

IN CHANCERY OF NEW JERSEY.

NEW JERSEY, to wit: The State of New Jersey to Cape May Real Estate Company

[SEAL]

GREETING: We command you, that you appear in manner and form required by law in our Court of Chancery, on the sixteenth day of March, 1915, at Trenton, to answer to a bill of complaint exhibited against you in our said Court by Neptune Fisheries Company, and to do further and receive what our said Court shall have considered in that behalf; and this you are not to omit, under the penalty that may fall thereon. 10

WITNESS, his Honor, EDWIN ROBERT WALKER, Chancellor of our said State, at Trenton, the twenty-third day of February, in the year of our Lord one thousand nine hundred and fifteen. 20

ROBERT H. McADAMS, Clerk.

JAS. S. GRADWELL, Sol'r.

NOTICE.—The defendant is NOT required to appear at Trenton in person, at the return day, but if he intends to make a defence it is only necessary for him to answer, plead or demur to the bill within the time required by law. 30

ROBERT H. McADAMS,
Clerk.

IN CHANCERY OF NEW JERSEY.

To His Honor Edwin R. Walker, Chancellor of the State of New Jersey.

Your orator, the Neptune Fisheries Company, a corporation under the laws of the State of New Jersey, complaining shows:

1. That it was duly incorporated under the laws of the
10 State of New Jersey in the year nineteen hundred and
thirteen. That the purpose of said corporation was to
buy and sell fish and do all things appertaining to the fish
business and fish freezing.

2. Your orator further shows that the Cape May Real
Estate Company, a corporation under the laws of the State
of New Jersey, being or pretending to be, seized and pos-
sessed of or otherwise holding title to a certain parcel of
land and appurtenances thereunto adjoining or belonging,
20 situate in the township of Lower, county of Cape May,
described as follows: Beginning at a point in the inner
section of the projection of the harbor line and the line
running South fifty-seven degrees nineteen minutes and
twenty-two seconds East sixteen hundred and fifty feet
from the Mill Road, running to Schellenger's Landing;
and thence North thirty-two degrees forty minutes and
thirty-eight seconds East two hundred feet; thence North
fifty-seven degrees nineteen minutes and twenty-two sec-
30 thirty-two degrees forty minutes and thirty-eight seconds
West two hundred feet; thence South fifty-seven degrees
nineteen minutes and twenty-two seconds East three hun-
dred and fifty feet to the place of beginning.

3. And your orator further shows that the said Cape
May Real Estate Company did, on or about the twenty-
eighth day of February, nineteen hundred and fourteen,
make and enter into an agreement on the aforesaid date

whereby the said Cape May Real Estate Company agreed among other things to grant to your orator an option to purchase said ground, which said option was to extend over a period of five months, to wit: from the twenty-fifth day of February, nineteen hundred and fourteen, until the twenty-fifth day of July, nineteen hundred and fourteen, a copy of which said option is hereunto attached, and which shall be designated for the purpose herein contained as Exhibit One.

4. Your orator further shows that on the twenty-third day of July, nineteen hundred and fourteen, your orator accepted this option by writing a letter to the said defendant company agreeing to accept and perform all the conditions and terms specified in said agreement of option, which said letter was addressed to said defendant company's office, the said letter being registered and a receipt returned to your orator, a copy of which letter is hereto annexed and designated as Exhibit Two. 10

5. And your orator further shows that the defendant company, on the twenty-fourth day of July, nineteen hundred and fourteen, wrote a letter in acknowledgment of the above mentioned letter, therein stating that it would immediately begin carrying out the terms of the said agreement, a copy of which letter is hereto annexed and designated as Exhibit Three. 20

6. Your orator further shows that under the terms of the said agreement dated the twenty-fifth day of February, nineteen hundred and fourteen, made between your orator and the said defendant company, the defendant company agreed to sell all the above described tract of land, said land having a frontage of two hundred feet on the harbor and extending backward therefrom between parallel lines of that width three hundred and fifty feet from the present sod bank for the sum of Ten Thousand Dollars, payable on the issue to the said defendant company of one thousand shares of the capital stock of your 30

orator of the par value of Ten Dollars each, the said defendant company agreeing to accept.

7. And your orator further shows that the defendant company further agreed that upon the acceptance of this option that it, the defendant company, would immediately erect a substantial bulkhead along the present sod bank line as shown on the blue print attached to said agreement, sufficiently strong and permanent to hold in place any material to be filled in. And it further agreed to fill in
10 the whole of said property its entire width and depth to a grade corresponding to the grade of the City of Cape May, which grade, however, should not be less than nine feet above mean low water. And your orator further shows that the said defendant company also agreed that the property purchased should extend into the harbor to the outer dock or the harbor line, which is now or hereafter to be established and such extension was not to be reckoned in the three hundred and fifty feet mentioned as the depth, but the distance was to be measured from
20 the present sod bank line.

8. And your orator further shows that the defendant company also agreed that the deed which was to be given to your orator for the above mentioned property should contain an easement or right of way over the other lands of the defendant company extending from the main public road to the said property about to be conveyed to your orator, lying adjacent to the right of way of the Reading Railroad, which right of way should have been filled in and
30 graded to correspond to the grade of the said ground above mentioned.

9. And your orator further shows that it was also agreed by the defendant company that upon notification to it by your orator it would immediately commence to fill in and grade the said property and complete the same within two months from the date of notification; and that all of said grading and filling should be at the cost and

expense of said defendant company. And it was provided further that the title to said property to be conveyed to your orator, of the said defendant company, was to be free and clear of all encumbrances, to be good and marketable title and such as would be insured free of all exceptions by the West Jersey Title and Guarantee Company or some other good and reliable company.

10. And your orator further shows that it was also agreed by the defendant company that your orator should have the right to connect at any time with the tracks of the Atlantic City Railroad, and your orator for the purpose of said connection and maintenance of the same was to have a perpetual easement over the necessary lands of the defendant company for such connection to the nearest point of permanency of the tracks of the said railroad. 10

11. And your orator further shows that it was distinctly understood at the signing of the said agreement that the easement or right of way mentioned in paragraph eight of this bill was intended for a passage or drive-way only and not for railroad purposes, but it was agreed that if the defendant company at any time was desirous of extending a spur or track from said railway into other properties belonging to it, the said defendant company, or which it hereafter should sell to others, it should have a right of crossing said drive or passageway or easement with its tracks for that purpose. 20

12. And your orator further shows unto your Honor that it always has been willing and ready to perform its part of the said agreement and on having a good and marketable title shown to the said premises and a conveyance in fee simple thereof, discharged of all encumbrances made to it, and further on having the said defendant company erect a substantial bulkhead along the present sod bank as shown on the aforesaid mentioned blue print attached to the aforesaid mentioned agreement, sufficiently strong and permanent to hold in place any 30

material to be filled in; and further, on having the defendant company fill in the whole of said property its entire width and depth to a grade corresponding to the grade of the City of Cape May, which grade, however, should not be less than nine feet above mean low water; and on having further the said defendant company to insert into said deed for said property to your orator, an easement or right of way over the lands of said defendant company of the width of two rods, extending from the main public road to said property lying adjacent to the right
10 of way of the Reading Railroad; and having said defendant company to fill in said right of way or easement and grade it to correspond to the grade referred to above; and further to have said defendant company grant to your orator a perpetual easement over the property of the said defendant company; and further to have said defendant company to perform each and every covenant in said agreement, dated the twenty-eighth day of February, nineteen hundred and fourteen, between the said defendant
20 company and your orator; then your orator will pay the said purchase money or sum of Ten Thousand Dollars in the stock of your orator to the said defendant company.

And your orator hoped that the said defendant company would have complied with such reasonable request of your orator, as in equity and good conscience it should have done. And the said defendant sometimes pretends that it did not enter into said agreement with your orator, whereas your orator charges the contrary to be the truth. All of which said acts, doings and pretences of the said
30 defendant are contrary to equity and good conscience and tend to the manifest wrong, injury and oppression of your orator in the premises.

In consideration whereof and for as much as your orator is without adequate remedy in the premises at and by the strict rules of the common law and can only obtain relief in this Honorable Court, where matters of this na-

ture are properly cognizable and relievable; to the end, therefore, that the said defendant company may, to the best and utmost of its knowledge, remembrance, information and belief, full, true and perfect answer make to all and singular the matters aforesaid, without oath, and that as fully and particularly as if the same were here repeated, and that your orator may have such further or other relief in the premises as the nature of the case may require and as shall be agreeable to equity and good conscience.

May it please your Honor, the premises considered, to grant unto your orator the State's writ or writs of subpoena, issuing out and under the seal of this Honorable Court, to be directed to the said Cape May Real Estate Company, commanding it, by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor in this Honorable Court, then and there to answer all and singular the said premises, and to stand to, abide by and perform such order and decree therein as to your Honor shall seem meet, and shall be agreeable to equity and good conscience. And your orator, as in duty bound, will ever pray, etc.

JAMES S. GRADWELL,
Solicitor and of Counsel with Complainant.

EXHIBIT I.

THIS AGREEMENT, made this Twenty-fifth day of February, A. D. 1914, BETWEEN the CAPE MAY REAL ESTATE COMPANY, a corporation created by and existing under the Laws of the State of New Jersey, party of the first part, and the NEPTUNE FISHERIES COMPANY, a like corporation, party of the second part;

10 WITNESSETH, That for and in consideration of the sum of One Dollar, the receipt whereof is hereby acknowledged, the said party of the first part hereby agrees to give unto the said party of the second part, at any time within five months from the date hereof, the option of purchasing a piece of land on the Harbor front of said CAPE MAY REAL ESTATE COMPANY'S plans, which land is situate in the Lower Township of Cape May County and lies just to the northward of the Reading Coal Trestle on what is known as the Leaming Farm, and is shown on the map or draft hereto attached. Said
20 land is to have a frontage of two hundred (200) feet on the Harbor, and extend backward therefrom between parallel lines three hundred fifty (350) feet from the present sod bank.

If this option is accepted the price to be paid for the said land by the party of the second part is the sum of TEN THOUSAND (\$10,000.00) DOLLARS, payable by issuing to the said party of the first part of One
30 Thousand (1,000) shares of the capital stock of the said party of the second part—NEPTUNE FISHERIES COMPANY—at the par value of Ten (\$10) Dollars per share, which the said party of the first part hereby agrees to accept for the same.

And the said party of the first part further agrees that it will, upon the acceptance of this option and notification so to do, immediately erect a substantial bank or bulk-head along the present sod bank line, as shown on blue print attached, sufficiently strong and permanent to hold

in place the material to be filled in, and will fill in the whole of said property its entire width and depth to a grade corresponding to the grade of the City of Cape May; which grade, however, shall not be less than nine feet above mean low water.

It is further agreed that if this option is accepted, the property herein agreed to be sold shall extend out into the Harbor to the outer dock or Harbor Line of the same which now or hereafter may be established, and which extension, however, is not to be reckoned in the Three Hundred and Fifty (350) feet in depth; that distance being measured from the present sod bank lines. 10

It is further agreed that the deed or deeds for said property shall contain an easement or right-of-way over other of the said party of the first part of a width of two rods, and extending from the main public road to said property and laying adjacent to the right-of-way of the Reading Railway; which right-of-way or easement, however, may be used in common by others who may hereafter purchase or use other properties in the vicinity, and which right-of-way shall be filled in and graded to correspond to the grade above referred to. 20

If this option is accepted by the party of the second part, then and in such case the party of the first part agrees, upon notification by the party of the second part, to at once commence the filling in and grading of said property and to complete the same within two months from the date and time of said notification. All of which grading and filling in is to be at the proper cost and expense of the said party of the first part; and upon the completion of the same the party of the second part agrees to pay the full consideration for the premises. PROVIDED, however, and it is expressly understood, that the title to the property to be conveyed must be free and clear of all encumbrance, and a good and marketable title, and such as may be insured, free of all exceptions, by the West Jersey Title and Guaranty Company, or some other good and reliable company. 30

It is further agreed, that the said party of the second part shall have the right, if this option is accepted and the premises purchased by it, to connect at any time with the tracks of the Philadelphia and Atlantic City Railroad Company (Reading Railway System), and that for said purpose of said connection and the maintenance of the same, the said party of the second part shall have a perpetual easement over the necessary land for such connection, from its property over the property of the party of the first part to the nearest point of permanency of the tracks of said Railroad Company.

10 And it is further understood and agreed, that the said right-of-way or easement shall not be located longitudinally on the right-of-way of the width of two rods, hereinbefore provided for, but that said former right-of-way is intended only for a passage and driveway, and not for railroad purposes. But it is agreed, however, that if at any time the party of the first part is desirous of extending a spur or track from said railroad into other property, belonging to them, or which they may hereafter sell to others, it shall have the right to cross said drive or passage way with its track for that purpose.

20 IN WITNESS WHEREOF, the said parties hereto have caused their respective seals to be hereto attached, acknowledged by their Presidents and attested by their Secretaries, the day and year first above written.

Witnesses, CAPE MAY REAL ESTATE COMPANY,
B. G. ECKARD. NELSON Z. GRAVES,
EDW. H. HEILMAN. President.

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Attest:

C. EARLE MILLER,
Secretary.

EDW. H. HEILMAN. NEPTUNE FISHERIES COMPANY,
H. J. CRUGER. EMERSON C. CUSTIS,
President.

Attest:

J. H. CRUGER,
Secretary.

STATE OF NEW JERSEY, }
 COUNTY OF CAMDEN, } ss.

BE IT REMEMBERED, That on this Twenty-fourth day of September, in the year of our Lord one thousand nine hundred and fourteen, before me, the subscriber, a Commissioner of Deeds for the State of New Jersey, personally appeared Emerson C. Custis, who, being by me duly sworn, on his oath saith, that he is the President of the Neptune Fisheries Company, a party within named, and that J. H. Cruger is the Secretary; that deponent knows the common or corporate seal of said party and that the seal annexed to the within Deed or Agreement of Conveyance is such common or corporate seal; that the said Deed or Agreement of Conveyance was signed by the said President and the seal of said Neptune Fisheries Company affixed thereto; that said Deed or Agreement of Conveyance was signed, sealed and delivered as and for the voluntary act and deed of said Neptune Fisheries Company for the uses and purposes therein mentioned, pursuant to a Resolution of the Board of Directors of said Neptune Fisheries Company; and at the execution thereof the deponent subscribed his name thereto as witness. And the deponent further saith, that the said Deed or Agreement of Conveyance was duly accepted, pursuant to a Resolution of the Board of Directors of the said Neptune Fisheries Company; and that notice of the same was duly given to the said Cape May Real Estate Company as per the terms as provided on July 23, 1914; and that the receipt of said notice was duly acknowledged by the said Cape May Real Estate Company under date of July 24, 1914.

Sworn and subscribed the day and year aforesaid.

JOHN A. MACPEAK,
 Commissioner of Deeds.

EXHIBIT 2.

PHILADELPHIA, July 23rd, 1914.

ATTENTION MR. N. Z. GRAVES,
Cape May Real Estate Company,
22 S. 3rd St., Phila., Pa.

GENTLEMEN:—

10 As per the following resolution approved by the Board of Directors of the Neptune Fisheries Company, under yesterday's date, I beg to notify you that this Company accepts the option referred to under its full terms and will arrange for title insurance immediately:

“RESOLVED, That the proper officers of this Company be and they are hereby authorized, empowered and instructed to accept and close a certain option entered into for the Cape May Real Estate Co. under date of February 20 Twenty-fifth, Nineteen hundred and fourteen, for the purchase of a certain parcel of land situate on Cape May Harbor, New Jersey, and upon a notification of acceptance to the said Cape May Real Estate Company, to request the filling in of the said parcel of land at the earliest date according to the terms thereof.”

Am leaving the city to-day for a few days but will endeavor to see you immediately upon my return.

Very truly yours,

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EMERSON C. CUSTIS,
President.

EXHIBIT 3.

CAPE MAY, N. J., July 24, 1914.

NEPTUNE FISHERIES COMPANY,
EMERSON S. CUSTIS, President,
Cape May, N. J.

GENTLEMEN:—

We beg to acknowledge receipt of your favor of the 23rd inst., and in accordance with agreement made between the Neptune Fisheries Company and this Company, beg to state that the property will immediately be filled in and graded. In the meantime will you kindly, in order to place this matter in the proper condition so far as the carrying out of the agreement is concerned, place in the hands of the West Jersey Title & Guaranty Company one thousand (1,000) shares of the capital stock of your Company, same to be held by them pending the filling in and grading of the property, upon the completion of which the transaction can be concluded by delivery of deed to your Company. 10 20

Yours very truly,

NELSON Z. GRAVES,
President.

IN CHANCERY OF NEW JERSEY.

	Between		
	NEPTUNE FISHERIES COMPANY,	}	ON BILL, &C.
	Complainant,		
	AND		
10	CAPE MAY REAL ESTATE COM-	}	ANSWER.
	PANY,		
	Defendant.		

The answer of Cape May Real Estate Company, defendant, to the bill of complaint of Neptune Fisheries Company, complainant.

- 20 1. This defendant says, that it admits the incorporation of the Neptune Fisheries Company under the laws of the State of New Jersey, at the time and for the objects set forth in the bill of complaint.
2. This defendant says, that the Cape May Real Estate Company is a corporation of the State of New Jersey and is seized and possessed of the tract of land mentioned and described in complainant's bill.
3. This defendant says, that it admits the making of the agreement set forth in complainant's bill.
- 30 4. This defendant admits the acceptance by the Neptune Fisheries Company and the option mentioned in said agreement in manner and form set forth in the bill of complaint.
5. This defendant says, that it admits that a letter was written on behalf of the Cape May Real Estate Company in acknowledgment of a letter of the Neptune Fisheries Company, mentioned in said bill and therein stated that

steps would be taken to carry out the terms of said agreement.

6. This defendant says, that the statements contained in the sixth, seventh, eighth, ninth, tenth and eleventh paragraphs of complainant's bill, relative to the terms of the agreement, dated the twenty-fifth day of February, one thousand nine hundred and fourteen, are according to the terms and conditions of said agreement.

7. This defendant says, that it has no knowledge, information or belief as to whether the complainant has always been willing and ready to perform its part of the agreement upon the defendant carrying out the terms of the agreement on its part to be done and performed, and thereupon deliver to the defendant certificates of its capital stock in the sum of ten thousand dollars. 10

8. This defendant says, that prior to the making of the agreement mentioned in the bill of complaint in this cause, the Neptune Fisheries Company, or some one in its behalf, induced the defendant to enter into an agreement similar to the agreement mentioned in the bill of complaint, and fraudulently and dishonestly caused the land mentioned in said agreement to be described contrary to the true understandings and agreements between the parties, and that upon the rescinding of said agreement induced the defendant to enter into the agreement mentioned in the bill of complaint upon the false and fraudulent statement that the capital stock of the Neptune Fisheries Company had been subscribed to the extent of sixty per cent. of its authorized capital stock, or more than sufficient to put up a building to cost, with machinery, about sixty thousand dollars. 20 30

And this defendant, by way of cross-bill exhibited against the complainant, says:

1. That it was induced to enter into the agreement, marked "Exhibit 1" in complainant's bill of complaint,

by one Emerson C. Custis, who was acting in behalf of the said Neptune Fisheries Company, upon the statements and representations of the said Custis that the stock of the Neptune Fisheries Company had been subscribed in a sum equal to sixty per cent. of its authorized capital stock and that a sufficient sum of money had been subscribed by reputable and responsible parties to enable the Neptune Fisheries Company to erect a building upon the lot of land in the agreement mentioned, to cost, with machinery, about the sum of sixty thousand dollars; and the
10 said Custis further represented that he had subscribed to the stock of the said company to the extent of five thousand dollars.

And this defendant, by way of cross-bill, further says, that the defendant company is without tangible assets and that its stock has no value, and that the statements and representations made by the said Custis were false and fraudulent and made for the sole purpose of inducing the defendant to part with valuable property without just
20 and fair consideration. That subsequently the said Custis admitted that the stock of the Neptune Fisheries Company was not subscribed for to the extent claimed at the time the agreement was entered into; that the said Custis from time to time promised to furnish to the officers of the Cape May Real Estate Company a list of subscriptions for the capital stock of the Neptune Fisheries Company, but from time to time, upon subsequent requests, declined to furnish the desired information, all of which
30 said acts and doings of the complainant are contrary to equity and good conscience.

In consideration whereof and to the end therefor, that the complainant company may, to the best of its knowledge, information and belief, full, true and perfect answer make to all and singular the matters aforesaid, without oath, and that as fully and particularly as if the same were here repeated; and that, by decree of this Honor-

able Court, the said agreement, marked "Exhibit A" in the complainant's bill, may be rescinded, set aside and for nothing holden; and that the defendant may have such further or other relief in the premises as the nature of the case may require and as shall be agreeable to equity and good conscience.

And the defendant prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

WESCOTT & WEAVER, 10
Solicitors for and of Counsel with Defendant.

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IN CHANCERY OF NEW JERSEY.

	Between	}	
	NEPTUNE FISHERIES COMPANY,		ON BILL, &C.
	Complainant,		REPLICATION.
	AND		
10	CAPE MAY REAL ESTATE COM-	}	ANSWER TO CROSS-
	PANY,		BILL.
	Defendant.		

The replication of Neptune Fisheries Company, complainant, to the answer of the Cape May Real Estate Company, defendant.

The complainant joins issue on the answer of the defendant.

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JAMES S. GRADWELL,
Solicitor of Complainant.

And this complainant, by way of answering to cross-bill exhibited against this complainant, says:

That it denies that the said Emerson C. Custis acted on behalf of the Neptune Fisheries Company in making the agreement mentioned in complainant's bill, and was the agent of the said complainant, and denies that the said Custis stated that there was sixty per cent. of the
30 stock subscribed, but admits that he might have said, some time previous to the signing of the said agreement, that there was close to sixty thousand dollars worth of the said stock either subscribed to, or different parties pledged themselves to take this amount, which would have been sufficient to erect a building upon the lot of land which this complainant is suing for. And the said Custis further admits that he has subscribed to the stock

of the complainant to the extent of five thousand dollars. This defendant further denies that the company is without tangible assets, and denies further that the stock has no value, and denies further that the said Custis made false and fraudulent statements with the purpose of inducing said defendant to part with the said ground.

But this complainant further says, in denial of the allegations set forth in defendant's cross-bill, that before the signing of the agreement attached to the bill of the said complainant, to wit, agreement dated the twenty-fifth day of February, nineteen hundred and fourteen, that the said Cape May Real Estate Company, through its agent and president, Nelson Z. Graves, entered into a prior agreement dated November twenty-fifth, nineteen hundred and thirteen, agreeing to sell exactly the same piece of ground for exactly the same price and to perform exactly the same condition; and that the only reason why the subsequent agreement, to wit, agreement dated February twenty-fifth, nineteen hundred and fourteen, was drawn up, was for the accommodation of the Cape May Real Estate Company through its agent, Nelson Z. Graves. The only reason stated by the said Graves being that the ground was not fully described enough and that the building of the bulkhead which the said Cape May Real Estate Company agreed to do was too indefinite, and it was on this account that the said Graves himself suggested the drawing of a new agreement; a copy of the first agreement, to wit, dated November 25th, 1913, is hereto attached and made part of this answer.

And this complainant, by way of further denial, further answering says, that the said Graves used threats of all character to compel the said Custis to destroy the said original agreement, but the said Custis then and there stated to the said Graves that he no longer held the said agreement as trustee, but had fulfilled his duty and assigned the same to the Neptune Fisheries Company, whereupon the said Graves again used threats against the

said Custis; that the said Custis subsequently, at a meeting of the directors of the said Neptune Fisheries Company, suggested that a committee be appointed to call upon the said Graves, the said Custis refusing to having anything further to do with Graves except in the presence of others, which said committee entered into the terms of the agreement dated February 25, 1914, and that the said Custis had nothing whatever to do with the said Graves consummating the said agreement for the Cape May Real Estate Company.

- 10 This complainant further denies that they agreed to give said defendant a list of the subscriptions for its capital stock, and denies further that the said defendant had any right whatsoever to a list of said subscribers, and that the said complainant denies that it used any means whatsoever to have the said defendant enter into an agreement fraudulently and falsely, and says that the final consummation of this agreement was after a deliberation of nearly five months, during which period of
- 20 time and during the said negotiations every possible question was settled, as between the parties, to the entire satisfaction of all parties concerned except the said Nelson Z. Graves, the president of said corporation, who, when he found that he could not control the said Neptune Fisheries Company, has used every impediment and means to prevent the company being organized and fulfilling the duties of its organization.

- This complainant says further, that the refusal on the part of the said company to carry out this agreement is
- 30 its only reason for not proceeding with the construction and completion of its plant.

And this complainant prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

JAMES S. GRADWELL,
Solicitor of Complainant.

This agreement, made the twenty-fifth day of November, A. D. 1913, between the Cape May Real Estate Company, a corporation created by and existing under the laws of the State of New Jersey, of the one part, and Emerson C. Custis, trustee in organization for a company to be organized under the laws of the State of New Jersey, of the other part.

Witnesseth, that the said Cape May Real Estate Company, for and in consideration of the sum of one dollar, which is hereby acknowledged to have been paid, agrees to and with the said Emerson C. Custis, acting as trustee 10 as aforesaid, his nominee or assigns, at his or their option, that at any time within a period of ninety (90) days from the date hereof, it will grant, bargain and sell, in fee simple, to the said Emerson C. Custis, trustee, his nominee or assigns, for a total consideration of ten thousand (\$10,000) dollars, a tract or parcel of land with a frontage of two hundred (200) feet on Cape May Harbor, in the county of Cape May and State of New Jersey; and with a depth of land bordering on Cape Island 20 Creek of three hundred and fifty (350) feet. The title to the said land to be free of all incumbrances, and such as will be insured by a reputable Title Company of the State of New Jersey free of all exceptions—with such water rights as now exist to the said land.

It is also understood and agreed between the parties hereto, that in consideration of the said purchase being consummated as aforesaid, that the right of the said Emerson C. Custis, trustee, or his nominee or assigns, to the easement or use of a railroad right-of-way or connection now over other lands of the said Cape May Real Estate Company to the right-of-way of the Atlantic City 30 Railroad Company shall run with the land for all time.

And it is further understood and agreed, that the said Cape May Real Estate Company will fill in the same with sand or soil to the grade of land as set by the city of Cape May.

In witness whereof, the said parties hereto have hereunto placed their hands and seals the day and year first above written.

CAPE MAY REAL ESTATE COMPANY,
By NELSON Z. GRAVES, [L. S.]
EMERSON C. CUSTIS,
Trustee.

Witnesses.

Note: Erasure on fourth line above made before signing.
10 H. F. COULTER.

ENDORSEMENT.

For value received, as per the terms, consideration and conditions of the within agreement, I hereby assign, transfer and set over unto the Neptune Fisheries Company all my right, title and interest to the within agreement, and hereby state that the said company is the same company for which I accepted a trust in organization.

In witness whereof, I have hereunto set my hand and seal this second day of December, A. D. 1913.

20 EMERSON C. CUSTIS, [L. S.]
Trustee.

IN CHANCERY OF NEW JERSEY.

Between NEPTUNE FISHERIES COMPANY, Complainant, AND 30 CAPE MAY REAL ESTATE COM- PANY, Defendant.	}	ON BILL, &C. REPLICATION.
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The defendant joins issue on the answer of Neptune Fisheries Company to its answer in the nature of a cross-bill.

WESCOTT & WEAVER,
Solicitors of Defendant.

IN CHANCERY OF NEW JERSEY.

Between NEPTUNE FISHERIES COMPANY, Complainant, AND CAPE MAY REAL ESTATE COM- PANY, Defendant.	}	ON BILL, &C. DECREE.	10
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This cause coming on to be heard upon the bill of complaint and answer, replication, cross-bill and answer thereto, filed in the presence of James S. Gradwell, of counsel with the complainant, and Francis D. Weaver, of counsel with the defendant, and the pleadings having been read, whereby it appears that all the material allegations in said bill are admitted, and no proofs having been offered in substantiation of the allegations contained in said cross-bill, and the arguments of counsel having been heard and considered, and the Chancellor being of the opinion that the complainant is entitled to relief: 20

It is thereupon, on this twenty-fourth day of November, 1917, by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED that the said defendant, upon the terms and conditions hereafter set forth, shall make, execute and acknowledge in due form of law, and deliver to the complainant a good and sufficient warranty deed for that certain parcel of land situate in the township of Lower, county of Cape May, described as follows: 30

Beginning at a point in the inner section of the projection of the harbor line and the line running south fifty-seven degrees nineteen minutes and

twenty-two seconds East sixteen hundred and fifty feet from the Mill Road, running to Schellenger's Landing; and thence North thirty-two degrees forty minutes and thirty-eight seconds East two hundred feet; thence North fifty-seven degrees nineteen minutes and twenty-two seconds West three hundred and fifty feet; thence South thirty-two degrees forty minutes and thirty-eight seconds West two hundred feet; thence South fifty-seven degrees nineteen minutes and twenty-two seconds East three hundred and fifty feet to the place of beginning.

10 Together with all the right, title and interest of the said defendant in the land under water appurtenant to the above described premises and extending into the harbor to the outer dock or harbor line now or hereafter established; and that said deed of conveyance for said property shall contain an easement or right of way for a passage and drive-way, but not for railroad purposes, over other land of said defendant of a width of two rods extending

20 from the main road to said property and lying adjacent to the right-of-way of the Reading Railway, with the provision that such right-of-way or easement may be used in common by others who may hereafter purchase or use other properties in the vicinity; and with the further provision that if at any time the defendant is desirous of extending a spur or track from said railroad into other property belonging to it, or which it may hereafter sell to others, it shall have the right to cross said drive or passageway with its track for that purpose. And that

30 said deed of conveyance shall likewise grant a perpetual easement for the construction and maintenance of a railway track connecting the above described premises with the tracks of the Philadelphia and Atlantic City Railroad Company over other lands of the said defendant, to the nearest point of permanency of the tracks of said Railroad Company; provided, that said easement shall not be located longitudinally on the right-of-way of the width of two rods above provided for.

And it is further ORDERED, ADJUDGED and DECREED that it be referred to Charles V. D. Joline, one of the Special Masters of this Court, to ascertain the cost of erecting a substantial bank or bulkhead along the present sod bank line as provided for in said agreement, and of filling in the whole of said property its entire width and depth to a grade corresponding to the grade of the City of Cape May, which grade, however, shall not be less than nine feet above mean low water; and said Master is to have power to examine witnesses in relation to said matter, and shall report what, in his opinion, will be the cost of doing such work. 10

And it is further ORDERED, ADJUDGED and DECREED that upon the confirmation of said report and ascertainment of the cost of such work, the amount thereof shall be deducted from the purchase price of \$10,000 payable in the shares of stock of the complainant at the par value of Ten Dollars per share; and upon the tender by the complainant of the balance so ascertained, payable in stock of the complainant, said defendant shall execute and deliver a deed of conveyance for said property containing the provisions above set forth. 20

Respectfully advised,
JOHN H. BACKUS,
V. C.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

<p>Between</p> <p>NEPTUNE FISHERIES COMPANY,</p> <p>Complainant and Respondent,</p> <p>AND</p> <p>10 CAPE MAY REAL ESTATE COM- PANY,</p> <p>Defendant and Appellant.</p>	}	<p>PETITION OF APPEAL.</p>
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*To the Honorable, the Court of Errors and Appeals in
the last resort in all causes:*

The petition of Cape May Real Estate Company, de-
fendant and appellant in the above entitled cause, respect-
fully shows that your petitioner finds itself aggrieved by a
20 final decree made in the Court of Chancery by his Honor,
Edwin Robert Walker, Chancellor of the State of New
Jersey, bearing date the twenty-fourth day of November,
nineteen hundred and seventeen, in a cause wherein the
said Neptune Fisheries Company was complainant and
the said Cape May Real Estate Company was defendant
in this respect, to wit:

A. That said decree orders and decrees the validity of
30 a certain agreement between the above named parties
upon that the same was capable of enforcement in the
Court of Chancery, and a bill filed for specific perform-
ance.

B. That by said decree the above named defendant and
appellant is decreed to execute and acknowledge and de-
liver a good and sufficient warranty deed to the complain-
ant for the lands and premises described in the agreement

and set out in said bill, together with the rights and easements in connection with the same, and that the cause be referred to the Honorable C. V. D. Joline, one of the Masters of this Court, to ascertain the cost of erecting a bank or bulkhead and filling in the same and that the amount so ascertained should be deducted from the purchase price to be paid by said Neptune Fisheries Company to the Cape May Real Estate Company mentioned in said agreement and that upon the tender of the balance of the purchase price, payable in stock of said complainant, said deed should be executed and delivered by the defendant-appellant. 10

And your petitioner appeals from the said petition for the following reasons:

1. It is therein decreed that the complainant is entitled to the relief prayed for in its bill without any testimony having been offered in support of the allegations contained in said bill.

2. And also for the reason that the said defendant is decreed to execute and acknowledge and deliver good and sufficient warranty deed to the complainant for the lands and premises therein described together with the rights and easements as set out in said bill. 20

3. And also for the reason that it is decreed that the cause be referred to the Honorable C. V. D. Joline, one of the Masters of this Court, to ascertain the cost of erecting a bank or bulkhead and filling in the same and to examine witnesses in connection therewith. 30

4. And also for the reason that upon the ascertainment of said cost, it is decreed the amount shall be deducted from the purchase price of Ten Thousand Dollars (\$10,000), payable in the stock of the complainant.

5. And also for the reason that upon the tender by complainant of the balance so ascertained payable in

stock, it is decreed the said defendant shall execute a deed of conveyance for said property containing the provisions as set forth in said decree.

6. And also for the reason that the prayer of said bill should have been denied as being contrary to equity and good conscience and complainant's bill dismissed.

7. And also because the agreement set out in the bill of complainant and the basis of said decree was not the proper subject of a bill for specific performance.

10 8. And also because specific performance cannot be decreed where the defendant is required to do anything in addition to the execution and delivery of a deed of conveyance.

J. H. GASKILL,
Solicitor for and of Counsel
with Defendant-Appellant.

Service of within is hereby acknowledged this 18th
20 day of April, 1918, by

JAMES S. GRADWELL,
Sol'r of Complainant.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between

NEPTUNE FISHERIES COMPANY,
Complainant-Respondent,

AND

CAPE MAY REAL ESTATE COM-
PANY,

Defendant-Appellant.

ON APPEAL FROM
CHANCERY.ANSWER TO PETI-
TION OF APPEAL.

10

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

This respondent, not acknowledging that any of the matters in the said petition of appeal contained are true, for answer thereto, nevertheless, says and admits that a decree was made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as therein stated, but as to the substance and form thereof this respondent prays to refer thereto when the same shall be produced, and this respondent is advised and believes that the said decree is agreeable to equity and prays that the same may be affirmed, with costs to be adjudged to this respondent.

20

JAMES S. GRADWELL,
Solicitor for and of Counsel with Respondent.

30

IN CHANCERY OF NEW JERSEY.

Between NEPTUNE FISHERIES COMPANY, Complainant, AND 10 CAPE MAY REAL ESTATE COM- PANY, Defendant.	}	ON BILL, &c. PETITION.
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Petition of the above named defendant respectfully shows:

1. That it has an authorized capitalization of three million five hundred thousand dollars (\$3,500,000), of which three million two hundred thousand dollars (\$3,200,000) have been paid in. That Greater Cape May Incorporated is the owner of fifty-one (51) per cent. of the stock of said Cape May Real Estate Company, which said stock is represented by one Nelson Z. Graves, who is the President of said Cape May Real Estate Company and also Greater Cape May Incorporated, and who, as petitioner is informed, also represented all of the other stock in said company with exception of about twenty-five (25) per cent. That in connection with the matters set out in the bill and answer in the above entitled cause, the said Nelson Z. Graves, as President of said Corporation, has had full charge.

2. Petitioners further show that said Nelson Z. Graves, by reason of his large investments at Cape May and in connection with various projects at that place, and by reason of the narrowing financial condition and a shorten-

ing of his lines of credit, turned over all of his property, both that which he held individually as well as his interests in various corporations and enterprises, to the Receivers appointed by the United States District Court for the District of New Jersey, in May of 1913, and that the value of the property and interests thus turned over to the Receivers was in the neighborhood of thirteen million dollars (\$13,000,000); that the creditors of the said Nelson Z. Graves, and of the various concerns in which he was interested, formed a committee and took over said property from said Receivers in the month of August, 1914, and that the said Nelson Z. Graves settled with the said creditors committee and took over the property remaining unsold, including his interests in the Cape May Real Estate Company and in a corporation afterward the Greater Cape May Incorporated, in October of 1917; that from the time said Receivers were appointed up to the time of the settlement between the said Nelson Z. Graves and the creditors committee, the said Nelson Z. Graves was constantly employed in looking after his interests and those of the said creditors and engaged in many transactions and litigations involving large amounts.

3. Your petitioner further shows that the above mentioned cause was set down for hearing before his Honor, John Backes, Vice Chancellor, on Monday, the eighth day of October, last past; that Wescott & Weaver, counsellors at law of Camden, represented the defendant at the time said cause was set down for hearing but that during the week preceding the defendant had arranged with Messrs. Wilson & Carr to look after the case in the place of the said Wescott & Weaver; that on the Saturday preceding the day fixed for the hearing of the above cause in Camden, the said Nelson Z. Graves was a witness in an important admiralty case in the United States District Court and that upon the adjournment of the Court on the said Saturday, the examination of the said Nelson Z. Graves was not finished and he was ordered by Judge

Haight to return on Monday for further examination; that the said Nelson Z. Graves on said Saturday directed Messrs. Wilson & Carr to present these facts to the Court and counsel and secure a further continuance. Petitioner is informed that said Wilson & Carr did not secure any continuance of the said case and did not appear before said Vice Chancellor on the day fixed for the hearing; that in the absence of the said Nelson Z. Graves, ~~formal~~ proofs were taken on behalf of the complainant; that Francis D. Weaver, of said firm of Wescott & Weaver, raised the point that specific performance could not be decreed in such a case as was made by the bill and the proofs; that the Vice Chancellor expressed his doubt and at the request of counsel for the complainant gave them permission to file a brief, copy to be served on counsel for the defendant. That sometime afterward the said Francis D. Weaver asked counsel for the complainant about the brief and was told that it had been overlooked in the multitude of engagements in connection with Red Cross work, etc., but that copy should be furnished. That the said Francis D. Weaver, having at this time given to the said Wilson & Carr a substitution, as Solicitor and Counsel in the case, intended to hand the brief when received to the said Wilson & Carr for them to answer, having in the meantime advised them of the legal proposition presented.

Petitioner is informed that no brief was ever served upon any counsel representing the petitioner. That petitioner recently learned that a decree had been entered and is informed that no copy of the proposed decree was presented to counsel for the petitioner or the petitioner given any opportunity to be heard with respect to the same, either as to its form or merits; that when petitioner learned that a decree had been entered he called up his counsel, Messrs. Wilson & Carr, and was told by them that it could not be so; that briefs were to be served, which had not been received and further that there was a legal

proposition pending before the Court, which was undisposed of, so far as they knew. That your petitioner then put the matter into the hands of Joseph H. Gaskill, of Camden, and through him ascertained that a decree had been entered and then directed him to secure the papers in the matter, asking said Wilson & Carr for a substitution and to take proceedings to open the decree.

4. Petitioners further show that they have a just and legal defense to the action upon the merits; that the agreement in question, the basis of the decree, was obtained by fraud and misrepresentation, all of which this petitioner expects he will be able to prove and sustain; that it was represented that sixty thousand dollars (\$60,000) of bona fide subscriptions had been obtained and that complainant was ready to proceed with the erection of the building as provided in the agreement between the parties. That your petitioners have been unable to secure a list of the subscriptions, giving names and amounts, and are informed that bona fide subscriptions to that amount have not been obtained and that the parties who have subscribed to the stock are resisting payment on the ground that their subscriptions were made under such circumstances and representations that they are not bound thereby, and petitioners are advised that the stock of said complainant has little or no value and that they are not able to carry out the project for which the land was obtained.

5. Petitioners further show that these proceedings were commenced in the year 1914 and remained in abeyance until the Fall and Winter of 1917.

Petitioners further show that the said Nelson Z. Graves is an important witness for the defendant, without whose testimony it was and is impossible to go to trial upon the merits and that petitioners expect to be able to produce the said Nelson Z. Graves as a witness upon the trial of this cause, if the decree is opened.

STATE OF PENNSYLVANIA, }
 COUNTY OF PHILADELPHIA. } ss.

10 NELSON Z. GRAVES, of full age, being duly sworn according to law, says, that he is the President of Cape May Real Estate Company, and was the person actually entrusted with the management and conduct of the above stated case; that he has read the foregoing petition and that the matters and things therein stated, so far as they relate to his acts are true and so far as they relate to the acts of others he believes them to be true. Deponent further says that the decree entered in the above stated cause was a matter of great surprise and that the defendant has a just and legal defense to the action upon the merits of the case.

N. Z. GRAVES.

Sworn and subscribed before me this 19th day of March, A. D. 1918.

20 WILLIAM F. WENIGER,
 Notary Public.

The above petition came on for hearing upon due notice before Vice Chancellor Backes, who denied the application.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
NEPTUNE FISHERIES COMPANY,
Complainant-Respondent,
and
CAPE MAY REAL ESTATE COM-
PANY,
Defendant-Appellant.

ON APPEAL.

BRIEF FOR DEFENDANT-APPELLANT.

Complainant, in its Bill, sets out that it is a corporation formed to "buy and sell fish and do all things appertaining to the fish business and fish freezing"; that on February 28th, 1914, it obtained an option from the Cape May Real Estate Company, extending over a period of five months, for the purchase of certain lands set out in the Bill, with certain rights and privileges, etc.

The option provided that the Real Estate Company was to erect a bulkhead in front of the lot of ground and fill in the whole property at a grade nine feet above low water. The consideration to be paid was ten thousand dollars (\$10,000) of the stock of the Fisheries Company. A copy of the option is annexed to the Bill and will be found on page 8 of the State of the Case.

Complainant alleges that it accepted the option two days before it expired, by letter with copy of resolution (State of the Case, page 12), and received an acknowledgment. (State of the Case, page 13.)

The Answer sets up fraudulent misrepresentations on the part of the Fisheries Company, which induced the Real Estate Company to give the option, in that it was told that the capital stock of the Fisheries Company had been subscribed to the extent of sixty per cent. (60%) or more than sufficient to put up a building to cost, with its machinery, sixty thousand dollars (\$60,000).

Annexed to the Answer was a Cross-Bill reciting the fraudulent misrepresentations that the stock had been subscribed by reputable and responsible parties and also set out an admission by the representative of the Fisheries Company that the stock had not been subscribed for as stated, that the company had no tangible assets, and that its stock was without value, and praying for a rescission of the agreement. (See Answer, State of Case, page 14; Cross-Bill, page 16.)

The Answer to Cross-Bill admits statement as to subscription. (P. 18.)

The Bill was filed February 23rd, 1915. (See Subpoena, State of Case, page 1.) Answer and Cross-Bill were duly filed.

The case came on for hearing before Vice Chancellor Backes November 24th, 1917, and was disposed of by the Vice Chancellor in the absence of the defendant and *without taking any proofs*. (See Decree, State of Case, page 23.)

The Decree directs the Real Estate Company to make a deed of conveyance for the property in question, and

refers the matter to C. V. D. Joline, Special Master, to ascertain the cost of erecting the bulkhead and filling in the property, according to the option agreement, and directs that "the amount thereof shall be deducted from the purchase price of \$10,000 payable in the stock of the complainant at the par value of \$10 per share," and upon tender of the balance of stock the defendant is to execute and deliver a deed, etc. (See Decree, State of Case, page 25.)

The defendant having had brought to its knowledge for the first time this Decree, in the month of February, last past, when notice was given of taking of proofs under the Decree, caused to be filed a Petition praying that the Decree might be opened and defendant's proofs heard in support of the allegations of its Answer and Cross-Bill. (See Petition, State of Case, page 30.)

Vice Chancellor Backes denied the Petition.

According to the Petition, at the time set for the hearing, the president of the Real Estate Company, being the person having charge of this litigation, was a witness in an Admiralty case in the United States Court, obliged to return to that court for further examination as a witness, and therefore unable to appear at the hearing of this cause before Vice Chancellor Backes. In addition to the fact above stated, there had been a change of counsel for the Real Estate Company; Messrs. Wescott & Weaver, who had filed the Answer, were at the time of the hearing, no longer employed by the Real Estate Company, but Messrs. Wilson & Carr had at that time been substituted; the president of the Real Estate Company had notified their new counsel, Messrs. Wilson & Carr, of his inability to appear on the day fixed for the hear-

ing and expected them to secure a continuance; they did not appear at the time and place stated for the hearing, but Mr. Weaver, of Wescott & Weaver, knowing their firm had filed the Answer and feeling some responsibility until the new counsel actually appeared, was present at the hearing but without the defendant or any witnesses. Vice Chancellor Backes, who had gone to Camden to hear the case, without being advised by the new counsel of the defendant's inability to proceed with the trial on that day, ordered a Decree to be entered in favor of the complainant *without taking any proofs* whatever.

Mr. Weaver then made the point that a Decree for specific performance could not be entered, by reason of the fact that there were other things to be performed or done by the Real Estate Company, besides making a conveyance of the land.

Some doubt being expressed by the Vice Chancellor, permission was given counsel for the complainant to file a Brief, copy of which was to be served upon counsel for defendant. No Brief was ever filed or served, and the first knowledge that either the Real Estate Company or either of the above-named counsel had of the Decree was at or about the time it was proposed to take testimony before the Special Master.

The above facts are set out in the Petition, sworn to by Nelson Z. Graves, president of the defendant company, and will be found in the State of the Case, page 30.

ARGUMENT.

I.

The Agreement in question is uncertain and indefinite; no time or place is stated in the Agreement, when and

where the Deed is to be delivered and the consideration paid. An essential feature is wanting; the Contract must be certain in all its parts.

McKibben vs. Brown, 14 N. J. E., 13; 15 N. J. E., 498.

II.

The notice of acceptance of the Option by the Real Estate Company was conditional and not absolute; it was based upon the deposit of the stock with the Title Company, to be held pending the filling in and grading. (See page 13.) No proof was offered that this condition had ever been complied with. The minds of the parties had never met.

III.

The Agreement provides that the Real Estate Company is to commence the work of filling and grading upon notification so to do (page 8, bottom), the same to be completed within two months from the time of notification. (Page 9, line 27.) There never was any notification given by the Fisheries Company to the Real Estate Company; no proof whatever was offered before the Vice Chancellor. If it be argued that the acknowledgment of the acceptance of the option was a waiver in that the Real Estate Company stated that the property would be immediately filled and graded, yet that acknowledgment is conditioned upon the deposit by the Fisheries Company of the \$10,000 stock with the West Jersey Trust Company, the same to be held pending the filling in and grading. (See page 13.) No proof of the de-

posit of the stock having been made and no proof of any notice to that effect, the complainant has not complied with the terms of the agreement and is not entitled to performance.

IV.

The Decree is based upon the statement that the material allegations in the Bill are admitted. (Page 23, line 19.) Reference to the Answer shows that paragraph 7 does not admit that the complainant was ever ready or willing to perform its part of the agreement. Here, unquestionably, was necessity for proof. (See page 15.)

Thorp vs. Pettit, 16 N. J. E., 488.

Crane vs. Decamp, 21 N. J. E., 414.

Merritt vs. Brown, do., 401.

V.

The complainant states that it has been willing to perform the Agreement; but there was no proof of this or of any tender, either oral or in writing, and certainly without some proof being offered of a tender, it has no right to demand performance by the Real Estate Company.

Long vs. Hartwell, 34 N. J. L., 116.

VI.

The Decree is not in accordance with the Agreement; the Agreement provides for a "good and marketable title" (see Agreement, page 9), whereas the Decree provides

for a "good and sufficient Warranty Deed." (See Decree, page 23.)

VII.

The Decree is not in accordance with the prayer of the Bill; the complainant insisted that the company should be required to fill in and grade in accordance with the Agreement (see page 6, line 10, etc.), whereas, the Decree provides that the complainant is to do this work and charge the expense to the defendant by deducting the same from the shares of stock to be delivered.

VIII.

The Answer to the Cross-Bill both denies and admits that the party who negotiated the Agreement with the defendant acted as agent of the complainant; the denial is in the first part of Answer to Cross-Bill. (Page 11.) The admission is in the same Answer. (Bottom, page 19.)

IX.

The Answer to the Cross-Bill admits that the agent of the complainant stated that stock to the amount of \$60,000 worth had been subscribed (see page 11), but there is no averment in the Answer to the Cross-Bill that such stock had been subscribed; it would therefore appear that the stock to be given complainant is the only stock issued outside of the qualifying shares.

X.

It does not appear that the filling in and grading can at this time be done within the price to be paid the Real Estate Company, even supposing the stock to be worth par. No proofs were offered to this effect. The Court must be satisfied that the claim is fair, reasonable and just and the contract equal in all its parts.

Crane vs. Decamp, 21 N. J. E., 414.

Merritt vs. Brown, do., 401.

XI.

A Decree for specific performance rests within the sound discretion of the Court, and does not necessarily follow upon default by defendant, if default was made. (See cases cited, Vol. 6, N. J. Digest, 11282.)

XII.

A Court of Equity, not being bound to aid the complainant in a suit for specific performance unless his claim is found in justice, will look into all the circumstances and see whether any fraud was practiced at the time of the sale.

Miller vs. Chettwood, 2 N. J. E., 199.

Scott vs. Schiner, 27 N. J. E., 185.

A contract induced by fraudulent representations will not be enforced in Equity.

Carskaddon vs. Kennedy, 40 N. J. E., 259.

XIII.

A decree for specific performance cannot be awarded in a case like this, where in addition to the delivery of the Deed, in accordance with the contract, the defendant company is required to do certain work upon the premises to be conveyed.

Madison Athletic Ass'n vs. Brittin, 60 N. J. E., 160.
Wharton vs. Stoutenburgh, 35 N. J. E., 266-7.

Specific performance will not be decreed where anything is to be done to ascertain price.

VanDoren vs. Robinson, 16 N. J. E., 256.
McKibbin vs. Brown, 14 N. J. E., 13-20.
McKibbin vs. Brown, 15 N. J. E., 490.

XIV.

Where complainant has a complete remedy at law Bill will not lie. (See cases cited, Vol. 6, N. J. Digest, 11275.)

Where it cannot be contended that performance of contract in specie will alone answer the ends of justice.

Shimer vs. Morris Canal, 27 N. J. E., 364.

Bill for specific performance will not be entertained for compensation or damages recoverable at law.

Borden vs. Curtis, 48 N. J. E., 120.
Peeler vs. Levy, 26 N. J. E., 330-333.

It is based upon inadequacy of legal remedy to compensate in damages.

Brown vs. Brown, 33 N. J. E., 650.
Hurd vs. Groch, 51 Atl., 278.

This Bill contains no allegation that this piece of land is absolutely essential.

There was want of diligence on part of complainant in prosecuting its suit. The option agreement is dated in February, 1914. The Bill was filed in February, 1915. The hearing was in October, 1917. Diligence is necessary.

Ketcham vs. Owen, 36 Atl., 1095.

J. H. GASKILL,
Solicitor of and Counsel with Defendant.

New Jersey Court of Errors and Appeals

Between	}	On Appeal.
Neptune Fisheries Com-		
pany,		
<i>Complainant-Respondent,</i>		
and		
Cape May Real Estate Com-		
pany,		
<i>Defendant-Appellant.</i>		

BRIEF FOR COMPLAINANT-RESPONDENT.

I.

This case comes before the Court on appeal from a decree of the Court of Chancery, granting the prayer of the bill of complaint, and decreeing that Cape May Real Estate Company, defendant-appellant, specifically perform its contract with Neptune Fisheries Company, complainant-respondent.

II.

ARGUMENT.

The facts as stated in the brief of the appellant are based more upon the petition as filed for the opening of the decree than upon the actual facts

existing in the pleadings and at the time fixed for the hearing, and would therefore unquestionably mislead the Court in the consideration of this case.

In the first place, there was no evidence taken at the time fixed for hearing, for the reasons stated subsequently. We have, therefore, nothing to rely upon except the pleadings in this case.

The bill discloses that the respondent had an agreement with the appellant to purchase a tract of land located at Cape May, for the consideration of Ten Thousand Dollars, payable in the stock of the respondent upon delivery of a deed free and clear of all encumbrances and free from all exceptions. (State of Case, page 9, line 35.) In addition to this obligation and among certain other conditions expressed in the agreement, it was agreed that there should be erected a substantial bulk-head or bank along the entire front, sufficiently strong and permanent to hold in place the material to be filled in, and then the filling in of the whole of the property for its entire width and depth, to a grade corresponding to a grade of the City of Cape May, which should not be less than nine feet above mean low water. (State of case, p. 8, line 35.)

The agreement also set out that it would be necessary for the respondent to accept this optional agreement within five months, which was accepted on July 23, 1914, and which was within the five months' period expressed in the agreement dated February 25, 1914 (page 12). The appellant acknowledged receipt of the acceptance of the option on July 24, 1914 (State of Case, p. 13), stating in the same acknowledgment that they would proceed immediately with the fulfillment of their agreement.

These are the substantial facts as set forth in the bill. In the answer the defendant admits these facts

but claims by way of defense that it was induced to make this agreement by fraud and misrepresentations of the agent (Custis) of the respondent. (State of Case, page 15.) The fraud which was set forth in the answer consisted of the statement made by the said agent that sixty per cent. of the authorized capital stock had been subscribed and a sufficient sum of money had been subscribed to enable respondent to erect a building on the land in question, to wit, about \$60,000. These are the only allegations in the answer or in the case which are alleged to be false and the only reason alleged why the appellant should not perform its agreement. The answer to the cross-bill as filed by the respondent, denies that the said Custis was the agent of the Company (State of Case, p. 18) for the purpose of making any agreement, but admits that sometime previous to the signing of this agreement of February 25, 1914, that he might have said that there was about sixty thousand dollars in cash subscribed, because this was the truth, and this amount would have been sufficient to erect a building on the ground in question.

The answer to the cross-bill further states most emphatically that the company did have tangible assets and the stock was not, as alleged in the cross-bill, without value. And further, in reply to the cross-bill, the answer shows beyond question that the signing of the agreement of February 25, 1914, was not made upon any hurried or hasty consideration on the part of appellant, but, on the contrary, several months previous (November 25, 1913) said appellant entered into a similar agreement, through its same President (Graves) and Secretary, with this respondent, to sell the same ground and perform the said duties as were to be performed under the agreement of February 25, 1914, and the only reason why the new

agreement of February 25, 1914, was drawn, was because the President of the appellant did not feel that the ground was sufficiently described (State of case, p. 19). The agreement of November 25, 1913, was assigned to the respondent after incorporation, and made part of the answer to cross-bill. (State of case, p. 21.)

The facts above recited are all the facts involved in the case, and as there are no proofs to the contrary, the matter resolves itself down to one fundamental proposition, and that is, in the absence of fraud as alleged in the answer, unquestionably the respondent would have been entitled to a decree, because, as the Vice-Chancellor stated in his oral memoranda, all the facts are practically admitted. There is no proof in the case to show that there was any misrepresentation on the part of respondent, while, on the other hand, this respondent avers that the very statements which the appellant alleges were fraudulent, were actual facts.

It would appear from appellant's brief that its entire case rests on the Vice-Chancellor's refusal to open the decree under the petition filed. The President of the appellant Company, Mr. Graves, alleges in his petition in the first place, that he had no knowledge of the decree. The fact, nevertheless, remains that Messrs. Wescott and Weaver represented the appellant, and were present at the time fixed for the hearing; that as counsel they had notice that the Vice-Chancellor would advise the decree herein upon the presentation of the same to him. The petition alleges that there was a substitution of the attorney, Wilson & Carr for Wescott & Weaver; and that the said Wilson & Carr were notified to inform the Vice-Chancellor at the time fixed for the hearing that he, the said Graves, would be unable to be present on

account of being a witness in another case. If this allegation is so, there is absolutely no evidence to support it, while on the contrary, there has never been a substitution of attorney filed since the suit started, nor did counsel for the respondent have any knowledge whatsoever of Wilson & Carr in the transaction. The first intimation that there was any change in counsel of the appellant was several months after the decree was filed, when about to take proofs before the Special Master, C. V. D. Joline, Esq., counsel with respondent was informed by Joseph H. Gaskill that he represented the Cape May Real Estate Company and that he had been substituted for Wescott & Weaver, and that he was considering filing a petition to open the decree, which, after considerable delay on the part of the appellant, was done.

Therefore, if Mr. Graves, as President of the Cape May Real Estate Company, the appellant, did not have any knowledge of the filing of this decree, it was because he did not take the trouble to find out. His actions were very similar at the time set for the hearing, as his counsel, Mr. Francis Weaver, at that time stated to Vice-Chancellor Backes that he had been endeavoring for months to have the Cape May Real Estate Company, through its President, Mr. Graves, pay more attention to the case; that he had written Mr. Graves several letters, had called to see him and had the hearing postponed twice because of Mr. Graves' neglect, and told Mr. Graves several weeks previous to the time set for final hearing, that he would be unable to have the case postponed again; that it was necessary to have him appear, which the said Graves promised to do, but neglected to do.

These statements of Mr. Weaver of Wescott & Weaver were made to the Vice-Chancellor on the day of the final hearing.

Upon the return day of the petition for the opening of the decree, the Vice-Chancellor, after hearing the petition, stated to counsel of the appellant, Mr. Gaskill, in the presence of counsel with the respondent, that he was perfectly familiar with all the facts involved, that he had gone from Trenton to Camden on two occasions to hear the case, and had been disappointed in each instance, owing to the neglect of Mr. Graves to appear, as President of the appellant company; that he remembered perfectly Mr. Weaver's statement of his endeavors to get his client to pay some attention to the case; and that Mr. Weaver further stated that he was unable to get any definite information from Mr. Graves, and that it was impossible for him to get Mr. Graves to prepare his case; and that he remembered very clearly that there was nothing said in reference to serving a brief on Wescott & Weaver by counsel for the respondent; and that he remembered perfectly well that Mr. Weaver stated facts that, to his mind, showed the entire neglect of the case on behalf of the officers of the appellant, and his conclusion was that Mr. Graves intended to pay no attention whatsoever to this suit; and that further, he remembered nothing was said in reference to Mr. Graves being engaged as a witness in any other court, or that there had been substitution of other counsel; and further, that Mr. Weaver stated that he represented the appellant, and he was there to do the best he could to take care of his client, who neglected to appear at the trial. Therefore, he denied the application to open the decree.

III.

REPLY TO APPELLANT'S ARGUMENT.

The argument of counsel with the appellant would also appear to be based upon a misconstruction of the actual facts, and is therefore without foundation. For instance, if we take Arguments 1 and 2 together, we find that there can be no question as to the certainty of the time of delivery of the deed, as it is fixed most emphatically in the agreement, to wit, "upon the completion of the work." (State of Case, p. 9, line 32.) Likewise, as to the payment of the purchase price, it was to be paid upon the completion of the work, and it certainly cannot be argued in a case of specific performance that there was no place of settlement, for the appellant has fixed by its acknowledgment of its acceptance of the option, the office of the West Jersey Title & Guaranty Company as the place for the delivery of the deed and consideration (State of case, p. 13), and even in the absence of any place expressed in the agreement to make settlement, the settlement would be presumed to take place at the office of the appellant. (*King vs. Ruckman*, 20 N. J. E. p. 316.)

The 3d argument is answered by a notification of the acceptance of the agreement (State of Case, p. 12), for we find in a resolution passed by the Board of Directors of the respondent, the following: "Upon a notification of acceptance to the Cape May Real Estate Company to request the filling in of the said parcel of land at the earliest date according to the terms thereof." This resolution was sent by the President of the respondent company with a notification, "That this company accepts the option referred

to under its full terms." This was certainly a notification to proceed with the work and as this condition precedent had not been performed, appellant was not entitled to have the stock placed in escrow for an indefinite period while it neglected its duty.

As to Argument 4, of appellant's brief, counsel for the appellant contends that the appellant does not admit that the respondent was willing to perform, and therefore it was necessary for proof. But, if the Court please, the appellant does not deny in paragraph 7 (State of Case, p. 15) that respondent was ready or willing to perform, but on the contrary, they state that they "have no knowledge," and this, under the rules of the court of equity, does not meet the allegations squarely. Therefore, in the absence of such denial, the allegation in the bill is sufficient.

By Argument 5, the appellant denies that there has ever been a tender, and argues that therefore respondent has no right to demand performance, and cites the case of *Long vs. Hartwell*. That case is not analogous with the case before the court. The Hartwell case is based upon the settled rule that if either the vendee or vendor wishes performance, he immediately makes his part of the agreement precedent. While in this case, it is the contention of the respondent that the respondent has always been ready to perform as soon as the appellant performed the conditions precedent, which is strictly within the ruling of the Hartwell case, and it cannot be argued that the respondent was charged with more than making an equitable tender. The appellant was bound by the conditions precedent to bulk-head and fill in the ground, and until such time respondent was only charged with holding itself ready to perform. It is not necessary (to maintain a suit for specific performance) to make an actual tender in lawful money

such as would sustain a plea of tender in an action at law. It is sufficient, if the respondent is ready and willing to pay at the time and place, if any is fixed, after having accepted and being satisfied that all conditions precedent are fulfilled as offered by the appellant. (*Worsch vs. Woodruff*, 61 N. J. E. p. 78.)

As to Argument 6, it would appear that this question is without equitable or legal significance, as the agreement calls for the "title to the property free and clear of all encumbrances, and a good and marketable title, and such as may be insured, free of all exceptions," while the decree orders a "good and sufficient warranty deed," the two are practically and substantially the same, and as prayed for in the amended bill as ordered amended. And aside from this, it is not a matter of defense to a decree for specific performance, but a matter to be determined after the question of whether respondent is entitled to specific performance itself is determined. (*Worsch vs. Woodruff*, 61 N. J. E. p. 83.)

As to Argument 7, the decree is exactly in accordance with the amended bill, as it provides: "That allowance be made to the complainant for the cost of performing said work and that such deed or conveyance be made by the defendant to the complainant, upon complainant's paying the difference between the purchase price provided for in said agreement and the cost of doing said work."

The Argument in paragraph 8 is not a true statement of the facts as the answer to the cross-bill sets forth (State of Case, p. 18, line 25) that Custis was not the agent who made the agreement mentioned in complainant's bill, to wit, February 25, 1914, but admits (page 19, line 32) that Custis was the agent for the agreement mentioned in the answer to the cross-bill (November 25, 1913), two entirely distinct agree-

ments, one made before the incorporation, which is not being sued on, and the one made after incorporation, which is being sued on. And, further, the answer to the cross-bill states that the said Custis refused to have anything further to do with Graves and that therefore a committee was appointed to make the new agreement, which is being sued on. (State of case, p. 20, line 24.)

Likewise, in Argument 9, there is a mis-statement of the facts as the answer to the cross-bill distinctly states that there was \$60,000 in stock subscribed, which was sufficient to erect a building upon the lot of land in question (State of Case, p. 18, line 34), showing beyond a question that these were not qualifying shares.

As to Argument 10. The argument advanced by appellant in its tenth point is not a defense to a suit for specific performance, but is a matter to be determined before a Master. The contract was to do certain work, and in the absence of any conditions changing the character or quality of the work to be performed, the court will decree specific performance.

As to Argument 11 raised by the appellant, it is admitted.

As to Argument 12, there is no proof whatsoever of any fraudulent representation, but a positive denial that there was.

As to Argument 13, there is nothing in the decree which requires the appellant to do any work whatsoever, as the decree only orders that the cost of the work shall be ascertained and the amount of said work be deducted from the purchase price, and upon the tender of the balance, the appellant execute and deliver a deed. (State of Case, p. 25.)

As to Argument 14. Damages will not be compen-

sation for the loss of the ground in a case of this character, and it is self-evident from the location and character of the industry that there is a decided inadequacy of legal remedy to compensate for the loss of the ground, and there is no evidence of the want of diligence in the prosecuting of this suit, as the option or agreement did not expire until July 25, 1914, and the bill was filed within six months, as the bill alleges, it was hoped that the appellant would perform its agreement as it promised to do. And where the respondent proceeds with the suit as promptly as the nature of the case will permit, specific performance will be decreed. (*Doren vs. Robinson*, 16 N. J. E. p. 256.) And, while equity requires the party who would enforce specific performance to be diligent and prompt, it does not discourage purposes of settlement or reasonable delays for that purpose. (*Houghwouth vs. Boisanein*, 18 N. J. E. p. 315.) And where the defendant acquiesces in the delay, he is not at liberty to take advantage of it. (*Ashmore vs. Evans*, 11 N. J. E. 151.)

Therefore, in conclusion, the case resolves itself down to the one point raised by the appellant in its answer and cross-bill: did, or did not the respondent company commit a fraud and thereby induce appellant to enter into the agreement? This is the whole question involved. There is no evidence produced by the appellant to show fraud. Therefore, that phase is eliminated. The allegation of fraud set forth in the cross-bill is answered by the respondent by saying the facts complained of were the truth, to wit: that there was \$60,000 worth of stock subscribed, which was sufficient to erect the buildings and machinery; that the said Custis did subscribe to the stock to the extent of \$5,000.00, and these facts are not denied by appellant. While, in direct contradic-

tion to any fraudulent designs on the part of this respondent, the pleadings show by the actions of the appellant clearly that there was no deception. There were several months' time during which the appellant could have made and did make thorough investigation of the situation, because we find the appellant made an agreement of substantially the same character over four months previous, to wit, in November, 1913, in which they agreed to do the same things as in the agreement of February, 1914. The only reason for drawing the new agreement was to satisfy Graves, the President of the appellant company, he stating that the premises were not fully described. This, if the court please, should show beyond any doubt that there was no question in Graves' mind (he is the leader and the chief stockholder of the appellant company) that there was no fraud; that the only person who acted illegally and inequitably has been the said Graves, President and representative of said appellant company, who refused to perform the agreement and neglected to appear on several occasions before the Hon. Vice-Chancellor Backes, and by the words of his former counsel, Mr. Weaver, at the time fixed for the hearing, "refused and neglected to prepare his case." All of which actions were perfectly apparent to Vice-Chancellor Backes when he refused to open the decree.

It was the said Graves who used every impediment and means to prevent this respondent company from carrying out the objects for which the ground was to be used. He further claims that there was a substitution of attorney, Wilson & Carr, and that the said Wilson & Carr were requested to inform the Vice-Chancellor that he, the said Graves, was engaged in another court. If there ever was such a substitution of attorney, there has never been any

evidence disclosed of said substitution, as the substitution has never been brought to the attention of the counsel of the respondent, nor has it been placed of record. And by the careful examination of the record of this case, this Honorable Court will find that the said Graves has done everything possible, and after finding that he could not control the respondent company, by asking for a list of subscribers and divers other things, to prevent the carrying out of the building and the purposes of this respondent at Cape May.

It is contended that there is no reason shown why the decree appealed from should be reversed, and it should therefore be affirmed.

JAMES S. GRADWELL,
Solicitor of and

NORMAN GREY,
of Counsel with Complainant-Respondent.