911.

30 (Signed) "UNITED FRUIT COMPANY,
"By S. C. Schermerhorn.
(Signed) "M. DAVILA P."

"Whereupon, after due consideration, upon motion duly made and seconded it was unanimously

"Voted that the said agreement be and the same is hereby approved by this committee and is adopted as the valid and binding agreement of the United Fruit Company.

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Exhibit "B," Attached to Bill of Complaint.

"Further voted that the treasurer be and he is hereby authorized and directed to pay Senor Davila \$25,000 at once and to pay \$25,000 on February 1st, 1912, and to make the remaining payments according to the terms of the said agreement, it being understood that the indebtedness of Senor Davila to this company falling due on February 1st, 1912, shall be retained out of the sum payable on that date, interest being adjusted.

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"Further voted that the proper officers be authorized and directed to deliver to Senor Davila a certified copy of these votes.

"In Witness Whereof I have hereto set my hand and the seal of the United Fruit Company at Boston, Massachusetts, this ninth day of November, 1911.

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(Signed) "CHARLES A. HUBBARD,
"Assistant Secretary of the
"United Fruit Company."
(Seal of United Fruit Co.)

Exhibit "B."

(Copy of original in Spanish language.)

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(Hoy dos estampillas)

En la Ciudad de Boston, Condado de Suffolk, Estado de Massachusetts, Estados Unidos de América, a las 11:00 a. m., a los once días de Junio de 1912, ante mí, Russell G. Partridge, Notario Público de este Estado, con residencia en esta Ciudad, Calle de State No. 53, y de los testigos que al final se expresarán, comparece: El Señor Andrew Woodbury Preston y Poland, natural de Boston, mayor

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Exhibit "B," Attached to Bill of Complaint.

de edad, casado, de profesión comerciante y veci-
no de esta Ciudad de Boston, el que comparece
como Presidente de la Compañía titulada "United
Fruit Company," sociedad anónima organizada y
existente de conformidad con las leyes del Estado
de New Jersey, Estados Unidos de América, y es-
tablecida en la Ciudad de Jersey City, en dicho
Estado, según aparece del certificado de incorpo-
ración de dicha Compañía, que me exhibe y de-
vuelvo, expedido por el Secretario de Estado del
Estado de New Jersey, referido, con fecha treinta
(30) de Marzo de 1899 de que certifico, así como
de que el mencionado Sr. Andrew Woodbury
Preston y Poland, a quien conozco personalmente,
tiene a mi juicio la capacidad legal necesaria para
el otorgamiento de esta escritura, justificando su
carácter de Presidente de la "United Fruit Com-
pany" con el libro de actas de dicha Compañía,
llevado en forma legal, que me exhibe y así mismo
devuelvo, en el que aparece haber sido elegido Pre-
sidente de la Compañía en la Sesión de su Junta
de Directores celebrada en 13 de Diciembre de 1911,
de lo que igualmente certifico, así como de que en
la actualidad continúa el Sr. Andrew Woodbury
Preston y Poland en el mencionado cargo. Y dice
el Sr. Andrew Woodbury Preston y Poland: Pri-
mero.—Que la Junta de Directores de la "United
Fruit Company" tomó en la sesión celebrada el día
11 de Junio de 1912 el siguiente acuerdo.—Que el
Presidente de la Compañía queda autorizado y con
todas las facultades necesarias para otorgar en
idioma español y de acuerdo con las leyes de la Re-
pública de Colombia un poder a favor del Sr. Ma-
nuel Augustin Montejo y Hébert, mayor de edad,
soltero, de profesión comerciante, residente hoy en
el pueblo de Santa Marta, en la República de Co-
lombia, a fin de que el Sr. Manuel Augustín Monte-

Exhibit "B," Attached to Bill of Complaint.

jo y Hébert, pueda en nombre de la Compañía comparecer ante todas las Autoridades y funcionarios de la República de Colombia, ya sean del Estado, las Provincias o los Municipios y ante todos los Jueces y tribunales de la misma, tanto en la Jurisdicción Civil, como en la Criminal y contencioso administrativo, en toda clase de juicios o procedimientos, como demandante o demandado y usando o apartándose de toda clase de recursos ordinarios o extraordinarios, incluso los de casación y quejas y todo otro que pueda corresponder, pudiendo comprometer en árbitros los asuntos, hacer transacciones, recusaciones, embargos, preventivos y definitivos, y ejercitar en general todos los derechos y acciones que en cualquier caso puedan corresponder a la Compañía en la República de Colombia; también para que pueda tomar posesión y administrar todas las propiedades y negocios de la Compañía en la República de Colombia, cobrando y recibiendo las cantidades que en la actualidad o en cualquier tiempo puedan deberse a la Compañía en dicha República; para que pueda pagar las contribuciones é impuestos que correspondan y comprar y vender efectos, mercancías y bienes muebles de todas clases; pudiendo alquilar o arrendar cualquiera clase de bienes muebles o inmuebles por el tiempo y condiciones que juzgue convenientes, para el uso de la Compañía ó a favor de otras personas o Compañías, los que pertenezcan a la "United Fruit Company," pudiendo comprar y aceptar traspasos de bienes inmuebles y derechos reales de todas clases, los que hará inscribir en los correspondientes registros de la propiedad, usando para esto los recursos legales correspondientes, pero sin que pueda vender ninguna clase de bienes inmuebles o derechos reales pertenecientes a la

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Exhibit "B," Attached to Bill of Complaint.

10 Compañía sin que ésta le otorgue poder especial para ello; depositando en el Banco o Bancos que tenga por conveniente el dinero perteneciente a la Compañía y extraerlo de dichos Bancos; para que haga los pagos de las obligaciones y deudas de la Compañía en Colombia; para que nombre y separe
20 los empleados y Jornaleros que estime necesarios, fijándoles su compensación y obligaciones; y en general, para que pueda otorgar a nombre de la Compañía toda clase de contratos por documentos públicos o privados, excepto tomar dinero a préstamo o emitir pagarés o documentos negociables a nombre de la Compañía sin autorización escrita del Presidente, Vice-Presidente o Tesorero de la misma o acuerdo de su Comité ejecutivo o de su Junta de Directores; pudiendo sustituir el poder en todo o
30 en parte y revocar sustitutos, debiendo antes de hacer esas sustituciones consultar con la Compañía a fin de que ésta le preste su conformidad en cada caso, pero sin que al hacer las escrituras de sustitución, tenga que justificar en manera alguna, esa consulta y conformidad de la Compañía; pues al efecto, la Compañía quedará obligada por los actos de los sustitutos, háyase o no cumplido por el Sr. Manuel Agustín Montejo y Hébert, con el requisito de la consulta y aprobación expresadas.
Entendiéndose, sin embargo, que el referido poder y cualesquiera sustituciones que en virtud del dicho poder se hagan, han de expirar y terminar pasados tres (3) años a contar desde la fecha del mencionado poder, a no ser que se hayan revocado antes.

40 Yo, el Notario, Certifico, en virtud del conocimiento que tengo de los idiomas inglés y castellano, que lo anterior es una traducción fiel de la parte correspondiente del acta de la sesión de la Junta de Directores referida, según aparece del

Exhibit "B," Attached to Bill of Complaint.

libro de actas de la Compañía, que está llevado en forma legal, en el idioma inglés. Sigue diciendo el Sr. Andrew Woodbury Preston y Poland: Segundo.—Que el anterior poder no le está suspendido, revocado o limitado; y en su consecuencia, como Presidente de la "United Fruit Company" y en cumplimiento del acuerdo citado de su Junta de Directores, otorga: Que dá poder amplio y bastante al Sr. Manuel Agustín Montejo y Hébert, para que en representación de la "United Fruit Company" y como Administrador General de sus bienes y negocios en la República de Colombia, comparezca ante todas las autoridades y funcionarios de la República de Colombia, ya sean del Estado, las Provincias o los Municipios, y ante todos los Jueces y Tribunales de la misma, tanto en la Jurisdicción Civil como en la Criminal y Contenciosa Administrativa, en toda clase de Juicios o procedimientos como demandante o demandado, y usando o apartándose de toda clase de recursos, ordinarios o extraordinarios, incluso los de Casación y quejas y todo otro que pueda corresponder, pudiendo comprometer en árbitros los asuntos, hacer trasaciones, recusaciones, embargos, preventivos y definitivos, y ejercitar en general todos los derechos y acciones que en cualquier caso puedan corresponder a la Compañía en la República de Colombia; también para que pueda tomar posesión y administrar todas las propiedades y negocios de la Compañía en la República de Colombia, cobrando y recibiendo las Cantidades que en la actualidad o en cualquier tiempo puedan deberse a la Compañía en dicha República; para que pueda pagar las contribuciones e impuestos que correspondan y comprar y vender por el precio y condiciones que estime convenientes, frutos, efectos, mercancías y

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Exhibit "B," Attached to Bill of Complaint.

bienes muebles de todas clases; pudiendo alquilar o arrendar cualquiera clase de bienes muebles o inmuebles por el tiempo y condiciones que juzgue convenientes para el uso de la Compañía, o a favor de otra persona o Compañía, los que pertenezcan a la "United Fruit Co.," pudiendo comprar y aceptar trasposos de bienes inmuebles y derechos reales de todas clases, los que hará inscribir en los correspondientes Registros de la Propiedad, usando para esto los recursos legales correspondientes, pero sin que pueda vender ninguna clase de bienes inmuebles o derechos reales pertenecientes a la Compañía sin que ésta le otorgue poder especial para ello; depositando en el Banco o Bancos que tenga por conveniente el dinero perteneciente a la Compañía y extraerlo de dichos Bancos; para que haga los pagos de las obligaciones y deudas de la Compañía en Colombia; para que nombre y separe los jornaleros que estime necesarios, fijándoles su compensación y obligaciones; y en general para que pueda otorgar a nombre de la Compañía toda clase de contratos por documentos públicos o privados, excepto tomar dinero a préstamo o emitir pagarés o documentos negociables a nombre de la Compañía sin autorización escrita del Presidente, Vice-Presidente o Tesorero de la misma o acuerdo de su Comité Ejecutivo o de su Junta de Directores; pudiendo sustituir este poder en todo o en parte, y revocar sustitutos, debiendo antes de hacer esas sustituciones consultar con la Compañía a fin de que esta le preste su conformidad en cada caso, pero sin que al hacer las escrituras de sustitución tenga que justificar en manera alguna esa consulta y conformidad de la Compañía, pues al efecto la Compañía quedará obligada por los actos de los sustitutos, háyase o no cumplido por el Sr. Manuel Agustín Montejo y Hébert con el requisito de la

Exhibit "C," Attached to Bill of Complaint.

Consulta y aprobación expresadas. Entendiéndose, sin embargo, que el referido poder y cualesquiera sustituciones que en virtud del dicho poder se hagan, han de expirar y terminar pasados tres años a contar desde la fecha del mencionado poder, a no ser que se hayan revocado antes.

Así lo dijo el Sr. Andrew Woodbury Preston y Poland ante los testigos Sr. John Woodman Damon y Watson y Sr. Harold Latham Bradley y Cole, mayores de edad, de profesión escribiente y comerciante respectivamente y vecinos de esta ciudad de Boston, sin impedimento legal para serlo; y de cuyo conocimiento, profesión y vecindad yo, el Notario, doy fé.— Y leído por mí, el Notario, el presente documento, por renunciar a hacerlo el otorgante y los testigos, manifiestan su conformidad y firman ante mí, que certifico de todo el contenido de esta escritura. firmado: Andrew Woodbury Preston y Poland,—Presidente, por "United Fruit Company."

Testigo.

Testigo.

Exhibit "C."

(Translation of Exhibit B.)

At the City of Boston, Suffolk County, State of Massachusetts, United States of America, at 11 A. M. on the 11th day of June, 1912, before me RUSSELL G. PARTRIDGE, Notary Public of the said State, residing in this City, Number 53 State Street and in the presence of the witnesses, whose names are hereunto subscribed, personally appears ANDREW WOODBURY PRESTON and POLAND, a native of Stockton, of full age, married merchant and a resident of this City of Boston,

Exhibit "C," Attached to Bill of Complaint.

10 who appears as President of the company known
as "UNITED FRUIT COMPANY", a stock cor-
poration, organized and existing under the laws of
the State of New Jersey, United States of America,
and domiciled at the City of Jersey City in said
State, as appears from the Certificate of Incorpor-
ation of the said company, which he exhibits to me
and which I return, issued by the Secretary of
State of the State of New Jersey aforesaid, under
date of March 30th, 1899, whereto I certify and I
further certify that the said Andrew Woodbury
Preston and Poland, Esq., is to me personally
known and in my opinion, has the necessary legal
capacity to execute this instrument, and he fur-
nishes evidence that he is president of the United
20 Fruit Company, by means of the minute book of
the said company, kept in due form of law, which
he exhibits to me and which I likewise return to
him, wherein and whereby it appears that he was
elected president of the company at a meeting of
its board of directors held on the 13th of December,
1911, whereto I likewise certify and also certify
that at the present time, the said Andrew Wood-
bury Preston and Poland continues in said office.

And Mr. Andrew Woodbury Preston and Poland
30 says:

1. That the board of Directors of the United
Fruit Company at the meeting held on the 11th day
of June, 1912 adopted the following resolution:

40 "That the President of the company is here-
by authorized and given all necessary powers
to execute in the Spanish language and in ac-
cordance with the laws of the Republic of Co-
lombia, a power of attorney to Manuel Agus-

Exhibit "C," Attached to Bill of Complaint.

tin Montejo and Hebert, Esq., of full age, bachelor, merchant, residing at the present time at the town of Santa Marta, in the Republic of Colombia, so that Mr. Manuel Agustin Montejo and Hebert may, in the name and on behalf of the company appear before all officers and authorities of the Republic of Colombia, either of the State, Provinces or Municipalities and before all Judges and Courts thereof, as well in civil as in criminal and contentious administrative matters, in every kind of suit or proceeding, either as plaintiff or as defendant and making use of or discontinuing every kind of ordinary or special appeal, including writs of error and complaints, and every other application for relief that may be proper, with power to agree upon arbitrators to arbitrate matters, and to enter into compromises, object to judges and other officials on the ground of disqualification, levy attachment and executions and in general, to exercise all the rights and rights of action, which in any event may belong to the Company in the Republic of Colombia; and the said attorney is further empowered to take possession and administer all the properties and business of the company in the Republic of Colombia, collecting and receiving the amount which at the present time or at any time hereafter may be owing to the company in said Republic; to pay taxes and imposts that may be proper and to buy and sell goods, merchandise and personal property of every kind; being empowered to rent or lease any kind whatsoever of real or personal property for the time and under the terms which he may deem proper, for the

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Exhibit "C," Attached to Bill of Complaint.

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use of the company or to rent or lease to other persons or companies the property of the United Fruit Company, and being empowered to purchase and to accept transfers of real property and real rights of every kind, which transfers he shall cause to be recorded in the proper real estate registries and making use therefor of the proper legal procedure; but he shall have no power to sell any real estate or real rights of any kind whatsoever, belonging to the company, unless the company shall execute a special power of attorney to him therefor; depositing in the bank or banks which he deems proper, the money belonging to the company and with power to withdraw the same from said banks; to make payment of the obligations and debts due by the company in Colombia; to appoint and discharge the employees and laborers which he deems necessary and to fix their compensation and duties; and in general, empowering him to execute on behalf of the company, every kind of contract by public or private instrument, except borrowing money or executing promissory notes or negotiable instruments in the name of the company, without written authorization from the president, vice-president or treasurer thereof or pursuant to resolution of its executive committee or its board of directors; with power to substitute this power of attorney in full or part and to revoke substitution; it being his duty prior to making such substitution to consult the company in order that it may consent thereto in each case, but at the time of executing the instrument of substitution, he shall not be required to

Exhibit "C," Attached to Bill of Complaint.

prove in any way whatsoever that he has so consulted and obtained the consent of the company, but the company shall be obligated by the acts of the substitute, whether or not the aforesaid requisite of consultation and approval has been complied with by Mr. Manuel Aguestin Montejo y Hebert. It being understood however, that the aforesaid power and any substitutions whatsoever that may be made by virtue thereof, shall expire and terminate after the lapse of three years from the date of the said power, unless it has been sooner revoked."

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I, the notary, in view of the knowledge which I possess of the English and Spanish languages, that the foregoing is a true translation of the respective part of the minutes of the meeting of the board of directors aforesaid, as the same appears from the minute book of the company, which is kept in due form of law in the English language.

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And Mr. Andrew Woodbury Preston and Poland further says:

2. That the foregoing power to him has not been suspended, revoked or limited; and consequently and as president of the United Fruit Company and in compliance with the said resolution of its board of directors, he executes this instrument, to wit;

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That he gives power of attorney, ample and sufficient to Mr. Manuel Aguestin Montejo y Hebert, so that he in the name and on behalf of the United Fruit Company and as general manager of its property and business in the Republic of Colombia, may appear before all officers and authorities of the Republic of Colombia, either of the State, Pro-

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Exhibit "C," Attached to Bill of Complaint.

10 vinces or Municipalities and before all Judges and
Courts thereof, as well in civil as in criminal and
contentious administrative matters, in every kind
of suit or proceeding, either as plaintiff or as de-
fendant and making use of or discontinuing every
kind of ordinary or special appeal including writs
of error and complaints, and every other applica-
tion for relief that may be proper, with power to
agree upon arbitrators to arbitrate matters, and
to enter into compromises, object to judges and
other officials on the ground of disqualification,
levy attachments and executions, and in general,
to exercise all the rights and rights of action, which
in any event may belong to the company in the
Republic of Colombia; and the said attorney is
20 further empowered to take possession and admin-
ister all the properties and business of the com-
pany in the Republic; to pay taxes and imposts
that may be proper and to buy and sell goods, mer-
chandise and personal property of every kind; be-
ing empowered to rent or lease any kind whatsoever
of real or personal property for the time and under
the terms which he may deem proper, for the use
of the company or to rent or lease to other persons
or companies the property of the United Fruit
30 Company, and being empowered to purchase and
to accept transfers of real property and real rights
of every kind, which transfers he shall cause to be
recorded in the proper real estate registries and
making use therefor of the proper legal procedure;
but he shall have no power to sell any real estate
or real rights of any kind whatsoever, belonging
to the company, unless the company shall execute
a special power of attorney to him therefor; de-
positing in the bank or banks which he deems
40 proper, the money belonging to the company and

Exhibit "C," Attached to Bill of Complaint.

with power to withdraw the same from said banks; to make payment of the obligations and debts due by the company in Colombia; to appoint and discharge the employees and laborers which he deems necessary and to fix their compensation and duties; and in general, empowering him to execute on behalf of the company, every kind of contract by public or private instrument, except borrowing money or executing promissory notes or negotiable instruments in the name of the company without written authorization from the president, vice-president or treasurer thereof or pursuant to resolution of its executive committee or its board of directors; with power to substitute this power of attorney in full or part and to revoke substitutions; it being his duty prior to making such substitution to consult the company in order that it may consent thereto in each case, but at the time of executing the instrument of substitution, he shall not be required to prove in any way whatsoever that he has so consulted and obtained the consent of the company, but the company shall be obligated by the acts of the substitute, whether or not the aforesaid requisite of consultation and approval has been complied with by Mr. Manuel Agustin Montejo Herbert. It being understood, however, that the aforesaid power and any substitutions whatsoever that may be made by virtue thereof, shall expire and terminate after the lapse of three years from the date of said power, unless it has been sooner revoked.

The foregoing was so stated by Mr. Andrew Woodbury Preston Y. Poland in the presence of the witnesses, John Woodman Garmon (?) and Watson Harold Latham Bradley and Cole, of full age, occupation, clerk and merchant respectively and

Exhibit "C," Attached to Bill of Complaint.

residents of this city of Boston, without any legal disqualification to act as witnesses and I, the Notary, certify that I am acquainted with them and their profession and residence.

10 And the present instrument having been read by me, the Notary, as the party executing the same and the witnesses waived so doing themselves, they declare their conformity therewith and sign before me, and I certify to the entire contents of this instrument.

(Signed) ANDREW WOODBURY
 PRESTON y POLAND,
 President for the United
 Fruit Company.

20 Witness:

J. W. Garmon,
 H. L. Bradley,

(Sgd.) Russell G. Partridge.
 The Notary.

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Notice of Motion to Dismiss Bill.

IN CHANCERY OF NEW JERSEY.

Between

MANUEL DAVILA,
Complainant,
and

UNITED FRUIT COMPANY,
Defendant.

On Bill, etc. 10

Sir:

TAKE NOTICE that on Tuesday, the twenty-first day of November, 1916, at ten o'clock in the forenoon, or as soon thereafter as we can be heard, we shall apply to the Chancellor, at the Chancery Chambers, in the City of Newark, for an order dismissing the bill of complaint on the following grounds: 20

1. The bill of complaint does not disclose a cause of action.

2. The bill fails to disclose any meeting of the minds of the parties upon the contract sought to be enforced. 30

3. There was no acceptance of the option conferred by the contract, Exhibit A.

4. The bill fails to set forth a contract upon which the Court will decree a specific performance.

5. The contract sought to be enforced is not such a one as the Court can take entire cognizance of, or compel performance of in all its details. 40

Notice of Motion to Dismiss Bill.

6. The contract sought to be enforced is indefinite and uncertain in (a) the subject matter to be conveyed, and in (b) the price to be paid.

10 7. The bill seeks to have the Court enforce an agreement to arbitrate or (in the alternative) to make a valuation.

8. The bill seeks to have the Court make a better contract for the parties than they have made for themselves.

9. The bill seeks to have the Court make a different contract for the parties than they have made for themselves.

20 Yours respectfully,

MCCARTER & ENGLISH,
Solicitors of Defendant.

To

AUGUST C. STREITWOLF, Esq.,
Solicitor of Complainant.

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Opinion.

(Rendered February 8, 1917.)

IN CHANCERY OF NEW JERSEY.

Between

MANUEL DAVILA,
Complainant,
and

UNITED FRUIT COMPANY,
Defendant.

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Submitted
January 15,
1917.

Mr. AUGUST C. STREITWOLF, and Mr. PHANOR J. EDER and Mr. DIX W. NOEL (of the New York Bar), for the complainant.

20

Mr. ROBERT H. MCCARTER, and Mr. LOUIS MARSHALL (of the New York Bar), for defendant.

FOSTER, V. C.:

This is a motion to dismiss the bill of complaint filed in this cause to compel the specific performance of a contract alleged to have been entered into by the defendant for the purchase of lands in the Republic of Colombia and in addition to have the defendant submit to arbitration the question of the value of some of the lands referred to in the contract, or in the alternative to have the Court ascertain, by such proof and means as shall seem equitable the reasonable and fair value of such lands. 30

The contract set out in the bill consists of two papers, one referred to as the option, dated Novem- 40

Opinion.

ber 3, 1911, and the other a telegram dated October 24, 1912, claimed to be an acceptance of the option, signed by one Montejo, the agent of the defendant.

The portion of the option involved in this action reads as follows:

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“The said Davila further agrees to give the United Fruit Company an option to purchase at any time within one year all the remaining lands in the Santisima Trinidad de Aracataca and La Concepcion and other lands adjacent and owned or controlled by the said Davila. the price to be paid for uncultivated lands shall be \$20 gold per hectare; the price to be paid for cultivated land shall be the fair value

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agreed by the parties or fixed by three arbitrators, one chosen by each party and one by the two so chosen.”

The telegram of acceptance as set out in the bill of complaint, reads as follows:

“October 24, 1912.

Santa Marta,
Manuel Davila.
Bogota.

30

Exercising the option given by you to the company in agreement of November 3rd of last year, Company formally notifies you that it purchases your remaining lands in the Santisima Trinidad tract bounded on the north by the river Sevilla, on the east by the Valle Dupar highway, on the south by the river Aracataca, on the west to the swamp or inundated lands (Anegadizos) of the Cienega Grande. Appoint attorney to execute deed. Your affectionate friend,

40

MONTEJO.”

Opinion.

The bill alleges that the total area of the lands agreed to be sold was 25,580 hectares and 5,000 square meters; that of this total area 24,580 hectares and 5,000 square meters is uncultivated land and 1500 hectares is cultivated land, or stated in terms with which we are more familiar, the entire tract contained approximately 64,000 acres, of which 3750 acres were cultivated. 10

The bill further alleges that complainant has at all times been ready, willing and able to execute a deed for the lands in accordance with the terms of the contract; and that he has repeatedly requested defendant to appoint a time and place for the performance of the contract and that this defendant has failed and neglected to do.

A number of reasons have been assigned in support of the motion to dismiss, but in view of the conclusion which I have reached, it will not be necessary to refer to more than one of them, viz: 20

The bill cannot be maintained because it seeks a decree for the enforcement of an agreement to arbitrate, or in the alternative to fix the price which the defendant is to pay for the lands claimed to be covered by the alleged contract.

This objection states substantially what was held by the Chief Justice in delivering the opinion of the Court in the case of the *City of Providence vs. St. John's Lodge*, 2 Rh. Island 46, and quoted with approval by Chancellor Green in our leading case of *McKibbin vs. Brown*, 14 Eq., 13; affirmed 15 Eq., 498, when he said: 30

“It is undoubtedly true that a court of equity will not enforce a contract of sale where the price is to be fixed by the parties, or by arbitrators to be chosen by the parties, and for the plain reason, that the contract sought to be 40

10 enforced is incomplete in an essential particular, and the court have no power to substitute themselves or a master to fix the price in the place of the parties or of arbitrators to be chosen by the parties. This would be not to enforce an existing contract of the parties, but to make one for them."

20 By the terms of the option before us, the price to be paid for the cultivated land is "the fair value agreed upon by the parties or fixed by three arbitrators, one chosen by each party and one by the two so chosen." And it appears that the contract is in this respect, at least, incomplete, and uncertain, because the price to be paid for the cultivated land was still a matter for negotiations, at the time the telegram of acceptance of the option was received by the complainant.

In the course of his opinion in *McKibbin vs. Brown*, supra, Chancellor Green stated the doctrine which has been uniformly followed in the cases in our State, when he said:

30 "No specific performance of a contract can be decreed in equity unless the contract be actually concluded and be certain in all its parts. If the matter still rest in treaty, or if the agreement in any material particular be uncertain or undefined, equity will not interfere. *Fry on Spec. Per.*, Sec. 164, 203.

"I lay it down as a general proposition," said Lord Rosslyn, "to which I know no limitation, that all agreements, in order to be executed in this court, must be certain and defined." *Lord Walpole vs. Lord Oxford*, 3 Ves., 420.

40 "The same doctrine is uniformly recognized in all the cases, English and American."

Opinion.

In the later case of *Woodruff vs. Woodruff*, 44 Eq., 349, where the contract provided that complainant might purchase back his interest in the farm at a valuation to be made by two disinterested parties, one to be selected by the complainant and the other by the representative of Patrick Woodruff, and Patrick's representative refused to name a valuer, Chancellor McGill quoted with approval from Fry on Spec. Perf., Sec. 163, that:

10

“If the contract be between A and B to sell and buy at such a price as valuers, to be named by them, shall fix, it seems that either A or B may refuse to name a valuer, and the contract will remain incapable of completion, without any liability on the part of the refusing party.”

20

In the case of *Domestic Telegraph Co. vs. Metropolitan Telephone Co.*, 39 Eq., 160, the contract sought to be enforced provided that on the expiration of the first license, and in a certain contingency, the complainant should have the first right of acquiring a license, and the relief sought was to compel the defendant to specifically perform this contract by granting to complainant a new license “upon such terms as may be determined by the court,” Vice Chancellor Van Fleet, citing *McKibbin vs. Brown*, supra, *Potts vs. Whitehead*, 20 Eq., 55, and *Waterman on S. P.*, Sec. 141, 152, held, that courts of equity may compel the specific performance of a contract which the parties have agreed upon and which is sufficiently certain and definite in its terms to enable the court to see what they meant, but that it was entirely beyond the power of any judicial tribunal to make a contract for litigants, or compel them to make a contract with each other.

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10 Until the contract has been concluded between the parties and its terms definitely ascertained, and while negotiations are pending over matters relating to the contract, and which the parties regard as material to it, although as to some matters they may be agreed, specific performance will not be decreed. *Brown vs. Brown*, 6 Stew., 650.

In affirming the opinion of V. C. Van Fleet on appeal, 40 Eq., 287, no opinion of the majority of the court is reported, but Mr. Justice Magle in his dissenting opinion, at page 303, said :

20 "Where contracts have left terms to be fixed by arbitration, and one of the contracting parties has refused to enter into the arbitration according to the contract, courts of equity have declined to compel the refusing party to enter into the arbitration he has contracted for. This refusal, I apprehend, is grounded on the general rule that courts of equity will not specifically enforce an agreement to submit any matter of difference between parties to such a tribunal."

30 In the early case of *Copper vs. Wills*, Saxton, page 10, Chancellor Vroom said :

"The principle is well settled that the court has no power to compel a party to appoint an arbitrator and of course that a specific performance cannot be decreed."

And to the same effect is *Van Doren vs. Robinson, et al.*, 16 Eq., 256.

40 Counsel for complainant while recognizing generally the rule followed in the foregoing cases, contends, however, that the stipulation in this con-

Opinion.

tract to the effect, that the price to be paid for the cultivated land is to be fixed by the parties or by arbitrators named by them is but a subsidiary and unimportant, and not an essential or material part of the contract, and therefore brings the case within the exception to the rule, explained in *Fry on Spec. Per.* 5" Ed. p. 179, Sec. 364, viz: "That equity exercises jurisdiction in such cases on the view that such contracts are substantially for the sale of the property at a fair price, the mode of ascertainment, though indicated by the contract, being subsidiary and non-essential, so that if the mode of ascertainment has failed the court will have recourse to some other means of coming at the fair price and of thus carrying into effect the contract in its essential parts."

The argument advanced to bring this case within the exception is that, the cultivated lands on which the price is to be fixed represent only six per cent. of the total area to be conveyed; that these lands being under cultivation, bearing growing crops, which must fluctuate in value from season to season, it is therefore obvious, that neither the parties nor arbitrators could determine the fair value of this improved parcel until defendant had exercised its option to purchase and fixed a time at which title should pass.

The difficulty with the proposition thus advanced is that it, in effect, claims that the contract is not to be regarded as an entirety, and that the part relating to the cultivated lands may be severed from the rest of it. I am unable to adopt this view and I am also unable to reach the conclusion that the provision of the contract relating to the mode of ascertaining the value of the cultivated lands is a non-essential and not a material part of the contract. While

Opinion.

10 it is true such lands represent only six per cent. of the tract to be purchased, they amount, however, to 1500 hectares according to the bill, and in the bill it is alleged that this cultivated land is worth \$100 per hectare, which at complainant's own valuation would make these lands worth \$150,000—an amount which I am unable to say is unimportant or insignificant. At the valuation fixed by complainant for the cultivated and uncultivated lands the total cost of the property would be something over \$600,000, and I am not convinced that one-quarter of this sum is so immaterial and unimportant that the court should ignore the mode agreed upon by the parties for its ascertainment, and should compel the defendant to pay the whole or such part thereof as the court should determine was fair and reasonable. This would not be enforcing the contract of the parties; it would be making a contract for them.

20 The law controlling the situation before me is too well settled to leave room for any doubt.

30 I consider the value of the cultivated lands to be a very material part of this agreement, and I also regard the method of ascertaining this value, which the parties have agreed upon, as an essential part of the contract; apparently by this contest the parties themselves so regard it, and as neither fraud or part performance has to be considered, there is nothing in the case to justify me in taking it out of the general rule denying specific performance of an incomplete contract.

A decree will be advised that the bill be dismissed.

Final Decree.

IN CHANCERY OF NEW JERSEY.

Between

MANUEL DAVILA,
Complainant,
and

UNITED FRUIT COMPANY,
Defendant.

On Bill, etc. 10
Decree Dismiss-
ing Bill.

The defendant having moved to dismiss the bill of complaint for want of equity, and due notice thereof having been given, and counsel having been heard in support of and in opposition to the said motion, and the Court being of opinion that the said motion should prevail: 20

It is ORDERED on this 13th day of March, 1917, on motion of McCarter & English, Solicitors of defendant, that the bill of complaint be and it is hereby dismissed with costs.

Respectfully advised.

EDWIN R. WALKER,
Chancellor. 30

T. E. FOSTER,
V. C.

**Notice of Appeal (Filed September 9,
1917).**

IN CHANCERY OF NEW JERSEY.

10	Between MANUAL DAVILA, Complainant, and UNITED FRUIT COMPANY, Defendant.	}	On Bill, etc.
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Sir:

20 TAKE NOTICE that Manual Davila, the above named complainant, hereby appeals from the final decree entered in this cause and bearing date the 13th day of March, 1917, dismissing the complainant's bill herein, and from each and every part thereof, to the Court of Errors and Appeals, in the last resort in all cases.

Dated, September 7th, 1917.

30 AUGUST C. STREITWOLF,
Solicitor for and of Counsel
for the Complainant.

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

AUGUST C. STREITWOLF,
Of Counsel.

40

**Petition on Appeal (Filed September
28, 1917).**

NEW JERSEY COURT OF RECORDS AND
APPEALS.

Between

MANUEL DAVILA,
Appellant,

and

UNITED FRUIT COMPANY,
Appellee.

By Complain-
ant from
Decree of
Dismissal from
Chancery.

10

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

20

The petition of Manual Davila, the appellant in the above stated cause, respectfully shows that your petitioner finds himself aggrieved by a final decree made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, wherein the said Manual Davila was complainant, and the United Fruit Company, defendant, upon the decision of a motion to dismiss the bill of complaint brought by the defendant upon the several grounds recited in a notice of motion bearing date the 21st day of November, 1916, upon the ground that the said motion and the decree entered thereon was erroneously granted, for that the said Chancellor should have dismissed the said motion and directed the defendant to answer.

30

Your petitioner humbly appeals from the decree and assigns error in the decision of said Court of Chancery as follows:

40

Petition on Appeal.

FIRST.—Said Court erred in sustaining the motion of the defendant to dismiss the bill of complaint.

10 SECOND.—Said Court erred in construing the contract set forth in the bill as merely an agreement to arbitrate, or in the alternative to fix the price which the defendant is to pay.

20 THIRD.—Said Court erred in holding as stated in the opinion of the learned Vice-Chancellor, that the contract sought to be enforced was incomplete and uncertain “because the price to be paid for the cultivated land was still a matter for negotiations, at the time the telegram of acceptance was received by the complainant.”

FOURTH.—Said Court erred in holding that the complainant’s right to equitable relief rests upon the contention that the contract in suit is severable, with respect to the cultivated as distinguished from the uncultivated lands.

30 FIFTH.—The Court erred in holding that the alternatives for determining the fair value of the cultivated lands were of the essence of the entire contract, so that the refusal of either parts would render the contract unenforcible.

SIXTH.—The said Court erred in ignoring the actual fair value of the cultivated land, as shown by the undisputed allegations of the bill and in holding that the parties or either of them regarded the method of ascertaining the fair value of this portion of the entire tract as essential.

40 SEVENTH.—The said Court erred in failing to hold that the alternative provisions for determin-

Petition on Appeal.

ing the fair value of the cultivated lands constituted a subordinate and subsidiary stipulation with respect to the contract as a whole and that even with regard to the cultivated land the agreement disclosed is in substance a purchase at their face value.

Your petitioner therefore prays that the said decree may be reversed, set aside and for nothing holden. And that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet. 10

AUGUST C. STREITWOLF,
Solicitor and of Counsel for the Appellant,
Office & P. O. Address,
40 Paterson Street,
New Brunswick, 20
New Jersey.

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Answer to Petition on Appeal.NEW JERSEY COURT OF ERRORS AND
APPEAL.

10

MANUEL DAVILLA,
Complainant-Appellant,

and

UNITED FRUIT COMPANY,
Defendant-Respondent.On Bill, etc.
On Appeal
from Chan-
cery.

The answer of the above named respondent, to the petition of appeal of the above named appellant.

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The respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto nevertheless says, that it admits that a decree was on the 13th day of March, 1917, made and entered in the Court of Chancery in a cause for that purpose mentioned in the said petition as is therein stated, but as to the form and substance thereof this respondent prays to refer thereto when the same is produced. This respondent is advised and believes that the said decree is agreeable to equity and prays

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that the same may be affirmed, with costs to this respondent.

McCARTER & ENGLISH,
Solicitors for and of Counsel with Respondent.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

MANUEL DAVILA,
Complainant-Appellant,

and

UNITED FRUIT COMPANY,
Defendant-Respondent.

On Appeal 10
from Final
Decree of
the Chan-
cellor.

APPELLANT'S POINTS.

20

Statement.

This is an appeal from a final decree entered upon defendant's motion (pp. 25 and 26), dismissing the bill of complaint.

The bill seeks specific performance of a contract for the purchase, by defendant, of a tract of land situated in the Republic of Colombia.

As shown by the bill (p. 1, fol. 20), the land involved is a portion of a larger tract known as the Santisima Trinidad de Aracataca, situate in the Department of Magdalena. Prior to the making of the contract in suit, certain portions of this larger tract, by an arrangement with defendant, had been conveyed by the complainant and his associates to the Santa Marta Fruit Company, a corporation, complainant and his associates receiving therefor 2,440 shares of the capital stock of said corporation. The remaining shares of this corporation—2,560 shares—were held by defendant (p. 2, fols. 10-30).

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40

For the purpose of acquiring the ownership and control of the entire Santisima Trinidad de Aracataca tract the defendant, on the 3d day of November, 1911, entered into a written agreement with the complainant (p. 2, fols. 20-40, p. 3, fol. 10).

The text of this agreement is set forth in full as Exhibit "A" attached to the bill of com-
10 plaint (p. 8 *et seq.*).

By this agreement, for certain cash payments extending over a period of two years and aggregating \$250,000 the complainant sold to the defendant the 2,440 shares of the Santa Marta Fruit Company previously received by complainant and his associates, agreeing to deliver 1,790 shares at once, and the remaining shares, in any event, within two months from the date
20 of the agreement. The complainant further agreed to give to the defendant

"an option to purchase at any time within one year all the remaining lands in the Santisima de Aracataca and La Concepcion and other lands adjacent owned and controlled by the said Davila."

The agreement then proceeds:

30 "The price to be paid for uncultivated lands shall be \$20 gold per hectare; the price to be paid for cultivated land shall be the fair value agreed by the parties or fixed by three arbitrators one chosen by each party and one by the two so chosen."

As shown by the allegations of the bill (p. 1, fols. 20-40, p. 2, fol. 10 (paragraph 3 of complaint), and p. 3, fol. 10), the tract designated
40 by the agreement consisted of and comprised all

the land known as the Santisima Trinidad de Aracataca tract except and excluding that portion theretofore acquired by the Santa Marta Fruit Company and the defendant; and the tract is bounded as follows: ,

“On the North by the river Sevilla; on the East by the Valle Dupar Highway; on the South by the river Aracataca and on the West by the swamps or inundated lands (Anegadizos) of the Cien Grande” (paragraph 3 of bill) 10

The total area involved is 25,580 hectares and 5,000 square meters (p. 1, fol. 30) (approximately 100 square miles), of which 24,080 hectares and 5,000 square meters (or 94 square miles) are uncultivated land and 1,500 hectares (or six square miles) are cultivated land (p. 6, par. 11 of the bill) 20

Shortly before the expiration of its option, to-wit, on the 24th day of October, 1912, by a notice in writing addressed to the complainant the defendant exercised and accepted the said option. (P. 3, par. 7 of the complaint.)

A correct translation of this notice is as follows (p. 4):

“Santa Marta. October 24th, 1912, 30

MANUEL DAVILA,

BOGOTA,

Exercising the option given by you to the Company in agreement of November 3rd of last year, Company formally notifies you that it purchases your remaining lands in the Santisima Trinidad tract bounded on the North by the river Sevilla, on the East by the Valle Dupar Highway, on the South 40

by the river Aracataca, on the West to the swamp or inundated lands (anegadizos) of the Cienaga Grand. Appoint attorney to execute deed. Your affectionate friend,

MONTEJO."

10 Subsequent to its acceptance of the option the defendant consented to the transfer of a small portion of the tract (45 hectares) to complainant's nephew. (P. 5, fol. 20.) The bill of complaint avers that except for this 45 hectares the complainant is in a position to transfer and deliver title to all of the lands involved in the controversy. (Par. 9, of Complaint.)

20 On the date of the receipt of defendant's notice of acceptance the complainant notified the defendant in writing that he was ready and willing to execute a deed for the transfer of the lands in accordance with the terms of the contract. He has repeatedly requested the defendant to appoint a time and place for performance (par. 10 of bill), and has offered to submit to arbitrators, as provided in the agreement, the determination of the fair value of the cultivated area. It appears that the defendant has refused to submit to arbitration and has wholly repudiated the agreement and refused to perform the same (p. 6, bill of complaint, par. 11).

30 It does not appear that defendant's refusal to perform is founded upon any disagreement between the parties as to the actual value of the lands under cultivation. It appears, without controversy, from the face of the bill that the fair and reasonable value of said cultivated land is \$100.00 for each hectare thereof (p. 6, par. 12).

40 In dismissing the bill the court below held

that in view of the large proportion of the total price represented by the fair value of the cultivated lands, the mode of ascertaining the fair value of this portion of the tract in the option agreement of November 3, 1911, could not be regarded as subsidiary or non-essential, and that the bill therefore failed to disclose a completed contract.

In the view of complainant's counsel, the principles of equity jurisprudence controlling the case are admirably stated in the opinion of the Learned Vice-Chancellor. The application of these principles to undisputed facts and the correctness of the court's ruling in the interpretation of the written instruments upon which, in the main, the bill of complaint is founded, are, in substance, the only questions sought to be reviewed upon this appeal.

20

POINT I.

The mode of determining the fair value of the cultivated lands as indicated in the agreement of November 3rd, 1911, is a subsidiary provision and not of the essence of the contract.

If the words "agreed by the parties or fixed by three arbitrators one chosen by each party and one by the two so chosen" were of the essence in the option which the agreement of November 3, 1911, purports to give to defendant, plainly they would constitute a condition precedent to the existence of any obligation whatsoever on the part of the complainant.

If the phrase were so construed, Davila, the complainant, could have defeated the entire purpose and intention of the agreement, on the

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part of the defendant in entering into this contract and in purchasing Davila's stock in the Santa Marta Fruit Company, which purpose, as shown by the bill of complaint (p. 2, fols. 20-40), was to acquire exclusive ownership and control of the entire Santisima Trinidad de Aracataca tract. By the simple expedient of declining to agree with the defendant, upon any sum
 10 whatsoever as the fair value of the improved lands or to name an appraiser, he could have made the option feature of the agreement wholly abortive. In other words, if the phrase be so construed, the agreement when it said "The said Davila further agrees to give the United Fruit Company an option to purchase at any time within one year all the remaining lands," etc., did not in fact convey any option at all, the alleged agreement, in this respect being
 20 *nudum pactum*.

Williams—Vendor and Purchaser, Second ed. (1911), p. 1094.

"And note that the defense mentioned by Sir E. Fry of the incompleteness of the contract really amounts to a denial either of the formation or the enforceability of the contract: Fry, Sp. Perf. SS. 337 Sq. 3rd ed.
 30 It is true that under this head (SS. 355 sq.) the learned author discusses the case of a contract to sell at a price to be fixed by some valuer, or two valuers or their umpire; when as a rule the contract, is not enforceable unless the price has first been so fixed;—But in this case the *contract* to sell is made subject to the condition precedent that the price shall be so fixed, and the *condition* is such that from its very nature the
 40 court cannot enforce its specific perform-

ance. It should be noted that if the court considers that the stipulation as to the manner of ascertaining the price is not essential and that the real agreement is to sell at the fair value, it will direct a reference to ascertain the price."

Citing:

Milnes v. Gery, 14 Ves., 400, 407. 10

Gregory v. Mighell, 18 Ves., 328, 333.

Gourlay v. Somerset, 19 Ves., 429, 431.

Is it reasonable to suppose that the parties or either of them, by the phrase indicating the method of ascertaining the fair value of the cultivated lands intended to establish a condition precedent to their mutual liability? If such had been their intent, would they not have been more explicit? It would have been easy to add "provided the parties or the arbitrators to be named shall agree as to the fair value of the improved lands." Yet the main clause of the option agreement—the clause in which Davila agrees to give the option—is on its face absolute and unconditional. 20

It is a familiar rule of interpretation that where a doubt exists and one mode of construction renders a contract valid and the other invalid, the former should be adopted. 30

Cardinal Rules of Legal Interpretation,
E. Beal, 2nd ed., 1908, pp. 133, 134,
and cases collected.

The learned Vice-Chancellor, in the concluding paragraph of his opinion says: (p. 34, fol. 20):

"I consider the value of the cultivated lands to be a very material part of this agree- 40

ment, and I also regard the method of ascertaining this value, which the parties have agreed upon, as an essential part of the contract; apparently by this contest the parties themselves so regard it, and as neither fraud nor part performance has to be considered, there is nothing in the case to justify me in taking it out of the general rule denying specific performance of an incomplete contract."

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As already noted, it nowhere appears that this contest arises from any real failure of the parties to agree as to what is actually the fair value of the cultivated land. Moreover, if the acts of the parties are to be considered, other than the language they used in the written instruments, in the light of their general purpose and the surrounding circumstances as shown by the complaint, the attention of the court may well be directed to contemporaneous acts:

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(1) For instance it would seem pertinent that the defendant, having entered into the agreement of November 3, 1911, as alleged in the bill, for the purpose of acquiring the entire Santisima Trinidad de Aracataca tract, agrees to pay to the complainant for the outstanding stock of a Santa Marta Fruit Company which holds only a portion of the tract, the substantial sum in cash of \$250,000. If its purpose as stated, was to acquire the entire tract, would it have paid out this large sum upon the faith of a mere conditional option which was subject entirely to the whim or caprice of the complainant?

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(2) After the defendant had exercised its option, the defendant consented to the transfer of a small portion of the tract to complainant's

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nephew (bill of complaint, par. 9). This allegation certainly indicates that the defendant at some time prior to the filing of the bill of complaint construed its acceptance of the option as a completed contract and not merely a step in the negotiation of a contract.

(3) The language used by the defendant in its notice of acceptance also indicates that it construed complainant's offer to convey as absolute and not conditional upon the result of further negotiations or the appointment of appraisers. The notice reads "Exercising the option given by you, the company formally notifies you that it purchases your remaining lands * * * Appoint attorney to execute deed." 10

The defendant, at this critical time, just eleven days before the expiration of its option, does not invite further negotiations. In no uncertain terms it calls upon the complainant to convey and the complainant on the self same day notified the defendant that he was ready and willing to execute the deed (p. 5, par. 10). 20

In the light of these contemporaneous acts it is respectfully submitted that the defendant should not now be heard to say that the option given to it in the agreement of November 3, 1911, was not an unconditional offer, nor should it be heard to say that when it wrote its notice of acceptance the parties still were merely negotiating. 30

The words "agreed by the parties or fixed by three arbitrators one chosen by each party and one by the two so chosen" must therefore be construed as a subsidiary and subordinate provision, in the agreement of November 3rd, 1911, the agreement being in the main the purchase and sale of the stock of the Santa Marta Fruit Company for \$250,000, coupled with an option for the 40

purchase of the remaining lands of the Santisima tract for a price substantially agreed upon. So construed the terms of the option, in connection with defendant's acceptance, constitute a completed contract, enforceable in equity.

Castle Creek Water Co. v. City of Aspen,
146 Fed. 8 pp. 11, 12.

10 *Van Doren v. Robinson*, 16 N. J. Eq. 256;
Pomeroy on Specific Performance of
20 *contracts*, 2nd ed. (1897) at p. 213,
Section 151.

POINT II.

The contract is not incomplete or uncertain as to the price to be paid; the contract being in substance, as to the cultivated lands, a sale of these lands at their fair value.

The price of the uncultivated lands is stated to be \$20 per hectare. These lands comprise in area, about 94% of the lands covered in the option agreement, the cultivated lands, according to the allegations of the bill constituting but 6%.

30 If the case at bar falls within that class of cases in which a mode of ascertaining value, though indicated in the agreement, is not of the essence, the agreed price of the cultivated lands is manifestly their fair value.

40 It is true that if the fair value, as fixed by the court, is \$100 per hectare, as alleged in the bill, this value will constitute a very substantial sum. The fact that the fair value may be great, however, should not require nor does it warrant the inference that the parties, in their contract of November 3rd, 1911, intended the adoption of one or another of the indicated modes of as-

certaining the value to be a condition precedent to the existence of any obligation under the option feature of the contract.

In this connection, it should be recalled that the defendant entered into the agreement for the purpose of eventually acquiring the entire Santisima tract; that in furtherance of this purpose and on the faith of this option it was paying \$250,000 to complainant in order to acquire control of that part of the tract owned by the Santa Marta Company; that the specified price of the uncultivated lands covered by the option, liquidated at \$20 per hectare, represented a further proposed investment of \$480,000. If we assume therefore that \$250,000 represents the total cost to the defendant of acquiring control of the lands owned by the Santa Marta Fruit Company, the entire transaction contemplated in the agreement will, if consummated, represent a total investment of \$880,000. Of this sum, the part represented by the cultivated lands embraced in the option constitutes but \$150,000.

It should be noted also that as to the uncultivated lands, the price is fixed by the contract at a liquidated sum, per hectare. It is only as to the improved lands that the fair value must be determined. Apparently, therefore, the case resembles a familiar line of cases where the arbitration feature relates only to improvements and is held not to constitute a bar to specific performance.

“It is a settled rule, that where a contract provides for the sale of an estate, or dwelling house, or a manufactory, at a specific price, and also for the sale of the timber in the one case or furniture in the second, and the fixtures or machinery in the other, at

prices to be fixed by arbitration, if the arbitration fails for any reason, the contract will still be enforced—the price of the timber, furniture, or machinery being ascertained in some convenient manner.”

Pomeroy on Specific Performance of Contracts, 2nd. ed. 1897 at page 214.

10 The same rule is stated in *Fry on Specific Performance*, 5th ed., pages 179, 180.

In *Jackson v. Jackson*, 1 Sm. & G. 184 therein cited, there was a contract to sell land and bleach works at a sum fixed and the plant and machinery to be taken at a value to be ascertained by valuers to be appointed by the parties. It was there held that the provision for a valuation of the improvements was a subsidiary stipulation only and specific performance was decreed. Similarly, in

20 *Richardson v. Smith*, L. R. 5 Ch. 649, there was a contract for the sale of an estate with a provision for the valuation of certain furniture and articles and in

30 *Dinham v. Bradford*, L. R. 5 Ch. 519, where a partnership contract contained a provision for a valuation at its expiration, the Court ascertained the value.

The ground upon which equity exercises jurisdiction in such cases is explained in Fry's *Specific Performance*, 5th edition, at page 179, section 364, as resting on the view that the contracts are substantially for the sale of the property in question at a fair price, the mode of ascertainment, though indicated by the contract, being subsidiary and nonessential, so that if the

40 mode of ascertainment has failed, the Court will have recourse to some other means of coming at

the fair price and of thus carrying into effect the contract in its essential parts.

In the case at bar, as the relatively small parcel of which it is necessary to determine the fair value consists of lands under cultivation, presumably bearing growing crops which must fluctuate in value from season to season, it would seem obvious that neither the parties nor arbitrators could determine the fair value of this improved parcel, until the defendant had exercised its option to purchase the entire tract and thereby determined the time at which the title should pass. 10

In the leading English case of

Milnes v. Gery, 14 Ves., 400,

the contract provided for the appointment by the parties of two appraisers, who in case of failure to reach an agreement were to choose a third person, whose determination should be final. The two appraisers named by the parties not only disagreed as to the valuation, but they failed to agree upon a third person as umpire. It was urged in that case by the defendant (Sir Samuel Romilly, being of counsel) that specific performance should not be decreed, because there had been no breach of contract whatever on the part of the defendant, he having faithfully named his arbitrator pursuant to the terms of the contract. 20 30

In denying specific performance, Sir William Grant, M. R., concluded:

“I do not know, that upon this point there can be any difference between decisions at Law or in Equity. If you go into a Court of Law for damages, you must be able to state some valid legal contract, which the 40

10 other party wrongfully refuses to perform. If you come to a Court of Equity for a specific performance, you must also be able to state some contract, legal or equitable, concluded between the parties; which the one refuses to execute. In this case, the plaintiff seeks to compel the defendant to take this estate at such price as a Master of this Court shall find it is worth; admitting that the defendant never made that agreement; and my opinion is that the agreement he has made is not substantially, or in any fair sense, the same with that; and it could only be by arbitrary discretion that the Court could substitute the one in the place of the other."

20 It was conceded by counsel for the defendant (at page 405), and noted by the Master of the Rolls (at page 408), that if there had been any evidence of *mala fides* or any interference with the valuation by the arbitrators on the part of the defendant, a different case would have been presented.

30 The Master also distinguished the case then under consideration from a contract, which was in substance an agreement to sell at a fair value, saying at page 405:

40 "The case of an agreement to sell at a fair value is essentially different; the case in which the Court has modified particular, subordinate parts of an agreement, falls far short of the decree that is now demanded. * * * The Court never professes to bind a man to any agreement except that which he has made; but some times holds the agreement which it executes, and that, which he has made, to be substantially the same;

when to common understandings there is a very perceptible difference between them.”

Sugden on Vendor, 8th Amer. ed., at page 288 says:

“If an agreement be made to sell at a fair value, the Court will execute it, although the value is not fixed.”

10

Dart on Vendor and Purchaser, 7th ed., page 242 says:

“A general agreement to sell at a ‘fair valuation’ may be enforced; and the Court will, if necessary, direct a reference to ascertain the price.” (citing an extended collection of English cases, including

Marsh v. Jones, 40 Ch. Div., 563.

20

In the last mentioned case, there was an agreement by which the defendant lessor had agreed to purchase machinery in a mill from the tenant plaintiff at a proper valuation at the expiration of the tenancy. The valuers named by the parties, pursuant to the agreement, failed to agree. The Court referred the question of value to the official referee, although the plaintiff, in his bill offered to take the value fixed by the defendant’s valuer. 30

In *Coles v. Peck*, 96 Ind., 333-339, 49 Am. 161, in commenting on the rule laid down in *Milnes Gery*, *supra*, it is said:

“The doctrine of that case has, however, generally been followed by the Courts of the United States only in a limited and restricted sense, and is mainly applied only to contracts for reference in which by the form 40

and language of the stipulation the mode of determining the price by valuers or arbitration, is made an essential provision—in fact, condition—to the validity of the agreement, and to cases in which the parties can be easily placed in *statu quo*, or where an action for damages can be made to afford an adequate remedy. There is another
 10 recognized class of contracts providing a mode for ascertaining the price of property by arbitration or reference, in which the language used in the stipulation is treated as non essential, regarding the stipulation itself as virtually an agreement to sell the property at a fair price.”

In Mutual Life Ins. Co. v. Stephens, 214 N. Y.,
 20 488, at 495, the Court said:

“There have been numerous cases in which the courts have decreed specific performance of agreements in leases to renew at a rental value to be fixed by appraisers chosen by the parties or to convey the premises at its value to be fixed in like manner. But in such cases the provision for an appraisal has been regarded as incidental and
 30 subsidiary to the substantive part of the agreement; and so the party refusing to name an appraiser has not been heard to complain of not having the appraisal made in the way agreed upon; but, treating the method as a matter of form rather than substance, the courts have by a reference or otherwise determined the value for the purpose of enforcing the contract according to its real spirit and purpose. (See *Kelso*
 40 *v. Kelly*, 1 Daly, 419; *Van Beuren v. Wother-*

spoon, 12 App. Div., 421; *Weir v. Barker*, 104 id., 112; *Grosvenor v. Flint*, 20 R. I., 21; *Kaufmann v. Liggett*, 209 Penn. St., 87, *Castle Creek Water Co. v. City of Aspen*, 146 Fed. Rep., 8.) In such cases the appraisal has been made as a mere incident to the main relief granted, *i. e.*, the enforcement of the agreement to sell or renew.”

The case of *Castle Creek Water Co. v. City of Aspen*, 146 Fed. Rep., 8, Eighth Circuit, before Sanborn and Van Devanter, Circuit Judges and Philips, District Judge, in many of its aspects is similar to the case at bar. 10

In that case, there was a contract between a water company and the City, wherein the company agreed to give the City the option to purchase the works at the end of a term at a price to be determined by four appraisers chosen by the parties and a fifth to be chosen by the four, on condition that the City give notice of its intention to buy a year before the expiration of the term. The City gave the notice, but subsequently refused to appoint appraisers to complete the purchase. It was held that these facts disclosed an equity in the complainant, the Water Company, which entitled it to specific performance of the contract by the City. 20

It was argued there, as in the case at bar, that a court of equity might not lawfully fix the price or select the parties to determine the price, because such a course of action would substitute the master or the court for the parties' appraisers and would thus make a new agreement for them, which no court could lawfully do. 30

Replying to this contention, the Court in an opinion by Sanborn, *C. J.*, said at page 12. 40

10 “The answer to this contention, however,
is that it is not the court but the defaulter
himself who by his own refusal to perform
his contract deprives himself of the benefit
of the appraisers to be chosen by the parties;
that it does not lie in his mouth to say that
the court may not select the valuers as long
as he wrongfully refuses to do so, and that
he is estopped from taking advantage of his
own wrong to prevent the complainant from
successfully invoking the aid of a court of
equity to compel him to perform his agree-
ment. The authorities upon this subject are
not entirely in accord, but the more cogent
reasons and the weight of authority sustain
these salutary rules; Where in a contract
20 of sale of real estate at a price to be fixed
by appraisers chosen by the parties, the
stipulation for the valuers is not a condition
nor the essence of the agreement, but is sub-
sidiary or auxiliary to its main purpose and
scope, and the parties may not be left or
placed in *statu quo* by a refusal to enforce
the contract, a court of equity may deter-
mine the price itself, by its master or by
appraisers of its own selection, and may
enforce specific performance of the agree-
30 ment of sale. But where the stipulation for
the appraisers is a condition or the essence
of the contract of sale, and a refusal to
enforce it will leave the parties in their
original situations when the agreement was
made, a court of equity will not specifically
enforce it. *Union Pac. Ry. Co. v. Chicago,*
R. I. & P. Ry. Co. 51 Fed. 309, 330, 2 C. C.
A. 174, 224; *Tscheider v. Biddle*, 4 Dill, 58,
62, Fed. Cas. No. 14, 210; *Cherryvale Water*
40 *Co. v. City of Cherryvale*, 65 Kan. 219, 59

Pac. 176, 180; *Town of Bristol v. Bristol & Warren Waterworks*, 19 R. I. 413, 34 Atl. 359, 361, 32 L. R. A. 740; Fry on Specific Performance, Sec. 247, 342, 348; Waterman on Specific Performance, Sections 44, 47; Pomeroy on Contracts, Sections 150, 151; *Coles v. Peck*, 96 Ind. 333, 339, 49 Am. Rep. 161; *Herman v. Babcock*, 103 Ind., 461, 3 N. E. 142; *Biddle v. Ramsey*, 52 Mo. 153, 159; *Black v. Rogers*, 65 Mo. 441; 449; *Braintree Water Supply Co. v. Braintree*, 146 Mass. 482, 487, 16 N. E. 420; *Parson v. Ambos (Ga.)* 48 S. E. 696; *Hall v. Warren*, 9 Ves. 605; *Gourlay v. Duke of Somerset*, 19 Ves. 429; *Richardson v. Smith*, L. R. 5 Ch. 648; *Dinham v. Bradford*, L. R. 5 Ch. 519. 10

Were the defendant in the case at bar seeking specific enforcement as against the present complainant, the analogy with the case last quoted would perhaps be more complete. If, however, the contract in suit could be specifically enforced by the defendant, equitable relief to the complainant should not be denied. 20

Smith v. Smith, 93 Atlantic 890.

In *Kaufman v. Liggett*, 209 Pa., 87, arbitrators provided for in a lease failed to fix a valuation upon which a renewal was to be based. The Court extended complete equitable relief as to the lessee. 30

Dike v. Greene, 4 R. I., 285, at page 289:

“Under such a contract, as this Court have had occasion before to consider, if from the neglect or refusal of the other 40

party, accident or mistake, there has been a failure to appraise by the joint action of the contractors, and thus to make certain the value even of the principal subject of the contract, a Court of Equity may through a master make the appraisal itself, for the purpose of enforcing the sale or purchase at the price thus appraised."

10 The Court cites, among other cases, the interesting English case of

Morse v. Merest, 6 Mad., 26.

In that case there was an agreement of sale at a value to be set by three named valuers, A, B and C. The defendant prevented the valuers from going on the land for the purpose of making a valuation. The Vice-Chancellor
20 held that though the time of the valuation was of the essence of the contract, in equity a defendant was not permitted to set up a legal defence which grew out of his own misconduct. He specifically enjoined the defendant from preventing a valuation and intimated that when the three named arbitrators had fixed the price to be paid, the Court would then specifically enforce the contract.

30 In *Estes v. Furlong*, 59 Ill., 298, the agreement read in substance that for the consideration of \$300 in hand paid, the defendant would give the plaintiff thirty days preference to buy the land where he lived at \$1,000 an acre, one-half down and balance in one year and "a fair valuation" appraised for the dwelling and stable at the time said Estes (the plaintiff) wants possession." The defendant refused a
40 tender of the cash instalment, on the ground that the valuation of the house and stable had not been made.

The Court held that the contract "implied a reasonable estimate, to be made by the parties, or if they could not agree, to be determined by the Court upon proof.

The Court at page 304 said:

"Here then was a substantial contract for the sale of land at a fair price * * *. The mode of ascertainment of the value of the buildings, though indicated in the agree- 10
ment, is not definitely settled, and did not become an essential ingredient in the contract. It is entirely subsidiary.

"Upon a bill filed for specific performance under such circumstances the Court must determine the value upon proof."

The Chancellors of New Jersey have recognized and applied the principles laid down in 20
the foregoing cases.

In *Van Doren v. Robinson*, 16 N. J., Equity 256, 260 the Court said at page 260:

"This class of cases has given rise to some conflict of opinion and the line which marks the limits of the court's exercise of jurisdiction is not clearly defined. The true principle seems to be, that when the price to be paid can be ascertained, in consistency 30
with the terms of the contract, performance will be enforced. But the Court will not make a contract for the parties, nor adopt a mode of ascertaining the price, not in accordance with the real spirit of the agreement."

In *Woodruff v. Woodruff*, 44 N. J. Eq., 349, 16 Atl., 4 (1888), though this case is apparently 40
adverse, there was a stipulation as to a valua-

tion which should serve as the price to be paid which related to the entire subject matter of the agreement. Furthermore the complainant, in that case, sought specific performance not as against a party to the original contract, but against his devisees (p. 358), and the sentimental considerations mentioned by the Court certainly were not of a character to invite the
10 extension of equitable relief.

POINT III.

The defendant may not avail itself of its own default to defeat the enforcement of the contract in a Court of Equity.

Where, as in the case at bar, in a contract of sale at fair value in which the fair value may
20 be fixed by appraisers, the party in default takes advantage of his own failure to comply with the stipulation as a defense, the situation would seem analogous to that presented in cases relative to the production of an architect's certificate as a condition precedent to recovery. In this class of cases, in the United States, as in England, any circumstance amounting to a
30 waiver of the condition does away with the production of a certificate.

New York & New Haven Sprinkling Co.
v. *Andrew*, 173 N. Y., 25.

Where the person appointed to issue the certificate dies or is discharged, failure to name another amounts to a waiver.

Fitts v. Reinhart, 102 Iowa, 311.

40 Even where the defendant is not himself at fault the New Jersey Courts have held that the fraudulent refusal of the architect to withhold

his certificate is a sufficient excuse to the plaintiff for not producing it.

Chism v. Schupper, 51 N. J. L. R., 1.

See also *German American Ins. Co. v. Norris*, 100 Ky., 29.

Home Fire Ins. Co. v. Hammong, 44 Neb., 566, 576.

Schmurr v. State Ins. Co., 30 Oreg., 29.

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Moreover, in the case at bar, it does not appear that there is any actual disagreement between the parties as to the value of the cultivated lands, by virtue of which the defendant may evoke the privilege of having the price determined by arbitrators under the alternative provision contained in the contract.

The complainant alleges (paragraph 12) that the fair and reasonable value of the said cultivated land is \$100 for each hectare thereof. The complainant's allegation as to the fair value of the cultivated land must be taken as admitted by the defendant. The defendant therefore must sustain the position:

20

"We admit that \$100. per hectare is in fact the fair value of the 1500 hectares of cultivated lands, but as the bill of complaint shows that we refused, prior to the commencement of this action to agree that \$100 per hectare was the fair value, we are now excused and relieved from our purchase even as to the 24,080 hectares at \$20 per hectare."

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Complainant respectfully submits that the case presented is not controlled by the decision in *Woodruff v. Woodruff*, *supra*, but that in resorting to this Court, he may fairly rely upon the numerous precedents above cited, in which the stipulation as to the mode of determining the fair value of a portion of the subject matter covered by the contract has been held sub-

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sidiary and has not been permitted to defeat the specific enforcement of the contract as a whole.

As stated by Pitney, V. C. (1897) in

Duffy v. Kelly, et al., 55 N. J., 627, 37 Atl., 597,

10 “Viewed in the light of a suit for specific performance, the power and duty of the Court, where, as here, it is necessary, in order to do justice, to ascertain the fair value of the subject of the sale, must be considered as settled in this Court.”

It may be that upon the bill of complaint and defendant's answer thereto, no issue whatsoever will be presented as to the value of the cultivated lands.

20 The suggestion as to an arbitration contained in paragraph 3 of the complainant's prayer for relief is inserted by the complainant merely that the defendant, in spite of its default, may not urge, that through the exercise of this court's jurisdiction it will forfeit any privilege, however subsidiary, it might have enjoyed if it had voluntarily carried out the contract of purchase according to its terms. It is respectfully submitted, however, that should the issue

30 arise, the case then presented will be one in which, upon the authorities, a Court of Equity is fully warranted in taking proof as to the fair value of the cultivated portion of the tract to be conveyed.

Castle Creek Water Co. v. City of Aspen, 146 Fed. Rep., 8.

Coles v. Peck, 96 Ind., 333-339, 49 Am. Rep., 161.

Mutual Life Ins. Co. v. Stephens, 214

40 N. Y., 488, 495.

Estes v. Furlong, 59 Ill., 298.

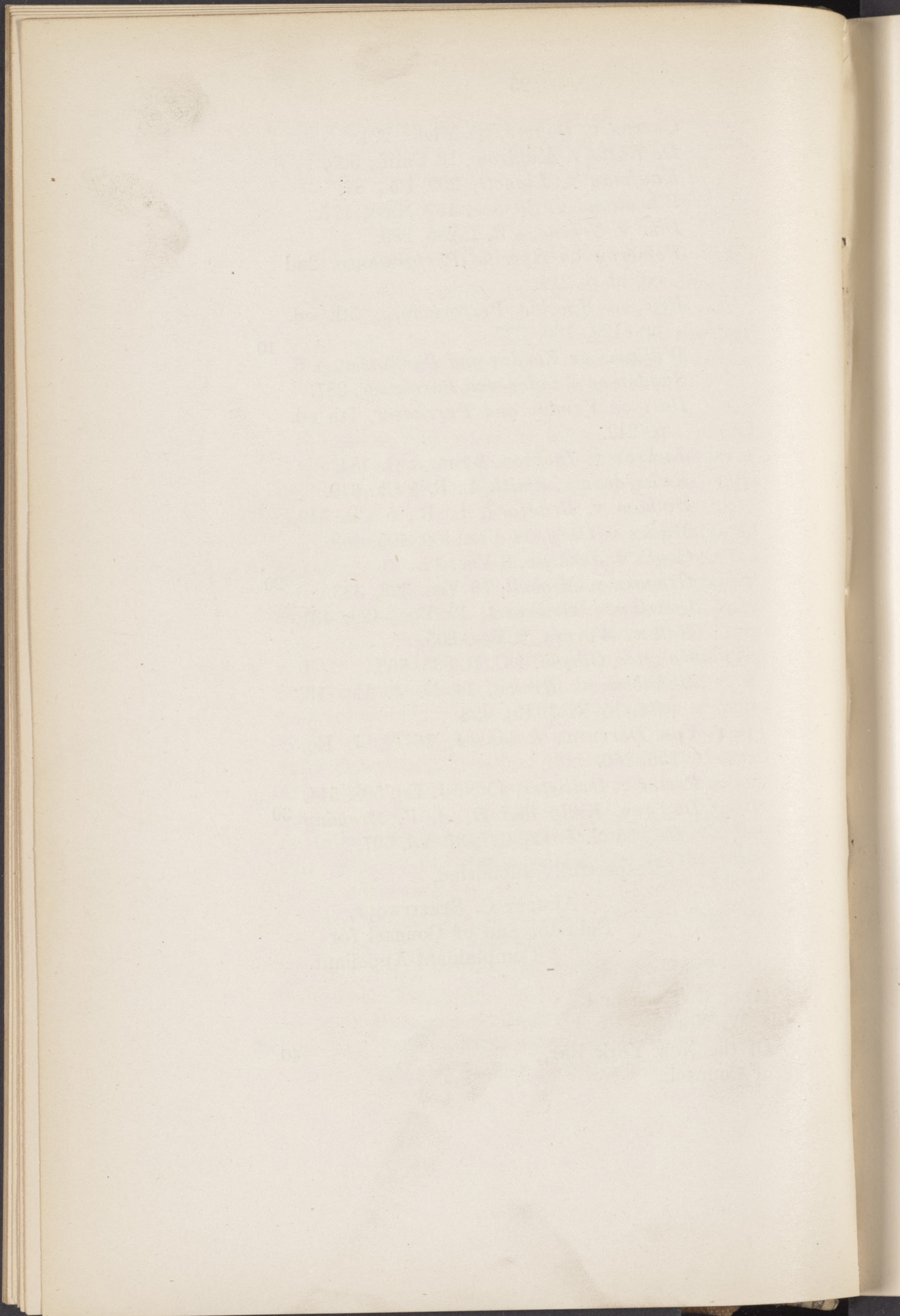
- Curran v. Rogers*, 35 Mich., 221.
De Rutte v. Muldrow, 16 Calif., 505.
Kaufman v. Liggett, 209 Pa., 87.
Wheatland v. Silsbee, 159 Mass. 177.
Dike v. Greene, 4 R. I. 285, 289.
Pomeroy on Specific Performance, 2nd ed. at p. 214.
Fry on Specific Performance, 5th ed. pp. 179, 180, 337. 10
Williams on Vendor and Purchaser, p. 5.
Sugden on Vendor and Purchaser, 287.
Dart on Vendor and Purchaser, 7th ed. p. 242.
Jackson v. Jackson, 1 Sm. & G. 184.
Richardson v. Smith, L. R. 5 Ch. 649.
Dinham v. Bradford, L. R., 5 Ch. 519.
Milnes v. Gery, 14 Ves. 400, 405, 409.
Cooth v. Jackson, 6 Ves. 12. 20
Gregory v. Mighell, 18 Ves. 328, 333.
Gourlay v. Somerset, 19 Ves. 429, 431.
Hall v. Warren, 9 Ves. 605.
Valpy v. Gibson, 4 C. B. 835, 863.
McKibbin v. Brown, 14 N. J. Eq. 13; affd. 15 N. J. Eq. 498.
Van Doren v. Robinson, 16 N. J. Eq. 256, 260.
Potter v. Hollister, 45 N. J. Eq. 508, 514.
Duffy v. Kelly and B. A. V. Brewing Co., 55 N. J. Eq. 627, 37 Atl. 597. 30

Respectfully submitted,

AUGUST C. STREITWOLF,
 Solicitor and of Counsel for
 Complainant-Appellant.

PHANOR J. EDER and
 DIX W. NOEL,
 Of the New York Bar,
 of Counsel.

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New Jersey Court of Errors and Appeals.

Between

MANUEL DAVILA,
Complainant-Appellant,

and

UNITED FRUIT COMPANY,
Defendant-Respondents.

On Appeal
from Final
Decree of
the Chan-
cellor Dis-
missing the
Bill.

Respondent's Points.

This suit was brought to enforce specific performance of an alleged contract for the purchase of lands in the Republic of Colombia and to require the defendant to submit to arbitration on the question of the value of 1500 hectares of cultivated land referred to in the agreement, and to determine the consideration to be paid for such land, or in the alternative that the Court ascertain its reasonable and fair value "by such proof and means as * * * shall seem equitable." (*Rec.*, p. 7, lines 20 to 33.)

The granting of a motion to dismiss the bill on the grounds hereinafter stated was advised by Vice Chancellor Foster, and a decree to that effect was rendered on March 13, 1917.

The basis of the action is an option agreement, dated November 3, 1911, and an alleged accep-

tance of the option contained in a communication from one Montejo, who is alleged to have been the duly authorized agent of the defendant. The option agreement, after providing for the purchase by the defendant from the complainant of 2,440 shares of the capital stock of the Santa Marta Fruit Company for \$250,000, which was subsequently carried out, contains the following provision:

“The said Davila further agrees to give the United Fruit Company an option to purchase at any time within one year all the remaining lands in the Santisima Trinidad de Aracataca and La Concepcion and other lands adjacent and owned or controlled by the said Davila. The price to be paid for uncultivated lands shall be \$20 gold per hectare; the price to be paid for cultivated land shall be the fair value agreed by the parties or fixed by three arbitrators one chosen by each party and one by the two so chosen. (Rec. pp. 8, 9.)”

The so-called notice of acceptance, as it appears in translated form in the bill of complaint, reads as follows (*Rec. p. 4*):

“Santa Marta, October 24th, 1912.

Manuel Davila
Bogota

Exercising the option given by you to the Company in agreement of November 3rd of last year, Company formally notifies you that it purchases your remaining lands in the Santisima Trinidad tract bounded on the North by the river Sevilla, on the east by the Valle Dupar highway, on the south by the river Aracataca, on the west to the swamp or inundated lands (anegadizos) of the Cienaga Grande. Appoint attorney to execute deed. Your affectionate friend
Montejo.’

In the bill of complaint it is alleged that the tract of land known as the Santisima Trinidad de Aracataca contained a total of 25,580 hectares and 5,000 square meters, and was owned and controlled

by the Santa Marta Fruit Company, a corporation, by the complainant, and by several others, "all of whom, excepting said corporation, made, executed and delivered good, valid and effectual powers of attorney unto your complainant, whereby said complainant was authorized to make, execute and deliver good and valid deeds for the conveyance of such lands" (*Rec. p. 1, lines 30 to 40*). These lands were described as follows:

"On the North by the river Sevilla; on the East by the Valle Dupar Highway; on the South by the river Aracataca and on the West by the swamps or inundated land (Anegadizos) of the Cienaga Grande. (*Rec. p. 2*)."

The bill of complaint also alleges that, subsequent to the acceptance of the option, the defendant consented to a transfer of a small tract of the Santisima Trinidad de Aracataca, embracing 45 hectares, to complainant's nephew, and with the exception of that tract "the complainant individually and through his associates still is in a position to transfer and deliver title to all said lands aforesaid, except such as is owned and controlled by the Santa Marta Fruit Company, as aforesaid" (*Rec. p. 5, lines 20 to 30*). Complainant further alleged that he notified the defendant that he was ready and willing to execute a deed for the transfer of said lands in accordance with the terms of the contract, and on numerous occasions requested the United Fruit Company to appoint a time and place for the performance of the contract, "but defendant has failed and neglected to fix a time and place for the purpose of performing said contract, and has failed and neglected to negotiate for a time and place as requested." (*Rec. pp. 5 and 6.*)

The bill of complaint alleges that, of the total area of 25,580 hectares and 5,000 square meters,

24,580 hectares and 5,000 square meters is uncultivated land and 1,500 hectares is cultivated land; that the complainant has offered to submit the question of price to be paid for the cultivated land to arbitration, as in the agreement provided, but the defendant has refused to submit to arbitration and has wholly repudiated the agreement and has wholly failed and refused to perform the same. (*Rec. p. 6, lines 9 to 20.*)

The various questions which arise on this state of facts will now be considered, without regard to logical order, our contention being that the bill of complaint does not disclose a cause of action for specific performance.

The discussion will proceed under two main heads, which include the following nine grounds on which the motion to dismiss was made (*Rec., pp. 25, 26*):

(1) The bill of complaint does not disclose a cause of action.

(2) The bill fails to disclose any meeting of the minds of the parties upon the contract sought to be enforced.

(3) There was no acceptance of the option conferred by the contract, Exhibit A.

(4) The bill fails to set forth a contract upon which the court will decree a specific performance.

(5) The contract sought to be enforced is not such a one as the court can take entire cognizance of, or compel performance of in all its details.

(6) The contract sought to be enforced is indefinite and uncertain in (a) the subject-matter to be conveyed, and (b) the price to be paid.

(7) The bill seeks to have the court enforce an agreement to arbitrate or, in the alternative, to make a valuation.

(8) The bill seeks to have the court make a different contract for the parties than they had made for themselves.

(9) The bill seeks to have the court make a better contract for the parties than they made for themselves.

The opinion of Vice-Chancellor Foster (*Rec. pp. 27-34*), considers the case with great clearness, and after a careful review of the authorities reaches the conclusion that since the contract was incomplete and uncertain, with respect to the price to be paid for the cultivated land, it was unenforceable. The contentions of the appellant are met with the terse answer: "This would not be enforcing the contract of the parties; it would be making a contract for them."

POINTS.

I.

The bill cannot be maintained because it seeks a decree for the enforcement of an agreement to arbitrate, or in the alternative for the fixing by the Court of the price which the defendant is to pay for the lands claimed to be covered by the alleged contract.

The instrument of November 3, 1911, does not specify the area of the property which is the subject-matter of the option which it confers. It does not specify the gross price for the lands which are mentioned. It does not state how many hectares are cultivated or how many are uncul-

tivated. It appears that part of the land is cultivated and part of it uncultivated. According to the bill of complaint the cultivated area is extensive, covering 1500 hectares, the value of which is claimed in the bill to be \$100 for each hectare. The option agreement, however, while it fixes \$20 gold per hectare as the price to be paid for the uncultivated land, makes no provision as to the price of the cultivated land, other than that it shall be "*the fair value agreed by the parties or fixed by three arbitrators one chosen by each party and one by the two so chosen.*"

The alleged notice of acceptance is likewise silent on the subject of price. It purports to exercise the option given by the complainant to the defendant in the agreement of November 3, 1911, and consequently it harks back to the provisions of that instrument with respect to the price to be paid for the cultivated lands. The option is one for the purchase of "*all the remaining lands in the Santisima Trinidad de Aracataca and La Concepcion and other lands adjacent and owned or controlled by the said Davila.*"

It is, therefore, an entire contract, including cultivated and uncultivated lands, and must stand or fall as such entire contract.

The cultivated land, constitutes a component part of the subject-matter of the option, and if the alleged agreement between the parties is incapable of specific performance with respect to the cultivated land, no case is made out for the exercise by this Court of its chancery powers with respect to the specific performance of the alleged contract between the parties.

It appears from the bill of complaint that the defendant has refused to agree with the complainant either as to the price to be paid for the 1500 hectares of cultivated land or with respect to the

appointment of arbitrators. Hence the complainant, recognizing the necessity of arriving at a price for the cultivated land before there can be a specific performance, asks for a decree compelling the defendant to submit to arbitration, or in the alternative, the Court of Chancery is asked to ascertain the reasonable and fair value of the land, and thereupon to enforce specific performance.

This, we contend, is beyond the powers of a court of chancery, as has been frequently adjudged by various courts of equity jurisdiction, especially those of New Jersey.

The leading case in this State is *McKibbin v. Brown*, 14 N. J. Eq. 13, *affd.* 15 N. J. Eq. 498. There, the defendant leased to the complainant a hotel and its furniture for a specified term for \$8,000 rent. The lease contained the further stipulation that if the complainant should keep the hotel in a proper manner he should have the privilege of releasing it, exclusive of the furniture, upon the same terms, except that the complainant, if he exercised such privilege, should purchase the furniture at a stipulated price, and that the times or credits to be given by the defendant to the complainant *should be the subject of arrangement between the parties*. The parties not being able to agree as to the time of credit on which the furniture should be sold; the lessee filed a bill against the lessor to compel a renewal of the lease and a sale of the furniture on such credit as the court should deem reasonable. It was held that specific performance of the contract could not be decreed in equity, the court having no power to fix a term of credit for the parties. In the course of his opinion Chancellor Green said:

“No specific performance of a contract can be decreed in equity unless the contract be actually concluded and be certain in all its parts. If the matter still rests in treaty, or if the agreement in any material particular be uncertain or undefined, equity will not interfere. *Fry on Spec. Per.* §164, 203.

‘I lay it down as a general proposition,’ said Lord Rosslyn, ‘to which I know no limitation, that all agreements, in order to be executed in this court, must be certain and defined.’ *Lord Walpole v. Lord Orford*, 3 *Ves.* 420.

The same doctrine is uniformly recognized in all the cases, English and American.

The present agreement was concluded and is certain as to all its terms, except as to the credits which were to be given for the price of the furniture. That, by the express terms of the contract, was to be the subject of future arrangement between the parties. In this particular the contract was not concluded, or if concluded by the execution of the instrument, the term was not certain or defined. Is this uncertainty or want of conclusiveness in the agreement of such character and materiality as to forbid the interference of the court in order to enforce a specific performance? * * *

The court is therefore asked to decree a specific performance of the agreement, and that the defendant, among other things, shall sell and transfer the said furniture to the complainant for the ascertained price ‘for such times and credits of payment as this court shall deem reasonable and just’ according to said agreement. Is such a decree within the power of this court?

By the terms of the contract, as executed, it is stipulated that the times or credits to be given should be the subject of arrangement between the parties. The court are now asked to carry that contract into execution, and, in so doing, to direct that the times and credits shall be such, not as the parties shall agree upon, but such as this court shall deem reasonable and just. Now, upon the very face of the transaction, is it not apparent that this is asking the court not to enforce the specific performance of an agreement made by the parties, but to make an agreement for them? Is it not in direct violation of the agreement? The times or credits were stipulated to be such as the *parties themselves* should assent to. Each party reserved to himself the right of control over that matter. Neither consented to trust it to the judgment of this court or of any other tribunal. *Suppose the stipulation had been that the furniture should be taken at such price as the parties might agree*

upon. If the parties could not or would not agree, could this court enforce the performance of the contract for such price as the court might deem reasonable? Is a contract for sale at a fixed or contract price tantamount to a contract for sale upon a *quantum valebant*? A price stipulated by the parties may be and often is deemed competent evidence of what the goods are worth, but the fair value of the goods never has been, and never can be evidence of a contract price. Or, suppose, again, that the contract had been that the lease should be renewed upon such terms as the parties should thereafter agree upon. If the parties could not agree as to the terms, could a court of equity be called upon to enforce the renewal of the lease upon such terms as the court might deem reasonable and just? Would not this principle, if carried out, enable this court to enforce the performance of any contract, however imperfect in its terms? Would it not rather enable the court to make contracts for the parties, and compel them to submit to terms which they never assented?

No case, I think, can be found, certainly the researches of counsel have furnished none, which go the length of supporting the claim of the complainant's bill.

In *Graham v. Call's Exr.*, 5 *Munford*, 396, upon an agreement for the sale of land, *subject to a condition that the price should be afterwards be ascertained by the parties*, the court held the agreement too incomplete and uncertain to be carried into execution by a court of equity.

So where a valuation is, by the terms of the agreement, to be made by arbitrators named by the parties, or by an umpire to be selected by them, and the arbitrators will not act, or cannot agree either as to the valuation or the umpire, the court will not interfere to appoint an umpire or to make a valuation. *Milnes v. Gray*, 14 *Ves.* 400; *Blundell v. Brettargh*, 17 *Ves.* 232; *Gourlay v. The Duke of Somerset*, 1 *V. & B.* 68; *Agar v. Macklew*, 2 *Sim. & St.* 418; *Morgan v. Milman*, 17 *Eng. Law & Eq.* 203; *Tobey v. The County of Bristol*, *Story* 200; *Smallwood v. Mercer*, 1 *Washington*, 374; *Baker v. Glass*, 6 *Munf.* 212; *Wallingford v. Wallingford*, 6 *Har. & J.* 490. * * *

In the case of *Morgan v. Milman*, decided in 1853, before the lords justices of the Court of Appeal, Lord Cranworth said, 'all the authorities enunciate the proposition in the stongest language, that when the parties have stipulated that the price shall be ascertained by arbitration, if the arbitration does not proceed, and the price be so ascertained according to the mode in which

the parties have stipulated, the court has no right to make a different contract than the parties have entered into, and ascertain the price for them in some different mode.' ”

In *Van Doren v. Robinson*, 16 N. J. Eq. 256, it was held that an agreement for the sale of land at a price to be ascertained by the parties, is too incomplete and uncertain to be carried into execution by a court of equity. The Chancellor, after citing *McKibbin v. Brown*, *supra*, said:

“It is further objected that the contract will not be enforced, because the price to be paid for the reconveyance of the land is not ascertained by the contract. The agreement is that the land shall be reconveyed for a *fair price*, if the grantor will accept the deed and pay such price. It is urged that the effect of the agreement is simply to give to the vendor the refusal of the property, if the parties could agree upon the price. If such be the effect of the contract, the court will not decree a specific performance. An agreement for the sale of land, at a price to be ascertained by the parties, is too incomplete and uncertain to be carried into execution by a court of equity. *Graham v. Call*, 5 Munf. 396.

But where the contract is that the land shall be reconveyed, *not at a price to be agreed upon by the parties*, but at a fair price, or at a fair valuation, the court will direct the valuation to be made by a master, and will enforce the execution of the contract. * * *

This class of cases has given rise to some conflict of opinion, and the line which marks the limits of the court's exercise of jurisdiction, is not clearly defined. The true principle seems to be, that whenever the price to be paid can be ascertained, in consistency with the terms of the contract performance will be enforced. But the court will not make a contract for the parties, nor adopt a mode of ascertaining the price, not in accordance with the real spirit of the agreement. In this case, the *mode* in which the price shall be fixed, is not designated in the contract. It is required simply that it be a fair price. To ascertain that value, by any mode of investigation, will conflict neither with the letter, nor with the spirit of the contract.”

In *Potts v. Whitehead*, 20 N. J. Eq. 55, it was likewise held that a contract, any material part

of which remains to be settled by negotiation between the parties, will not be enforced in equity on a bill for specific performance. In that case there was a written offer to convey land within a time fixed at a price named, of which a portion named was to be paid on the execution of the deed and the remainder by a mortgage on the land, with interest at six per cent. There was, however, no designation of the time when that portion of the consideration which was to be secured by mortgage was to be paid. This left a material part of the contract to be settled by negotiation, and hence was considered as not presenting a case for specific performance.

In *Woodruff v. Woodruff*, 44 N. J. Eq. 349, 16 Atl. Rep. 8, 1 L. R. A. 380, a deed contained the following covenant:

“If the said grantor, A. Dickinson Woodruff, shall survive the said grantee, P. Houston Woodruff, he, the said grantor, shall have the right at any time within eighteen months after the death of said grantee, to purchase back again all the right, title and interest in said farm hereby conveyed, at a valuation to be then made by two disinterested persons, one of whom shall be selected by the legal representatives of the said grantee and the other selected by said grantor; in case of disagreement the parties so selected may choose a third person.”

Specific performance was denied, CHANCELLOR MCGILL saying:

“The second objection is that the contract is incomplete because no price is fixed for which the property shall be reconveyed. That contract provides that the complainant may purchase back his interest in the farm at a valuation to be made by two disinterested persons, one to be selected by him and the other to be selected by the representatives of Patrick. The defendant, Louisa Woodruff, claims to be the sole representative of Patrick, and refuses to name a valuer upon her part; and it is insisted in her behalf that this court will not compel her to appoint such a person, and will not require such

person to act if he be appointed,—in other words, will not complete the incomplete contract by compelling an agreement as to the price for which the reconveyance is to be made.

It is settled that the court will not decree the specific performance of a contract which involves the payment of a price, until the price shall be ascertained. The ascertainment of the price must precede a decree. *Pom. Spec. Perf.* § 149; *McKibbin v. Brown*, 1 *McCart.* 19, 2 *McCart.* 498.

Where the contract specifies a mode of ascertaining the price, which is essential, the contract is conditional till the ascertainment, and is absolute only when the price has been determined. If there be default in this respect the contract remains imperfect and incapable of being enforced. *Fry, Spec. Perf.* § 163; *McKibbin v. Brown*, *supra*.

The limit to which this court has gone in fixing the price to be paid is to ascertain it by reference to a master, when the agreement simply provides that it shall be fair, without pointing out a mode of determining it. *Van Doren v. Robinson*, 1 *C. E. Green*, 256.

In *Domestic Teleg. & Teleph. Co. v. Metropolitan Teleph. & Teleg. Co.* 12 *Stew.* 160, 13 *Stew.* 287, the agreement provided that the terms of sale were to be fixed 'by the party of the first part,' and the court refused to compel that party to fix them.

In *Fry on Specific Performance*, 163, it is said: 'If the contract be between A and B to sell and buy at such a price as valuers to be named by them shall fix, it seems that either A or B may refuse to name a valuer, and the contract will remain incapable of completion without any liability on the part of the refusing party.'

In *Copper v. Wells*, *Sext.* 10,—where the bill was filed for the specific performance of an agreement that at the expiration of a building lease the buildings and machinery should be valued by three indifferent persons,—one to be chosen by each party and the third to be mutually chosen by them,—or in case of their disagreement, then by the two who shall have been chosen by the parties to the contract; and one of the parties refused to name an appraiser,—Chancellor Vroom said: 'The principle is well settled that the court has no power to compel a party to appoint an arbitrator, and of course that a specific performance cannot be decreed.' In *Mitchell v. Harris*, 2 *Ves. Jr.* 129, Lord Eldon inquired whether there was any instance of a bill to compel parties to name arbitrators; and in *Street v. Rigby*, 6 *Ves. Jr.* 818, the same Chancellor remarks: 'There is considerable

weight as evidence of what the law is, in the circumstance that no instance is to be found of a decree for specific performance to name arbitrators, or that any discussion upon it has taken place, in experience, for the last twenty-five years.' The same principle is recognized in *Nichols v. Chalie*, 14 Ves. Jr. 270; *Waters v. Taylor*, 15 Ves. Jr. 10; *Wilks v. Davis*, 3 Meriv. 509; and has been recently confirmed by this court in the late case of *Newbold v. Pearson*.'

In *McKibbin v. Brown*, above cited, Chancellor Green states that where a valuation is, by the terms of the agreement, to be made by arbitrators named by the parties, or by an umpire to be selected by them, and the arbitrators will not act, or cannot agree either as to the valuation or the umpire, the court will not interfere to appoint an umpire or make a valuation.'

See also

Copper vs. Wells, Saxt. 10.

Brown vs. Brown, 33 N. J. Eq. 650, *affd.* 40 N. J. Eq. 287.

Domestic Telegraph & Telephone Co. vs. Metropolitan Co., 39 N. J. Eq. 160.

City of Providence vs. St. John's Lodge, 2 R. I. 46.

In *Greason v. Keteltas*, 17 N. Y. 496, the same doctrine was announced by Judge Selden as follows:

"It is well settled that courts of equity will never entertain a suit to compel parties specifically to perform an agreement to submit to arbitration. (*Gourlay v. Duke of Somerset*, 19 Ves. 431; *Agar v. Macklew*, 2 Sim. & Stuart, 418.) To do so, would bring such courts in conflict with that policy of the common law which permits parties in all cases to revoke a submission to arbitration already made. This policy is founded on the obvious importance of securing fairness and impartiality in every judicial tribunal. Arbitrators being selected, not by law, but by the parties themselves, there is danger of some secret interest, prejudice or bias in favor of the party making the selection; and hence the opposite party is allowed, to the latest moment, to make inquiries on the subject. So scrupulously is this right of revocation

guarded, that it is not lost, although the submission has been actually made a rule of court. (*Mitchell v. Harris*, 2 Ves. 129, notes 3, 4, Sumn. ed.) But an additional reason for the refusal of courts of equity to entertain jurisdiction in such cases is, that it is against their policy to make decrees which they cannot enforce. If the arbitrator be named in the decree, this would violate the policy of the law as to the right of revocation; and if not named, the decree could readily be evaded by choosing an arbitrator who would refuse to act."

See also,

Metropolitan Exhibition Co. v. Ewing, 42 Fed. Rep. 198.

Mutual Life Ins. Co. vs. Stephens, 214 N. Y. 488.

The efforts of the appellant to escape the force of these decisions are ineffectual:

(1) *The contract was not, as is argued, either in terms or in the eye of the law, one to pay "the fair value" of the cultivated lands.*

The language of the option is: "The price to be paid for cultivated land shall be the fair value agreed by the parties or fixed by three arbitrators one chosen by each party and one by the two so chosen." It is thus an essential part of the provision relating to the price to be paid, that that price is not merely to be the fair value, but "the fair value" which is to be agreed upon by the parties or is to be fixed in a specially designated and carefully defined mode. This qualification cannot be disregarded. Effect should be given to every word employed in the exceedingly concise terms of the option. To eliminate them would disregard the carefully chosen phraseology of the parties. Two methods, and none other, for ascertaining the fair value were expressly pointed

out, 1, such as would be agreed upon by the parties themselves, and, 2, such as would be fixed by three arbitrators chosen in a specific manner, and in no other manner, and by no other agency.

The alleged acceptance in no manner departs from the quoted provision of the option. It begins with the words: "Exercising the option given by you to the Company in agreement of November 3rd of last year, Company formally notifies you, etc.". Hence the terms of the option are to be read into the so-called acceptance, and so read the only provision as to price is that contained in the option.

(2) The contention that the cultivated land constitutes only six per cent. of the entire tract, and that, therefore the provision as to the fixing of the price for that land, is unimportant, is fallacious.

The option contract was an entire contract, which covered alike the cultivated and the uncultivated lands. The complainant seeks specific performance as to both. Neither party could not without the consent of the other eliminate either. Recognizing his dilemma complainant prays for the appointment of arbitrators to establish the value of the cultivated land, or, in the alternative, that the Court shall determine such value. It is therefore idle to say that 1500 hectares of cultivated land constituting a component part of the option, which by its terms is not separable, are negligible.

Moreover, the complainant alleges that the cultivated land was worth \$100 per hectare (*Rec., p. 6, par. 12*). There being 1500 hectares, on that valuation they would amount to \$150,000. The remaining 24,000 hectares, at \$20 per hectare,

would amount to approximately \$480,000. The aggregate valuation claimed by the complainant for both the cultivated and uncultivated lands, would therefore be \$630,000, of which the alleged value of the cultivated land constitutes about twenty-four per cent.

(3) *The contention that the option is enforceable, because the respondent under its interpretation of the instrument could arbitrarily withhold its assent to the valuation of the property therein referred to, is a begging of the question.*

The option was one which permitted the defendant to purchase on certain conditions. Notice was given of an intention to exercise the option. If the terms of the option were such as required further action by the parties, or by arbitrators to be chosen by them, before a complete contract enforceable in equity could be made out, that was due to the deliberate action of both parties. An unconditional contract of purchase was not created by the fact that the defendant indicated the purpose of exercising the option. The appellant might have declined to agree upon a price for the cultivated land, or to join in the designation of arbitrators to fix the price. The situation was precisely the same as it would have been if the complainant had offered to sell the lands in question on the same terms as those specified in the option, and the defendant had agreed to buy them on those terms. At the most the option was an offer and the telegram of Montejo was the acceptance of the offer. But his acceptance did not eliminate the conditions which were an essential part of the offer and of the so-called acceptance. On the contrary, by such acceptance these very

conditions were made a vital part of the acceptance.

(4) *The claim that the respondent, by its alleged written acceptance of October 24, 1912, "purchased and thereby became in equity the owner of the entire tract, including improvements", is a manifest confusion of terms.*

If any contract was entered into, it was never an executed contract. At the most, it was an agreement by Davila to sell on certain terms, and an agreement on the part of the respondent to buy on those terms. Surely that did not pass the title of the property, especially since it was contemplated that deeds were to be executed. Nor is it pretended that the respondent ever took possession, or that any act was done whereby this executory contract was in any way performed. Everything remained to be done.

(5) *This case does not involve as is charged, an attempt on the part of the respondent to avail itself of its own default to defeat the enforcement of a contract.*

The fundamental objection to this contention is, that the defendant does not recognize the existence of an enforceable contract. The minds of the parties had never met as to the essentials of the contract which was the subject of discussion. There was no completed contract. Hence the assertion of that fact by the defendant, was not an attempt by the latter to take advantage of its own default. There being no contract, there could be no default. What the appellant is asking the Court to do is, not to enforce an existing contract, but to make one for the parties,

and to substitute for an incomplete arrangement a contract of its own making.

The cases cited by the appellant in support of its claim of default are governed by an entirely different principle from that applicable here and all of them arose under entirely different circumstances. They were all cases of building contracts which required the production of an architect's certificate that work for which compensation was sought, had been completed, as a condition precedent to recovery for work done under such contracts. The non-production of such a certificate because of the fraudulent refusal of the architect, or because of his death, or because of circumstances which amounted to a waiver of compliance with the condition, has no relevancy to the question as to whether or not a completed contract had been entered into. In every one of the cases instanced there was no question as to the terms of the contract, but solely as to the performance of its conditions. Given a contract, its enforcement cannot be defeated by one who is responsible for a failure to comply with one of its conditions. But in the absence of a definite, certain or completed contract, failure to recognize an unperfected attempt to create one, as a binding agreement, cannot be regarded as a default, nor include the basis of an estoppel precluding a decision that an enforceable contract exists.

(6) The argument that because the bill of complaint alleges that the fair and reasonable value of the cultivated land is \$100 per hectare, such value is to be taken as admitted by the defendant, is without merit.

The contract sought to be enforced fixes no price for the cultivated land, but leaves it to be

determined by agreement of the parties or to be fixed in a particular manner. The right to enforce the contract specifically, depends upon the contract itself, and not upon terms which are sought to be imported into it. An allegation by the complainant that the land is worth \$100 per hectare, is of no more importance than if the allegation had been that it was worth \$1,000 per hectare. All that it means is, that the complainant is asking the Court to substitute for the contract on which the suit is based, which is incomplete so far as price is concerned, an agreement that the respondent shall pay \$100 per hectare for the cultivated land. The motion to dismiss is based on the ground that, on its very face, the contract sought to be specifically enforced cannot be enforced because it is incomplete, indefinite and uncertain.

(7) *The authorities relied on by the complainant are either entirely inapplicable to the facts of this case or are in direct opposition to the decisions on which we rely.*

It is most extraordinary that, in arguing before this Court a cause of this importance, the leading case decided in this jurisdiction directly dealing with the subject—*McKibbin v. Brown*, 14 N. J. Eq. 13, *affd.* 15 N. J. Eq. 498—is not even adverted to.

It is equally extraordinary that *Van Doren v. Robinson*, 16 N. J. Eq. 256 and *Woodruff v. Woodruff*, 44 N. J. Eq. 349, are treated so cavalierly as to make it almost impossible to recognize those decisions from the statement made concerning them on pages 21 and 22 of Appellant's Brief.

It is likewise interesting to note that *Potts v. Whitehead*, 20 N. J. Eq. 55, *Carr v. Passaic Land*

& Improvement Co., 19 N. J. Eq. 424, 22 N. J. Eq. 85, and other applicable decisions are not even referred to.

We can rest our argument with entire security upon these several decisions, which are identical with the present case, and which meet every suggestion made by the appellant by way of an attempt to remove it from the scope of the principle in support of which we have invoked them.

Thus, in *McKibbin v. Brown*, among other things, the Court said:

“Suppose the stipulation had been that the furniture should be taken at such price as the parties might agree upon. If the parties could not or would not agree, could this court enforce the performance of the contract for such price as the court might deem reasonable? * * * So where a valuation is, by the terms of the agreement, to be made by arbitrators named by the parties, or by an umpire to be selected by them, and the arbitrators will not act, or cannot agree either as to the valuation or the umpire, the court will not interfere to appoint an umpire or to make a valuation.”

In this connection it may be useful to note that, although in *McKibbin v. Brown* the principal subject-matter of the contract was the lease of a hotel, the subject as to which the contract was incomplete related merely to the purchase of furniture, a mere incident to the main contract; yet specific performance was denied.

Attention is again called to *Van Doren v. Robinson*, 16 N. J. Eq. 256, which clearly distinguishes this case from most of the cases on which the complainant relies. There the Chancellor said:

“But where the contract is that the land shall be conveyed, *not at a price to be agreed upon by the parties*, but at a fair price, or at a fair valuation, the court will direct the valuation to be made by a master, and will enforce the execution of the contract.”

Here, the contract is not that the cultivated land shall be sold at a fair price, or at a fair valuation, without specification as to the mode by which such fair price or such fair valuation shall be ascertained, but it is, in the very language of the Chancellor, "at a price to be agreed upon by the parties," or, in the alternative, by arbitrators to be selected by them. Here, the mode by which the price is to be fixed is designated in the contract; whereas, in most of the cases cited by the complainant, no mode was specified, and, therefore, the ascertainment of a fair price, or of a fair valuation, was one which the court could determine.

The quotation from *Williams on Vendor and Purchaser*, p. 1094, appearing on page 6 of Appellant's Brief, has no relevancy to the present case, since the manner of ascertaining the price of the cultivated land was made essential by the parties. The real agreement was not, to sell at a fair price, but at a fair price to be agreed upon by the parties or by arbitrators.

Jackson v. Jackson, 1 Sm. & G., 184, involved the purchase of lands and bleach-works at a fixed sum. The purchaser also agreed to take at a valuation the plant, machinery and utensils at the bleach-works. The vendee and purchaser were each to designate one valuer and in case of disagreement the two so chosen were to appoint a third. But no valuation was in fact made, and the defendant refused to perform.

The Vice Chancellor said:

"There can be no doubt that if the agreement did not express the price to be paid but left it to be settled by arbitrators, which is the case put forward by the defendant, it is not such an agreement as this court can decree to be specifically performed. The essence of the agreement was that the sum of £7770 shall be paid for the

land, premises and bleach works, but there is a stipulation that the purchaser shall take the plant and machinery at a valuation. I do not think this involves any uncertainty as to the price for which the property is agreed to be sold; since such stipulation, as to *fixtures and subordinate appendages* is to be found in almost every contract for sale."

In the present case the cultivated land is certainly not a subordinate appendage. It comes within the principle recognized in the case just cited. We submit, however, that the decision there rendered is in direct conflict with *McKibbin v. Brown*.

Milnes v. Gery, 14 Ves. 400, is a direct authority in favor of the defendant and was relied upon by the Chancellor in *McKibbin v. Brown*. The Court there differentiated between an agreement to sell at a fair value without qualification as to how such fair value was to be ascertained, and one which provided that such value was to be ascertained by the parties or by arbitrators (*Appellant's Brief pp. 13 and 14*).

The same is true of the quotations from *Sugden on Vendors*, p. 288, and from *Dart on Vendor and Purchaser*, p. 242, appearing on page 15 of Appellant's Brief.

Marsh v. Jones, 40 Ch. Div. 563, cited on the same page of Appellant's Brief, was a case where the contract apparently was to sell at a "proper valuation," without qualification as to how such valuation was to be ascertained. The mere fact that the parties appointed arbitrators, who did not agree upon the valuation, did not overcome the provision of the contract.

Coles v. Peck, 96 Ind. 333, cited in the same connection, apparently does not approve of the rule in *Milnes v. Gery*. In that respect it differs with the New Jersey decisions, which have expressly adopted the principle of *Milnes vs. Gery*.

Nor is there anything in *Mutual Life Ins. Co. v. Stephens*, 214 N. Y. 488, which avails the complainant here. On the contrary, that case is an authority for us. There the plaintiff was the assignee of a lease, which provided that, upon a certain contingency, appraisers should be appointed to make an appraisal of the leased premises, and that the lessee should have the option to purchase at the appraised value. The lessee made improvements under the terms of the lease, and then brought action to compel specific performance of the provision relative to appraisal, without having exercised its option to purchase. It was held that the plaintiff could not, while failing to exercise its option to purchase, remain free to refuse performance on its part and to resort to equity to compel the specific performance of the agreement to appoint appraisers. That was the only question involved in the case, and whatever may have been said beyond the determination of the proposition indicated, was obiter. Judge Miller said:

“True, an appraisal may aid the plaintiff to decide the question, and the parties stipulated that the lessee was to have six months after the appraisal to make its decision; but, aside from other objections, if the provision for an appraisal is of such substance that a court of equity will entertain jurisdiction of a suit merely to compel its enforcement, it is so substantial a part of the contract as that it must be enforced in the manner agreed upon, namely, by the appointment of an appraiser by each party, with power to choose a third if they disagree; and yet courts will not compel parties to name appraisers who may nullify the decree by refusing to serve. *Greason v. Keteltas*, 17 N. Y. 491.”

After employing the language just quoted, which expressed the *ratio decidendi*, there followed the language found on pages 16 and 17 of Appellant's Brief, which has no application whatever to the present case. This is especially so, in view

of the fact that, in the case cited, the plaintiff was not only in possession of the leasehold which was sought to be terminated, but had made improvements under the terms of the lease, for which the right to purchase afforded the plaintiff a means of reimbursement against loss. The contract was not an executory one, and therefore presented elements which are entirely absent here.

Much stress is also laid on the decision in *Castle Creek Water Co. v. City of Aspen*, 146 Fed. Rep. 8. An examination of that case, however, shows important points of differentiation. There the plaintiff's assignors constructed water works under an agreement whereby the municipality was to have the right to purchase them at the expiration of twenty years, on condition that it should give notice of its intention to buy one year in advance of the date of the purchase, and that in the event that the parties should fail to agree upon the price it was to be determined by five appraisers. The plaintiff constructed the water works at an expense of \$150,000 and supplied water to the town and its inhabitants. The Court held that the main purpose and scope of the contract was to procure water works for the defendant and for its inhabitants. In the course of the opinion the Court recognized the decisions on which we here rely, including *Milnes v. Gery*, 14 Ves. 400, *Van Doren v. Robinson*, 16 N. J. Eq. 256 and *Greason v. Keteltas*, 17 N. Y. 491. After citing these decisions Judge Sanborn said:

“The general rule that contracts for the sale and conveyance of real estate may be specifically enforced by a court of equity has become firmly established, upon the ground that actions at law for the breaches of these contracts do not place the parties in the same situation in which they were before the agreements were made, and for that reason do not afford adequate relief. Contracts to arbitrate disputed claims escape this rule, be-

cause the failure to enforce them leaves the parties in their original situations, with their original claims and rights of actions. *Separate agreements of sale of real estate, in which the prices have not been agreed upon or in which they are to be fixed by valuers to be chosen by the parties, do not fall within the rule for the same reason, so long as they have not been executed in whole or in any substantial part.* In contracts of this class the price is an essential condition, which determines the nature and the value of the contract, and until it is fixed the parties may be left in *statu quo* by the mere refusal to enforce the agreement. They fall so near the line, however, that a court of equity will readily enforce an agreement of sale for a fair price, or for a reasonable value of the property, on the ground that that is certain which can be made certain, and that the court may itself ascertain the fair price or the reasonable value. *Milnes v. Gery, 14 Ves. 400, 404.* Thus far the two rules that equity will specifically enforce a contract for the sale of real estate and that it will not enforce an agreement to arbitrate claims or to appraise property run *pari passu.*"

We find, therefore, in the case cited, an express recognition of the principle for which we here contend, which has been frequently applied by the Courts of New Jersey under circumstances identical with those existing in the present case. The opinion then proceeds:

"There is, however, a class of cases to which both rules appear to apply, but in which the application of the one necessarily excludes the use of the other. *They are cases in which a contract of sale of real estate springs from a broader agreement which has been partly performed,* so that the parties may not be placed in their original situations by a mere refusal to enforce the agreement of sale, and the stipulation for the appraisal of the value or the determination of the price is a subsidiary or auxiliary part of the same contract. In cases of this nature it is clearly inequitable to permit a party to an agreement to deprive a complainant of its benefit by his own wrong by means of his unjustifiable refusal to appoint the appraisers which he has solemnly agreed to select, and in that way to avoid the discharge of his obligation. Large amounts of money are often invested in reliance upon such an agreement, and the defaulting party frequently

receives the substantial benefits of the contract before he avails himself of this device to repudiate it. He then refuses to name appraisers, and argues that his contract is that the price of the property shall be determined by persons whom the parties shall select, and that a court of equity may not lawfully fix the price or select the parties to determine it because such a course of action would substitute the master or the court for the parties' appraisers, and would thus make a new agreement for them, which no court may lawfully do."

The present case presents none of the elements set forth in the excerpt just quoted. The contract of sale here does not spring from a broader agreement. The language found in the third and fourth paragraphs of Exhibit A annexed to the Bill of Complaint (*Rec., pp. 8 and 9*), is the beginning and end of the agreement with which we are here concerned. Nor has there been any partial performance of that contract. Nor has anything occurred which has changed the status of any of the parties. Nor has there been any investment made by the complainant in reliance upon the terms of the agreement. We have here the typical case of a contract of sale which is not complete, because the price of an important part of the subject-matter has not been fixed, and has not been ascertained in the manner specified in the agreement, which is the exclusive method for such ascertainment.

The attention of the Court is called expressly to the fact, that the paragraphs which we have just quoted from the opinion in *Castle Creek Water Co. v. City of Aspen*, are not to be found in the Appellant's Brief. The quotation from that opinion which it contains and which appears on pages 18 and 19, begins where our quotations end, and presents an entirely erroneous and contorted view of what the Court actually decided.

Morse v. Merest, 6 *Mad.* 26, cited on page 20 of Appellant's Brief, was a case where the agreement of sale named valuers, and the defendant sought to prevent them from going on the land which was the subject-matter of the sale, for the purpose of making the valuation. That is an entirely different proposition from that which is here involved. There nothing remained to be done by the parties. The relief granted was an injunction to restrain the defendant from preventing the valuation.

Estes v. Furlong, 59 *Ill.* 298, was a sale "at a fair price," without specification as to how that price was to be ascertained.

Duffy v. Kelly, 55 *N. J. Eq.* 629, 37 *Atl. Rep.* 597, has nothing in common with this case.

There a lease provided that the tenant should have the option of extending it for another term "unless the landlord shall pay a fair price for the building" to be erected by the tenant, provided three months' notice be given by either party before the expiration of the lease. The landlord elected to purchase the building and gave the required notice, and sued for the enforcement of the provision.

It is to be observed that the agreement was one for the purchase of the building at a fair price. It was not at a price agreed upon by the parties or by arbitrators. The distinction between the two classes of contract was recognized by Vice-Chancellor Pitney, who in his opinion cited approvingly *Van Doren v. Robinson* and *Milnes v. Gery*, (*supra*), in both of which the essential difference between an agreement to sell at a fair price and one to sell at a price thereafter to be agreed upon or to be fixed in a particular method was emphatically shown.

II.

The contract alleged to have been entered into and which is sought to be enforced, is not only indefinite and uncertain with respect to the price to be paid for the lands which are its subject-matter, but it is likewise indefinite and uncertain as to the subject-matter to be conveyed, and the bill clearly indicates that there has been no meeting of the minds of the parties.

An uncertain contract cannot be specifically performed.

Myers v. Metzger, 63 N. J. Eq. 779; 52 Atl. Rep. 274.

Moore v. Galupo, 65 N. J. Eq. 194; 55 Atl. Rep. 628.

Equity will always decline to interfere when the terms of the contract are left in uncertainty.

Potter v. Hollister, 45 N. J. Eq. 508, 18 Atl. Rep. 204; *affd.* 46 N. J. Eq. 609, 22 Atl. Rep. 56.

Nor will specific performance be decreed where the court is uncertain what the agreement was.

Rockwell v. Lawrence, 6 N. J. Eq. 190.

A decree for the specific performance of a contract to give two mortgages in part payment for the purchase of lands, without stating when they were to be paid, or at what rate of interest, will be

refused on the ground that performance cannot be decreed when any material part of the terms or conditions of the contract are uncertain.

Nichols v. Williams, 22 N. J. Eq. 63.

To entitle one to a decree for the specific performance of a contract, the contract must have been completely determined and its terms definitely ascertained.

Brown v. Brown, 33 N. J. Eq. 650.

Where land is to be conveyed, specific performance will not be enforced unless the contract designates with certainty the land to be conveyed.

Carr v. Passaic Land Co., 19 N. J. Eq. 424;
22 N. J. Eq. 85.

Force v. Dutcher, 18 N. J. Eq. 401; *affd.* 19
N. J. Eq. 424.

In *Potter v. Hollister*, 18 Atl. Rep. 204, Vice-Chancellor Van Fleet said, with respect to a contract which was sought to be deduced from letters:

“His (the defendant’s) letters, either when standing alone or when taken in connection with those of the other party, must contain all the material terms of the contract, and they must make it manifest that both parties understood the terms of the contract alike,—in other words, that their minds met. When, however, it appears that the whole of the subject-matter about which the parties dealt is not embraced in the letters on which the complainant relies, and their contract, for that reason, is incomplete, (their minds never having come together) there a court of equity can do nothing, for it is only in cases of completed contracts, which are fair in themselves, and which have been fairly obtained, that equity can give relief by way of specific performance. *Braeutigam v. Edwards*, 38 N. J. Eq. 542. Equity will always decline to interfere when the evidence leaves the terms of the contract in uncertainty, or if it be reasonably doubtful whether the contract was

finally closed. *Brewer v. Wilson*, 17 N. J. Eq. 180-182; *Brown v. Brown*, 33 N. J. Eq. 650-657. * * * Considerable caution should be used in decreeing specific performance. The court is bound to see that it really does the complete justice which is aimed at, and which is the ground of its jurisdiction. *King v. Morford*, 1 N. J. Eq. 281. In a case where doubt exists as to whether a contract has been made, the court is without the least claim to jurisdiction."

So in *Sheehan v. Humphreys*, 81 N. J. Eq. 416, 83 Atl. Rep. 189, 190, Vice-Chancellor Howell said; in a suit for specific performance with regard to shares of the capital stock of a corporation where the correspondence did not mention the number of shares:

"The correspondence does not mention the number of shares. It refers to a previous conversation, in which it was specifically stated that Humphreys should retain an interest and remain in the directorate. How can the court determine how many shares were in the contemplation of the parties at the time of the correspondence. The only statement on the subject appears in the January conversation, and that left it entirely indeterminate. This court is debarred from granting relief in specific performance cases in cases where there is doubt, either concerning the facts or the law. This has been determined by the court of last resort in a long line of cases, *McKibbin v. Brown*, 14 N. J. Eq. 13, affirmed 15 N. J. Eq. 498; *Potter v. Hollister*, 45 N. J. Eq. 508, 18 Atl. Rep. 204, affirmed 46 N. J. Eq. 609, 22 Atl. Rep. 56; *Myers v. Metzger*, 63 N. J. Eq. 779, 52 Atl. Rep. 274; *Doutney v. Lambie*, 78 N. J. Eq. 277, 78 Atl. Rep. 746; *Van Riper v. Wickersham*, 77 N. J. Eq. 232, 76 Atl. Rep. 1020, 30 L. R. A., N. S., 25."

Returning to *Carr v. Passaic Land, Improvement and Building Co.*, *supra*, it there appeared that a resolution was entered upon the minutes of the defendant to sell to the complainant two acres of ground at a price to be placed upon them, at a point which he might select, and a second resolution that two acres of land be sold to the complainant at \$800 per acre. It was held that

this did not designate the land to be sold with sufficient certainty to entitle the complainant to a decree for a conveyance. The Chancellor said:

“It is well settled that an agreement, or memorandum, for the sale of land, must designate the land to be sold, as well as the price, with certainty. In this case, the first resolution does not fix the price; it is simply to sell Carr two acres at a price to be placed on them, at the point which he might select. It is very indefinite as to the land, and even as to the fact whether he should be allowed to select anywhere upon the tract of the company; but as to price, is it expressly open for negotiation. The second resolution is, that two acres of land be sold to Mr. Carr at \$800 per acre. It does not locate the lands, nor refer to the former resolution, nor in any way authorize him to select the lands; nor is there anything in the minutes from which it can be inferred that it was for two acres anywhere that he might select.”

On the subsequent hearing, reported in *22 N. J. Eq. 85*, the Chancellor said:

“It is proved, by parol, that before this resolution was passed, receiving the report of the committee, Carr had told the members of the board where he wanted the two acres; and I have no doubt that these two acres were intended to be sold to him. But, unfortunately, this could not be gathered from the written resolution. A resolution ‘that two acres be sold,’ is, upon its face, vague and uncertain. The vagueness and uncertainty is patent, and no parol proof can be admitted to explain it.”

On the general subject of the necessity for certainty and definiteness in a contract, attention is called to the language of Judge Andrews in *Stanton v. Miller*, *58 N. Y. 192-200*; and to *United Press v. New York Press Co.*, *164 N. Y. 406, 410* and *Brauer v. Oceanic Steam Navigation Co.*, *178 N. Y. 339*.

Applying these principles to the present case, we contend that it is impossible, under the terms of the option, to determine what lands are to be

purchased, how many hectares are referred to, what the character of the land is as to cultivated and uncultivated areas, and when and where the alleged purchase was to be carried out.

(a) The option refers to a purchase of "all the *remaining* lands in the Santisima Trinidad de Aracataca and La Concepcion *and other lands* adjacent and owned or controlled by the said Davila." There is nothing in the instrument which identifies "the *remaining* lands". The remainder of what? Apparently it is contemplated that something must be excluded from lands coming within the general description in order to ascertain what "land" remains. There is nothing, however, to show what is to be excluded. The bill of complaint seeks to deduce the inference, that the lands of the Santa Marta Fruit Company are to be excluded. There is, however, nothing in the option which refers to any lands of the Santa Marta Fruit Company. The only reference to that company is, that 2440 shares of its stock are to be purchased by the United Fruit Company from Davila.

(b) By the second paragraph of the bill, the entire tract of land known as the "Santisima Trinidad de Aracataca" is alleged to contain a total of 25,580 hectares and 5,000 square meters. The option makes no reference to the area of the tract. This quantity of land is, however, alleged to include lands "owned and controlled by the Santa Marta Fruit Company, your complainant *and several others.*" Notwithstanding that fact, the allegation of the eleventh paragraph is, that of the total area of 25,580 hectares, 24,580 hectares are uncultivated and 1500 cultivated. There is thus an inexplicable indefiniteness and uncertainty as to the subject-matter of the option.

(c) By the third paragraph of the complaint the lands referred to in the previous paragraph are described by reference to boundaries more or less uncertain, the western boundary especially being indefinite "by the swamps or inundated lands (Anegadizos) of the Cienaga Grande." The lands so referred to must necessarily include lands owned and controlled by the Santa Marta Fruit Company, the complainant, and several other persons.

(d) The contract is sought to be made out by the telegram of Montejo, dated October 24, 1912, by which he is claimed to have accepted the option. An examination of that document, however, as set forth in the seventh paragraph of the bill of complaint, shows that he did not accept the option which was conferred, but departed in material respect from its terms. There is nothing to indicate that there was any adoption by Davila of the modified terms of the acceptance. The only allegation in the bill on that subject is that contained in the tenth paragraph, which states:

"That on the date of the receipt of said acceptance of said option, complainant by telegraph and in writing, notified the United Fruit Company that he was ready and willing to execute a deed for the transfer of *said lands in accordance with the terms of said contract.*"

That does not suffice to create a meeting of the minds.

Poel v. Brunswick-Balke-Collender Co., 216
N. Y. 310, and cases cited.

(e.) As already stated, the option included "all the remaining lands in the Santisima Trinidad de Aracataca and La Concepcion and other lands adjacent and owned or controlled by the said

Davila." This description manifestly indicated three categories, namely: (1) lands in the Santisima Trinidad de Aracataca; (2) lands in La Concepcion, and (3) other lands adjacent and owned or controlled by the said Davila, and which, as is set forth in the second paragraph of the bill, belonged to other persons.

The telegram of acceptance sent by Montejo does not refer to these three categories. On the contrary, it is a formal notification that the United Fruit Company purchases "your remaining lands in the Santisima Trinidad tract bounded," etc. This was merely an offer to purchase Davila's remaining lands, and not those of any other person. The option related not only to Davila's lands, but to those of other persons, and was an option for "all" and not of only a part of the lands to which the instrument referred.

(f) In the next place, the acceptance only related to the purchase of Davila's remaining lands in the "Santisima Trinidad tract." That necessarily excluded the lands in La Concepcion, which is presumptively another tract, and likewise excludes "other lands adjacent and owned or controlled by the said Davila."

The description of the lands known as the Santisima Trinidad given in the third paragraph of the bill, is practically the same as that contained in the telegram of October 24, 1912. Hence the option of the complainant and the acceptance by Montejo relate to two entirely distinct propositions, the latter covering merely Davila's remaining lands in the Santisima Trinidad tract, while the former related not only to Davila's lands in the Santisima Trinidad tract, but also to lands belonging to him in La Concepcion and lands belonging to others adjacent to the Santisima Trinidad tract and La Concepcion.

There has, therefore, been no meeting of the minds. At all events there is such uncertainty and indefiniteness as to what was the subject-matter of the option and acceptance, that the case comes within the authorities above cited.

(g) Moreover, the acceptance cannot constitute the basis for an independent contract, in view of the fact that, neither in terms nor by reference, does it specify any price which the United Fruit Company was to pay for the lands referred to therein. From that point of view, therefore, there is such a lack of certainty and definiteness as to stand in the way of a decree for specific performance.

That the complainant is evidently seeking to enforce specific performance not only with respect to lands belonging to him, but also to lands belonging to others, appears from the allegation of the second paragraph of the bill, that the "several other" owners had made, executed and delivered good, valid and effectual powers of attorney to him whereby he was authorized to convey their lands.

This likewise appears from the allegation of the fourth paragraph of the bill, to the effect that the defendant, on or about the 3rd day of November, 1911, entered into an agreement with the complainant "who possessed powers of attorney to sell and dispose of said lands on behalf of all the individual owners thereof," whereby the complainant "gave to the United Fruit Company an exclusive option upon such lands owned and controlled by the complainant *and his associates as aforesaid.*"

The same idea is conveyed by the ninth paragraph, in which it is alleged that "the complainant individually *and through his associates* still

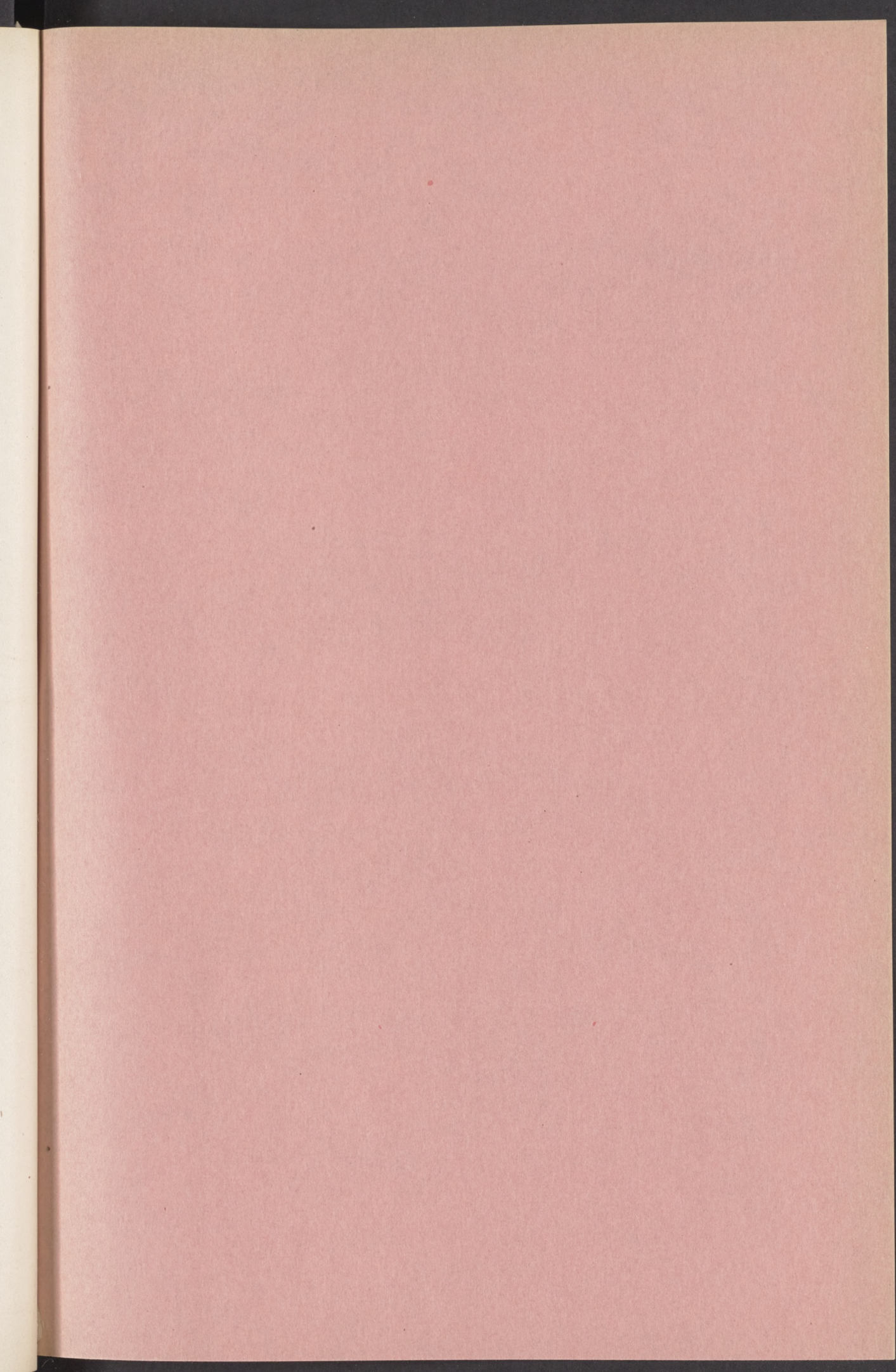
is in a position to transfer and deliver title to all said lands aforesaid, except such as is owned and controlled by the Santa Marta Fruit Company as aforesaid."

There is no allegation to show how much of the land referred to belonged to the complainant and how much to "others" or to his "associates". This is significant, in view of the terms of Montejo's telegram, which notifies the complainant that the defendant purchases "your (his) remaining lands in the Santisima Trinidad tract."

III.

It is respectfully submitted that the decree dismissing the Bill of Complaint should be affirmed with costs.

ROBERT H. McCARTER,
LOUIS MARSHALL (of the New York Bar),
Respondent's Counsel.



It is to be noted that the bill is an
amendment to the act of 1887, and
is not a new act. It is also to be
noted that the bill is not a
repeal of the act of 1887, but
an amendment to it. The bill is
intended to be a permanent
amendment to the act of 1887,
and is not intended to be a
temporary amendment.

III.

It is respectfully submitted that the
above bill should be referred to the
committee on the subject of the
act of 1887.

Very respectfully,
J. J. [Name]
[Address]
New York City