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New Jersey Court of Errors and Appeals

DAVID L. LEVINE, <i>Complainant-Appellee,</i>	} On Appeal From Court of Chancery.	10
vs.		
LAFAYETTE BUILDING CORPORATION, <i>Defendant-Appellant.</i>		

Bill of Complaint.

(Chancery Docket 63-97.)

IN CHANCERY OF NEW JERSEY.

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

Complainant, David L. Levine, of the City of Newark, County of Essex and State of New Jersey, respectfully says unto your Honor:

1. On or about the 21st day of August, 1925, defendant Lafayette Building Corporation, agreed to sell to complainant, certain lands and premises known as the Tate property, located on the west side of the County Road, in the Borough of Rockleigh, consisting of 195 acres, more or less, and being the same parcel then under contract of sale to the Lafayette Building Corporation, for the sum of \$117,000., and thereupon executed a written memorandum of said sale, a copy of which is hereto annexed and marked "Exhibit 1."

40

Bill of Complaint.

2. At the time of the making of the said contract between complainant and the said defendant, it was specifically represented to the said complainant, by the said defendant, that the said premises contained approximately 195 acres of land, and the purchase price of \$117,000 fixed in the said contract was fixed with reference to a certain price per acre, all of said lands being vacant and unimproved, and which said lands were being purchased by complainant for development purposes; and there was exhibited to complainant, by defendant, at the time complainant entered into said contract, a map of said property, on which the several parcels of said real estate were delineated, and on which the acreage of each of said parcels was marked, the total acreage of all of said parcels being 196 and 155 acres. At the time of the making of the said contract between complainant and defendant, the said defendant had the contract for the purchase of said lands and premises, which said contract was, on September 30, 1925, recorded in Book 1359 page 409, &c., of Deeds in the Bergen County Clerk's Office, in which said contract said premises were described as follows:

ALL those certain lots, tracts or parcels of land and premises, situate, lying and being in the Borough of Rockleigh, in the County of Bergen and State of New Jersey, and more particularly described as follows:

FIRST TRACT: BEGINNING at a point in the westerly line of Carteret Road, in the north-easterly corner of land formerly of F. Monroe Dyer and running thence (1) North 66 degrees 58 minutes 15 seconds West 1664.10 feet to a stake; thence (2) North 33 degrees 12 minutes

Bill of Complaint.

East 554.29 feet to a stake; thence (3) North 66 degrees 30 minutes West 1777.77 feet to a stake; thence (4) North 22 degrees 15 minutes 30 seconds East 493.40 feet to a stake; thence (5) North 21 degrees 30 seconds East 235 feet to a point; thence (6) North 23 degrees 49 minutes 30 seconds East 236.24 feet to a stake and land formerly of R. Haddock; thence (7) South 65 degrees 58 minutes 30 seconds East 777.86 feet to the westerly line of land now of formerly of N. Haring; thence (8) South 26 degrees 26 minutes 26 seconds West 469.92 feet to a point; thence (9) South 66 degrees 05 minutes East 2858.70 feet to the westerly side of said Carteret Road; thence (10) Southerly and along the westerly side of said Carteret Road to the point or place of Beginning.

Excepting therefrom a house lot on said westerly side of Carteret Road now or formerly owned by A. Haring and shown upon map of Survey of Property Belonging to William L. Tait, Township of Harrington, Bergen Co., N. J. made by Watson G. Clark, August 31, 1915.

SECOND TRACT: BEGINNING at a point in the westerly side of Carteret Road in the north-easterly corner of land of Rabell and running thence (1) North 70 degrees 62 minutes 40 seconds West 998.72 feet to a stake; thence (2) South 21 degrees 31 minutes 30 seconds West 123.50 feet to a point; thence (3) North 66 degrees 49 minutes 30 seconds West 1258.20 feet to the easterly line of land now or form-

Bill of Complaint.

erly of N. Haring; thence (4) North 26 degrees 52 minutes East 148.50 feet to a stake; thence (5) Westerly and along the northerly line of land now or formerly of N. Haring 459 feet to the easterly line of land formerly of R. Haddock; thence (6) North 26 degrees 27 minutes 30 seconds East 325 feet to a stake; thence (7) North 64 degrees 40 minutes West 812 feet to a stake; thence (8) North 26 degrees 30 minutes 30 seconds 646.50 feet to a stake and land of Thorn; thence (9) South 65 degrees 34 minutes 40 seconds East along the southerly line of land of Thorn 3364.42 feet to the westerly side of Carteret Road; thence (10) southerly and along the westerly side of Carteret Road 895.07 feet more or less to the point or place of Beginning.

THIRD TRACT: ALL that certain plot or parcel of land and premises hereinafter particularly described, situate, lying and being in the Borough of Northvale, in the County of Bergen and State of New Jersey. BEGINNING at the southeast corner thereof at the southwest corner of lands formerly of Peter Rycker in the line of the lands of Lucian Sanial running thence along the lands formerly of Lucian Sanial South $54\frac{1}{2}$ degrees West twelve chains and sixty links; thence North 37 degrees East four chains and ten links thence South 58 degrees East four chains and seventy links; thence North 36 degrees East nine chains thirty-two links; thence South 58 degrees East four chains and sixty links; thence South 24 degrees West fourteen chains and sixty-eight links to the point or place of Beginning.

Bill of Complaint.

Being known as Plot 28 in block 124, and Plot 1 in Block 125 on the Assessment Map of the Borough of Northvale.

Said defendant has now, and but recently secured title to said lands and premises, but it now appears that said premises, instead of comprising 195 acres, more or less, in fact comprise but 152 acres, more or less, a shortage of approximately 42 acres. Said map exhibited to the complainant showed the acreage at 195.25 acres, and the true acreage is 152.61 acres, or an actual acreage of 42.64 acres. Complainant is and always has been ready, able and willing and desirous of taking title to said lands and premises in accordance with the terms and contents of its contract evidenced by memorandum of August 21, 1925, provided proper abatement be made for the shortage in acreage; and complainant has tendered himself ready to take said property, but the defendant, as a condition, insists that the complainant should pay the full purchase price of \$117,000 as fixed in said contract, notwithstanding the shortage in acreage. But this complainant shows that he is entitled to an abatement from the purchase price for the amount of the shortage in the acreage.

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

1. That Lafayette Building Corporation, the defendant herein, may answer this bill of complaint without oath and each statement therein made.

2. That said defendant, Lafayette Building Corporation, may be decreed to specifically perform

Bill of Complaint.

10 said agreement entered into by it, with the complainant, with an abatement in the purchase price to be fixed by this Court, the complainant tendering himself ready and willing and hereby offering specifically to perform the said agreement on his part, with an abatement from the aforesaid deficiency in the quantity or acreage so contracted to be conveyed.

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

20 4. That complainant may have such other and further relief as may be proper.

HARRY S. NEIWIRTH,
Solicitor for Complainant.

30

40

Exhibit 1.

(Note: The original of this exhibit is a printed form with blanks filled in typewriting and signatures in handwriting. The words so filled in are printed in italics.)

AGREEMENT OF SALE.

Ridgefield Park, N. J., 10
August 21, 1925

Received from *David L. Levin*
address *21 Johnson Avenue, Newark, N. J.*
the sum of *One thousand dollars (\$1000)*
as part payment for *Purchase of property known as*
the Tait property located on
on property located *the west side of Tenafly Road*
in the Borough of Rockleigh 20
owned by *consisting of 195 acres more or*
less being the same parcel now
under contract to Lafayette
Corporation.

at a price of *One hundred seventeen thousand dol-*
lars (\$117,000)

on the following terms:

Formal Contract to be signed on *or before Septem-*
ber 1, 1925.

Additional money to be paid on signing of Formal 30
Contract *Four thousand (\$4,000) dollars*

Title to be closed on *October 20, 1925.*

Additional money to be paid on Closing title—
Twenty thousand (\$20,000) dollars

Subject to a first mortgage of *Seventy thousand*
(\$70,000) dollars

Terms of first mortgage *to be stated in contract—*
term 5 years

Exhibit 1.

A purchase money mortgage—*Twenty two thousand (\$22,000) dollars*

Terms of second mortgage—*Proportionate with first mortgage*

Subject to an assessment of *none*

10 Subject to restrictions of records, if any *none*

Taxes, Interest on Mortgage, Insurance Premium to be adjusted as of *October 20, 1925.*

This property is sold at the above mentioned price and terms, subject to the acceptance of the owner.

By.....

20 We agree to purchase the above mentioned property at the above price and terms.

.....

.....

Witness.

.....

30 I agree to accept the above mentioned price and terms for the sale of my property to

Lafayette Building Corp.

David Corn Pres.

(Seal)

Frank E. Smith Secy.

.....Treas.

Notice of Motion to Strike out Bill.

To the complainant, David L. Levine:

Take notice that on Monday, February 7, 1927, at the hour of ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Chancery Chambers in the City of Jersey City, we shall apply to the Chancellor for an order striking out the bill of complaint filed by you in the above entitled cause for the following reasons: 10

1. The said bill of complaint discloses no cause of action in that:

(a) It is apparent from the writing relied on by complainant, a copy of which is annexed to the bill of complaint, that it is not intended as a final and complete agreement of the parties, and therefore complainant is not entitled to a decree for specific performance as prayed in this bill. 20

(b) It is apparent from the writing relied upon by complainant, a copy of which is annexed to the bill of complaint, that said paper is on its face preliminary and not final, and by its very language indicates that features therein left unsettled were to be settled by further negotiations. 30

(c) The writing relied upon by complainant, a copy of which is annexed to the bill of complaint, expressly states that "Formal contract to be signed on or before September 1, 1925."

(d) The writing relied upon by complainant, a copy of which is annexed to the bill of complaint, does not state what all the terms of the final agreement are to be, the rate of interest 40

Notice of Motion to Strike out Bill.

10 on the mortgages, how long the second mortgage is to run, what provisions in relation to default of interest or taxes are to be inserted in the mortgages, what kind of a deed is to be given, the terms of the first and second mortgages, nor the name of the purchaser.

Yours respectfully,

MORRISON, LLOYD AND MORRISON,
Solicitors of the Defendant.

To:

20 HARRY S. NEIWIRTH, Esq.,
Solicitor of Complainant,
128 Market Street,
Newark, N. J.

Order Continuing Motion Until Final Hearing.

A motion to strike the bill having been argued by Morrison, Lloyd & Morrison of counsel with the defendant, in the presence of Merritt Lane, of counsel with the complainant:

30 It is, on this 18th day of April, 1927, ORDERED that the hearing upon the motion to strike the bill be continued until the final hearing of the cause and after the proofs are taken.

E. R. WALKER,
C.

Respectfully advised.
JOHN J. FALLON,
V. C.

40

Amendment to Bill of Complaint.

Amend the bill of complaint filed herein by inserting the following allegations:

1. Complainant further says that at the time of the execution of the agreement for sale, a copy of which is annexed hereto, a counterpart of said agreement of sale was prepared and was signed by complainant, David L. Levine, under the words in said counterpart "We agree to purchase the above mentioned property at the above price and terms"; the said counterpart of said agreement of sale was delivered to the defendant and has been since that time and is now in its possession. 10

2. Complainant offers to take said property and instead of the purchase money mortgage referred to in said contract to pay cash and offers also to take said lands and premises, subject to the first mortgage now a lien upon said lands and premises, whatever the terms of said first mortgage may be, and as hereinabove stated offers to pay the balance of the price which it may, under the terms of the decree, be directed to pay for said premises in cash. 20

3. At the time of the making of said contract between complainant and defendant the said defendant was under contract to purchase said lands and premises from the owner thereof, one Tait, which said contract was evidenced only by an agreement of sale in similar form to that entered into between complainant and defendant; that a dispute arose between defendant and the owner of the property with respect to the acreage to be conveyed, and therupon certain proceedings were taken in this Court by the Lafayette Building Corporation 30

Amendment to Bill of Complaint.

against the said William K. Tait by bill for specific performance, which said proceedings appear in Docket 54, page 583, and, as a result of such proceedings, a decree for specific performance was made, and on or about the 6th day of December, 1926, in accordance with the decree of this Court, the property was conveyed by the said Tait to the Lafayette Building Corporation, and at the time of such conveyance the said property was subject to a first mortgage of \$70,000, for a term of five years, which is the first mortgage referred to in the agreement of sale made between complainant and defendant, and complainant is willing to take said property subject to said first mortgage; that it was the intent of both complainant and defendant to be bound by the contract made on the 21st day of August, 1925, and evidenced by the agreement of sale a copy of which is annexed hereto; and the purpose of having a formal agreement executed was only to put in formal shape that which the parties had agreed upon; the provision in the agreement of sale that the terms of the first mortgage were to be stated in the contract did not mean that complainant and defendant were to agree upon the terms of the first mortgage for the complainant had nothing to do with the terms of such mortgage; the words simply meant that the terms which might be agreed upon between defendant and the said Tait with respect to the first mortgage as to its terms should be set out in the formal contract to be executed; the words in the said agreement of sale "terms of second mortgage, proportionate with first mortgage" meant that the terms of the second mortgage should be the same as the terms of the first mortgage, the words "proportionate" being used

Amendment to Bill of Complaint.

in the sense of same, and the reason why the word "proportionate" was used instead of "same" was that the first mortgage was for \$70,000 and the second mortgage \$22,000; the agreement of sale was on a form supplied and used by the agent of the defendant, and there is annexed hereto a copy of said form, which is printed; comparison between the copy of the form hereto annexed and the copy of the agreement of sale annexed to the bill of complaint will indicate what portions of said agreement are in printing and what portions of said agreement are in typewriting. The only reason why the formal agreement was not executed was because a dispute arose between the defendant and the person from whom defendant was purchasing said property, which was not settled until December, 1926. Complainant was always ready and willing to execute a formal contract and tendered himself ready and willing to execute said contract from time to time, and complainant says that defendant's neglect and refusal to execute such a formal contract is a fraud upon complainant.

HARRY S. NEIWIRTH,
Solicitor for Complainant.

(Annexed to this amendment is a copy of Exhibit 1, and also a copy of the printed part of the blank form as indicated on Exhibit 1 as printed above.)

Answer and Cross Bill.

The defendant Lafayette Building Corporation, a New Jersey corporation having its principal office and place of business in the Village of Ridgefield Park, Bergen County, New Jersey, answering the complainant's bill and the amendment thereto, says that:

10

1. It admits the execution of Exhibit 1 annexed to the complaint and denies the other allegations of paragraph one.

20

2. It admits the it had a contract recorded in book 1359, page 409, etc., of Deeds, substantially as alleged in paragraph two, but begs leave to produce the same and refer thereto as to the precise terms thereof; and further answering says that negotiations leading to the execution of this contract were had at or about the same time as the negotiations between complainant and defendant as to Exhibit 1; and that this defendant had no knowledge of the area of said lands other than the representation of the former owner, William L. Tait, from whom this defendant purchased, of which fact complainant had notice.

30

3. It admits that a map was exhibited to complainant on which the area of said premises was marked, as alleged in paragraph two, and further answering says that this map was one furnished to this defendant by said Tait and was so represented to complainant and denies that this defendant represented to complainant that said premises contained approximately 195 acres of land as alleged in paragraph two.

40

Answer and Cross Bill.

4. It admits that said premises as described in paragraph two have been conveyed to this defendant as alleged in paragraph three.

5. It admits that the area of said premises is actually 152.61 acres as alleged in paragraph three.

6. It admits that a counterpart of Exhibit 1, annexed to the bill, was signed by complainant as alleged in paragraph one of the amendment to the bill of complaint, and denies the other allegations of that paragraph. 10

7. It admits that certain proceedings were taken in this court by this defendant against said Tait, that a decree for specific performance was made, and that a conveyance and mortgage were made substantially as alleged in paragraph three of the amendment to the bill of complaint, but begs leave to refer to the record of said proceedings and to said deed and mortgage as to the form and contents thereof. 20

8. It admits that at the time Exhibit 1 was signed, a similar document had been signed by this defendant and said Tait, as alleged in paragraph three of the amendment to the bill of complaint, and denies the other allegations in respect thereto, in said paragraph three. 30

9. It denies that it was the intent of both complainant and this defendant to be bound by Exhibit 1, and that the purpose of having a final agreement executed was as alleged in paragraph three of the amendment to the bill of complaint, and admits that the reason no formal agreement was executed between complainant and this defendant was the 40

Answer and Cross Bill.

dispute and the resulting litigation as above mentioned, between this defendant and said Tait, and further answering says that complainant had notice thereof and knew that by reason thereof this defendant was unable to make a binding agreement to sell said premises to complainant.

10

By way of cross-bill by this defendant against the complainant, this defendant says that:

1. It repeats the affirmative allegations and admissions in its foregoing answer.

2. The writing annexed to the bill of complaint as Exhibit 1 was not intended as a final and complete agreement of the parties and complainant and this defendant have never entered into any binding contract in respect to said premises.

20

3. This defendant has tendered and now tenders itself ready to repay to complainant all moneys paid by complainant to this defendant, with lawful interest thereon.

This defendant therefore prays:

1. That complainant may answer this counter-claim.

30

2. That a decree may be made that complainant has no right, title or interest in said premises nor any lien upon or claim thereto.

3. That this defendant may have such further relief as may be agreeable to equity.

MORRISON, LLOYD & MORRISON,
Solicitors for and of
counsel with defendant.

40

**Replication to Answer and Answer to
Cross Bill.**

Complainant denies the affirmative matter set up in the answer and joins issue on the answer.

Answering the cross bill complainant says:

1. He denies the affirmative allegations set up in the answer. 10

2. He denies the statements contained in paragraph 2 and repeats all of the statements contained in the bill of complaint and the amendment thereto. He prays that the cross bill may be dismissed.

MERRITT LANE,
Solicitor for Complainant. 20

30

40

Testimony.

Chancery Chambers, Jersey City, N. J.,
January 4, 1928.

10 Mr. Lane: Before the trial opens, I move to amend the bill so as to insert a provisions that we are willing to take the property even if no abatement be allowed. I had intended to cover that by the second paragraph of the amendment to the bill, which has already been made; when I came to read it over there was some doubt in my mind as to whether I actually accomplished what I was after, or not.

The Vice-Chancellor (to Mr. Morrison): Will that hurt you?

20 Mr. Morrison: I do not think so; it is rather a late day to take that position, but I do not see why Mr. Lane should not be permitted to put that in his pleadings, if he cares to.

The Vice-Chancellor: Well, this being a court of equity, I presume I ought to allow the fullest latitude in the framing of the pleadings, so we will know what the real issue is.

30 Mr. Lane: I thought it was in by the Second Paragraph, but that might be construed in connection with the language preceding it to only apply to a certain mortgage which was supposed to be part of the consideration.

(The amendment prayed for is allowed.)

Mr. Lane: Does your Honor want an opening, or not?

The Vice-Chancellor: No; I have read these papers, and my reading of the papers refreshes my recollection of the matter, because it was before me one time before on a motion to strike.

David Levine—Direct.

THE CASE FOR THE COMPLAINANT.

DAVID LEVINE, SWORN.

Direct Examination by Mr. Lane:

Q. Where do you live? A. 21 Chestnut Avenue, Newark, N. J. 10

Q. What is your business? A. Fur salesman.

Q. When, were and through whom, did you become acquainted with this property which is the subject-matter of this suit? A. About the middle of August, 1925, my attention was called to the property by Mr. Ben Corn.

Q. And you then saw Dr. Corn? A. Yes.

Mr. Lane (to Mr. Morrison): And Mr. Corn, it is conceded, was President of your client, Mr. Morrison? 20

Mr. Morrison: Not this Mr. Corn, it is his brother, David Corn.

Q. Where? A. Why, in a conversation in his place of business; and my interest was aroused to a degree where I went up, the following Saturday, to have further discussion with his brother, Dr. Corn. 30

Mr. Lane (to Mr. Morrison): Will you concede that he is President of this defendant company?

Mr. Morrison: Yes.

Q. Tell us, shortly, what occurred? A. On that particular day I was taken to the property by Mr. Zimmerman and Mr. Frank Smith, who showed me over the property, and I was interested enough to call Mr. Weiser and Mr. Miller, who came up 40

David Levine—Direct.

I think a few days later, and on that day we decided that we were interested, and paid a deposit to sort of go into the deal—a preliminary deposit.

Q. Now, were was that paid? A. That was paid, if I am not mistaken, in Dr. Corn's home.

10 Q. Who were present? A. Mr. Weiser was present; Mr. Miller and myself; Dr. Corn, Mr. Zimmerman, and Mr. Frank Smith.

20 Q. Tell me what was said with reference to the acreage, and also with reference to the making of a contract for the sale of the property? A. We discussed the price of the property; the price given me, with Mr. Weiser and Mr. Miller being there, was \$600. Mr. Wesier suggested that we transact the deal and close it at \$575 an acre; they mentioned that there were 195 acres, at \$600, and Mr. Zimmerman intimated that he had somebody else who was interested and expected him that very day, and if we felt that we wanted it, why, we had better act quickly; and we concluded that it was a worth-while proposition, and we decided to pay \$600 for the entire 195 acres, which totalled \$117,000.

30 Q. Had the price per acre, or the amount of the acreage of the property, been referred to before that—at the time you were up at the property, or anything of that kind? A. Just off-handedly, I think Mr. Zimmerman said that it would be "around six hundred dollars an acre"; he intimated that he would try to get it for me at six hundred dollars an acre at the time that I saw the property myself.

Q. At that time, who was present? A. Mr. Frank Smith and Mr. Zimmerman.

40 Q. Who is Mr. Frank Smith? A. I think he is

David Levine—Direct.

the Secretary of this corporation, I am not quite sure.

Q. That is, of the defendant, the Lafayette Corporation? A. Yes.

The Vice-Chancellor: Is he an officer, Mr. Morrison?

10

Mr. Morrison: Yes, that is so; he is the Secretary.

Q. As I understand it, however, you arranged no definite price until this meeting which you had at Dr. Corn's house—is that right? A. Yes—not until we gave the deposit did he come to an understanding on the price, and that was \$600 an acre for the 195 acres.

Q. How long a discussion was it, back and forth, about the price? A. Why, the whole thing did not take more than an hour.

20

Q. Were there any figures used except the \$575 and \$600? A. No.

Q. In other words, did you attempt to split the difference, or anything of that kind? A. No.

Q. Now, after you had arranged upon the price, what did you do? A. Mr. Smith suggested that he would run back to his office and draw up a contract, or bill of sale, or whatever it may be—I don't know the legal terms of those things—and he came back very shortly with the paper, in which was mentioned the 195 acres, and, to the best of my ability, in reading, I concluded it was about what it should be.

30

Q. Now, during the course of the negotiations, was anything said with respect to the first mortgage that had to be upon the property? A. We had

40

David Levine—Direct.

an understanding to the effect that they had a \$70,000 first mortgage, which was to run from that time for a period of five years, and we were to get the same conditions that they had.

10 Q. Now, did anyone tell you, at that time, that they owned the property, or that they had it under contract to purchase? A. I don't think that phase of it was discussed, Mr. Lane.

Q. Now, was anything said at that time with respect to a second mortgage upon the property? A. Yes, there was to be a \$22,000, which was to run for the same length of time that the first mortgage was to run.

Q. And what was the interest to be? A. The usual rate of interest, I think—six per cent.

20 Q. Where did you stay while Mr. Smith went away to prepare the contract? A. I think I stayed at Dr. Corn's home.

Q. Then did Mr. Smith come back with some papers? A. Yes, sir.

Mr. Lane (to Mr. Morrison): Will you produce your counterpart?

(Mr. Morrison complied, producing and handing to examining counsel a paper.)

30 Q. I show you a paper produced by counsel for the defendant, and ask you whether that is your signature? A. It is.

Q. I show you a counterpart of that agreement, and ask you whether that is a paper which was signed by Mr. Corn and Mr. Smith, for the Lafayette Building Corporation, and delivered to you at the time? A. I couldn't say; I don't recall; I think it is, yes.

40

David Levine—Direct.

Q. Well, you got a paper, didn't you? A. Yes, I got a paper that was immediately turned over to our lawyer, Mr. Neiwirth.

Mr. Lane: Will it be conceded that this paper, purporting to be signed by the Lafayette Building Corporation, was, in fact, signed by Mr. Corn and Mr. Smith, the President and Secretary of the Corporation, and delivered to the purchasers? 10

Mr. Morrison: It was.

Mr. Lane: I offer both of these agreements in evidence.

(Both papers are admitted in evidence, without objection, and are marked respectively Exhibit C1 (being the paper signed by the Corporation) and Exhibit C2 (being the paper signed by Levine). 20

Q. I show you check dated August 21, 1925, for a thousand dollars, and ask you whether that is the check which was paid on that day, or was delivered on that day? A. It is.

Mr. Lane: Is it admitted that that was received by the Lafayette Building Corporation? 30

Mr. Morrison: It is.

(The check is offered in evidence by Mr. Lane, admitted, and marked Exhibit C3).

Q. Mr. Levine, I notice that in this document called "An Agreement of Sale", the language includes "formal contract to be signed on or before September 1st, 1925"—was there any conversation with respect to any other contract being signed than this one? 40

David Levine—Direct.

10 Mr. Morrison: We object to that, because, under the well-known rules, it would all be merged in the written contract, and, as far as subsequent discussions are concerned, they would be an attempt to modify the written contract.

20 The Vice-Chancellor: My recollection is that you have been contending—or, at least, you did contend at the time you made the motion to strike—that this paper is not the contract that was entered into between the parties, that it was only preliminary to the contract to be made. Of course, if you concede that this is the contract that was entered into between the parties, and if that is what they are trying to show, I can readily agree with you as to that.

Mr. Morrison: Our contention is not quite as broad as that; our contention is that that is an incomplete contract.

30 The Vice-Chancellor: Well, if it is incomplete it is not a contract, because there has to be a meeting of the minds and an agreement between the parties; now, if it is incomplete in any of its terms it cannot be said to be a contract.

40 Mr. Morrison: That would be so, legally, but in every-day language many things are called “contracts” which are not legal contracts; and that is the point involved in this case. What this gentleman calls a “contract” our contention is is not a legal contract, but, in the language these men used it would be called a “contract”. Mr. Lane has referred to it as a “contract”—

David Levine—Direct.

The Vice-Chancellor: If you are going to agree it is the contract, I think I am inclined to agree with you, and will sustain your objection; but, if not, I think I will overrule the objection.

Mr. Morrison: Will your Honor please tell me whether you use the word "contract" in the legal sense, or the common sense? 10

The Vice-Chancellor: I mean in the legal sense; that is all I am dealing with; because I am here to try the issue said to be existing between the parties, based on what is said to be a contract. Now, the complainant says it was a contract; you, in the making of the application for a motion to strike, argued, as I recall it, that it was not a contract for the reason that the words are in it "formal contract to be made hereafter", or words to that effect. 20

Mr. Morrison: We retain that position.

The Vice-Chancellor: Well, I feel, with respect to your motion that I am in this position—I am somewhat in a quandary as to whether you are conceding that this is a contract, or whether you are disputing it; if you are disputing it, then I will have to state that I will overrule the objection. 30

Mr. Morrison: Well, may I make the objection that this is not an enforceable legal contract? Now, my objection is that they are attempting to show an enforceable contract not shown by the paper-writing, and therefore not enforceable by specific performance. 40

David Levine—Direct.

The Vice-Chancellor: I overrule the objection, based on that statement.

Q. (Question repeated.) A. No, not that I recall.

10 Q. Were there any terms of the contract which were discussed and left unsettled, or anything of that kind, during the course of your talk, at that time?

Mr. Morrison: If the Court please, can we have the same objection here?

20 The Vice-Chancellor: I will have to sustain that objection, anyhow, because whether there was anything left unsettled I suppose is for us to consider, after he states all that transpired. You see, that would be a conclusion on the witness's part.

30 Q. Well, have you said all that took place between you on that day, Mr. Levine, as to any conversation as to the terms of the sale, or anything of the kind? A. There was nothing aside from the preliminary understanding that we had which brought about the drawing of these papers, and then we discussed as to when final settlement was to take place, which was, if I recall correctly, to be about a month or six weeks.

Q. And was anything said as to any event in connection with the final settlement, or the date of that final settlement? A. No definite date was set.

40 Q. Was anything said as to why that was—why no definite date was fixed for the final settlement? A. No, nothing that I recall.

David Levine—Direct.

Q. I notice that in this contract the language is sued, "Additional money to be paid on signing formal contract", and I show you a check, dated September 1st, 1925, to the order of the Lafayette Building Corporation, for \$4000, and ask you whether you delivered that check to the Lafayette Building Corporation? A. I did. 10

Mr. Lane: I offer that check, which it is admitted was received by the Lafayette Building Corporation, in evidence.

(Admitted and marked Exhibit C4.)

Q. To whom did you personally deliver that check, Mr. Levine, or how was it delivered to the Lafayette Corporation? A. I don't know whether I mailed it, but I think I had occasion to go up there, and I handed it to Mr. Frank Smith. 20

Q. It was not returned to you, anyway? A. No.

The Vice-Chancellor: Was that check cashed?

Mr. Lane: Yes, sir; it is admitted to have been cashed. (To opposing counsel) You may cross examine.

Mr. Morrison: No questions. 30

JOSEPH WEISER, sworn.

Direct Examination by Mr. Lane:

Q. Mr. Weiser, where do you live? A. 69 Stengel Avenue, Newark, N. J.

Q. What is your business? A. Fur dresser and dyer. 40

Joseph Weiser—Direct.

Q. When did you first hear anything about this purchase of this property? A. Why, the latter part of October, I believe, or the middle of October, Mr. Levine came down to my house and told me about the thing; and I told him—

10 Q. Well, never mind what you told him; you said “October”—will it refresh your recollection that the agreement of sale, Exhibit C2, is dated August 21, 1925—now, with that fact in mind, would you say it was October? A. It may have been August; it was in the summer time.

Q. And then, when did you first see anybody representing the Lafayette? A. That was the day I went out with Mr. Levine and Mr. Miller.

20 Q. And where did you go, and whom did you see? A. I saw Mr. Zimmerman at the time; I met him at Mr. Smith’s office. Mr. Smith was not there, and Mr. Zimmerman went out to this parcel of ground with us and took us over it, and showed us the ground.

Q. When did you first see anybody in connection with this purchase? A. At Dr. Corn’s home.

30 Q. Who was present at Dr. Corn’s home? A. Mr. Smith, Dr. Corn, Mr. Zimmerman, Mr. Levine and Mr. Miller.

Q. Now, tell me what was said with respect to the price of the property? A. While looking over the ground I said to Mr. Zimmerman, “What is the best price you people will take for this?” and he said, “\$600 an acre”. I said, “Now, if you will take \$575?” He says, “No, there is a Mr. Smith coming over from New York, who is interested in this, and we can get \$600 an acre from him, but I prefer that you people get it”; so the talk became

40

Joseph Weiser—Direct.

general with reference to the price, and we decided to take it at \$600 an acre.

Q. How long did that conversation between you all take place? A. Oh, I don't think we were there over twenty or twenty-five minutes, on the ground; then we went to Dr. Corn's home.

10

Q. Now, after the discussion at Dr. Corn's home with respect to the fixation of the price, what happened? A. Why, Mr. Smith said he would draw up a contract and come right back; so he left us, and the talk became general, on general topics, waiting for Mr. Smith; and when he came back Mr. Levine signed this contract and gave him a check for a thousand dollars.

Q. Now, this contract contains the language "Formal contract to be signed on or before September 1st, 1925"—was your attention directed to that, or was anything said with respect to a formal contract?

20

Mr. Morrison: We make the same objection to that question as the similar objection made to the question to the former witness.

The Vice-Chancellor: I will overrule the objection.

A. Why, not to my knowledge; I cannot recall anything about any other contract; I do not recall it.

30

Q. Was there anything said to the effect that at some future time you would get together and agree upon some terms—was anything of that kind said, or talked about? A. Not to my knowledge; I don't remember. We did agree on the mortgage plans; there was supposed to be a \$70,000 and a \$22,000 second mortgage.

40

Joseph Weiser—Direct.

Q. What was said, if anything, as to when the title should close? A. I think it was a question of thirty days, or thereabout, that we were to take title—four or five weeks after the day we were there we were to take title. It was made out in
10 Mr. Levine's name.

The Vice-Chancellor (to Mr. Lane): I suppose you appreciate that all that is expressed by this witness is not going to impress me much; he says, "I think".

Mr. Lane: He is like a good many other witnesses—he says he thinks, when, after all, it is his best recollection.

The Witness: Well, four or five weeks
20 after we were supposed to take title.

Q. Well, was anything said as to the Lafayette Company having this property, at that time, under contract, and as to when this title was to close, with respect to when their title was to close—was anything of that kind said? A. Not to my knowledge.

Mr. Lane: You may cross examine.

Mr. Morrison: No questions.
30

HERMAN MILLER, sworn.

Direct Examination by Mr. Lane:

Q. Mr. Miller, where do you live? A. 392 Seymour Avenue, Newark, N. J.

Q. What is your business? A. Plumbing and
40 heating contractor.

Herman Miller—Direct.

Q. When did you first hear of this property? A. About August the 20th, Mr. Levine called me up and told me about this proposal—

Q. Never mind the talk you had with him; then what did you do? A. August 21st we went to Ridgefield Park, and there we met Mr. Zimmerman, and Mr. Zimmerman took us out to where this parcel is, and we looked it over, and we asked him what he was asking for it, and he said, "\$600 an acre". With that, we went back again to Ridgefield Park, to Mr. Smith's office, and we met Mr. Smith, and then, from there, we went over to Dr. Corn's house, and we got talking about the price there again, and we tried to get the acreage for \$575 an acre, and they would not let it go for that and they wanted \$600 an acre; so then we closed on \$600 an acre; and then we started talking about the terms, so we arranged with them that there were to be a \$70,000 first mortgage, and a \$22,000 second mortgage for the same length of time as the first mortgage; and, with that, Mr. Levine gave them a check—that is, Mr. Smith went back to the office and drew up a contract, and he came back with it, and Mr. Levine gave him a check, and they both signed, and with that, we left, after that.

Q. Now, was anything said at that time with respect to when your title would close? A. About October 20th.

Q. Well, was anything said with respect to their having the property under contract at that time—the Lafayette—with respect to your closing title? A. Yes.

Q. What was said? A. They said that they were taking title at that time, and it would be a good time for us to take title at the same time.

Herman Miller—Direct.

Q. Did they tell you anything about whom they had a contract to take title with—did they mention the man's name? A. Tate.

10 Q. Was anything said at that time about any other contract being signed between you people, or between Levine and the Lafayette, or anything of that kind? A. No, there was no arrangements made of signing any other contracts.

Q. Was anything said at that time that at some future time you would get together upon any terms, or anything of that kind? A. No, sir.

20 Q. What is your recollection as to what, if anything, was said as to the terms of this second mortgage? A. The terms of the second mortgage was to run the same length of time as the first mortgage, a period of five years.

Q. What kind of property is this? A. It is land—195 acres they told us it was.

Q. Yes, but is it vacant land? A. Vacant land.

Q. Useful for what purpose? A. Well, I don't know what purpose—for any purpose, I suppose—to develop; I don't know what other purpose it could be used for—I suppose for farming.

30 Q. Well, either farming or developing? A. Either farming or developing.

Q. It has no special value as a place of land except for farming or developing, has it? A. Farming or developing, yes.

The Vice-Chancellor: I note there is a counterclaim to your answer—have you replied to that counterclaim?

Mr. Lane: Yes, sir—a denial.

40 The Vice-Chancellor: I have not got the original papers here, and that is the reason I ask.

Herman Miller—Direct.

Mr. Lane (to Mr. Morrison): You may cross examine.

Mr. Morrison: No questions.

Mr. Lane: I offer in evidence the file in the case of the Lafayette Building Corporation, Complainant v. William L. Tate, Docket No. 59, page 683; and I also offer in evidence a copy of the deed from Mr. Tate to the Lafayette Building Corporation, which copy is certified. 10

(The file is admitted, and also the Certified Copy of the Tate deed, which latter paper is marked Exhibit C5.)

Complainant rests.

Mr. Lane: I want to make certain that when I offer the record in Lafayette Building Corporation v. Tate I offer particularly the bill of complaint in that cause as admissions against the Lafayette Building Corporation. It sets out its contract with Tate, although, of course, it is admitted in the pleadings in this case, anyhow. 20

THE CASE FOR THE DEFENDANT. 30

FRANK E. SMITH, sworn.

Direct Examination by Mr. Morrison:

Q. Mr. Smith, where do you reside? A. I reside at 750 Carroll Place, Teaneck.

Q. What is your profession or business? A. Real Estate Broker. 40

Frank E. Smith—Direct.

Q. And where is your place of business? A. 191 Main Street, Ridgefield Park.

Q. You are an officer, are you not, in the Lafayette Building Corporation? A. Yes, I am the Secretary.

10 Q. And you have had that office since the organization of that company, some three or more years ago, have you not? A. Yes, sir.

Q. Do you recall a property which the Lafayette Building Corporation purchased from a Mr. Tate—property in the Borough of Rockleigh, in Bergen County? A. I do.

Q. And do you recall signing, for your corporation, the agreement, or the paper which has been marked in evidence as Exhibit C1? A. Yes.

20 Q. Now, before this Exhibit C1 was signed by your corporation, did you meet Mr. Levine, or the gentlemen with whom he was working in connection with this transaction? A. I did.

Q. And how were those gentlemen first brought into contact with you, in connection with this transaction? A. Why, the first time I hear about them was at the time Dr. Corn told me he had someone interested in the property.

30 Q. Now soon after that did you see Mr. Levine, or his associates? A. I think about a week later.

Q. And what was done at that time? A. I don't think anything specific was done.

Q. Well, what was the subject of the conversation between you and the other officers of the Lafayette Corporation and Mr. Levine and his associates—was it in relation to this property? A. Oh, yes.

40 Q. What was the general scope of the conversation? A. Why, they seemed to be interested in buy-

Frank E. Smith—Direct.

ing it, and of course we were interested in selling it to them.

Q. Did you have any papers or documents in relation to the property at that time? A. No, sir.

Q. Did you have any representations of the property on paper at that time? A. Yes, we did.

10

Q. And what was it that you had? A. Well, we had a map, furnished us by Col. Tate, which showed the property.

Q. And when had you first gotten possession of that map? A. Oh, I think I got that around the 1st of August.

Q. And from whom did you get that map? A. I got that map from Frank & Sunden.

Q. Who were Frank & Sunden, and what was their relationship to this piece of property? A. They were the real estate brokers representing Col. Tate.

20

Q. Do you remember by who that map had been prepared? A. The map had been prepared by a surveyor in New York; his name is Watson Clark.

Q. And what did that map show as to the property which your company had purchased from Tate, and was then discussing with Mr. Levine? A. Do you mean as to its area?

30

Q. Well, tell me what it showed? A. Well, it showed a plotting—a regular surveyor's map, showing the various tracts that made up the parcel.

Q. Was the area of the parcels indicated on the map? A. Yes, it was.

Q. And what was the total area indicated by that map? A. $195\frac{1}{4}$ acres, I believe it was— $195\frac{1}{4}$, yes.

Q. And you had that map at the first conference with Mr. Levine and his associates, had you? A. I had.

40

Frank E. Smith—Direct.

Q. Did you have any later conferences with them? A. After showing them the map?

Q. After showing them the map? A. Yes, we had.

10 Q. What were those? A. Why, they came out practically every Saturday there for about three weeks before they did any business with us.

Q. And did you see them on these various occasions? A. I think I saw them—I did not see them on the first occasion, but I think I did on the next two.

20 Q. Now, during those conferences what, if anything, was done with this map that you had mentioned—who kept the map, who took it? A. Why, the day that we signed the sales agreement I gave the map to Mr. Levine.

Q. And were you asked by Mr. Levine for any other copies of the map, or any other maps? A. During the week he either called me up, or came to the office, and told me he would like to get additional copies of that map.

Q. What did you do in response to the request? A. I wrote to Watson Clark and asked him what he would charge for those additional copies.

30 Q. Well, without bringing in your correspondence with Mr. Clark, did you get additional copies from Mr. Clark? A. Yes, we did.

Q. And what was done with the additional copies when you did get them? A. I mailed them to—no, I don't know whether I mailed them, but I gave them to Mr. Levine, either by mail or in person.

Q. And before sending them to him did you examine the additional copies? A. No, sir.

40 Q. Did you hear from Mr. Levine about those ad-

Frank E. Smith—Direct.

ditional copies after you had sent them to him?

A. Yes, about a week or ten days later, I should say it was, I heard from him.

Q. And what did he say in respect to them? A. Why, he was very much excited; I don't recall the exact words, but the impression was that there was something wrong with the maps. 10

Q. Did you later see those additional copies you had sent to Mr. Levine? A. I did.

Q. And did they differ from the first map which you had received from Mr. Tate and given to Mr. Levine? A. They did differ.

Q. And what was the difference? A. Why, the difference was approximately in tabulating the area, and going over the various parcels there was a difference of about 40 acres between the two maps. 20

Q. What was the acreage shown by the first map you mentioned? A. The first map we received from Tate was 195 $\frac{1}{4}$ acres, I think.

Q. And the maps you got at Mr. Levine's request for additional copies showed how many acres? A. About 155.

Q. Until those additional maps had been purchased and sent to Mr. Levine, and your attention called to the difference, had you know the area of the property you bought from Tate, except by the map which he furnished you? A. No; I was as much surprised as Mr. Levine was to know that it was short. 30

Q. Was the area of the property subsequently checked so as to ascertain which map was correct? A. It was.

Q. And which was found to be correct? A. The revised map which was sent to Mr. Levine was found to be correct, or approximately correct. 40

Frank E. Smith—Cross.

Cross Examination by Mr. Lane:

Q. Mr. Smith, are you sure that you showed a map of this property to Mr. Levine— A. Positively.

10 Q. Now, wait until I get through—before the signing of the contract of sale? A. Yes, sir.

Q. When did you get the map back from Mr. Levine? A. I never got it back.

Q. Wasnt' the map used in the trial of the case of the Lafayette Company v. Tate? A. I do not recall.

Q. In this Court? A. I do not recall.

20 Q. You were here during the trial of that case, weren't you? A. Yes; but it was admitted that there was a map showing that area; there was no argument about that.

Q. I know there was not; but you do not recollect the map being present in court? A. No, I don't.

Mr. Lane: I think that is all.

(The witness left the stand but was recalled by Mr. Morrison.)

Re-direct Examination by Mr. Morrison:

30

Q. Mr. Smith, in these discussions with Mr. Levine and his associates, before this paper C2 was signed, what, if anything, was said as to the price at which this property should be sold by your company and purchased by them? A. Why, we had set a price of \$125,000 on it—that was our price.

Q. Did you quote them that price when they first came into negotiation with you? A. Yes, sir.

40

Q. I notice that the prices tated in Exhibit C2

Frank E. Smith—Re-direct.

is \$117,000; what conversation took place that brought about the reduction in the price? A. Well, that was a compromise price; I don't just recall what they offered, I don't know whether it was \$110,000, or what it was; but that was a sort of a—well, that is the price we came down from \$125,000 to—\$117,000. 10

Q. Do you recall what the first offer made by Mr. Levine was—how much they offered? A. Why, as I recall it, it was \$110,000.

Q. And then, I suppose, or is it the fact, that, by negotiations beginning with their offer of \$110,000 and your asking price of \$125,000, you came to this price of \$117,000? A. Yes, sir.

Further Cross Examination by Mr. Lane: 20

Q. Mr. Smith, when you were first asked you said you had no recollection as to what their offer was; now, what refreshed your recollection in the space of half a minute? A. Well, I said it was around \$110,000, or around that figure.

Q. You said you did not know; now you say it was \$110,000; I want to know what refreshed your recollection within half a minute? A. Well, what I think did refresh my recollection more than anything else was I remembered, at the time, they said something about, "Well, let us split it evenly, and that recalled to my mind that their original offer was \$110,000. 30

By the Vice-Chancellor:

Q. Why didn't you think of it when you were on the stand before? After you left the stand you talked with counsel, didn't you? 40

Frank E. Smith—Further Cross.

Mr. Brogan: No, sir; not on this point; we never mentioned it.

The Vice-Chancellor: But he did have a talk with counsel, didn't he?

Mr. Brogan: Oh, yes.

10 The Vice-Chancellor: I was going to ask him whether that talk with counsel had anything to do with refreshing his recollection.

The Witness: No, sir.

By Mr. Lane:

20 Q. Well, I am more concerned in the refreshing of your recollection when you were on the stand; after you went back to the stand the second time, and was asked what their offer was, you said you didn't know, and then, in response to the very next question, I think—

30 Mr. Morrision: It did not go quite that way; he was not down from the stand at any time during the examination as to these prices; there was a pause while I conferred with Mr. Brogan, and then I asked him, the second time, as to what Levine's first offer was; but he had not been off the stand during that interval between the first time I asked him what Levin's offer was and the second time I asked him that question.

40 The Vice-Chancellor: No; but counsel is directing his attention to his testimony given before he left the stand and before he was recalled, and he was asking him what it was that refreshed his recollection from the time he left the stand until the time he came back again; and I am anxious to know myself, too;

Frank E. Smith—Further Cross.

in other words, witnesses are expected to be truthful; before he said he did not remember, as I recall his testimony, and, on being recalled, he does remember something; now, I want to know what refreshed his recollection.

Mr. Brogan: This man was asked nothing at all about price. He was then recalled, because I thought that something should have been put in as to what the facts were about the price. He did not talk with us about it. Now, he was asked what Mr. Levin's offer was, and he said he did not recall it clearly, it was around \$110,000, it might have been more, or it might have been less. That is my distinct recollection; I will ask Mr. Black to substantiate it.

(Former testimony of the witness read as follows:)

"Q. I notice that the price stated in Exhibit C2 is \$117,000; what conversation took place that brought about the reduction in the price? A. Well, that was a compromise price; I don't just recall what they offered, I don't know whether it was \$110,000, or what it was; but that was a sort of a—well, that is the price we came down from \$125,000 to—\$117,000.

"Q. Do you recall what the first offer made by Mr. Levine was—how much they offered? A. Why, as I recall it, it was \$110,000."

Q. That is the instance I am directing your attention to; two or three instants later you say it was \$110,000; I want to know what, in that brief space of time refreshed your recollection? A. Well, I mentioned "\$110,000".

Frank E. Smith—Further Cross.

Q. But you said first that you didn't know it was \$100,000, that you didn't know what it was? A. Well, it might have been an unfortunate sentence; I don't remember; maybe I was just feeling for words.

10 Q. Now, you say it was split—the way you figure it, it was a split between \$125,000 and \$110.00; that is the way you fix it, is it? Is that so? A. That is about the way it was worked out.

By the Vice-Chancellor:

Q. Well, do you know whether it was worked out that way? A. As I recall, that is the way it was worked out.

20 Q. Well, was it worked out with you? A. Well, I was there.

Q. Tell us what happened there at that time which resulted in the \$117,00 figure? A. Well, it is kind of hard to recall all of the discussion that went on, but, as I recollect, they offered \$110,000, and we quoted \$125,000, and we gradually worked the figures back and forth.

30 Q. How did you do it—that is what I am trying to find out; I am trying to find out what transpired there, what was said between the parties which will indicate that there was a compromise on \$117,000. This is a business transaction, and you had a previous hearing in court, I understand, upon one aspect of it; it seems to me you ought to remember something about it. You see, I cannot take your guess on it; I am trying to get your best recollection of what transpired? A. Well, I do not want to make a statement that is untrue; I cannot tell you exactly just how it came about.

40

Frank E. Smith—Further Cross.

Q. Well, why did you make the positive statement, then, that the \$117,000 was a compromise, if you do not remember how it came about? A. Well, that is the final figure arrived at.

Q. I ask you now, was there any price per acre mentioned in any of the conversations at all that you had with these people? A. Not to my knowledge; they might have mentioned it, but I did not.

10

Q. Well, did they mention it; that is what I am concerned about. Three witnesses have sworn that \$600 an acre was the price asked by you people; you were present at th conversations, weren't you? A. Several of them; most of them I think I was.

Q. And they say that they offered \$575, and then it was stated that some man named Smith (if I remember the name right) in New York, was interested, and was coming over to see about it, and you people would prefer to sell it to Levine, or these parties, and then you finally agreed on, as they say, \$600 per acre; now, that is what I am concerned about, as to whether or not there was any talk about the price per acre? A. Well, you see we did not figure it out on an acreage basis.

20

Q. I am not asking you that, I am asking for the talk; I don't care how you "figured it out"—three witnesses have sworn that the price you were discussing was per acre; now, you have not said a word about "acreage", you have given a lump sum of \$125,000 as the asking price, and say their offer was \$110,000; I am trying to find out just what the real talk was—whether it was price per acre, or whether it was a lump sum? A. A lump sum, as I recall it.

30

Q. Now, just charge your recollection; I am trying to find out what it was; you said a moment ago

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Frank E. Smith—Further Cross.

10 that you are not very clear as to what did transpire, and I am calling your attention to the price, and three witnesses have sworn as to what talk was had, and that the talk was of the price per acre; I am asking you now the very frank question whether it is the effect of your recollection of the matter, or it is not the effect, that the talk of price was per acre? A. The fact that the price per acre was not—here is the idea—

Q. I do not want the idea, I want to know what the fact is? A. And I am trying to explain it to you.

20 Q. Tell me what your recollection is of the conversation between these parties. Tell me, as best you can, what the talk was that you and your associates had with these parties at the time you agreed as to the purchase of this property and as to the price asked and fixed? A. Well, as I recall it, was asked \$125,000 for it.

Q. Who asked it? A. Why, I think Dr. Corn did all the negotiating.

Q. You were present? A. I was present; yes, I was.

30 Q. Well, now, what did he say? A. Well, he said he wanted \$125,000 for it.

Q. And yet you say that this map was shown, which showed 195 $\frac{1}{4}$ acres? A. Yes.

Q. And you did not figure per acre? A. No, sir.

Q. I mean, there was no figure made, per acre? A. You see, we figured we ought to make \$40,000 on it.

40 Q. I know, but from these papers in court here it appears that you people were claiming that there ought to be 195 acres received from Tate? A. Yes, sir.

Frank E. Smith—Further Cross.

Q. Well, I still would like to know, as far as I can from your statement of what transpired, what the talk was between the parties, so you can give it to me the best you can, throughout? A. And I recall that they offered \$100,000.

Q. I wish you would tell me who had the talks?

A. Well, they were all talking; that is the trouble—everybody was talking. 10

Q. Who talked for your side, for whom you use that expression? A. Well, as I recall, I would say something now and then, and Dr. Corn would say a little something.

Q. Tell me now what you said, and I will know what you said, if you can remember? A. I cannot remember now.

Q. How were you interested in it—were you the broker, or a party in interest? A. I was a party in interest. 20

Q. Not the broker? A. No, sir. This happened three years ago, you know.

Q. I know, but you were considering making forty thousand dollars, so you must have had a somewhat real interest in the matter; can't you remember just what conversation you had with these parties? A. As to what price was fixed?

Q. Well, as to the transaction? A. Well, you see these people were out so many times—you know what I mean—first they were in my office, and then in Dr. Corn's office. 30

Q. Then I will try to get it out from you this way: the first time they came out did you see them? A. No, sir.

Q. So you don't know what conversation they might have had the first time? A. No, sir.

Q. Were they out more than twice? A. I should 40

Frank E. Smith—Further Cross.

say they were out two or three times before they signed that agreement.

Q. Do you recall, then, whether you saw them the second and third times, or the second, or third?

A. The second and third times I saw them.

10 Q. Tell us what conversation you had with them the second time about the price, if anything? A. I do not recall what conversation took place then.

Q. Well, do you remember what was said the third time about price? A. The third time, I believe, was the time they signed the agreement, and that was the time we really got down to the facts.

Q. Was it you that told these parties that some man named Smith, coming from New York, was interested in the property? A. No.

20 Q. Did you hear that statement made? A. I heard that statement made on the stand, but that was the first time I ever heard it.

Q. Well, did you hear any of the parties, at any of the times you were there and Mr. Levine was present, mention that the price that you and your associates were asking was six hundred dollars an acre, and that Mr. Levine offered five hundred and seventy-five dollars an acre? A. I never heard any such offer as that.

30 Q. Well, who did you hear offer \$110,000? A. Why, I am not sure whether it was Mr. Miller or Mr. Levine. I believe this day they signed up that agreement there were three parties on each side there, and they were all talking at once.

By Mr. Lane:

40 Q. You offered, on behalf of your company, to abate this price \$117,000, didn't you?

Frank E. Smith—Further Cross.

Mr. Morrison: We object to that; that was in settlement, in the negotiation.

The Vice-Chancellor: I think I had better not admit that.

Mr. Morrison: There were many offers made, and if we go into that I think we had better have them all. 10

The Vice-Chancellor (to the stenographer): You had better strike all that out about that, Mr. Black.

Q. Why did you put in "195 acres"? A. Why?

Q. Yes. A. As I understand, I showed the map that showed 195 acres.

Q. That was referred to, wasn't it? A. Yes.

Q. And you showed them that, and put in "195 acres" for the tract, and yet not a word was said as to the price per acre, and this was acreage, wasn't it? A. Sure it was. Well, that is what we thought we had. 20

Q. Well, I don't care whether you thought you had it, as I understand it, you said, although you showed a map which showed 195 acres to them, the property was valuable only as acreage, so that acreage made a difference, and, although you put in your contract "195 acres", nobody said a word about "per acre"—now, is that true? A. Yes. 30

By the Vice-Chancellor:

Q. You said hat map showed the various tracts which went to make up the entire plot? A. Yes.

Q. How many tracts were there, do you know? A. I think there were four tracts. 40

Frank E. Smith—Further Cross.

By Mr. Lane :

Q. Farm-land acreage is usually sold by the acre, is it not? A. Well, that is the reason we didn't mention anything about the price "per acre".

10 Q. The reason why you did not mention it by the acre is that acreage is usually sold by acre? I think it would be just the reverse. A. Well, the reason we did not was because we were selling the whole piece.

Q. Yes, I know, but the value of a piece for development purposes depends upon the acreage, does it not? A. Well, it all depends on the quality of the acreage.

20 Q. Well, no matter whether the quality was poor or not poor, the addition of acreage adds value, doesn't it? A. Sometimes.

By the Vice-Chancellor :

Q. You people bought it for development purposes, did you? A. Well, we bought it for speculation, and what we were going to do was to hold it a while, and if we did not get a buyer we were going to develop it later.

30 Q. Well, your bill of complaint in the Tate case does state "the lands were vacant and unimproved lands, which complainant and complainant's assignor were purchasing for developing, for subdividing into building lots, and otherwise improving them, of which defendant had knowledge"? A. Well, we were going to do that eventually.

40 Q. Well, how can you say that, if you say you were holding it for speculation? A. Well, if we did not get an immediate sale, that is what we were going to do with it.

Frank E. Smith—Further Cross.

By Mr. Lane:

Q. Now, you know, for development purposes, acreage is an important thing, is it not? A. You mean the size of it?

Q. Yes, the size of the acreage? A. Surely.

Q. You deal in farm properties, don't you? A. 10
Yes.

Q. Farm properties are sold by the acre, aren't they? A. No, they are not; that is where you are wrong.

Q. Without regard to acreage? A. Well, it decides what you term as the price, I admit that.

Q. When I say "acreage", I mean size, of course. That is all.

By Mr. Morrison:

20

Q. In answer to a question of Mr. Lane's you said something about the "quality of the acreage"—was this Tate property of uniform character or quality throughout the entire acreage? A. Was it uniform?

The Vice-Chancellor: The quality?

A. No, it was not uniform throughout.

Q. Will you give us a brief description of the quality of the land in the different parts of the tract? A. Well, I should say about twenty-five or thirty acres were low. 30

By the Vice-Chancellor:

Q. You said it was made up of four tracts? A. Yes.

Q. Which particular tract—if only one tract—was that which was low? A. Well, two of the tracts were small; I should say they were low. 40

Frank E. Smith—Further Cross.

Q. What tracts were they—I suppose you called them by name, didnt' you? A. Well, the way I always designated them, one I called "the Northvale tract", and then there was what we called "the north and south county tract",—they were the big tracts.

10

Q. Were those the two that were low? A. No, they were pretty high; and then, in back of the south tract was a low piece there of acreage.

By Mr. Morrison:

Q. How did the properties in the south parcels compare, as to accessibility by public roads? A. Why, the two big tracts had frontage, I think—county road frontage.

20

Q. Did that frontage run along the greater or lesser side of the tracts—narrow, or wide? A. The road frontage?

Q. Yes? A. Well, the road frontage, I guess, was about—well, it ran along the lesser side.

Q. And were there any of the parcels which did not front on public highways? A. Yes.

Q. Which ones? A. The small tract or eight acres did not face on a county road, or highway.

30

By the Vice-Chancellor:

Q. Well, if the four tracts were contiguous, they were accessible from a roadway, weren't they—in their entirety? A. Well, I am not sure about that one tract of eight acres; I don't think it was; I suppose it was supposed to be conected up, but it never was.

40

Mr. Morrison: What I am asking the witness is how much road frontage there was,

Frank E. Smith—Further Cross.

and to what part of the property that gave immediate access. Your Honor is developing the thought of cutting it up for speculation, for re-sale: now, in doing that, of course, the more access to public highways it has, the more easily it can be cut into lots; if you have a long narrow strip, 150 ft. deep, lying along a highway, you have lots developed at once, and that has a bearing upon the "per acre proposition", because this property was not uniformly valuable; some of it, directly on the public highways, was worth much more per acre than that which lay back from them, and that which lay in swamps. 10

The Vice-Chancellor: Well, I am not enough of a surveyor to appreciate that, but what I have in mind is that there is, I will call it a "surveyor's rule" that indicates that where property fronts on a roadway, and you take away part of the land fronting on the roadway, it does not lessen the value of that which was previously to the rear of the plot—in other words, that which was previously to the rear becomes then the front, and it is just as valuable then as the front was originally. I forget what the name of the rule is—it is not the Davies Rule—there are several rules, but I am not sure that it was the Davies Rule I have in mind; but I have in mind this—that if the tract was one entire tract and any part of it faced on a roadway, certainly the taking away of some of it from the roadway would not diminish in value that which was behind it; whereas, 20 30 40

Frank E. Smith—Further Cross.

that which was behind it would be of less value before the taking away than it would be afterwards.

10 Mr. Morrison: I do not recall that rule, except in eminent domain cases, and usually then there is a new roadway on which the remaining property has a frontage.

The Vice-Chancellor: Yes; I say that if any part was taken away from the front, for the purpose, we will say, of a roadway, it does not diminish the value of that which was previously in the rear of the original tract.

20 Mr. Morrison: Well, my thought was that if we had a piece of property in the shape of a lot, and the road was along the narrow side, and there was another lot and the road was along the long side, we would have a different rule for acreage.

The Vice-Chancellor: Yes—the Davies Rule, I think brings it right down to inches, whereas the other rules put it on a front foot basis, or a square foot basis; but the Davies Rule brings it right down to inches.

30 Mr. Brogan: The Davies Rule?

The Vice-Chancellor: Yes; but that is a little far remote from what we are considering here.

Re-cross Examination by Mr. Lane:

40 Q. Mr. Smith, the acreage of farm property, when purchased by the acre, is purchased at an average price per acre, is it not? A. Well, a lot of times the farmer doesn't know how much acreage he has there.

Frank E. Smith—Re-cross.

Q. I said, "if purchased by the acre"—you never yet saw a farm in your life where every acre was exactly equal to every other acre, did you? A. Why, no, there is a difference.

Q. And when you talk about "price per acre" for a farm, you mean an average price over the whole farm, don't you? A. Sure. 10

Q. So that some parts of the farm are valued high and some parts valued low, and you cannot do business in any other way, can you? A. No.

By the Vice-Chancellor:

Q. In other words, these four tracts you speak of—in estimating the value of this entire tract, you would take into consideration the low land, and put a price on that, in your own estimation, and then you would also take into consideration the high land, and put a better price on that, and then strike an approximate rate per acre for the whole? A. Yes, sir. 20

Mr. Lane: My experience teaches me that they do not even do it that way.

The Vice-Chancellor: Well, they may not do it that way for farming purposes, but if this property was bought for building purposes you may rest assured that they would do it that way. Is there anything else with this witness? 30

Mr. Lane: I think not.

David Corn—Direct.

DAVID CORN, sworn.

Direct Examination by Mr. Morrison :

Q. You reside in Ridgefield Park, do you not?

A. Yes, sir.

10 Q. And you are a practicing physician by profession? A. Yes, sir.

Q. You are also an officer of the Lafayette Building Corporation? A. I am.

Q. What office do you hold? A. I am the President.

Q. Do you recall, Doctor, dealing with Mr. Levine and his associates in reference to this so-called Tate property? A. I do.

20 Q. When did they first get into touch with you about it, and how? A. Well, it was in the middle, or about the middle of August, on a Saturday afternoon; it was around between one and two o'clock in the afternoon, while I was getting ready to sit down for lunch, when Mr. Levine rang the bell and came into my house.

30 Q. Had you seen him before that time? A. Never before—and he introduced himself and said he was a friend of my brothers, and he had told him that he had bought some acreage, and he wanted to see whether he could get interested in something and buy some of it himself.

Q. What did you do with Mr. Levine in reference to the call—did you take him to see the property? A. Well, after we had lunch together in my house, after my office hours, after two o'clock, I took him over and showed him that property and two or three other pieces of property.

40 Q. Was anybody else with him at that time? A. No, he was alone at that time.

David Corn—Direct.

Q. Did he come back at a subsequent time? A. He then came back the following Saturday.

Q. How many times did he come back in reference to this property? A. I am sure that at least the third time was the time when we closed—maybe the fourth.

Q. Finally, you say, the third time, this paper C2 was signed? A. Yes, sir.

10

Q. Now, in your discussions with Mr. Levine and the other gentlemen who may have been with him on the subsequent visit, what did you say to him about the price your company wanted for this ground? A. We asked him \$125,000 for the property.

By the Vice-Chancellor:

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Q. When you say "we", tell me who said that? A. Well, I said it in behalf of the Lafayette Building Corporation.

By Mr. Morrison:

Q. And what did Mr. Levine and his associates offer for the property? A. Their first offer was \$110,000.

Q. And who made that offer? A. Mr. Levine.

30

Q. And can you remember, or will you tell us as near as you remember, just what words he used when he made that offer? A. Well, he simply said, "I know what the property cost you, and I think, if you will take \$110,000, you are making a nice profit"; but we thought that was not sufficient price, and we insisted upon \$125,000, and finally it went back and forth until the compromise price was \$117,000.

40

David Corn—Direct.

Q. And that price was then put into this paper, C2, which was signed by both parties? A. Yes, sir.

10 Q. When you first knew of this Tate property, Dr. Corn, was it in connection with the purchase by your company from Mr. Tate? A. Yes, sir.

Q. What, if anything, did you have to show what the property consisted of? A. Well, when we were over at Mr. Tate's, I believe Frank & Sunden, the brokers for Mr. Tate, gave us a map which showed 195 $\frac{1}{4}$ acres.

Q. What did you do with that map in connection with the transaction with Mr. Levine? A. Well, the map was in the office of Mr. Frank Smith, who showed it to Mr. Levine.

20 Q. And when was it shown to him? A. The day before the agreement was signed—I think the second interview.

Q. Do you know whether that map was taken away by Mr. Levine? A. That I don't know.

Q. Do you know anything about Mr. Levine coming with this later supposed copy of that map, which showed a different area? A. Well, no more than what Mr. Frank Smith told me.

30 Q. When did you first hear from Mr. Levine, or his associates, that there was a question about the size of this property? A. That was also following—Mr. Smith called my attention to the fact that his attention was called by Mr. Levine that when they compared the two maps there was a shortage of about 42 acres.

40 Q. Doctor, won't you please tell us whether you heard of the shortage that Mr. Levine had complained of before or after this paper C2 was

David Corn—Direct.

signed? A. That was after that paper was signed.

Q. And about how long after? A. That was probably, at least, between ten days and two weeks.

Cross Examination by Mr. Lane:

Q. At the time you purchased the property did you figure on the acreage? A. No, sir. 10

Q. Not at all? A. No, sir.

Q. Had no reference to the acreage, at all, at the time you purchased it? A. No.

Q. From Tate? A. No, sir.

Q. Absolutely not? A. No, sir.

Q. You are sure of that? A. Yes.

Q. And it made no difference to you? A. It did make a difference, but we did not purchase it by the acre. 20

Q. Well, then, you did rely upon the acreage? A. Well, he told us, but we did not purchase it by the acre.

Q. You relied upon the acreage in fixing your purchase price? A. We relied on the statement of "195 acres", yes, sir.

Q. Then you fixed your purchase price lying upon the amount of acreage as 195 acres? A. Well, I don't know whether we fixed it; we gave him the price. 30

Q. Did you give him your price, and then he tell you that there was 195 acres, or did he tell you there was 195 acres and then you give him the price? A. Yes, he told us there was 195, and wanted so much, and we gave him that.

Q. Then you did figure upon the acreage, did you not? A. No, sir; we did not.

Q. Did you know the bill of complaint, which was filed in the case against Mr. Tate contains the 40

David Corn—Cross.

statement,—“Complainant and complainant’s assignor”—“complainant” is you, and “complainant’s assignor” is the Lafayette Company”—“relied upon the acreage as shown on said map, in calculating the purchase price”—now, what did you mean by that? A. Well, I say, I don’t know what we would have done—

10 Q. (Interrupting) Answer the question? A. Well, I say we paid him that price for 195 acres.

Q. (Question repeated at the request of cross examining counsel.) A. Well, it was because there was such an enormous difference in the acreage represented and the acreage as it actually appeared.

By the Vice-Chancellor:

20 Q. Now, you stated to counsel that you did not, in fixing the purchase price, rely upon acreage? A. No, we bought it as a whole.

Q. Now, he is calling your attention to a recital contained in the bill of complaint filed in behalf of your company as against William L. Tate, in this Court, in which your corporation did assert that you did rely upon the acreage? A. Well, I say we did that because there was such an enormous difference between the representation and the actual acreage; if it was five or ten acres we wouldn’t have done it, but there was such an enormous difference between the representation of Mr. Tate of 195 acres and the actual amount; and then, when Mr. Levine called our attention that there was only 142, we thought the difference was too great; although we paid him a lump sum for the property.

30 Q. Your attention is called to the complaint filed in this Court, in what is called “the Tate suit”, in

40

David Corn—Cross.

which your corporation is said to have complained that you relied, in the purchase of the property, upon an acreage of 195 $\frac{1}{4}$ acres (and, as it appears in there, it is 196 and some fraction acres); is it the fact that you did rely upon that amount of acreage? A. Well, we did; they promised to give us 195 acres, your Honor. 10

Q. Well, that is what counsel is directing your attention to? A. Yes, to that extent, we did, but we did not compute the acreage in the price.

Q. Well, you did consider it of some moment? A. Yes, we did, because it was so large.

Q. If you were told it was 150 acres you would have paid that price for it, then? A. Well, I can't say, at this time.

Q. Well, why did you seek an abatement, in the Tate suit, from the court? A. Because there was so much difference. 20

Q. Well, doesn't that indicate that you were not satisfied to pay \$85,000? A. Yes, but he represented that the property was 195 acres, and after it was found it was only 152, we found it was too much shortage to go without consideration.

Q. Yes, but in your Tate suit you were contending that it was only 153 acres and not 195, and you were seeking an allowance off the purchase price because of the fact that you were not getting 195 acres? A. Yes, sir. 30

Q. Now, in view of that, I am asking you, do you mean to say that if you were told, in the beginning and before you signed the contract, that there was 153 acres in it, that you still would have paid \$85,000? A. Well, that I can't say; we might, or might not. 40

David Corn—Cross.

Q. When did you make up your mind that you were not satisfied with the price in the Tate suit?

A. Oh, that was the time when Mr. Levine called our attention that great shortage.

10 Q. Now, Mr. Levine called your attention to the shortage before you filed that bill of complaint, didn't he? A. Yes, yes, yes.

Q. So, when you filed the bill of complaint, you knew it was 150 acres instead of 195? A. Yes, because it was such a great difference.

Q. And you thought you should be given that allowance by the seller? A. Yes, sir.

By Mr. Lane:

20 Q. Now, Doctor Corn, was anything said in respect to "acreage" at all? A. No, sir.

Q. At the time you talked to Levine? A. No, sir; we were not interested in that.

Q. Not a word—is that right? A. Yes.

Q. At the time you talked to Levine? A. Yes.

Q. Well, why did you put in the contract "195 acres? A. Well, that was the amount Mr. Tate gave us. I told them it was the same property we got from Mr. Tate.

30

By the Vice-Chancellor:

Q. You knew you were buying from Tate four parcels of land, didn't you? A. Yes.

Q. And you say you did not consider the question of acreage, at all—is that right? A. Well, we didn't buy it per acre, your Honor.

40 Q. Well, you did not consider that material—the question of acreage—did you? A. I knew he told us there was 195.

David Corn—Cross.

Q. You were buying this one parcel comprising these four tracts? A. Which he said was 195 acres.

Q. And it did not make any difference to you whether it was 195, or 20, as long as you got the tract? A. Well, when he told us there was 195 $\frac{1}{4}$, and after our attention was brought to the fact that there was only 153, it naturally made us feel that we ought to get— 10

Q. (Interrupting) I am trying to find out from you whether you considered the acreage, or not; you cannot tell? A. Well, we did, sure, but not at the time we bought it, per acre; we didn't buy it per acre.

Q. You saw this big tract of land, didn't you, that you were going to buy? A. Yes.

Q. And you wanted that tract of land? A. Yes, sir. 20

Q. And you say you did not consider the amount of acres in it, is that right? A. Well, I considered the acreage, yes.

Q. You did consider, then, the statement of 195 acres as a criterion of the value of the property?

A. Yes. I may say, your Honor, without—

Q. (Interrupting) No, answer that—you did consider it as some criterion of value, did you not? 30

A. I really could not say.

(Former question repeated, as follows:)

“Q. You did consider, then, the statement of 195 acres as a criterion of the value of the property?”

A. Well, all I can answer is that he said 195 we would have under the sale price.

Q. Well, if he had said “153”, would you have given the same price? A. Well, that I couldn't say now. 40

David Corn—Cross.

Q. Why not? A. At the time, if he had told us "153 acres", and he asked us the price we paid him, and I felt at that time we could still make a profit, I probably would have given him the price for the 153 acres.

10 Q. Then you were not buying this great big plot of land that you saw at a price of \$85,000 because you thought you were buying 195 acres—is that what you say now? A. On the contrary, I say if had only told me at that time there was only 153, and if I could make a profit, I still would have given him the \$85,000 for the 153.

Q. You saw the land, didn't you? A. I saw the land.

20 Q. And you were willing to pay \$85,000 for that piece of land that you saw? A. Yes, sir.

Q. Three witnesses here have testified that in discussing the price of this property a per-acre figure was announced of \$600—now, did you hear any such talk? A. No, sir.

Q. Do you say there was no such talk there? A. They may have talked among themselves; I did not hear it.

30 Q. I am wondering whether three witnesses have deliberately perjured themselves here, or not? A. No, I say we were not interested in the price per acre; whether they did, or not, they probably did it among themselves.

Q. You were a party to their conversation? A. Not of their own private conversation.

40 Q. I am speaking of the conversations between your side of the case and theirs—do you say now that "six hundred dollars an acre" was not mentioned by you, or any of your associates, to Mr. Levine? A. No, sir.

David Corn—Cross.

Q. And do you say that Mr. Levine and his associates did not offer five hundred and seventy-five dollars an acre? A. No, sir.

Q. Did Mr. Weiser have any conversation in the matter, at all? A. Well, all my conversation was with Mr. Levine and myself. They may have interrupted and come in some statement, but as far as I can recall, the most of the dealing was with Mr. Levine. 10

Q. Didn't Weiser talk at all? A. Well, I say he may have come in and interjected some statement, but most of it was with Mr. Levine.

Q. I understood Weiser to say that you stated the price was six hundred dollars an acre, and that he said he (as I remember his testimony) tried to get it for five hundred and seventy-five dollars—now, you say nothing was said by anybody at all about that? A. I have no such recollection. 20

Q. You do not want to be put in the position of saying that no such conversation was had there, but you have no recollection of it—is that it? A. No, they could have mentioned it among themselves.

Q. I am not talking about that, I am talking about the conversation with you and your associates? A. No, I have no such recollection. 30

The Defendant Rests.

David Levine—Recalled, Direct.

COMPLAINANT'S REBUTTAL EVIDENCE.

DAVID LEVINE, recalled.

Direct Examination by Mr. Lane:

10 Q. At the time of the negotiations which led up to the signing of this contract, at the time the contract was signed, was a map shown to you at that time? A. No, sir.

Q. When was it shown to you? A. After these papers were signed.

Q. At the same time, or later? A. Later.

Q. Was the map then sent to you? A. Presumably a copy of it was sent to me.

20 Q. A copy of it was sent to you? A. Yes.

Q. Was more than one copy sent to you? A. There was one copy, if I recall correctly, sent to me; after which four or five copies followed.

30 Q. I notice that in the bill of complaint filed by you in this case, the language is used, in the Second Paragraph,—“There was exhibited to complainant by defendant” (that is you) “at the time the complainant entered into said contract, a map of said property, on which the several parcels of said real estate were delineated, and on which the acreage of each of said parcels was marked, the total acreage of all said parcels being 196.55 acres”,—did you have anything to do with the preparation of that bill of complaint—do you know who prepared it, this pleading? A. Yes, I do.

Q. Do you know who prepared this bill of complaint—do you know anything about it? A. Yes.

Q. Who? A. Mr. Harry Naiwirth.

40 Q. How do you know that? A. Well, we engaged

David Levine—Recalled, Direct.

him as counsel at the time to go into detail in this matter.

Q. Is that statement contained in the bill of complaint that the map was delivered to you, or shown to you at the time he contract was actually made, correct? A. The statement to the effect that the map was shown to me at the the the contract was drawn up? 10

Q. Yes. A. If I recall correctly, it is not correct.

By the Vice-Chancellor:

Q. Are you having any difficulty in recalling correctly? A. I do not recall seeing anything in the way of a map. If I may have just a word of explanation, this thing originally took the shape of such a friendly deal because of the friendship that existed between Mr. Corn and myself, that we, as laymen (not being represented legally) just assumed that everything was going to be all right—that whatever they said went. 20

Mr. Lane: I want to say, for the purpose of the record, if Mr. Morrison does not object, that Mr. Naiwirth, who was retained by Mr. Levine, did not draw this bill; I drew this bill of complaint, and that language is my own. 30

The Vice-Chancellor: Well, I suppose you want to indicate to me, by that statment, the small amount of credence I can give to this witness's testimony, do you?

Mr. Lane: No, I do not mean that, at all. That was my best information at the time. I did not see Mr. Levine at all. I drew the bill on the information that I thought I had; 40

David Levine—Recalled, Direct.

and I thought, up to the date we came here to try the case, that that map had been shown at that time. He says that was not so.

By Mr. Lane:

- 10 Q. At the time of this contract, or the negotiations, was anything said about \$125,000 for the whole price, and you offered \$110,000, or anything of that kind? A. Not a word.

By the Vice-Chancellor:

- 20 Q. Mr. Corn testified here that he personally stated that the price was \$125,000—you say he did not say that? A. Not a word. We discussed it from a six hundred dollar an acre angle. If I may have a word by way of explanation, I want to say that the original parties who discussed this with me—

Mr. Brogan: I object to that.

The Vice-Chancellor (to the witness): You had better not make any explanation now, because it may be material, and it may not be.

- 30 By the Vice-Chancellor:

Q. Mr. Frank E. Smith has testified that "the price of \$125,000 was mentioned in a lump sum", just as I have stated—what have you to say as to that? A. Not a word along those lines.

Q. He also testified that your first offer was \$110,000 in a lump sum—is that so? A. No, sir.

- 40 Q. Was there any lump sum offer, or counter offer, made? A. At the original—

David Levine—Recalled, Direct.

Q. (Interrupting) At any time? A. When the discrepancy in this acreage was called to their attention we met in Ridgefield Park, and they showed an agreeableness to make a concession which did not meet our approval.

Mr. Lane: You are getting in this settlement arrangement now. 10

Q. I do not mean that—I mean, up to the time this paper, which is called a “contract” was signed, C1 and C2, was there anything mentioned about a lump sum price? A. No, sir.

By Mr. Lane:

Q. One other question, Mr. Levine—during the course of the negotiations for settlement, after this thing fell through, there were then, as a matter of compromise or attempts to compromise, certain prices mentioned, were there not? A. Yes, sir. 20

The Vice-Chancellor: That was subsequent to the making of the contract?

Mr. Lane: Yes.

Q. Now, is it possible that some figures were mentioned there? 30

Mr. Morrison: We object to that, as matter of argument.

Mr. Lane: I withdraw it.

Cross Examination by Mr. Brogan:

Q. Mr. Levine, you read this paper, of course, before you signed it, didn't you? A. Rather crudely, yes. 40

David Levine—Recalled, Cross.

Q. What do you mean by you "read it rather crudely"—can't you read? A. Yes, I can.

Q. Everything that is on there? A. Yes.

Q. And you did read it—it is very short? A. Yes.

10 Q. Well, you read it, then, before you signed it?
A. Yes, I did.

Q. And why did you sign a paper that did not express what your understanding was?

The Vice-Chancellor: What does that question mean?

Mr. Brogan: Pardon me; I withdraw the question.

20 Q. I call your attention to the fact here that you signed a sales agreement, or whatever you want to call it—C2,—which says that a formal contract was to be signed on or before September 1st, 1925: if that, in fact, is true, then you were to sign such a contract—is that right? A. A formal agreement, rather, when we finally took title, which was supposed to be—

Q. (Question repeated) A. According to our agreement there, yes.

30 Q. And you now say, as I understand you on direct examination, that this paper, C2, was a final agreement, is that right? A. I didn't say anything of the sort.

The Vice-Chancellor: He was not asked that question.

40 Q. What do you say about that—were you, or were you not, to sign a subsequent agreement?

David Levine—Recalled, Cross.

The Vice-Chancellor: Is not that something I have to determine from all of this evidence? There is a case of McCauley v. somebody—I have not got the right book here—which I think is quite significant in a case of this kind, and it is applicable to a case of this kind, and it holds that if parties enter into a paper writing such as this, where all the terms are substantially (I will use the word “substantially”, instead of definitely determined), and it recites that a formal contract is to be thereafter executed, that that does not in any wise minimize the effect of the paper writing, because the parties may have had some purpose in putting the thing into the form of what is called “a formal contract”. Now, this McCauley case (if I have got the name of the case right in my mind) I had occasion to refer to in a memorandum that I filed recently in *Pesin v. Morgan Realty Company*; but, aside from that, the case of *Wharton v. Stoutenburgh* has some significance in the same respect. Now, it seems to me, that question you are asking is going to—

Mr. Morrison: The rule has been somewhat modified.

The Vice-Chancellor: I appreciate that, too. Was it you that relied on the *Wharton* case when you argued the motion?

Mr. Lane: I stated it, but I submit it has not been modified, it is the rule today.

The Vice-Chancellor: Well, the thing I want to call attention to is the case of I

David Levine—Recalled, Cross.

10 think it is McCauley v. someone, and I believe the opinion is written by Justice Swayze (I was trying to find it here a moment ago) in which it is distinctly stated that the mere fact that a formal contract is to be prepared and signed subsequent to the making of the paper writing which is relied upon as the complete agreement, does not in any wise minimize the effect of the paper. I think, however, I will admit that question for the purpose of getting in the case all that can be gotten into it, because I know that both counsel have been sitting by and letting questions be asked that might strictly be objected to. I think I will, for that reason

20 allow that question.

Q. What do you say about that—were you, or were you not, to sign a formal contract? A. No.

Q. Then why did you sign this agreement, C2, which recited that the signing of a formal contract on September 1st, 1925, was your agreement? A. May I ask, doesn't that say "on, or about"?

Q. "On, or before." A. "On, or before?"

30 Q. Yes, sir; that is not true, then, is it? A. Not according to that.

Q. I say, that was not your agreement, then, to sign another agreement? A. That was my agreement then.

By the Vice-Chancellor:

Q. What was your agreement then—you are pointing at something.

40

David Levine—Recalled, Cross.

Mr. Brogan: To sign a formal agreement, on or before September 1st?

The Witness: According to that.

The Vice-Chancellor: What did you point at then?

The Witness: That was my agreement then, according to that—to sign a formal contract on or before September 1st. 10

Mr. Brogan: The witness is referring to Exhibit C2, which is a paper signed by Mr. Levine.

By Mr. Brogan:

Q. Now, in other words, if I understand you, on August 21, 1925,—look at me please—on August 21, 1925, it was your agreement entered into and signed by you, with the Lafayette Building Corporation, that, subsequent to the signing of this, you were to come together with these parties, on or before September 1st, 1925, and enter into a formal contract—is that right? 20

Mr. Lane: I object to that question.

The Vice-Chancellor: I will have to sustain that objection, because it appears to me you are adding a little to much to your question, Mr. Brogan. 30

Mr. Brogan: Suppose you strike it out.

Q. Then, on August 21, which is the date of C2, which was signed by you, it was your contract that you were to meet with the other party to the contract, on or before September 1, 1925, and sign a further formal contract? 40

David Levine—Recalled, Cross.

10 Mr. Lane: I object to that; counsel is not distinguishing between what the agreement is as written, and what this man's understanding was, and the testimony is getting to be hopelessly confused. You are putting this paper before him, and you read it, and say that "under the terms of the paper that is what it says"—now, that does not indicate that that was the contract as he understood it, at all.

Q. You read this contract, Mr. Levine? A. More so today than before, yes.

20 Q. Did you testify a few minutes ago that you read the contract before you signed it? A. At that time, as I said, "crudely", yes.

Q. Crudely? A. Yes.

Q. Do I understand you, then, that you did not understand it when you signed it? A. I will say that I did.

30 Q. You say you did—therefore, you read it thoroughly, if you understood it, didn't you? A. I won't say I read it thoroughly, I just glanced through it and signed it, more because I was told that was the paper that I was to sign.

Q. The paper is written in simple English, is it not? A. Yes.

Q. And you read that paper in simple English, didn't you? A. Yes.

Q. You understood what you were signing, didn't you? A. Yes, sir.

Q. Before you signed it? A. Yes.

40 Q. And it said you were to enter into a further contract on September 1st, 1925?

David Levine—Recalled, Cross.

The Vice-Chancellor: No, it does not say anything of the kind, it says "a formal contract".

Q. We will amend it to "formal" on September 1st, 1925? A. Yes.

Q. And you signed this paper and left the office, and understood that you were to come back and sign a formal contract on or before the date mentioned—is that right? A. Yes.

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The Vice-Chancellor: That is manifested, too, by their answer in this cause.

Q. Now, you went and saw this property alone?
A. The first time, yes.

Q. And you liked it? A. Yes.

20

Q. And then you brought your associates? A. Yes.

Q. And they went and saw the property? A. Yes.

Q. And you saw this land stretching along the plain there, and you thought that that land, at that price, was a good buy, didn't you? A. At six hundred dollars an acre—yes.

Q. I didn't ask you that.

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Mr. Lane: Well, I am going to object to that; that is what he did ask him.

Q. Is it not a fact that you (and when I say "you" I mean your side, the purchasers of this property) were the first ones to call the attention of the Lafayette Building Corporation to the fact that in his plot which they had represented as containing 195 acres they were, in fact, 45 acres short

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David Levine—Recalled, Cross.

—is not that so? A. That I called their attention to it?

Q. Yes? A. Yes.

Q. And, up to that time, they assumed that they had this full and complete 195 acres—is not that so?
10

Mr. Lane: I object; how can he talk about what they may have assumed?

Mr. Brogan: That is all.

HERMAN MILLER, recalled.

Direct Examination by Mr. Lane:

20 Q. Mr. Miller, at the time of the negotiations for this contract, and at the time that the contract was actually signed, what is your recollection as to whether you had a map? A. We had no map.

Q. At the time of the negotiations for the contract was there any lump sum price of 125,000 made upon the property by them, or offer of \$110,000 by you made at that time? A. No, sir.

No cross examination.

30

JOSEPH WEISER, recalled.

Direct Examination by Mr. Lane:

Q. Mr. Weiser, what is your recollection as to whether or not, at the time this contract was made, and at the time the negotiations for the property were had, whether here was a map? A. There was
40 no map in evidence at that time.

Joseph Weiser—Recalled, Direct.

Q. Did you subsequently see a map? A. After the contract was signed I suggested that a survey be made of this land so we would know what we had.

Q. What was said, or, rather, was there anything said, at the time of the negotiations for the price of the property, of a \$125,000 lump sum demanded by them, and \$110,000 offered by you, or anything of that kind? A. There was no lump sum; we discussed it in acreage only.

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No cross examination.

The complainant rests.

20

Both sides close.

Case orally argued by counsel, and held for submission of briefs.

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Exhibit C5.

THIS INDENTURE, made the Sixth day of December, in the year of our Lord One Thousand Nine Hundred and Twenty-six.

10 BETWEEN WILLIAM L. TAIT, widower, of the Borough of Rockleigh, in the County of Bergen, and State of New Jersey party of the first part;

AND LAFAYETTE BUILDING CORPORATION, a corporation of the State of New Jersey party of the second part:

20 WITNESSETH, That the said party of the first part, for and in consideration of One Dollar (\$1.00) and other valuable consideration lawful money of the United States of America, to him in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, has given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed, and by these presents does give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to its successors and assigns, forever,
30 ALL those certain tracts or parcel of land and premises, hereinafter particularly described, situate, lying and being partly in the Borough of Rockleigh and partly in the Borough of Northvale, in the County of Bergen and State of New Jersey:

40 PARCEL #1—First Tract: BEGINNING at a point in the westerly line of the Carteret Road, at its intersection with the northerly line of land now or formerly of Michael J. Ahearn and Thomas H. Bentley; running thence (1) north sixty-seven de-

Exhibit C5.

grees, forty-four minutes west, along the northerly line of lands now or formerly of said Ahern and Bentley, sixteen hundred thirty-six feet and forty-five hundredths of a foot (1636.45) to the southeast corner of property conveyed by Jacob I. Ferdon and wife to William Ferdon, by deed dated April 30, 1842, and recorded in book D-4 of deeds, page 449; thence (2) north thirty-two degrees, twenty-five minutes east, along the easterly line of lands so conveyed to Ferdon, five hundred fifty-four feet and forty-four hundredths of a foot (554.44) to the southerly line of the second tract of parcel number one; thence (3) south sixty-seven degrees, one minute east, along the southerly line of said tract, eighteen hundred twenty-two feet and two tenths of a foot (1882.2) to the westerly line of said Carteret Road; thence (4) southerly, along said line of said road, to the place of beginning. 10 20

Second Tract: BEGINNING at a point in the westerly line of Carteret Road, at the northeast corner of the first tract of parcel number one above described; running thence (1) north sixty-seven degrees, one minute west, along the northerly line of said first tract, eighteen hundred twenty-two feet and two tenths of a foot (1882.2); thence (2) north sixty-seven degrees, fourteen minutes west, along the northerly line of land conveyed by Jacob Ferdon to William Ferdon, by deed dated April 30, 1842, and recorded in book D-4 of deeds, page 449, eighteen hundred sixty-five (1865) feet to the middle of the Ludlow Ditch; thence (3) northeasterly, along the center of said ditch, four hundred eighty-five (485) feet to the southwest corner of the third tract of parcel number one; thence (4) south sixty-seven degrees, one minute east, be- 30 40

Exhibit C5.

10 ing partly along the southerly line of said third tract, and partly along the southerly line of lands formerly of Nicholas Haring, and partly along the southerly line of lands formerly of Moses Taylor, thirty-five hundred seventy-three (3573) feet to the westerly line of said Carteret Road; thence (5) southerly, along said line of said road, five hundred four (504) feet to the place of beginning.

EXCEPTING, however, out of the said second tract, the following described premises:

20 BEGINNING at a point in the westerly line of said Carteret Road, distant therein sixteen and one-half ($16\frac{1}{2}$) feet, on a course of north twenty-three degrees east, from its intersection with the division line between the first and second tracts of the first parcel; running thence (1) north sixty-seven degrees, one minute west, two hundred forty-seven feet and twenty-six hundredths of a foot (247.26), thence (2) north twenty-two degrees, fifty-nine minutes east, three hundred sixteen feet and thirty-three hundredths of a foot (316.33); thence (3) south seventy-six degrees, fifty-eight minutes east, two hundred forty-one feet and twelve hundredths of a foot (241.12) to the westerly line of the Carteret Road; thence (4) southerly, along said line of said road, three hundred sixty-four (364) feet to the place of beginning.

30
40 Third Tract: BEGINNING at the northwest corner of the second tract of parcel number one, in the center line of the Ludlow Ditch; and running thence (1) south seventy-three degrees east, along the northerly line of said second tract, eleven chains and seventeen links to the southwest corner of the second tract described in a deed made by Malcolm

Exhibit C5.

S. Mackay and others to Charles Francis Rabell, dated November 6, 1922, and recorded in book 1182 of deeds, page 374; thence (2) north twenty and one-half degrees east, being partly along the north-westerly line of the second tract described in said last mentioned deed, and partly along the westerly line of the third tract described in said deed, seven chains and twelve links; thence (3) north seventy-three degrees west, along the southerly line of lands now or formerly of Hiram Slocum, eleven chains and fifty-nine links to the center line of the Ludlow Ditch; thence (4) south seventeen degrees west, along the center line of said ditch, seven chains and fourteen links to the place of beginning.

10

PARCEL #2: BEGINNING at a point in the westerly line of Carteret Road, at its intersection with the southerly line of lands now or formerly of Richard B. Sloat; running thence (1) north sixty-eight degrees west, along the southerly line of lands of said Richard B. Sloat, thirty-three hundred seventy-two (3372) feet to the easterly line of lands now or formerly of William Ferdon; thence (2) south twenty-seven degrees, thirty minutes west, along said easterly line of land now or formerly of said Ferdon, six hundred forty-six and one-half (646½) feet to the lands formerly of Nicholas Haring, more recently of Hiram Slocum; thence (3) south sixty-nine degrees east, along said Haring's line, eight hundred four (804) feet; thence (4) south twenty-three degrees, thirty minutes west, still along said Haring's line, three hundred twenty-five (325) feet to the northerly line of the third tract described in a deed made by Malcolm S. Mackay and others to Charles Francis Rabell, dated November 6, 1922, and recorded in book 1182

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Exhibit C5.

10 of deeds, page 374; thence, along the line of the third tract described in said last mentioned deed, the following courses and distances: (5) south sixty-eight degrees east, four hundred fifty-nine (459) feet; (6) southerly, one hundred forty-eight and one-half ($148\frac{1}{2}$) feet; (7) south sixty-eight degrees, forty minutes east, thirteen hundred ten (1310) feet; (8) northerly, one hundred twenty-three and one-half ($123\frac{1}{2}$) feet (9) south seventy-three degrees east, nine hundred ninety-eight (998) feet, more or less, to the westerly line of said Carteret Road; thence (10) northerly, along said line of said road, eight hundred ninety-five (895) feet, more or less, to the place of beginning.

20 PARCEL #3: BEGINNING at the southeast corner thereof, at the southwest corner of lands formerly of Peter Rycker, in the line of the lands of Lucian Sanial; running thence (1) along the lands formerly of Lucian Sanial, north fifty-four and one-half degrees west, twelve chains, sixty links; thence (2) north thirty-seven degrees east, four chains, ten links; thence (3) south fifty-eight degrees east, four chains, seventy links; thence (4) north thirty-six degrees east, nine chains, thirty-two links; 30 thence (5) south fifty-eight degrees east, four chains, sixty links; thence (6) south twenty-four degrees west, fourteen chains, sixty-eight links to the point or place of beginning.

It is also the intention of the party of the first part to convey any interest he may have, by reason of certificates of tax sales to satisfy unpaid taxes or assessments.

40 TOGETHER with all and singular the houses, buildings, trees, ways, waters, profits, privileges, and ad-

Exhibit C5.

vantages, with the appurtenances to the same belonging or in anywise appertaining:

ALSO, all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof,

10

TO HAVE AND TO HOLD, all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, its successors and assigns, to the only proper use, benefit and behoof of the said party of the second part, its successors, and assigns forever:

AND the said WILLIAM L. TAIT, for himself, his heirs, executors and administrators, does covenant, promise and agree to and with the said party of the second part, its successors and assigns, that he has not made, done, committed, executed or suffered any act or acts, thing or things whatsoever, whereby or by means whereof the above mentioned and described premises, or any part or parcel thereof, now are, or at any time hereafter shall or may be impeached, charged or encumbered, in any manner or way whatsoever.

20

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal the day and year first above written.

30

Signed, Sealed and Delivered }
 in the Presence of }

FRED W. MATTATTOCKS.

WILLIAM L. TAIT (LS)

Duly acknowledged Dec. 6, 1926.

Recorded Dec. 13, 1926. Book 1462, p. 100 of
 deeds in Bergen County Clerk's Office.

40

Opinion.

CONCLUSIONS.

MR. HARRY S. NEIWIRTH, Solicitor for Complainant
(Mr. Merritt Lane, of Counsel) ;

10 MESSRS. MORRISON, LLOYD & MORRISON, Solicitor for
Defendant (Mr. Thomas J. Brogan, of Coun-
sel).

FALLON, V. C.

Complainant, as vendee, sues for specific perform-
ance of an alleged contract relating to lands situ-
ate in the Borough of Rockleigh, Bergen County,
New Jersey, with abatement in the purchase price,
such abatement to be fixed by the court, and ten-
20 ders himself ready and willing and offers to specifi-
cally perform on his part, with abatement of the
purchase-price for such deficiency in the quantum
of lands mentioned in the contract and that which
the defendant can convey. The proofs show that
one Tait, on August 10, 1925, contracted to sell to
the defendant the property in question. The al-
leged contract between complainant and defendant,
dated August 21, 1925, and bearing the caption
30 "Agreement Of Sale" recites that the defendant re-
ceived from the complainant the sum of \$1,000.,
"as part payment for purchase of property known
as the Tait property located on the west side of
Tenafly Road, in the Borough of Rockleigh, con-
sisting of 195 acres more or less, being the same
parcel now under contract to Lafayette Building
Corp." at a price of \$117,000. on the following
terms: "Formal contract to be signed on or before
40 on signing of formal contract Four thousand

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($\$4,000$) Dollars. Title to be closed on October 20, 1925. Additional money to be paid on closing title—Twenty thousand ($\$20,000$) Dollars. Subject to a first mortgage of Seventy Thousand ($\$70,000$) Dollars. Terms of first mortgage to be stated in contract—term 5 years. A purchase money mortgage—Twenty two thousand ($\$22,000$) Dollars. Terms of second mortgage—Proportionate with first mortgage. Subject to assessment of—none. Subject to restrictions of record if any—none. Taxes, Interest on Mortgage, Insurance Premium to be adjusted as of October 20, 1925. This property is sold at the above mentioned price and terms, subject to the acceptance of the Owner.”

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That the defendant, as Owner, agreed to the sale of the property, at the above mentioned price and terms, which were subject to acceptance of the defendant, is indicated by a writing at the bottom of the aforesaid “Agreement Of Sale” which reads: (omitting herein, as surplusage, the word “to” preceding the word “property” therein)

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“I agree to accept the above mentioned price and terms for the sale of my property—

LAFAYETTE BUILDING CORP.
DAVID CORN, Pres.
FRANK E. SMITH, Secy.

30

(Seal)

.....
Witness.”

The defendant upon contracting for the purchase of the property from Tait received from him a map of said property, made by Tait’s engineer, which showed the tract of lands to be 195.25 acres. The

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proofs disclose quite a variance between the testimony of the witnesses for the respective parties as to whether there was exhibited to the complainant, prior to the signing of the "Agreement Of Sale", the above mentioned Tait map. In view thereof I consider that I should regard the averment in the

10 complainant's bill that "there was exhibited to complainant by defendant at the time the complainant entered into said contract, a map of said property, on which the several parcels of said real estate were delineated, and on which the acreage of which said parcels was marked, the total acreage of all of said parcels being 195.25 acres," as the fact. It appears that the complainant, several

20 days after the signing of said paper, requested the defendant to obtain and furnish to him additional copies of the Tait map, and the defendant's secretary about a week or ten days thereafter furnished to the complainant several purported copies of the Tait map, which showed a tract of lands covering an area of 152.61 acres. The complainant, immediately upon observing the variance in quantity of lands shown by the respective maps, made complaint thereof to the defendant's secretary, Mr.

30 Smith, who testified that the complainant "was very much excited." Apparently as a result of the complainant's complaint to the defendant's officers, Messrs. Corn and Smith, of the shortage of approximately 42 acres, indicated by a comparison of the "Tait Map" exhibited to the complainant at the time of the purchase, and the several copies of maps furnished by the defendant to the complainant subsequent thereto, a suit was shortly thereafter instituted in this court by the defendant against Tait

40 for specific performance of the contract entered

Opinion.

into between said parties on August 10, 1925, with claim for abatement of the purchase-price because of deficiency in quantum of the tract of lands which was the subject-matter of their contract. The claim of the Lafayette Building Corporation against Tait for abatement was denied, and said corporation was given the option of a dismissal of its bill of complaint or taking a deed from Tait for 152.61 acres at the full price mentioned in their contract. *Lafayette Building Corp v. Tait*, 100 N. J., Eq. 73. The determination of the court, in said suit, was based on the testimony of Tait and his witnesses, whom the court apparently believed, that Tait, in his negotiations with the Lafayette Building Corporation, specifically insisted that the sale was to be of the tract in question regardless of area. The defendant elected to take such deed from Tait, and in part payment of the purchase price gave him a purchase money mortgage for \$70,000. The complainant herein, anticipating that the defendant could not convey to him "195 acres more or less," as stated in the "Agreement Of Sale" of August 21, 1925, signified his willingness to accept a deed of conveyance for the quantum of the property which the defendant could convey, upon being allowed an abatement of the purchase price for the difference between the number of acres which the defendant could convey (152.61 acres) and the number of acres mentioned in the "Agreement Of Sale" (195 acres) i. e., 42.39 acres. The only disputed question of fact arising out of the testimony in the case *sub judice*, and such is conceded in the memorandum submitted to the court by counsel for the defendant, is as to whether the tract of lands which is the subject-matter of the controversy between

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the parties to this suit, was sold for a lump sum of \$117,000., irrespective of the number of acres in the tract, or whether it was sold on a basis of \$600.00 per acre. The negotiations between the parties preceding the execution and delivery of the "Agreement Of Sale" as evidenced by the testimony, manifests, in my judgment, that the complainant purchased the property on a per acre basis at the rate of \$600.00 per acre, and on the representation of the defendant's president and secretary, fortified by their exhibition to the complainant at or before the signing of such "Agreement Of Sale", a map showing that the tract of lands for which the parties were negotiating comprised approximately 195 acres. That such is the fact is indicated also when it is considered that the stated number of acres, multiplied by the aforesaid rate of \$600 per acre, gives \$117,000, the purchase price agreed upon. It is urged in behalf of the defendant that the paper writing in question evidences an incomplete preliminary agreement, and reference is made to a recital therein as follows: "Formal contract to be signed on or before September 1, 1925, * * *. Terms of mortgage to be stated in contract—term 5 years," and the defendant claims that the only possible meaning to be deduced from such recital is that the parties in signing said paper deliberately left the terms of the first mortgage open, to be settled by further treaty, and to be set forth in a *formal* contract. The defendant urges also that said paper writing evidences, on its face, that certain important matters were left open for future negotiations and settlement by a *formal* agreement, stressing as a point in this regard that notwithstanding the "Agreement Of Sale" recites the payment

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of \$1,000 as part of the purchase price, it requires "Additional money to be paid on signing of formal contract Four thousand (\$4,000) Dollars." The proofs disclose that the complainant made a further payment of \$4,000 to the defendant on September 1, 1925—although no *formal* contract or other paper was *signed* by the parties subsequent to August 21, 1925. If, as urged by the defendant, the transaction between the parties was a preliminary agreement which was not to be regarded as concluded until a *formal* contract was signed on or before September 1, 1925, at which time an additional sum of \$4,000 was to be paid by the complainant to the defendant, the defendant, by accepting from the complainant a further benefit thereunder, to wit, the *additional* money—\$4,000, clearly, in my judgment, waived the "signing of formal contract." The fact of such payment of "additional money" by the complainant and acceptance thereof by the defendant eleven days after the alleged preliminary agreement was signed, is strongly indicative that the parties relied upon such alleged preliminary agreement, to wit, the "Agreement Of Sale" as a binding agreement between them, and the fact that said paper writing bears the caption "Agreement Of Sale" and expressly says—"This property is *sold* at the above mentioned price and terms, subject to the *acceptance* of the Owner", and that the owner's *acceptance* set out at the bottom of the instrument referring, as it does, to the *sale* of the *property* on "the above mentioned price and terms" is momentous in determining the *intent* of the parties. It cannot reasonably be urged that the defendant, having accepted a further payment of \$4,000 as "additional

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money" thereunder, notwithstanding no formal contract was *signed* by the parties, did not thereby explicitly manifest that it relied upon the "Agreement Of Sale" as a binding agreement. Furthermore, the defendant thereby further manifested, in my judgment, that it adopted such "Agreement Of Sale" as the binding contract of the parties in lieu of any further writing or "formal contract to be signed." *Berman v. Rosenberg* (Me.), 97 Atl. Rep., 6, 8, citing 29 L. R. A., 436 Note; *Sanders v. Potlitzer Bros., Fruit Co.*, 144 N. Y., 209; and *Wharton v. Stoutenburgh*, 35 N. J. Eq., 266. The fact that the paper writing in question contains the words "Formal contract to be signed * * *," though significant, is not conclusive that it was not intended to be a binding agreement. It is no more conclusive than is the caption of said paper writing which explicitly reads—"Agreement Of Sale", or the words—"This property is *sold* at the above mentioned price and terms, subject to the acceptance of the Owner," or to the word *sale* in the owner's acceptance clause set out at the bottom of said paper writing, all of which collocation of words are very significant, and may properly be regarded as evidential in ascertaining the *intent* of the parties. In *Wharton v. Stoutenburgh, supra*, the Court of Errors and Appeals held that the fact that parties negotiating a contract contemplated that a formal agreement should be prepared and signed, is *some evidence* that they did not intend to bind themselves until the agreement was reduced to writing and signed, *but, nevertheless, it is always question of fact, depending upon the circumstances of the particular case, whether the parties had not completed their negotiations and concluded*

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a contract definite and complete in all its terms, which they intended should be binding upon them, and which, for greater certainty, or to answer some requirement of the law, they designed to have expressed in some formal written agreement. (Italics mine.) Such decision has never been criticised or modified in any of the numerous cases which have since come before the court, *and each of such cases has been decided upon the particular facts of the case.* In 13 *Corpus Juris*, p. 290, 291, 292, Section 100, it is said—"If therefore it appears that the minds of the parties have met, that a proposition for a contract has been made by one party and accepted by the other, that the terms of the contract are in all respects definitely understood and agreed on, and that a part of the mutual understanding is that a written contract embodying these terms shall be drawn and executed by the respective parties, this is an obligatory agreement, which dates from the making of the oral agreement and not from the date of the subsequent writing" * * *, (and page 292)—"Where the contract is already in writing, it is none the less obligatory on both parties because they intend that it shall be put into another form." * * * In *Garrick Theatre Co. v. Gimbel*, 158 Wis., 649, 656; 149 N. W., 385 (at page 388), it is said: "The question whether an informal arrangement is intended by the parties to form a contract in and of itself or is only a step in the negotiations leading up to a binding contract, is not always easy of solution. The law undoubtedly is that an informal agreement complete in all its terms will take effect if the parties so intend, though a more formal contract is expected to be afterwards made, provided that the formal contract is not to contain

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material provisions not contained in or to be inferred from the preliminary informal agreement."

10 The proofs in the case *sub judice* do not disclose that any material provisions were to be inserted in the "formal contract to be signed," which were not contained in or to be inferred from the paper writing of August 21, 1925, characterized by counsel for the defendant as a *preliminary informal agreement*.

20 Of course, if it be reasonably doubtful whether a contract was completed equity will not interfere by decreeing specific performance. Nor will equity interfere when the evidence leaves the agreement as to any of its essential terms in uncertainty. *Brown v. Brown*, 33 N. J. Eq., 650-657. The mere fact, however, that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared (embodying the terms already agreed upon) which shall be signed by the parties, does not by itself show that they continue merely in negotiation. It is, of course, a matter to be taken into account by the court in construing the evidence and determining whether the parties have really come to a final agreement or not, but as soon as the fact of the final mutual assent of the parties is established, so that those who draw up the formal agreement have not the power to vary the terms already settled, the contract must be regarded as completed. 6 R. C. L. 619. See also *Berman v. Rosenberg*, *supra*, at page 8. And if the parties act under the preliminary agreement and receive benefits thereunder they will be held bound notwithstanding the fact that a formal contract has never been executed. 6 R. C. L. 619-620, citing 29 L. R. A. 26, Note. It is clearly established in the

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case *sub judice* that the defendant accepted a benefit, to wit, an additional payment of \$4,000 under the "Agreement Of Sale" aforesaid, a considerable time after the execution and delivery of such instrument, and it must therefore be considered as having relied upon said writing as a binding agreement.

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In *Williston on Contracts*, Sec. 28, page 36, it is said:

"The distinction between preliminary negotiations and completed contracts is often involved in cases where the parties contemplate the execution of a written agreement. It is everywhere agreed to be possible for parties to enter into a binding informal or oral agreement to execute a written contract. It is also everywhere agreed that if the parties contemplate a reduction to writing of their agreement before it can be considered complete, there is no contract until the writing is signed. But between these two clear situations, ambiguous ones arise as to which there is a difference. On the one hand it has been said by the New York Court of Appeals: 'Where all the substantial terms of a contract have been agreed on, and there is nothing left for future settlement, the fact, alone, that it was the understanding that the contract should be formally drawn up and put in writing, did not leave the transaction incomplete and without binding force, in the absence of a positive agreement that it should not be binding until so reduced to writing, and formally executed.' And, on the other hand, it has been said by the New Jersey Supreme Court, 'If it appears that the

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10 parties, although they have agreed on all the terms of their contract, mean to have them reduced to writing and signed before the bargain shall be considered as complete, neither party will be bound until that is done, *so long as the contract remains without any acts done under it on either side.*' (Italics mine.) This leaves open the question, how it is to be known that parties who mean to reduce it to writing mean that until then the contract shall not be 'considered as complete.' Under both these statements the ultimate question is one of fact as to the intention of the parties, * * *."

20 The New Jersey case above referred to is that of *Donnelly v. Currie Hardware Co.*, 66 N. J. L., 388. Since said decision our Supreme Court decided the case of *Trenton & Mercer County Traction Corp. v. Trenton*, 90 N. J. L., 378, wherein, at page 381, it is said:

30 "It is argued that the parties did not intend that there should be a complete contract until the written agreement was executed. * * * As Lord Cransworth said in *Ridgeway v. Wharton*, 6 H. L. Cas., 238 (at p. 268), the fact 'the parties do intend a subsequent agreement to be made, is strong evidence to show that they did not intend the previous negotiations to amount to an agreement;' but at the same time he protested against its being supposed because persons wish to have a formal agreement drawn up that therefore they cannot be bound by a previous agreement if it is clear that such an agreement had been made; and

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he expressed his approval of Sir William Grant's decision in the leading case of *Fowle v. Freeman*, 9 Ves., 351."

Defendant's counsel objected to complainant's witnesses testifying to statements made by a representative of the defendant who effected the sale of the property to which the paper writing in question relates, as to certain matters discussed during the negotiation which are not set forth in such paper writing. The purpose of such testimony was to show that said paper writing was intended by the parties to be a binding agreement, and for such purpose, the testimony was admitted, in order to apply the reasoning of the court in *Wharton v. Stoutenburgh*, *supra*. While it is elementary that parol evidence is not, in general, admissible between the parties to vary a written instrument, nevertheless, it is well settled that mistake, fraud, surprise or accident, furnish exceptions to this doctrine. *Pomeroy's Eq. Juris* (4th Ed.), Vol 2, Sec. 858. In *Morgan Realty Co. v. Pazen*, 139 Atl. Rep., 712, I determined, upon consideration of parol testimony, that the paper writing which was the subject matter of the controversy in said case was intended to be merely preliminary to a formal agreement thereafter to be entered into between the parties. I considered that the admission of parol testimony was proper for the purpose of determining whether such paper writing was intended to evidence a completed bargain inasmuch as it contained matter which might reasonably be regarded as indicative of its not being a completed bargain, particularly insofar as it indicated that certain terms were left indefinite and designedly so because

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of necessity and circumstances as to which the parties were not then definitely informed. The patrol evidence admitted in behalf of the complainant in the case *sub judice* was ostensibly for the purpose of showing that the defendant was purchasing from on Tait, subject to a first mortgage of \$70,000, the property which the defendant contracted by the aforesaid "Agreement of Sale" to sell to the complainant, and that while such first mortgage was to run for a term of five years, there were other terms of said mortgage which might not have been agreed upon between the defendant and Tait; and that the purpose of the parties in inserting in the paper writing *sub judice* the provision that the provision that the terms of the first mortgage were to be stated in the contract, was that the terms of such mortgage were to be such as agreed upon in the meantime between the defendant and Tait. That patrol evidence is admissible in cases such as the one *sub judice* is indicated by numerous authorities among which may be mentioned *Pomeroy's Ed. Juris* (4th Ed.), Vol. 2, Sec. 858; *Moore v. Galupo*, 65 N. J. Eq., 194, at page 206; *Wharton v. Stoutenburgh*, *supra*; *Trenton & Mercer County Traction Corp. v. Trenton*, 90 N. J. L., 378; *aff'd.* 91 N. J. L., 719; *Kauskin v. Guttman*, 98 N. J. Eq., 617; *aff'd.* 99 N. J. Eq., 887 (which involved a paper writing, in the nature of a *receipt*, which provided "Balance on Bond and Mortgage, as per agreement of sale to be drawn on August 13, 1925, subject to approval of purchaser"); *Venino v. Naegele*, 99 N. J. Eq., 183; *aff'd.* 134 Atl. Rep., 920 (wherein it appeared that the paper writing relied on was in the nature of a *receipt* reciting "Contract to be drawn up and signed within the next

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few days", which manifests that the parties had not intended by such receipt to make a contract); *Berman v. Rosenberg, supra* (wherein it appears that the Court from a reading and consideration of the testimony was of the opinion that the paper writing in question was binding upon the parties); *Hobelman v. Cavallo*, 140 Atl. Rep., 432 (wherein it appeared that the paper writing in question was a receipt, which, on its face, manifested that it was preliminary and not final); *Schneider v. Crawford*, 99 N. J. Eq., 249 (wherein it appeared that the paper writing in question was in the nature of a receipt, which, on its face, manifested that it was preliminary and not final, and clearly evidenced that there were terms left open for negotiation and agreement, and recited "Regular agreement of this sale to be drawn and signed by both parties hereto at any time before October 1, 1925", and reciting also that the vendor was to "take back second mortgage for balance due", thereby clearly indicating that there was a first mortgage, the amount of which not stated, to which the second mortgage would be subordinate as a lien, the amount of the second mortgage therefore being an indefinite item and undetermined between the parties).

In *Wharton v. Stoutenburgh, supra*, it was held that a final agreement had been reached, although the parties intended that a lease embodying the agreement should be executed. * * * The case of *Tansey v. Suckoneck*, 98 N. J. Eq., 669, relied upon by the defendant, is not analagous to the case *sub judice*. In said case there was nothing but a mere receipt of a most informal nature, reading as follows:

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10 "Received, Newark, N. J., Tuesday, October 28th, 1924, from Heime Suckoneck, two hundred and fifty dollars on account of purchase price 100 x 100 s. w. corner Miller Street and Avenue C, Newark, for \$10,000, formal agreement to be executed and addition amount paid on November 7th, 1924; title to be taken soon as searches are made. \$5,000 cash and \$5,000 mortgage. H. Suckoneck. \$250 Michael J. Tansey."

20 It will be readily observed that the receipt fails to disclose how much additional amount was to be paid on November 7th, 1924, and what all the terms of the formal agreement were to be. The court, in its decision, says:

"The basis for decision in the present case is that the paper is on its face preliminary and not final, and by its very language indicates that other features left unsettled are to be settled by further negotiations. * * *"

30 The court *did not hold* that the mere fact that the receipt stated that a formal agreement was to be executed was sufficient *in and of itself* to indicate that the parties did not intend to be bound by such receipt. Furthermore, it does not appear that the bill of complaint in said case contained, as it does in the case *sub judice*, allegations to the effect that the parties intended to be bound by the paper writing in question, and that a formal agreement was to be executed only for the purpose of putting the agreement of the parties in more formal shape (see
40 amended bill of complaint). In the case *sub judice*

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the paper writing which bears the caption "Agreement Of Sale", purports, upon its face, to provide for all the terms and conditions which are ordinarily provided for in contracts for sales of realty. It provides for the sales price, describes the property, recites "on the following terms", for the additional money to be paid, for the date of closing title, for the amount to be paid in cash and the amount to be represented by mortgage, for the term of the first mortgage and the term of the second mortgage, that taxes, interest on mortgage, and insurance premiums, be adjusted as of October 20, 1925, and that the title is not to be subject to any assessments, or restrictions of record. It evidences also that the property was *sold* for the price and terms mentioned therein, and that the defendant *agreed* to accept the price and terms mentioned for the *sale* of the property to the complainant (see vendor's acceptance clause on paper writing). 10 20

In *Venino v. Naegele, supra*, the court took proofs and therefrom determined that it was not the intent of the parties to be bound by such receipt. No such argument can be reasonably urged as to the case *sub judice* where the words of the "Agreement Of Sale" are "Formal contract to be signed. * * *" The use of the word "Formal" as a pre-fix to the word "Contract" signifies that the parties *had contracted*—and merely intended that their contract should be manifested by a more *formal* instrument. As mentioned hereinabove, the defendant clearly manifested that it regarded the paper writing in question as a binding contract not only by accepting from the complainant weeks after the execution and delivery of said writing a payment of \$4,000, which was additional to the sum 30 40

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of \$1,000 paid upon the signing and delivery of said paper, but also by its *acceptance* aforesaid for sale of the property at the price and terms mentioned in the instrument. The case of *Kushin v. Guttman, supra*, also cited by counsel for the defendant, is clearly distinguishable from the case *sub judice*. In said case the bill of complaint did not allege, as it does in the case *sub judice*, that the parties intended to be bound by the paper writing in question, and that a formal agreement was to be executed only for the purpose of putting the agreement of the parties in more formal shape. It is apparent that the receipt relied upon in that case did not evidence a contract between the parties, and that the parties did not intended to be bound thereby, because such receipt expressly stated that the "agreement of sale to be drawn" was to be "subject to approval of purchaser." Other cases cited by counsel for the defendant are of like import as the cases of *Tansey v. Suckoneck*, *Venino v. Naegele*, and *Kuskin v. Guttman*. None of the numerous cases which have come before our courts were based upon a written instrument such as the one in the case *sub judice*. This case is clearly distinguishable from the case of *Lafayette Building Corporation v. Tait, supra*. In that case Tait contended that the contract was for the sale of a tract of land regardless of acreage. The Lafayette Building Corporation claimed that a map exhibited to its representative by Tait, which showed a tract, 195.25 acres, was the determining feature. Vice-Chancellor Lewis said:

"Upon the making of the final contract with the complainant, for whom Frank E. Smith,

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Inc., appears to have acted as agent, it was specifically insisted in behalf of the defendant that the sale was to be of the tract in question, as located on the westerly side of the Carteret Road, regardless of area, and specific acreage was therefore not included in the contract, except by a reference thereto with the customary qualification of its being 'more or less'. I am satisfied from the proofs presented that such was the contract, and under the circumstances there can be no abatement in the purchase price. I am, therefore, constrained to advise a decree for specific performance in accordance with strict terms of the agreement of August 10th, 1925."

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Holding, as I do, that the parties intended to make a binding contract, the "Agreement Of Sale" aforesaid, executed by the defendant, even though signed by the defendant only (a counterpart thereof was signed by the complainant only and delivered to the defendant) complies with the provisions of the statute of frauds. In *Kamens v. Anderson*, 99 N. J. Eq., 490, Vice-Chancellor Leaming (on motion to strike bill) held:

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"Our statute of frauds does not require a contract for the sale of real estate to be signed by both parties to the contract. The requirement is that it 'shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized'. The great weight of authority is to the effect that the phrase, 'party to be charged', means the party sued, and that the

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signature of the other party is not essential.
 * * *” And (at p. 492) “so far as mutuality
 of obligation of performance is concerned that
 requirement was fully met when the vendee
 specified in the body of the contract filed his
 bill herein. *Cohen v. Pool*, 84 N. J. Eq., 77;
 10 aff'd. *Ibid.*, 189. Prior cases in this state to
 that effect are collected in *Pom. Spec. Perf.*
 (3d ed.), note ‘A’ to Sec. 170.”

If the terms of credit to be given to a vendee may
 be regarded as uncertain, the vendee may, as he
 offers to do in the case *sub judice*, waive all credit
 and pay cash, if the pleadings are so framed. See
 20 *Binns v. Smith*, 93 N. J. Eq., 33, wherein Vice-
 Chancellor Leaming says:

“The terms of the contract now sought to
 be enforced clearly disclose that the purchase
 money mortgage was to be an extension of
 credit to the purchaser; the contemplated in-
 stallment payments fully disclose that the time
 of payment was to be postponed. In such cir-
 cumstances it has been held to be the privilege
 of complainant to waive the credit and tender
 30 cash or a mortgage payable on demand. But
 the pleadings herein do not present any issue
 on that question.”

The Vice Chancellor denied specific performance
 in the case cited upon the ground that the com-
 plainant did not waive the credit. In the case *sub*
judice the complainant waives the credit intended
 by the second mortgage and offers to pay cash in-
 40 stead, and take the property subject to the first

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mortgage lien subject to which the defendant acquired the property.

Complainant urges that he is entitled to abatement because of the inability of the defendant to convey to him the quantity of acreage stated in the "Agreement Of Sale" aforesaid. In this respect it is pertinent to inquire as to how the purchase price was arrived at. The testimony of complainant's witnesses manifests that the complainant, in negotiating with the representatives of the defendant, among whom were David Corn, president of the defendant corporation, mentioned a purchase price per acre. It appears from their testimony that the defendant's representatives asked of the complainant the sum of \$600.00 per acre, and when asked whether the sum of \$575.00 per acre would be accepted were informed that a Mr. Smith was interested in the purchase of the property, from whom the sum of \$600.00 per acre could be obtained, but a preference would be given to the complainant, and finally the complainant decided to purchase the property at \$600.00 per acre. The defendant's witnesses testified that in the negotiations for the sale of the property a gross price of \$125,000 was asked in the first instance, that the complainant made a counter offer of \$110,000 and finally the parties agreed upon a purchase price of \$117,000. Mr. Corn, the president of the defendant corporation, who was a party to the negotiations, in reply to several questions propounded to him stated that the sum of \$600.00 per acre was not mentioned by him or any of his associates to Mr. Levine, but, on cross examination, he qualified the effect of his denial by saying he had no recollection of such offer. In my judgment it cannot reasonably be

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10 urged that the quantum of property which was the subject of negotiation between the parties could be regarded as of no significance. It is reasonable to consider, particularly in these times when there has been so much dealing in realty matters, that the greater the acreage the greater value it should be to the owner. In this connection it must be considered, as against the defendant, that in its aforesaid suit against Tait the defendant itself sought abatement upon the ground that in the contract between Tait, as vendor, and the defendant, as vendee, the defendant contracted to purchase 195 acres more or less. The fact that the court decided against the defendant in its aforesaid suit against Tait, can avail it nothing in the suit *sub judice*.

20 The defendant cannot urge as against the complainant herein the matters urged against it by Tait, particularly in view of the testimony of its witnesses in that case indicating that the quantum of acreage was momentous. In the Tait case the witnesses for the complainant therein (the defendant herein) testified that the quantum of acreage was the determining feature in the fixing of the purchase price as between said complainant and Tait. The defendant herein reverses the position taken

30 by it in the Tait suit and now claims that the purchase price between complainant and defendant in the suit *sub judice* was not based upon the quantum of acreage—but as an entire tract. Vice Chancellor Lewis, in the Tait case, *supra*, apparently believed the testimony of Tait and his witnesses that at the time of the making of the Tait—Lafayette Building Corporation contract, Tait specifically insisted that the sale was to be of the tract of land

40 regardless of area.

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There is a patent variance in the testimony of the witnesses of the respective parties in the case *sub judice*. The complainant and his witnesses flatly contradict the defendant's witnesses. Having observed the witnesses while testifying, and having in mind not only that which they testified to, but the manner in which they testified, and the impression made upon me at the time, and having since reviewed the testimony of the witnesses, I am of the opinion that the testimony of the complainant and his witnesses is entitled to greater credence than the testimony of the defendant's witnesses, as to the negotiation for the purchase of the property having been on a par acre basis. *Riehl v. Riehl*, 137 Atl. Rep., 787, 790; *State v. Lanto*, 99 N. J. L., 94.

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It is urged in defendant's behalf that complainant and defendant were mutually mistaken as to the quantum of acreage which was the subject matter of the negotiation between them, and therefore specific performance of the contract between complainant and defendant should be denied; that abatement should not be allowed; and that the contract should be rescinded. I do not find that there was a mutual mistake between the parties. The proofs do not warrant the complainant in being chargeable with any mistake whatever. Mutual mistake can exist only where both or all parties to a transaction are laboring under the same misapprehension or erroneous belief in regard to a particular fact or circumstance; that is, a mistake shared by both parties alike. *Black on Recission & Cancellation*, Vol. 1, page 361, Sec. 128. Recission cannot be enforced or ordered on account of the mistake of one party only, which the other party

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10 did not share; there can be no rescission on account of the mistake of one party only, where the other party was not guilty of any fraud, concealment, undue influence, or bad faith, did not induce or encourage the mistake, and will not derive any unconscionable advantage from the enforcement of the contract. *Black on Rescission & Cancellation*, Vol. 1, page 363, Sec. 128. A contract will not be rescinded in equity on the ground of mistake in its terms or provisions or as to the subject matter, unless such mistake is established by clear, satisfactory, and convincing proof. *Black on Rescission & Cancellation*, Vol. 1, page 416, Sec. 155. By seeking the remedy of rescission, the defendant necessarily acknowledges the "Agreement Of Sale" as a contract. To rescind, one must act promptly. Failure to rescind within a reasonable time is plenary evidence of the defendant's election not to do so. *Reed v. Benzine-ated Soap Co.*, 81 N. J. Eq., 182, 185. The defendant's claim for rescission must therefore be regarded as untenable.

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As to abatement—if such was not allowable except in a case where there was no mistake in a transaction, it might reasonably be urged that abatement could only be allowed in cases of fraud. It cannot reasonably be urged that there is any such limitation upon the rule of law relating to abatement. It is also urged in the defendant's behalf that the rule with respect to allowing abatement is applicable only to a case where a vendor seeks to compel the vendee to take the property. Such is not the fact. The taking of the property, with abatement, is the privilege of a vendee. In *Pomeroy on Spec. Per. Con.* (3rd Ed., 1926), pages 903-904, Sec. 438, it is said:

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“The vendee may, if he so elect, enforce a specific performance to the extent of the vendor’s ability to comply with the terms of the agreement, and may compel a conveyance of the vendor’s deficient estate, or defective title or partial subject matter, and have compensation for the difference between the actual performance, and the performance which would have been an exact fulfillment of the terms of their contract. Or, to state the doctrine in language used by Lord Eldon in a leading case: ‘If a man having partial interests in an estate, chooses to enter into a contract representing it and agreeing to sell it as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety, and, therefore, the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those circumstances, is bound by the assertion in his contract, that if the vendee chooses to take as much as he can have, he has a right to that and to an abatement, and the court will not hear the objection by the vendor, that the purchaser cannot have the whole.”

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In *Sugden on Vendors*, 193, it is said:

“When a vendee seeks a specific execution of an agreement, there is much greater reason for affording the aid of the court to a purchaser when he is desirous of taking the part to which the title can be made.”

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10 In *Hill v. Buckley*, 17 Ves. 394, it is said that where a misrepresentation is made as to quantity, though innocently, the purchaser is entitled to have what the vendor can give, with an abatement out of the purchase money for so much as the quantity falls short of the representation. The quantity of land was represented to be 217 acres and 10 perches. It turned out to be about 26 acres less and the vendee had an abatement *pro tanto*. The same rule of specific performance *pro tanto*, at the suit of the purchaser, with compensation for deficiency by abatement of the purchase money, was unanimously asserted by the New York Court of Appeals in *Waters v. Travers*, 9 Johns., 464. In *White v. Weaver*, 68 N. J. Eq., 644, it is said:

20 "A vendee, as complainant in a suit for specific performance, may procure a decree for the conveyance of the vendor's interest, with an abatement by way of compensation for defects in the title, although he knew of the defects when he began his suit."

30 In *Couse v. Boyles*, 4 N. J. Eq., 212, it appears the vendee agreed to convey 135 acres, more or less. There was a deficiency of over 20 acres in the quantity of the land conveyed. The purchaser, upon a bill filed by the vendor for the foreclosure of a purchase money mortgage was allowed an abatement for the deficiency in the land. The court held that where land was sold as containing so many acres, more or less, if the quantity on an actual survey and estimation, either overrunning or falling short of the contents named, be small, no compensation should be received by either party; the
40 words "more or less," must be intended to mean

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such a result; but if the variance be considerable, the party sustaining the loss should be allowed for it, and that this rule should prevail when it arises from mistake only, without fraud or deception. It was also held that the rule applies although the land is not bought or sold professedly by the acre, the presumption being that in fixing the price regard was had to the quantity. 10

In *Triplett v. Ivins*, 93 N. J. Eq., 203, the complainant, as vendee, sought a decree of specific performance of a written contract for the sale of land with an abatement from the purchase price, and in the opinion of Vice Chancellor Leaming (which was adopted by the Court of Errors and Appeals) it is said (at p. 206):

“Should complainant elect to take a conveyance of the life estate as of the date of the contract with an equitable abatement from the purchase price there appears to be no doubt of his right to do so. Professor Pomeroy stated this right to be ‘too strongly fortified, as well as founded on reason, to be successfully denied.’ Pom. Con. (Spec. Per.) Secs. 438, 439, and Notes. * * *.” 20

In *Storey's Eq. Jur.*, Sec. 779, the general rule is said to be that the purchaser, if he chooses, is entitled to have the contract specifically performed as far as the vendor can perform it, and to have an abatement out of the purchase money, or compensation for any deficiency in the title, quantity, quality, description or other matters touching the estate, and that there is nothing in such rule of which a vendor can complain. It is indicated that 30
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it is his own fault if he has assumed an obligation which he cannot fulfill. It cannot be regarded as inequitable to require the defendant to perform, so far as it is in his power to perform.

10 The defendant is not compelled to convey anything which it did not agree to convey, and the complainant pays for what he gets according to the rate established by the contract in question.

In *Lounsbery v. Locander*, 25 N. J. Eq., 554, it is said:

20 “The general doctrine of equity is, that * * * on a bill by the purchaser, a vendor will be required to allow compensation, in case he is able to make title for a part if not for the whole, if the purchaser consents to accept part performance with such compensation.”

30 In the case *sub judice* it cannot reasonably be urged by the defendant that it will be subjected to any condition of hardship if abatement be allowed against it, or that the complainant will derive any unconscionable advantage from the enforcement of the contract against it. If the defendant is paid what it is entitled to upon the basis of quantity of acreage which can be actually conveyed it will still have a profit from the land acquired by it from its grantor Tait. It purchased the property from Tait for \$85,000. If there be deducted from the purchase price stated in the “Agreement Of Sale” aforesaid (\$117,000) the sum of \$600.00 per acre for the shortage of 42.39 acres which the defendant is unable to convey, the amount deducted would be \$25,434.00, thus leaving to the defendant the sum of \$91,566.00, an excess of \$6,566.00 over the
40 amount paid by it to its grantor for the tract of

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lands in question. In *Melick v. Dayton*, 34 N. J. Eq., 245, it was held that abatement was allowable where there was gross mistake, and that a gross mistake is where the quantity of land conveyed falls so far short of the quantity represented as to clearly warrant the conclusion that the grantee would not have contracted had he known the truth. In said case there was only a difference of four and forty-hundredths of an acre (4.40) in a tract of 97 acres more or less. See also *Frenche v. Chancellor*, 51 N. J. Eq., 624, wherein it appeared that the defendant claimed he purchased the land by the acre and paid for it by the acre at the rate of 195.98 acres. The description of the premises in the deed concludes "Containing 195.98 acres, be the same more or less." The court cited *Couse v. Boyles*, *supra*. In *Straus v. Norris*, 78 N. J. Eq., 488, it was held that where through innocent mistake a grantor represented that a tract, described by metes and bounds, containing but 69.71 acres, contained 82 acres more or less, the grantee, purchasing by the acre and paying the price in ignorance of the deficiency, could sue in equity for the deficiency in the acreage; the words "more or less" not including a considerable variance, and the mistake being sufficient to induce the court to believe that if the truth had been known the purchase would not have been made.

Counsel for the defendant urges that specific performance, being a discretionary remedy, should not be exercised in the case *sub judice*. It must be borne in mind however, that while specific performance is referred to as a discretionary remedy, it must be regarded as requiring the exercise by the court of a sound discretion. In *Page v. Martin*,

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46 N. J. Eq., 585, the Court of Errors and Appeals said (p. 589) :

10 “That relief rests not upon what the court must do, but rather what, in view of all the circumstances, it ought to do. * * * In every case of this character the court is chiefly concerned with the equities of the parties before it.”

20 Counsel for the complainant urges that even if the purchase price may not be regarded as having been fixed on a per acre basis, the property is of such a nature that it would be equitable for the court to allow abatement on the basis of so much per acre for the shortage, and that while it is true that a court of equity will not allow abatement where there is no way of fixing the amount thereof, it will allow abatement if there is any reasonable way of fixing the amount. The land in question, it is said, is of such a nature and was bought for such purposes as that, even if the price was not fixed on the basis of so much per acre, the court may fairly allow abatement on that basis, for while there may be differences in value in different parts of the tract, it may be assumed that the shortage is over the whole tract. There is no doubt that whenever the court determines that abatement should be allowed, the matter may be referred to a Master to determine, upon proper investigation, the amount which should be allowed by way of deduction from the purchase price. See *Coster v. The Monroe Mfg. Company*, 2 N. J. Eq., 467, at pages 479-480; also cited in *Couse v. Boyles, et al*, 4 N. J. Eq., 212 at page 218. See also *Triplett v. Ivins*, 40 93 N. J. Eq., 202 at page 206, bottom.

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The defendant, upon notice to the complainant, moved to strike the bill of complaint upon grounds stated in the notice. The hearing upon said motion was by order continued until the final hearing of the cause and after proofs taken. I will now advise an order denying said motion. I will advise also a decree for the complainant as prayed for in the bill of complaint as amended. I will advise an order referring to a Master for investigation and report, the question as to what amount should be allowed to the complainant by way of abatement from the purchase price mentioned in the "Agreement Of Sale" aforesaid.

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Dated, Hoboken, N. J., June 19, 1928.

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**Reference to Master as to Amount of
Abatement.**

(Not Printed.)

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Directions as to Terms of Final Decree.
COURT OF CHANCERY OF NEW JERSEY.

Chambers of

Vice-Chancellor John J. Fallon
Jersey City, N. J.

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January 16, 1929.

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My consideration of the arguments advanced by counsel for the respective parties, and of the merits of the case, actuates me in determining that the decree should be so framed that the complainant shall have the benefit, as part of the purchase price, of a first mortgage of \$70,000, which was a lien upon the lands and premises when the bill of complaint was filed, and that the complainant should not be required to make payment of any interest whatever to the defendant, nor should the defendant be required to allow any interest upon the sum of \$5,000 paid by the complainant to the defendant, by way of deposit on the purchase price. If the defendant had conveyed to the complainant at the time provided in the contract therefor, the complainant would have had the beneficial enjoyment of the lands and by utilization thereof may have made same revenue producing. Inasmuch as the complainant by his amended bill offered to take the property "subject to the first mortgage now a lien upon said lands and premises, whatever the terms of said first mortgage may be", and it appearing that said first mortgage required three installment payments of \$5,000 each, which have been paid by the defendant, thus reducing said mortgage to the principal sum of \$55,000, the defendant should be required to accept from the complainant, as part

Directions as to Terms of Final Decree.

of the purchase price, a mortgage for \$15,000 subject only in priority of payment and lien to the first mortgage of \$55,000, such \$15,000 mortgage to run for a like period of time, and to be at a like rate of interest, and under like terms and conditions (other than requirement for installment payments) as provided in the first mortgage. If the defendant cannot prevail upon the first mortgagee to extend the time of his mortgage for the period of five years contemplated by the Tait-Lafayette contract, the defendant, it seems to me, should be required to refinance said mortgage in a way to insure to the complainant a conveyance of the lands and premises subject either to a \$55,000 first mortgage to run for such period of time (the aforesaid \$15,000 second mortgage to be subordinate thereto), or arrange for the placing of a \$70,000 first mortgage on the lands and premises running for such period of time, thus obviating the necessity of two mortgages of \$55,000 and \$15,000, respectively.

Unless counsel can agree upon the form of the decree, embodying the terms hereinabove mentioned, which is to be presented to me for advising, counsel may appear before me again on Monday next at which time I will endeavor to settle the terms of the decree.

In the form of decree submitted to me by counsel for the complainant I note that he mentions that title should pass under the direction of a special master, at a time and place fixed by him, not more than sixty and not less than thirty days, unless the parties otherwise agree. I do not consider that the complainant should be allowed sixty days within which to close the title. It seems to me that the

Directions as to Terms of Final Decree.

time mentioned should be stated "not more than twenty and not less than ten days", unless the parties otherwise agree.

Respectfully,

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JOHN J. FALLON,
Vice-Chancellor.

Final Decree.

20 The above entitled cause coming on before the Chancellor in the presence of Merritt Lane and Harry S. Neiworth, of counsel with the complainant, and Morrison, Lloyd & Morrison, and Thomas J. Brogan, of counsel with defendant, upon bill, notice of motion by the defendant to strike the bill, answer and replication thereto, amended bill and answer thereto and replication thereto, counterclaim of defendant and answer thereto and replication thereto, and testimony taken in open court, and the court having considered the pleadings and the proofs of the parties and having heard and considered the argument of counsel, and it appearing to the court that the contract stated in complainant's bill as having been made for the sale of the property referred to in complainant's bill by the defendant to the complainant was and is a valid and subsisting contract of sale and that it was represented to the complainant at the time of the making of said contract that the property was of an acreage of 195.25 acres, or 195 acres more or less, and that, in fact, the true acreage of said land

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Final Decree.

was but 152.61 acres and that there was a difference of 42.64 acres between the acreage of the property upon the map as exhibited by the defendant's agents to the complainant at the time of the making of the contract of sale and the true acreage of the land agreed to be sold by the defendant to the complainant and that such shortage was not discovered by the defendant until after the making of said contract of sale and until after the complainant had paid to the defendant the further sum of \$4,000.00 which was to be paid by the complainant on or before the first day of September, 1925, and that the land was purchased as acreage, the sale price being arrived at by taking a price of \$600.00 per acre;

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And it further appearing to the court that at the time of the making of the contract of sale, title to said lands and premises was not in the defendant but that said defendant had said premises under contract of sale from one Tait and that subsequently said defendant secured title to said lands and premises subject to a first mortgage of \$70,000.00; and the court being of the opinion that the parties intended by the provisions of said contract with respect to the first mortgage that such property should be taken by the complainant subject to a first mortgage for \$70,000.00, which should be placed upon the said premises by the defendant with such terms and conditions as might be agreed upon between it and its vendor; and it further appearing to the court that the complainant has waived the credit which it was entitled to under the terms of said contract by way of a second mortgage, and has offered and agreed to pay all amounts

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Final Decree.

which it is obliged to pay over and above the mortgage for \$70,000.00 in cash;

10 And it further appearing to the court, under all the circumstances of the case, that the said contract of sale is sufficiently definite and certain as to be enforced and that complainant is entitled to specific enforcement of said agreement and is entitled to an abatement of the purchase price by reason of the shortage and that, under the terms and conditions of said contract, such shortage is 42.64 acres; and it further appearing to the court that complainant has been always ready, willing and able to complete said contract but that defendant has wholly and without right refused to perform said contract; and the matter as to the amount 20 of the abatement having been referred to Clarence Mabie, one of the Masters of this court, and the said Master having reported that the amount of said abatement should be fixed at \$25,584;

It is, thereupon, on this 15th day of April, 1929, by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, ORDERED, ADJUDGED and DECREED, and the said Chancellor doth, by virtue of the power and authority of this court, hereby 30 ORDER, ADJUDGED and DECREE:

1. That the said contract referred to in the bill of complaint as having been made between the said complainant and defendant on August 21, 1925, be specifically performed in the manner hereinafter directed.

2. That defendant convey to the complainant the lands and premises which it acquired by deed from 40

Final Decree.

William L. Tait, dated the 6th day of December, 1926, recorded upon the 13th day of December, 1926, in the office of the Clerk of Bergen County in Book 1462 of Deeds, page 100, free, clear and discharged of and from all liens and encumbrances except a mortgage for the sum of \$70,000.00 made by the said defendant to its vendor, the said William L. Tait, which said lands and premises, so to be conveyed, are described as follows: 10

ALL those certain lots, tracts or parcels of land and premises, situate, lying and being in the Borough of Rockleigh, in the County of Bergen and State of New Jersey, and more particularly described as follows:

FIRST TRACT: BEGINNING at a point in the westerly line of Carteret Road, in the north-easterly corner of land formerly of F. Monroe Dyer and running thence (1) North 66 degrees 58 minutes 15 seconds West 1664.10 feet to a stake; thence (2) North 33 degrees 12 minutes East 554.29 feet to a stake; thence (3) North 66 degrees 30 minutes West 1777.77 feet to a stake; thence (4) North 22 degrees 15 minutes 30 seconds East 493.40 feet to a stake; thence (5) North 21 degrees 30 seconds East 235 feet to a point; thence (6) North 23 degrees 49 minutes 30 second East 236.24 feet to a stake and land formerly of R. Haddock; thence (7) South 65 degrees 58 minutes 30 second East 777.86 feet to the westerly line of land now or formerly of N. Haring; thence (8) South 26 degrees 26 minutes 26 second West 469.92 feet to a point; thence (9) South 66 degrees 05 30 40

Final Decree.

minutes East 2858.70 feet to the westerly side of said Carteret Road; thence (10) Southerly and along the westerly side of said Carteret Road to the point or place of beginning.

10 Excepting therefrom a house lot on said westerly side of Carteret Road now or formerly owned by A. Haring and shown upon map of Survey of Property belonging to William L. Tait, Township of Harrington, Bergen Co., N. J., made by Watson G. Clark, August 31, 1915.

20 SECOND TRACT: BEGINNING at a point in the westerly side of Carteret Road in the north-easterly corner of land of Rabell and running thence (1) North 70 degrees 62 minutes 40 seconds West 998.72 feet to a stake; thence (2) South 21 degrees 31 minutes 30 second West 123.50 feet to a point; thence (3) North 66 degrees 49 minutes 30 seconds West 1258.20 feet to the easterly line of land now or formerly of N. Haring; thence (4) North 26 degrees 52 minutes East 148.50 feet to a stake; thence (5) Westerly and along the northerly line of land now or formerly of N. Haring 459 feet to the easterly line of land formerly of R. Haddack; thence (6) North 26 degrees 27 minutes 30 seconds East 325 feet to a stake; thence (7) North 64 degrees 40 minutes West 812 feet to a stake; thence (8) North 26 degrees 30 minutes 30 seconds 646.50 feet to a stake and land of Thorn; thence (9) South 65 degrees 34 minutes 40 seconds East along the Southerly line of land of Thorn 3364.42 feet to the westerly side of Carteret Road; thence (10) Southerly

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Final Decree.

and along the westerly side of Carteret Road 895.07 feet more or less to the point or place of beginning.

THIRD TRACT: ALL that certain plot or parcel of land and premises hereinafter particularly described, situate, lying and being in the Borough of Northvale, in the County of Bergen and State of New Jersey. BEGINNING at the southeast corner thereof at the southwest corner of lands formerly of Peter Rycker in the line of the lands of Lucian Sanial running thence along the lands of formerly of Lucian Sanial South $54\frac{1}{2}$ degrees West twelve chains and sixty links; thence North 37 degrees East four chains and ten links thence South 58 degrees East four chains and seventy links; thence North 36 degrees East nine chains thirty-two links; thence South 58 degrees East four chains and sixty links; thence South 24 degrees West fourteen chains and sixty-eight links to the point or place of beginning.

Being known as Plot 28 in block 124, and Plot 1 in Block 125 on the Assessment Map of the Borough of Northvale.

3. That said title pass under the direction of Clarence Mabie, one of the Special Masters of this court, at a time and place to be fixed by him, not more than twenty and not less than ten days, unless the parties otherwise agree, and at a place to be fixed by said Master, at which time and place he shall give notice to the complainant and defendant by the service of notice upon their respective solicitors in this cause; that upon the passage of said

Final Decree.

title, said Master shall charge the complainant with the purchase price of \$117,000.00 without interest, less the sum of \$25,584, the amount of the abatement, and shall give credit to said complainant for the \$5,000.00 already paid on account of the purchase price without interest, and shall also give credit to the complainant for the amount of \$70,000.00, being \$55,000 principal now due upon the first mortgage, a lien upon the said lands and premises, without any interest to the date of the passing of title, and \$15,000.00, the amount of a mortgage to be given by the complainant to the defendant to run for a period of five years from the date of the passing of title with interest at six per cent. per annum, provided that the defendant shall secure an extension of the term of said first above mentioned mortgage of \$55,000 so that the said sum of \$55,000, shall become due and payable in five years from the date of passing title; and provided that, if the defendant cannot secure from the first mortgagee an extension of the term of said first mortgage of \$55,000 so that the said sum of \$55,000 shall become due and payable in five years from the date of passing title, then the said defendant shall convey said lands and premises free, clear and discharged of and from all mortgages and other liens now upon the said premises, and shall accept in part payment of said purchase price from the said complainant a mortgage of \$70,000 upon said premises, which shall become due and payable in five years from the date thereof with interest at six per cent. per annum, which mortgage shall contain the same terms and provisions as the said first above mentioned mortgage now a lien upon the

Final Decree.

said premises other than the requirement for instalment payments of the principal thereof, and also any taxes, water rents and assessments or other liens upon said lands and premises, and also the amount of the taxed costs as hereafter allowed to the complainant in this cause, the intent being that the said property shall be conveyed to the said complainant free, clear and discharged of any liens or charges as of the date of passing title save only the said mortgage or mortgages of \$70,000.00 herein provided for; if there be any balance due the said defendant upon the adjustment in the manner aforesaid, then the said complainant shall pay the said defendant the balance in cash; if, on the other hand, the said balance of the purchase price shall not be sufficient to make such payments, then the defendant shall pay to the complainant the balance required.

4. That the motion of the defendant to dismiss the bill be denied.

5. That the counterclaim of the defendant be dismissed.

6. That the defendant pay to the complainant the costs of this suit to be taxed, in which costs shall be included a counsel fee of \$3,000.00 and the costs of the Master in the fixing of the amount of the abatement and the costs of the Master upon the passage of title, and that the amounts to be allowed to the Master in each case be fixed by this court upon five days' notice to be given by either of the parties or the Master.

Final Decree.

7. That, if the defendant shall fail to carry out the terms of this decree and shall fail to make the conveyance directed by this decree, then this decree shall operate as a conveyance and may be recorded as such and application may be made to this court from time to time by either of the parties for such further relief or directions as may be proper to carry into effect the intent of this decree and the cause is retained for that purpose.

E. R. WALKER,
C.

Respectfully advised,
JOHN J. FALLON,
V. C.

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Notice of Appeal.

The defendant, Lafayette Building Corporation, hereby appeals from the final decree made in the above entitled cause on April 15, 1929, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in All Causes.

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Dated, April 23, 1929.

MORRISON, LLOYD & MORRISON,
Solicitors for and of Counsel
with Defendant Lafayette
Building Corporation.

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

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WM. J. MORRISON, JR.,
of Counsel with Defendant.

Service acknowledged Apr. 23, 1929.

MERRITT LANE,
Solicitor for Complainant.

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Petition of Appeal.

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

The petition of Lafayette Building Corporation,
the appellant in the above entitled cause, respect-
fully shows that:

- 10 1. Petitioner finds itself aggrieved by a final de-
 cree made in the Court of Chancery by his Honor
 Edwin Robert Walker, Chancellor of the State of
 New Jersey, bearing date April 15th, 1929, in a
 certain cause in said Court of Chancery wherein
 the said David L. Levine was complainant and the
 said Lafayette Building Corporation was defendant,
 in this respect, to wit, that the said decree adjudges
20 that the motion of the defendant to dismiss the
 bill be denied; the counterclaim of the defendant
 be dismissed, and that the contract referred to in
 the bill of complaint be specifically performed, and
 in respect to such specific performance that defend-
 ant was denied interest on the purchase price and
 was required as part of the purchase price to give
 credit to the complainant for the amount of \$70,000
 being \$55,000 principal now due upon the first
 mortgage, a lien upon the said lands and premises,
30 without any interest to the date of the passing of
 title, and \$15,000, the amount of a mortgage to be
 given by the complainant to the defendant to run
 for a period of five years from the date of the pass-
 ing of title with interest at 6% per annum, pro-
 vided that the defendant shall secure an extension
 of the term of the said first above mentioned mort-
 gage of \$55,000 so that the said sum of \$55,000 shall
 become due and payable in five years from the date
40 of passing title; and provided that, if the defendant

Petition of Appeal.

cannot secure from the first mortgagee an extension of the term of said first mortgage of \$55,000 so that the said sum of \$55,000 shall become due and payable in five years from the date of passing title, then the said defendant shall convey said lands and premises free, clear and discharged of and from all mortgages and other liens now upon the said premises, and shall accept in part payment of said purchase price from the said complainant a mortgage of \$70,000 upon said premises, which shall become due and payable in five years from the date thereof with interest at 6% per annum, which mortgage shall contain the same terms and provisions as the said first above mentioned mortgage now a lien upon the said premises other than the requirement for instalment payments of the principal thereof. 10

And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous in that: 20

1. Defendant's motion to dismiss the bill should have been granted because the paper sued upon was not a final agreement between the parties and there were outstanding features of the bargain to be settled by further negotiations. 30

2. Defendant's prayer, in its counterclaim, for rescission should have been granted, because it is proven that complainant and defendant were mutually mistaken as to the acreage of the premises in question at the time the paper sued upon was executed. 40

Petition of Appeal.

10 3. The provisions of the decree as to the purchase money mortgage are erroneous in that they are far more onerous upon defendant than the offer of the complainant, by his amendment to the bill of complaint, to take the premises in question subject to the existing mortgage.

4. The defendant is entitled to interest to and to have the taxes adjusted as of, the date of the filing of the amendment to the bill of complaint, as the paper sued upon was not an enforceable contract, if enforceable at all, until said amendment was filed.

20 Petitioner therefore prays that the said decree of the said Chancellor may be, in the particulars aforesaid reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this court shall seem proper.

MORRISON, LLOYD & MORRISON,
Solicitors for and of
Counsel with Appellant.

30 Service acknowledged April 23, 1929.

MERRITT LANE,
Solicitor of Complainant.

Answer to Petition of Appeal.

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

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, for answer thereto, nevertheless, says and admits, that a decree was, on April 15, 1929, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And this respondent is advised and believes that the said decree is agreeable to equity, and he prays that the same may be affirmed, with costs to be adjudged to this respondent.

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MERRITT LANE,

Solicitor and Counsel with Respondent.

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New Jersey Court of Errors and Appeals

DAVID L. LEVINE,
Complainant-Respondent,

VS.

LAFAYETTE BUILDING
CORPORATION,
Defendant-Appellant.

On Appeal from
Chancery Court.

BRIEF FOR DEFENDANT-APPELLANT.

Statement.

This is an appeal by defendant (vendor) from a decree for specific performance with abatement entered pursuant to the opinion of Vice Chancellor Fallon, reported in 6 N. J. A. R., 1196 and printed at page 82 in the state of case.

Pleadings.

Complainant (vendee) filed his bill for specific performance with abatement, based on a paper writing a copy of which is annexed to the bill, and which is as follows (Exhibit 1, Case, p. 7).

AGREEMENT OF SALE.

Ridgefield Park, N. J.,

August 21, 1925

Received from *David L. Levin*
 address *21 Johnson Avenue, Newark, N. J.*
 the sum of *One thousand dollars (\$1000)*
 as part payment for *Purchase of property known as*
the Tait property located on
 on property located *the west side of Tenafly Road*
in the Borough of Rockleigh
 owned by *consisting of 195 acres more or*
less being the same parcel now
under contract to Lafayette
Corporation.

at a price of *One hundred seventeen thousand dol-*
lars (\$117,000)

on the following terms:

Formal Contract to be signed on or before *Septem-*
ber 1, 1925.

Additional money to be paid on signing of Formal
 Contract *Four thousand (\$4,000) dollars*

Title to be closed on *October 20, 1925.*

Additional money to be paid on Closing title—
Twenty thousand (\$20,000) dollars

Subject to a first mortgage of *Seventy thousand*
(\$70,000) dollars

Terms of first mortgage *to be stated in contract—*
term 5 years

A purchase money mortgage—*Twenty two thousand*
(\$22,000) dollars

Terms of second mortgage—*Proportionate with*
first mortgage

Subject to an assessment of *none*

Subject to restrictions of records, if any *none*

Taxes, Interest on Mortgage, Insurance Premium
 to be adjusted as of *October 20, 1925.*

This property is sold at the above mentioned price and terms, subject to the acceptance of the owner.

By.....

We agree to purchase the above mentioned property at the above price and terms.

.....

.....

Witness.

.....

I agree to accept the above mentioned price and terms for the sale of my property to

Lafayette Building Corp.

David Corn Pres.

Frank E. Smith Secy.

(Seal)

..... Witness

(BACKING ON AGREEMENT OF SALE)

AGREEMENT
OF SALE

233772

Between

Return to

HARRY S. NEIWIRTH

Counselor at Law

128 Market St.

Newark, N. J.

Received in the Office of the
Clerk of Bergen Co. New
Jersey on the 9th day of
Nov. A. D. 1925 at 3:19
o'clock P. M. and recorded in
book 14 page 333 of Miscel-
laneous.

WM. P. EAGER, County Clerk.

A counterpart of this paper was signed by complainant (Case, p. 23, lines 1-22). The defendant moved to dismiss the bill on the ground that the paper sued upon was not an enforceable contract (Case, p. 9). Upon the hearing of this motion, complainant applied to amend (Case, p. 11) by offering to take the premises subject to "The first mortgage now a lien upon said lands and premises, whatever the terms of said first mortgage may be" (Case, p. 11 lines 21-23) and to pay the balance in cash, but did not relinquish the prayer for abatement. An order was made continuing the motion until the final hearing (Case, p. 10). The defendant filed its answer and cross-bill for rescission on the ground of mutual mistake as to the area of the premises in question (Case, p. 14); the com-

plainant filed his replication and answer to the cross-bill (Case, p. 17) ; to which defendant filed its replication. At the hearing, complainant was given leave to further amend, offering "to take the property even if no abatement be allowed" (Case, p. 18, lines 1-10).

The Facts.

At the time the parties to this suit became interested in the premises in question, this property was owned by one Tait who had a map which had been made by his engineer and which showed that there were $195\frac{1}{4}$ acres in the property. This map was shown by Tait to Lafayette Building Corporation's representatives, and by them to Levine, and all three used this map in their negotiations and all assumed it to be correct, and dealt with one another in the belief that there were $195\frac{1}{4}$ acres in the tract (Case, p. 35, lines 1-40). Lafayette Building Corporation's negotiation to buy from Tait and to sell to Levine were carried on at practically the same time.

On August 4, 1925 Tait and Lafayette Building Corporation signed a preliminary agreement and on August 10, 1925 they signed a formal contract (See record in Lafayette v. Tait, offered in evidence by respondent, Case, p. 33, lines 8-15). On August 21, 1925, after about three weeks' negotiation, Lafayette Building Corporation and Levine signed the paper, Exhibit 1 (Case, p. 7), annexed to the bill of complaint in this suit. This provided that a formal contract should be signed on September 1, 1925 and that the title should close on October 20, 1925. After the paper was signed and before this formal contract was executed, Lafayette Building Corporation, at Levine's request, obtained addi-

tional copies of the map from Tait's engineer. These copies when received from the Engineer showed the area of the premises in question to be only about 152 acres. This was the first time that either Tait, Lafayette Building Corporation or Levine knew or had any reason to suspect that the area of this property was less than $195\frac{1}{4}$ acres (Case, p. 36, lines 26-40, p. 37, lines 1-40). A survey made later fixed the true area as 152.61 acres.

After the discovery of the error in the map upon which all these parties had relied, Levine did not make a formal contract with the Lafayette Building Corporation. Lafayette Building Corporation sued Tait for specific performance with abatement and by an opinion filed on November 9th, 1926 were denied abatement because they had accepted a formal contract from Tait in which no statement of the acreage was made, and were given the option of dismissing their bill and taking back their deposit (rescission because of the mistake) or taking the property at the full price. See Lafayette Building Corporation v. Tait, 100 N. J. E., 73. It took title paying the full price and in part payment gave a purchase money mortgage for \$70,000 in which certain release clauses, provisions for amortization payments and other terms were inserted. Levine shortly after the Lafayette Building Corporation—Tait deed was delivered (Dec. 6, 1926) (Ex. C 5, Case, p. 76) brought this suit against the Lafayette Building Corporation (Subpoena served January 26, 1927).

There is a decree (Case, p. 114) for specific performance with abatement of \$25,584 and a requirement that the appellant procure or accept as part of the balance of the purchase price a \$70,000 mortgage for 5 years from the date fixed by the decree

for the delivery of the deed, and denying the vendor interest and taxes prior to the delivery of said deed. The decree directs that this \$70,000 mortgage "shall contain the same terms and provisions" as the Lafayette-Tait mortgage "other than the requirement for installment payments of the principal thereof" (Decree, Case, p. 120, lines 38-40 ; p. 121, lines 1-2).

The defendant (vendor) appeals.

At the trial there was a contest as to the amount to be abated from the purchase price by reason of the shortage in area. This question was referred to a master and by his report the amount was fixed at \$25,584. The appellant now concedes that if the respondent be entitled to specific performance at all, the amount of the abatement is correct and for this reason the proceedings before the Master are not printed in the State of Case.

I.

The paper sued upon does not express all of the terms of the agreement, certain terms being expressly reserved by these parties for statement in the formal contract.

It is apparent on the face of this paper that these parties have deliberately omitted therefrom certain terms of their bargain and have expressly reserved these for statement elsewhere, for the parties have expressly said in this paper that the terms of the first mortgage are "to be stated in the contract" (Ex. 1, Case, p. 7, lines 38-40), and the terms of the second mortgage are to be "proportionate with the first mortgage" (Ex. 1, Case, p. 8, lines 1-7).

The paper sued upon, as it stands, is not therefore, a complete and enforceable contract.

II.

Whether or not these parties intended this paper to be a final agreement, specific performance should not have been decreed.

If these parties did not intend this paper to be a final and complete agreement: if as is apparent from the paper itself, they left the parts of the bargain as to the terms of the mortgages to be settled by further negotiations and to be embodied in the formal contract, specific performance should not have been decreed, for the reasons stated by this Court in

Tansey v. Suckoneck, 98 N. J. E., 669;
Brown v. Brown, 33 N. J. E., 650,

and many similar cases.

If these parties did intend this paper to be their final and binding agreement, it is not complete as to its terms as to the mortgages (see Point I), and it is therefore not enforceable.

In McKibbin v. Brown, 14 N. J. E., 13, Ch. Green held in a specific performance case, that:

“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 particulars be uncertain or undefined, equity will not interfere.”

And his opinion was affirmed by this Court.

McKibbin v. Brown, 15 N. J. E., 498.

III

The terms not stated in the paper sued upon but reserved by these parties for statement in the formal contract, were not supplied by the pleadings and evidence.

Counsel for complainant, when defendant moved to dismiss his bill, amended by offering to pay the \$22,000 second mortgage in cash (Case, p. 11, lines 18-20). This eliminated further objection to the paper sued upon on the ground that it did not state the terms of the second mortgage.

Binns v. Smith, 93 N. J. E., 33.

As to the first mortgage, he pleaded and offered evidence to show that the parties had agreed to convey and take title subject to "the first mortgage now a lien upon said lands and premises, whatever the terms of said first mortgage may be" (Case, p. 11, lines 20-23). The learned Vice Chancellor accepted this contention, made it the basis of his decree, and required defendant to convey subject to a mortgage, or to accept a mortgage, having the terms of the Tait mortgage, and even went beyond the terms of complainant's offer by denying to the appellant the provisions for amortization or installment payments (Directions, Case, p. 113 line 9), which was a requirement of the Tait mortgage and which at the time of the trial appellant had performed, at an outlay of \$15,000 by reducing the Tait mortgage from \$70,000 to \$55,000.

But the paper sued upon does not say "subject to the existing first mortgage" and in fact there was no first mortgage when this paper was signed as the Tait-Lafayette title was not closed until a later date. The paper sued upon is dated August 21,

1925 (Ex. 1, Case, p. 7), and the Tait-Lafayette deed and mortgage are dated Dec. 6, 1926 (Ex. C 5, Case, p. 76), so no permissible construction of the words used in this paper "subject to a first mortgage of \$70,000. Terms of first mortgage to be stated in contract-term 5 years" could make these words mean "subject to the first mortgage now a lien upon the said lands and premises," for there was none when this paper was signed by these parties. And the most that complainant can ask in a case of this kind, is that the Court enforce the paper sued upon, if the Court can so construe it as to find therein a contract:—to enforce the contract made by the parties. Our Courts have always refused to make any new, different, or substitute contract for the parties, no matter how fair, or equitable the Court may consider an offer, like this one, made by one party but not accepted by the other.

Neither does this paper say "subject to the first mortgage to be made by Lafayette to Tait as provided in the contract between them." Counsel for complainant contended at the trial (and his contention was accepted and acted upon by the learned Vice Chancellor), that such was the agreement between these parties (Opinion, Case, p. 94, lines 1-23). It is needless to burden this Court with a discussion of the testimony as to this, for whether this was or was not the agreement, no such agreement is expressed in this paper and no such agreement was ever made in writing so as to satisfy the requirements of the Statute of Frauds. If this were not their agreement the paper sued upon is not a complete contract (no attempt having been made to suggest or prove any other agreement); if this were their agreement the paper sued upon does not express it, nor is it expressed in any other writing

signed by defendants. In either event the complainant is not entitled to specific performance.

Counsel for complainant may argue here, as he argued at the trial, that the Lafayette-Tait mortgage, signed by defendant, is a sufficient writing. But this mortgage expresses only the terms of the agreement between Lafayette and Tait as to the terms of this mortgage; it contains no agreement, no acknowledgement, no memorandum that complainant is to take title subject to this mortgage, or to a mortgage having the same terms. It is not in any sense an agreement by appellant supplementing the paper sued upon, nor does it purport to express any agreement between appellant and respondent. It has no more evidential value in this case than any other mortgage which appellant may have executed, and which, by parol testimony, might have been alleged to contain the terms agreed upon between appellant and respondent.

Despite this failure of competent evidence to prove any such agreement, this is what the decree requires the appellant to perform and more, for it denies to complainant the important and valuable provisions as to the amortization payments aggregating \$15,000.

The learned Vice Chancellor has found, on oral testimony and in part (as to amortization) without any testimony, that this was what these parties agreed to, and he has, in effect, reformed the paper to say this instead of what it does say, thus supplying in this paper what the parties expressly reserved "to be stated in the contract," and he has made a decree for specific performance on this paper so altered and so reformed.

That a contract for real estate cannot be so reformed and then used as a basis for specific per-

formance is settled. If the so-called contract is in writing, but omits some of the terms of the agreement, these omissions may be supplied by other writings if the circumstances show that these other writings were intended by the parties to express a part of the contract, but this Court has never permitted a contract to be made out in part by written evidence and in part by parol evidence and then used as a basis for a decree for specific performance.

In *Wharton v. Stoutenburgh*, 35 N. J. Eq., 266, this Court in an opinion by Mr. Justice Depue, held that:

“Where, in cases within the statute of frauds, the negotiations have been conducted in writing, if there has been a final agreement between the parties, the terms of which are evidenced in a manner to satisfy the statute, the agreement will be binding, although the parties may have declared that the writing is to serve only as instructions for a formal agreement, to be prepared and signed. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his lawfully-authorized agent, there exist all the materials which the Court requires to make a legally binding contract.”

In *Binns v. Smith*, 93 N. J. Eq., 33, Vice Chancellor Leaming said, at p. 34:

“It is clear that the understanding of the parties as to when the purchase-money mortgage referred to in the contract should be made

payable cannot be established by parol proofs. Schwartzman v. Creveling, 85 N. J. Eq., 402.”

and in the case cited by Vice Chancellor Leaming, Vice Chancellor Backes said, at p. 406:

“The policy of the statute is to exclude testimony of that uncertain character with respect to transactions within its provisions. It, therefore, requires the substantive parts of the contract to appear in the writing. To admit parol evidence of any of the terms of the contract with respect to which the memorandum is silent, would open the door to the very mischief the statute was intended to suppress.’ Johnson & Miller v. Buck, 35 N. J. Law 338; Schenck v. Spring Lake Beach Improvement Co., 47 N. J. Eq., 44; Nibert v. Baghurst, 47 N. J. Eq., 201; Bowers v. Glucksman, 68 N. J. Law, 146.

The written contract cannot even be reformed so as to include the terms of the verbal agreement for the purpose of specific performance. Wirtz v. Guthrie, 81 N. J. Eq., 271; Vogt v. Mullin, 82 N. J. Eq., 452; Davimos v. Green, 83 N. J. Eq., 596.”

In Gross v. Yeskel, 100 N. J. Eq., 293, this Court held that—

“Equity will not in one proceeding grant reformation of a contract and specific performance thereof.”

affirming another decision by Vice Chancellor Backes in which he held that—

“Contracts for the sale of land will not be reformed in respect of matters required by the

Statute of Frauds to be in writing, and then enforced" (Gross v. Yeskel, 98 N. J. E., 64).

IT IS RESPECTFULLY SUBMITTED THAT THE TERMS NOT STATED IN THE PAPER SUED UPON, BUT RESERVED BY THESE PARTIES FOR STATEMENT IN THE FORMAL CONTRACT, WERE NOT SUPPLIED BY SUCH EVIDENCE AS WOULD WARRANT A DECREE FOR SPECIFIC PERFORMANCE.

IV.

Complainant's payment of an additional \$4000 on account of the purchase price was not sufficient part performance to take this case out of the statute of frauds.

In Cooper v. Colson, 66 N. J. Eq., 328, this Court held that:

"Payment of a part, or even of the whole, of the purchase-money, under an oral agreement for the sale of land, is not an act of part performance to take the contract out of the statute of frauds."

V.

Appellant should not have been denied interest and carrying charges accrued prior to the amendment of complainant's bill.

The paper sued upon is, on its face, incomplete (see Point I). No offer was made by complainant to supply the omissions until the amendment was made. There is no proof of an offer or tender of these terms before that time.

Until that time neither party could be held to

perform, if indeed it was their intention to be bound until the "formal contract" had been made. The appellant, therefore, was not in default (if bound at all in this case) until this amendment was filed. It should not have been penalized by denying interest and carrying charges prior to the filing of the amendment.

VI.

Appellant's prayer for rescission should have been granted because of the mistake as to the true area of the property.

The Tait map, used by all of these parties in their negotiations, was assumed to show the correct acreage. After this paper had been signed, it was found that Tait's engineer who prepared the map, had made an error, and that the acreage was only 152.61 A. instead of 195 $\frac{1}{4}$ A. This was a mistake of fact without any fraud or misrepresentation by either party.

The jurisdiction of Equity to relieve against the consequences of a mistake of fact has existed from an early period and is thoroughly established. It is this jurisdiction that complainant has invoked for correction of this mistake by abatement, and defendant has invoked for relief from this mistake by rescission.

There is a clear distinction between cases in which the parties have in fact agreed, and by mistake the instrument signed by them does not express their agreement; and cases in which the parties have in fact, not agreed at all, where there has been, because of a mistake, no meeting of the minds, although there is no mistake in writing out the agreement. Where the parties have in fact agreed, equity will correct the error in the instrument.

This is reformation. Where the parties have, in fact, not agreed, where because of a mistake, their minds have never met, all that equity can do is to cancel the instrument and restore the parties to their former position. This is rescission.

“Where there is no pretense that the written instrument does not express the real contract as it was entered into, but the parties at the time of making their agreement, which was afterwards reduced to writing, were both laboring under a mistake concerning the subject-matter, the contract thus affected by such mistake will not be enforced. There is really no contract, for there was no intelligent consent. Performance will, therefore, be refused on the objection of the defendant, or the remedy of rescission will be granted at the suit of either party. This is a different case from that mentioned in the note under section 248. In that case the parties really agree as to the subject-matter, and the mistake consists in its description or designation in the writing; in this case there is no agreement with respect to it; the parties are in error concerning it from the beginning, so that their minds never met.”

(Pomeroy's Specific Performance of Contracts, Third Edition, 1926, Section 250, page 601.)

“But where the mistake or parol variation set up by the defendant does not show a mere mistake in the reduction of the contract put in writing, but that one party understood one thing and the other another, there is no such contract as the Court will enforce and the plaintiff's bill is consequently dismissed.”

(Frey on Specific Performances, 2nd Edition with American notes, p. 303, Section 486.)

When this paper was signed appellant was concerned with the profit it would make, i. e., the difference between what it had agreed to pay Tait and what Levine was agreeing to pay; and to its officers the total price was the all important and determinative factor in their negotiations. The price per acre, was, to them, a mere incident to be determined by a simple arithmetical division. Levine was concerned with the price per acre and the total price was, to him, a mere incident to be determined by a simple multiplication.

Complainant's witnesses testified that in the negotiations leading up to the sale they offered to buy at \$575 per acre and came up to \$600 per acre. (Levine, Case, p. 20, lines 10-30; Weiser, Case, p. 28, lines 30-40; Miller, Case, p. 31, lines 10-30.) Defendant's witnesses testified that in these negotiations a gross price of \$125,000 was asked, \$110,000 was offered and \$117,000 was finally agreed upon. (Smith, Case, p. 38, lines 30-40; p. 39, lines 1-20; Corn, Case, p. 55, lines 12-40.) Each flatly contradicted the other on this point. It is difficult to believe that men of this type have deliberately given false testimony. It is much more probable that they are like the two knights in the fable, who, coming up from opposite sides to a tavern sign swung out across the highway, said one:—"What a fine gold sign"; and the other,—“What a fine silver sign.” After calling each other certain disparaging and insulting names, they fought and in the fight whirled about until they had exchanged places, when in looking up at the sign again they

saw that it was gold on one side and silver on the other. So in this case, the complainant visualized this tract at so much per acre and the defendant at so much gross, and although each assumed (like the knights) that the other saw what he saw, it is manifest that these parties did not agree to the same thing in the same sense; that their minds did not really meet when they signed this paper.

Appellant agreed to sell for \$117,000 the PROPERTY IT HAD JUST BOUGHT OR WAS JUST BUYING FROM TAIT and which Tait's map showed to be 195 $\frac{1}{4}$ acres. The complainant agreed to buy 195 $\frac{1}{4}$ ACRES OF LAND AT \$600 AN ACRE which Lafayette had just bought from Tait. They each believed, mistakenly (as it afterwards was demonstrated) that they were buying and selling the same thing. They were both laboring under a mistake as to the subject matter, and the proper equitable remedy for this rescission and not reformation.

“Where the parties have apparently entered into a contract evidenced by a writing but owing to a mistake their minds did not meet as to all the essential elements of the transaction so that no real contract was made by them, then a Court of Equity will interpose to rescind and cancel the apparent contract as written, and to restore the parties to their former position.”

(9 Corpus Juris, Cancellation of Instruments, Mistake of Fact, p. 1166 and cases cited in foot note.)

This principle was applied by this Court in *Titus v. Phillips*, 18 N. J. Eq., 541, in which a decree for rescission was affirmed by this Court. The ven-

dor left his deed and a "due bill" or note for \$2510 in escrow, believing that the consideration for the sale was the assumption of certain encumbrances and also the payment of the \$2510. By mistake, the stakeholder delivered the deed without having the "due bill" signed, to the buyer who believed that the only consideration was the assumption of the encumbrances. There was a mistake as to a material element in the bargain;—the purchase price; the minds of the parties never met as to this and a decree for rescission (unless the buyer chose to pay the full price) was made and affirmed by this Court.

In a recent case, this Court again applied this principle. Mr. Justice Minturn, delivering the unanimous opinion of this Court said:

"It is manifest that the parties to this agreement have not agreed to the same thing in the same sense, so that there was lacking in the situation the meeting of the minds of the contracting parties, which forms the essential element to the valid consummation of a contract."

Gross v. Yeskel, 100 N. J. Eq., 293, at p. 294.

In the cited case the vendor had bought a brewery property, with a covenant not to use it as a brewery and to allow his vendor to remove certain chattels. It was agreed that the sale should be made subject to the covenant made by the vendor when he bought the brewery. The vendee believed the covenant referred only to the removal of the chattels. In this situation this Court held that there was no contract, no meeting of the minds, and affirmed a decree dismissing a bill for reformation.

We have been unable to find a case in this Court

where specific performance has been denied, or rescission granted, on the ground that the parties had been mistaken as to the area of the property sold. But the New York Court of Chancery has held in cases concerning a mistake as to the area that a decree for specific performance should not be made not only on the ground that there is no enforceable contract because there has been no meeting of the minds, but also on the ground that it would be highly inequitable to compel the buyer to pay the full price and to receive only part of what he bargained for, or on the other hand to compel the seller to deliver all he sold and to receive only part of the price he bargained for. To do either

“would be to effectuate what the parties did not intend and to execute an agreement to an extent never made.”

Schmidt v. Livingston, 3 Edw. Ch. (N. Y.), 213 at p. 215.

In the cited case a lot had been sold and was supposed by both parties to be of certain dimensions, and was found afterwards to be more than as large again, and a vendee's bill for specific performance was dismissed.

In *Coles v. Bowne*, 10 Paige (N. Y. Chan.), 526 a block of land was sold at auction, the buyer thought his bid was for the entire block as a unit and the seller thought it was the price for each of several distinct lots comprising the block, and the vendee's bill for specific performance was dismissed.

And there are three opinions in our own Court of Chancery in cases turning on a mistake as to area. In *Planer v. Equitable Life*, 37 Atl. 668 (not officially reported) Vice Chancellor Pitney decided a case in which there was a mistake as to the size

of the lot owned and sold by the vendor. At page 671 he said:

“Coming now to the question of the right of the complainant” (vendee) “to specific performance, it is to be observed that at the time the contract was made the officers of the company” (vendor) “as we have seen, had no knowledge or suspicion that their title did not cover what they understood they contracted to convey.”

and, (at the end of the opinion) he advised that the “complainant’s bill be dismissed, with costs, and the contractual letter be declared invalid as a contract, and delivered up.”

In *Lafayette Bldg. Corp. v. Tait*, 100 N. J. E., 73, the suit between the present appellant and its grantor, Vice Chancellor Lewis, while denying specific performance with abatement because it appeared from the formal contract accepted from Tait that the sale was of the tract regardless of area, held that because of the identical mistake as to the acreage of this tract, Lafayette was entitled to have its bill dismissed, the contract rescinded, and its deposit money returned, or at its option, it might take the property and pay the full price. It elected to do the latter for reasons which are obvious.

And in a very recent case, *Weil v. Lane* (not yet reported, Chancery docket 61-445), Vice-Chancellor Fielder on October 18, 1927, in an opinion dictated at the close of the testimony, said:

“I think these people dealt with each other in perfect good faith. Mrs. Lane expected to sell thirty acres. She had no information whatever about the size of her property other

than as contained in the deed from Gering to Harris, which deed she found among Mr. Harris' effects after his will was probated, she being the executrix named in the will and the property was devised to her. Mr. Weil does not seem to have gone over the property for the purpose of determining the acreage in it prior to the day he agreed to buy and made his down payment, but he accepted such assurance as Mrs. Lane was able to give him, which was, I say, founded upon the information she obtained from her deed as to the size of the tract.

The remedy of specific performance is discretionary in that it will not be granted even in pursuance of the letter of the contract unless it will accomplish complete justice between the parties. The question always also is: What, in view of all the circumstances of the case, should a court of equity do to further justice. Mrs. Lane surely thought when she agreed to sell, that she would receive \$13,000 for her farm, which she honestly thought comprised thirty acres. To compel her to convey what the survey shows she has, namely twenty-two or twenty-three acres with abatement from the sum she expected to receive, would be to make a contract for her which she would not have made, which under the circumstances would be required to accept upon abatement, so much less than she thought her property worth."

In substance this was a finding, that the parties, because of a mistake as to the acreage of the property, had not in fact agreed, their minds had not met; a refusal to apply the remedy of reformation and an application of the remedy of rescission.

In that case there was testimony that the property was fairly worth the full price, and it is to be noted that defendant in the present case offered no proof that the full price was more than the property was fairly worth, in fact, his amendment, made at the hearing by offering "to take the property even if no abatement be allowed" (Case, p. 18, lines 1-10), indicates that it is fairly worth to him the full price stated in this paper, although he is striving, in this court of equity, to get it for \$25,000 less. "He who seeks equity, should do equity".

While these Chancery cases are, of course, not binding authorities on this court, the principle there applied to cases of mistake as to the area of the property, is the same principle as that applied by this court in the cases cited above in which the mistake was as to some other essential element of the bargain so that the minds of the parties never met.

IT IS RESPECTFULLY SUBMITTED THAT APPELLANT'S PRAYER FOR RESCISSION SHOULD HAVE BEEN GRANTED, BECAUSE AS A RESULT OF THE MISTAKE AS TO THE TRUE AREA OF THIS PROPERTY, THE MINDS OF THESE PARTIES NEVER MET.

VII.

The precedents cited and relied upon by the learned Vice Chancellor as warranting a decree for abatement in this case, are not applicable on the facts in this case.

In support of this decree for specific performance with abatement, the Vice-Chancellor cited in his opinion the following authorities and precedents. It is respectfully submitted that these are not ap-

plicable on the facts of this case for the reasons stated below.

Pomeroy, Specific Performance (3rd Edition, 1926), 903, 904, Sect. 438 (Cited Case, p. 104, line 39).

A careful reading of this section, and of the others relating to it, discloses that the rule there laid down, i. e., that a

“vendee may, if he so elect, enforce specific performance to the extent of the vendor’s ability to comply with the terms of the agreement and may compel a conveyance of the vendor’s deficient estate or defective title, or partial subject matter, and have compensation for the difference between the actual performance and the performance which would have been an exact fulfillment of the terms of their contract”,

is applicable in the first place to cases in which there is a contract, where the minds of the parties have met. By the illustration quoted from Lord Eldon in *Mortlock v. Buller*, 10 Ves., 315:

“If a man having a partial interest in an estate, chooses to enter into a contract representing it and agreeing to sell it as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety, and therefore, the purchaser shall not have the benefit of his contract”

it appears that this section of Pomeroy is applicable in the second place to cases where the vendor

represents that he owns the property, and either by deliberate falsehood (active fraud) or negligent error, deceives the vendee as to what is the subject of the bargain.

In the present case there is first, no contract, for the minds of these parties never met (see Point V) and in the second place the appellant made no representation that it owned the property, for it is expressly stated in the paper, Exhibit 1, that what was sold was "the Tait property * * * now under contract to Lafayette Building Corporation" (Ex. 1, Case, p. 7, lines 17-24).

This section of Pomeroy is, therefore, not the one applicable in this case, but Section 250 cited in Point VI is the one which applies and supports appellant's contention that rescission and not reformation is the proper remedy in this case.

Triplett v. Ivins, 93 N. J. Eq., 202, cited (Case, p. 107, line 13) and relied upon by the Vice-Chancellor, is distinguished on the same ground, for in that case the vendor had (as in the illustration from Lord Eldon given by Pomeroy in Sect. 438) a partial interest, a life estate, and chose to enter into a contract agreeing to sell the land as his own, although the misrepresentation was not a deliberate fraud.

White v. Weaver, 68 N. J. Eq., 644, also cited (Case, p. 106, line 19) and relied upon, is a similar but stronger case for in that case Mrs. Weaver, the vendor, knew she had but an undivided one-third but deliberately contracted to sell the fee, and when asked "Will the children" apparently her co-tenants "make any fuss about the property, about your renting it?" with an option to purchase, said, "Oh, no, I have always rented it, and they agreed to it, whatever I do" (see 68 N. J. Eq., 644, at p. 646,

top of p.) so that in this case there was actual fraud or deliberate misrepresentation.

Lounsbury v. Locander, 25 N. J. Eq., 554 (Cited, Case, p. 108, line 13), is not a case of specific performance with abatement, and what was said as to that is obiter dictum. Mr. Justice Depue, delivering the opinion of this court, said (at p. 556, 3rd par.) :

“The prayer of the bill is that the defendant be decreed to sell and convey the premises unto the complainant ‘by a good and sufficient deed of conveyance, containing the several full covenants and warranty for the conveying and assuring of a perfect title in fee simple, free from all encumbrances’. The decree signed is in conformity with the prayer of the bill.”

And this court, while affirming the Vice-Chancellor as to specific performance, reversed the decree because it awarded to complainant certain covenants in the deed decreed to be given, which were not warranted by the agreement sued upon. The opinion below, by Vice-Chancellor Dodd, 24 N. J. Eq., 417, demonstrates that there was in this case no question of abatement because of any failure of title or area of the land, but merely a plain question of specific performance of a complete written contract, with adjustment, as required by the contract, for interest, taxes and expenses.

Couse v. Boyle, 4 N. J. Eq., 212, Melick v. Dayton, 34 N. J. Eq., 245, and Frenche v. Chancellor, 51 N. J. Eq., 624, cited (Case, p. 106, line 28, p. 109, line 1; p. 109, line 14), and relied upon by the Vice-Chancellor, were all foreclosure suits in which the mortgagee was seeking to compel full payment of the purchase price although the mortgagor had not

received all that he was entitled to get by reason of shortage of area or some similar failure of consideration.

Straus v. Norris, 78 N. J. Eq., 488, also cited (Case, p. 109, line 21), and relied upon by the Vice-Chancellor, was a vendee's suit after title had closed, for restitution of part of the purchase price because of a shortage in area. Vice-Chancellor Howell said, at page 492:

"It must be kept in mind that this suit is not a suit for the rescission or cancellation of the contract on the ground of misrepresentation, but is brought to recover back a portion of the purchase-money paid by the vendee upon the ground that he overpaid the vendor by reason of her misrepresentation of a then present fact. There appears to be no express authority in this state for such a proceeding. There are, however, many cases in which this court and the court of errors and appeals, in foreclosure suits, have ordered an abatement to be made in the amount secured by purchase-money mortgages which were the result of conveyances of land as to which the mortgagee misrepresented the number of acres in the tract conveyed and covered by the mortgage. These cases, to a large number of which reference will be made, are analogous in principle in the case at bar;"

and he recited and followed the foreclosure cases of *Couse v. Boyle*, *Melick v. Dayton*, *Frenche v. Chancellor* (*supra*), and other similar cases.

In cases like these it is of course equitable to allow abatement so as to prevent the mortgagor from collecting full payment for part of the property or a partial interest in the title. But these cases are

different from the present case in which appellant is not insisting on payment at all but offers, as he should equitably offer, to repay to Levine the money paid on account and asks for rescission (Case, p. 16, lines 22-40).

The only case in this state in which a vendee sued and was given a decree for specific performance with abatement, although both parties were mistaken as to the subject matter of the bargain, which we have been able to find (it was cited by counsel for Levine in his brief below) is *Triplett v. Ivins*, 93 N. J. Eq., 202. In that case the premises in question had been devised to the vendor by the will of her husband. "At the time the contract was made, both parties believed that defendant was the sole owner of the land." But there was an after-born child, and defendant had only a life estate. This was clearly a mistake of law and not a mistake of fact for all the facts were known, the existence, terms and date of the will, the existence and date of birth of the child, but the parties were mistaken as to the law of wills, assuming that she took a fee as devisee and not knowing that the will was invalidated by the subsequent birth of the child.

But this case is not a precedent, for a mistake of law as to the legal effect of a document, is not a defense to specific performance nor a ground for rescission;

Zane v. Cawley, 21 N. J. Eq., 130;

Mawralty v. Warren, 18 N. J. Eq., 124;

while a mistake of fact as to a material element of the transaction, with the result that there is no meeting of the minds of the parties, is a defense to

specific performance and is a ground for rescission (see Point VI).

In denying appellant's prayer for rescission, the Vice-Chancellor cited (Case, p. 104, line 23), *Reed v. Benzine-ated Soap Co.*, 81 N. J. E., 182, 185, as support for his statement that "Failure to rescind within a reasonable time is plenary evidence of defendant's election not to do so." But what both this court, in the opinion by Mr. Justice Parker, and the Chancery Court, in the opinion by (then) Vice-Chancellor Walker made clear and acted upon was that the complainant had delayed asking for rescission until "the position of affairs has changed so that the *status quo* cannot be restored" (p. 185, line 7). But, in the present case, the position of affairs has not so changed. Appellant offers to return Levine's money, and there is no evidence nor allegation that Levine has in any way changed his position. It is apparent that while the Lafayette-Tait suit was pending, both of the parties to the present suit awaited the result, and that promptly thereafter each of them sought in this suit, the remedy he was advised was available to him.

VIII.

It is respectfully submitted that this decree should be reversed and that the Court below should be directed to dismiss the complainant's bill and make a decree for rescission in accordance with the prayer of appellant's counterclaim.

MORRISON, LLOYD AND MORRISON,
Solicitors and of Counsel
with Defendant-Appellant.

By WILLIAM J. MORRISON, JR.

New Jersey Court of Errors and Appeals

<i>Between</i>	}	<i>On Appeal</i>
DAVID L. LEVINE,		<i>from</i>
<i>Complainant-Respondent,</i>		<i>Chancery.</i>
<i>and</i>		<i>Decree in</i>
LAFAYETTE BUILDING CORPORATION,	}	<i>Specific</i>
<i>Defendant-Appellant.</i>		<i>Performance</i>
		<i>for Vendee</i>
		<i>with</i>
		<i>Abatement.</i>
		Sat Below,
		FALLON, V.-C.

BRIEF FOR COMPLAINANT-RESPONDENT.

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

Statement of the Case.

The facts are so thoroughly and so clearly stated and the law so thoroughly discussed in the opinion of the Vice-Chancellor (p. 82) that it is useless to repeat them.

Conclusions of fact not challenged by appellant.

After a careful consideration of the testimony, the Vice-Chancellor, upon the facts, concluded:

1. That it was the clear intent of the parties that the agreement annexed to the bill (Exhibit 1, p. 7) should be a binding obligation notwithstanding that it contained the language, *formal contract to be signed on or before September 1, 1925* (pp. 86, 87).

2. That appellant vendor represented to respondent vendee that the property consisted of 195 acres and that representation was carried

into the contract (Exhibit 1, p. 7); that the purchase price was fixed between the parties at \$600 an acre (pp. 85, 86, 101); that there was no mutual mistake; that respondent relied upon the representation of appellant that the property contained 195 acres (pp. 103, 104).

3. That, subsequent to conceded knowledge on the part of appellant that the property did not contain 195 acres, which knowledge it certainly had when it filed its bill of complaint against its vendor, Tait, to compel specific performance from him with abatement, in January, 1926, it treated the contract between itself and appellant as binding and subsisting and did not attempt to rescind until it filed its cross bill in this cause on or about April 28, 1927, and that it did not tender to appellant either the \$1,000 which had been paid to it on October 21, 1925, at the time of the signing of the agreement of sale (Exhibit 1, p. 7) or the \$4,000 which had been paid to it on September 1, 1925, which payment was made and accepted notwithstanding the fact that no formal contract was signed on September 1, 1925 (Exhibit 1, p. 7), or at any other time, until the filing of the cross bill, from which conclusion of fact it inevitably followed that, upon the doctrine of election, not of laches as appellant seems to think, it lost any right to rescind if any such right it ever had.

Reed v. Benzene-ated Soap Co., 81 N. J. Eq. 182, 185;

Faulkner v. Wassmar, 77 N. J. Eq. 537;

Ginsberg v. Wolters, 94 N. J. Eq. 535.

The above conclusions of fact are not seriously questioned by appellant. Insofar as they may be questioned by inference, they will be hereafter dealt with.

I will consider the points made by appellant in the order made. Some will be considered together.

I.

The paper sued upon does not express all of the terms of the agreement, certain terms being expressly reserved by these parties for statement in the formal contract (p. 7).

II.

Whether or not these parties intended this paper to be a final agreement, specific performance should not have been decreed (p. 8).

As stated above, the Vice-Chancellor concluded, upon the facts, *that the parties intended the paper sued on to be a binding agreement*. That it was not *intended* to be a binding agreement is urged because of the presence of the phrases:

“Formal contract to be signed on or before September 1, 1925.”

“Additional money to be paid upon signing of formal contract, \$4,000.00 * * *”

“Subject to a first mortgage of \$70,000.”

“Terms of first mortgage to be stated in contract—term five years.”

“A purchase money mortgage—\$22,000.00.”

“Terms of second mortgage—proportionate with first mortgage.”

In looking at the paper without more we find that every term of an ordinary agreement of sale is expressed and that the paper is headed “Agreement of Sale” and that it ends, “This property is *sold* at the above mentioned price and terms”; and, “we agree to *purchase* the above mentioned property at the above price and

terms" and "I agree to accept the above mentioned price and terms."

It is well settled in the law that the mere fact that a formal contract is to be made after the signing of an instrument does not indicate that the instrument signed is not intended to be binding.

Wharton v. Stoutenburgh, 35 N. J. Eq. 266, and other cases referred to by the Vice-Chancellor on page 88, etc.

Nor does the mere statement that in the agreement the terms of the first mortgage are "to be stated in contract-term five years," indicate that the parties did not intend the agreement to be a binding and subsisting contract.

Upon this branch of the case, it is immaterial whether the contract made is so definite as that it may be specifically enforced for the parties have the right, if they desire, to make a binding and subsisting contract which is indefinite in its terms.

Whether it may be specifically enforced because of that indefiniteness, is another matter which will be hereafter considered.

Whether the parties intended to make a binding and subsisting agreement is, as this court stated in *Wharton v. Stoutenburgh*, 35 N. J. Eq. 366, "always a question of fact, depending upon the circumstances of the particular case."

The evidence offered to the effect that, at the time of the making of this contract, appellant was in negotiation with its vendor, Tait, for the terms of a first mortgage was to explain how it came about, that this agreement provided that the terms of the first mortgage, except that one specifically indicated in the agreement, *i. e.*, the

length of time five years, were to be stated in the formal contract. The language in the contract is *not* that "the terms of the first mortgage are to be subsequently agreed upon"; nor that the terms are "to be *fixed by* the formal contract." It provides merely that the terms are "to be *stated* in the contract."

We find the explanation of this language in the fact that appellant did not own the property at the time of the making of the contract. It was under contract to purchase the lands and premises, and, was, at that time, in negotiation with the owner of the premises as to the terms of the first mortgage, the amount only of the first mortgage then being fixed, and the length of time that the mortgage was to run. To determine the rights as between appellant and *its* vendor, one Tait, it was necessary to resort to the Court of Chancery and as a result of the proceedings in Docket 54, page 583, 134 Atl. 875, 100 N. J. Eq. 73, a decree for specific performance was made between the appellant and its vendor Tait, and, in accordance with the terms of that decree, a conveyance was made to the appellant and a first mortgage was given by appellant to its vendor for \$70,000 for a term of five years.

Appellant, at the time of the making of the contract between respondent and appellant, being in negotiation with its vendor as to the terms and conditions of the first mortgage which was to be a lien upon the property, appellant and respondent agreed that the property should be subject to a first mortgage of \$70,000 running for a period of five years, the terms and conditions, other than that specifically stated in the agreement of sale, of that first mortgage to be the

terms and conditions agreed upon between appellant and its vendor Tait. That is the effect of the testimony. Hence the language was used in the contract here under discussion, *i. e.*, that the terms of the first mortgage were "to be *stated* in the contract."

A formal contract was executed between appellant and Tait and the terms of the first mortgage were expressly stated in *that* formal contract and were in writing and the property was actually transferred to appellant, vendor, by Tait and such first mortgage is a lien upon the premises.

Appellant refers to *Tansey v. Suckoneck*, 98 N. J. Eq. 669, p. 8, affirming a decree advised by Vice-Chancellor Foster, but that case is not applicable here for there was nothing but a bare receipt stating no terms, the Court holding, upon the facts, that it was clear that the parties *intended* that the agreement should *not* be binding or effective until the formal contract was made. Appellant overlooks the affirmance by this court of the decree advised by Vice-Chancellor Foster in *Luczak v. Mariove*, 93 N. J. Eq. 501, affirming 92 N. J. Eq. 377, the affirmance being upon the opinion below which *is* applicable here.

In that case, Vice-Chancellor Foster said:

"The proofs show that these matters were purposely and necessarily left indefinite, as none of the parties knew, when the contract was made, for what time or at what rate of interest the first mortgage loan could be obtained, and by acquiescence they made the terms of this loan on which it could be obtained part of their contract."

A careful comparison of what this court said in *Wharton v. Stoutenburg*, 35 N. J. Eq. 266,

and what it said in affirming Vice-Chancellor Foster in *Tansey v. Suckoneck*, 98 N. J. Eq. 669, and its affirmance of Vice-Chancellor Berry in *Kuskin v. Guttman*, 98 N. J. Eq. 617, affirmed 99 N. J. Eq. 887, and its affirmance of Vice-Chancellor Foster in *Luczak v. Mariove*, 92 N. J. Eq. 377, affirmed 93 N. J. Eq. 501, indicates that in every case *it is a question of fact as to whether the parties intended to make a binding agreement*. And that question of fact, in the case at bar, may be resolved against appellant by a consideration of nothing but the paper itself but, when the circumstances surrounding the parties and the parol evidence is considered, as upon this branch of the case both may be, there can be no question and, indeed, it is not argued otherwise.

Appellant says also under its Point II, p. 8, that, even if the parties intended the paper to be a final agreement, specific performance should not have been decreed, apparently because the terms of the first mortgage were not expressed.

It is conceded under Point III, p. 9, that because respondent offered to pay the \$22,000 second mortgage in cash, there was eliminated any question of indefiniteness because the contract did not state the terms of the second mortgage.

Binns v. Smith, 93 N. J. Eq. 32, at p. 36.

But respondent, in the case at bar, offered to take the property subject to such first mortgage as was upon the premises given by appellant to its vendor Tait, insofar as the precise terms were not expressed in the contract, and under *Binns v. Smith*, 93 N. J. Eq. 33, and *Luczak v. Mariove*, 92 N. J. Eq. 377, affirmed 93 N. J. Eq. 501, this eliminated any indefiniteness with respect to the terms of the first mortgage.

Indefiniteness as to the terms of credit does not necessarily mean that a contract is so uncertain as that it may not be enforced. In *Luczak v. Mariove*, 92 N. J. Eq. 377, affirmed 93 N. J. Eq. 501, Vice-Chancellor Foster said, as to the fact that certain terms of the mortgage were not included,

“in the absence of definite terms in the contract, a court of equity will, if necessary, presume it to have been the intention of the parties that the mortgage should be made payable on demand (*Green v. Richards*, 23 N. J. E. 32), and will also presume, in the absence of a specified rate of interest, that the mortgage carries the legal rate of interest after demand. And, if the omission of these terms from the contract be attributed to the negligence of the parties, such negligence on the part of the defendants will not be permitted to defeat specific performance. *Krah v. Wassmer*, 75 N. J. E. 109; affirmed, 72 N. J. E. 305.”

This case was cited with approval by this court in *Cavanna v. Brooks*, 97 N. J. E. 329, at p. 334, and this court said:

“Uncertainty in the price, as in any of the other terms in the contract, is undoubtedly a reason for refusing specific performance. *McKibbin v. Brown*, 14 N. J. E. 13; affirmed 15 N. J. E. 498, and see *Davila v. United Fruit Co.*, 88 N. J. E. 602. So here, the failure of the parties to fix either an interest rate or a due date in the purchase money mortgages, or one of them, may be said to make the price both uncertain in amount and in the time for the payment thereof. *In respect to these particular provisions, however, the courts are able to supply the defects by reference to the ordinary conduct of reasonable men.* Thus, when a rate of interest is not stated, the parties will be presumed to have intended the legal rate, that being the one to whose reasonableness the

legislature has given its sanction. *Bowne v. Ritter*, 26 N. J. E. 457. Similarly, when no date for the maturity of the mortgage is expressed therein, a natural presumption is that the parties intended the creditor-mortgagee to have his money when he asks for it, *i. e.*, on demand. *Luczak v. Mariove*, 92 N. J. E. 377; affirmed 93 N. J. E. 501. A like presumption is indulged in respect to negotiable instruments where no time of payment is fixed by the instrument. *Messmore v. Morrison*, 172 Pa. St. 300."

"Courts of equity have given effect to these presumptions in cases where specific performance is sought. They have accordingly made decrees, *even though the rate of interest is not fixed* (*Luczak v. Mariove*, supra), *nor the due date of the mortgage included* (*Green v. Richards*, 23 N. J. E. 32; affirmed 23 N. J. E. 536."

It was also cited and relied upon by Vice-Chancellor Ingersoll in *South Jersey Furniture Corp. v. Dorsey*, 95 N. J. E. 535, in which the Vice-Chancellor said:

"Objection is also made that no time is fixed for the maturity of the first mortgage. Under such circumstances as here exist, a court of equity will, if necessary, presume it to have been the intention of the parties that the mortgage should be made payable on demand. *Green v. Richards*, 23 N. J. E. 32; *Luczak v. Mariove*, supra; *Patterson v. Loiseaux Lumber Co.*, 92 N. J. E. 569."

And where the terms of the credit to be given to the vendee are uncertain, it is settled that the vendee may waive credit and pay cash. *Binns v. Smith*, 93 N. J. Eq. 33.

Appellant confuses the effect of the indefiniteness of the terms of the first mortgage, as contained in the agreement, as an item of evidence bearing upon the question as to whether the parties intended to make a binding and complete

agreement with its effect upon the enforceability of such an agreement, assuming it to have been intended to be binding. The court below considered the indefiniteness of the terms of the first mortgage upon the first branch of the case and held, as a fact, that the parties intended that the agreement should be binding and effective. And, upon that branch of the case, the matter is within *Wharton v. Stoutenburgh*, 35 N. J. Eq. 266, and *Luczak v. Mariove*, 92 N. J. Eq. 377; affirmed 93 N. J. Eq. 501.

Upon the other branch of the case, assuming now that the terms of the first mortgage are indefinite, the matter of enforcement is within the control of the vendee for he may waive the terms of credit or the court may presume terms of credit left indefinite and the question is—how far must the vendee go and how far will the court presume? And, upon this branch of the case, *Green v. Richards*, 23 N. J. Eq. 32; *Luczak v. Mariove*, 92 N. J. Eq. 377; affirmed 93 N. J. Eq. 501; *Binns v. Smith*, 93 N. J. Eq. 33 and *Cavanna v. Brooks*, 97 N. J. Eq. 329, at p. 334, are applicable.

III.

The terms not stated in the paper sued upon but reserved by these parties for statement in the formal contract, were not supplied by the pleadings and evidence (p. 9).

Under this point, appellant argues that the effect of that portion of the decree which directs that appellant shall transfer the lands subject to the mortgage which was initially for \$70,000 now a lien thereon upon which there is now due \$55,000 and shall secure an extension of the mortgage now securing \$55,000 so that the sum

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p. 22.

of \$55,000 shall become due and payable in five years from the date of passing title, respondent, in order to make up the \$70,000, to give a \$15,000 mortgage to appellant to run for a period of five years from the date of the passing of title, with interest at 6 per cent. per annum, and, in case of the failure of appellant to obtain an extension of the payment of said \$55,000, then appellant to pay off the mortgage now a lien upon said property and accept a mortgage of \$70,000 due and payable in five years with interest at 6 per cent. containing the same terms and provisions as the first mortgage now a lien upon said premises "other than the requirement for installment payments of the principal thereof," is to import into the contract certain terms by parol evidence and that in fact it is a reformation of the contract based on parol evidence (and, indeed, it is argued (p. 11) with respect to one item upon no evidence at all) and specific performance in the same proceeding and appellant cites many cases to the effect that reformation and specific performance cannot be granted in the same proceeding.

Appellant misapprehends the effect of the opinion and of the decree. The contract is not reformed by the use of parol evidence. The physical situation was proven, not by parol but by written evidence, to interpret the language of the contract:

"Terms of first mortgage to be stated in contract— Term five years."

Appellant declines to argue that the conclusion of the Vice-Chancellor that the purpose of the parties, in inserting in the paper writing the provision that the terms of the first mortgage were to be stated in the contract, was that the terms of such mortgage were to be such as

agreed upon between appellant and Tait is erroneous, but it says that that is immaterial for "no such agreement was ever made in writing so as to satisfy the requirements of the Statute of Frauds."

Let us look at the physical situation proven by other than parol evidence.

At the time of the signing of the agreement of August 21, 1925, Exhibit 1, p. 7, appellant did not own the property sold but had it under contract from its owner, one Tait, under the terms of which it was to give a first mortgage of \$70,000 to run for a period of five years, the terms of which, however, had not then been fixed. At that point, the present contract between appellant and respondent, containing the language quoted, was executed.

Appellant had agreed to give a \$70,000 first mortgage to its vendor and also had agreed that the term of the mortgage was to be five years but had not agreed upon the other terms.

What then did the language:

"Subject to a *first* mortgage of \$70,000."

"Terms of first mortgage to be stated in contract—term five years"

mean? Appellant says that it could not have meant "'subject to the first mortgage now a lien upon the said lands and premises,' for there was none when this paper was signed by these parties." No one contended that this is what it meant.

The language, interpreted in the light of the physical facts and without the aid of parol evidence, meant that *the* first mortgage was to be *the* mortgage given by appellant to its vendor, Tait. It could mean nothing else for

appellant had agreed to give a first mortgage to Tait for \$70,000. And the language of the agreement is that the property should be taken "*Subject to a first mortgage of \$70,000,*" not that respondent should give to appellant a first mortgage for \$70,000. The property was to be taken *subject to a first mortgage*. Proof of physical facts may be referred to in interpreting language of a contract and is not offensive to the parol evidence rule or the Statute of Frauds.

Kammens v. Anderson, 4 N. J. A. R. 1097;
Franklin v. Welt, 4 N. J. A. R. 88;
Price v. McKay, 53 N. J. Eq., 588.

And this is the kind of proof which was relied on in the case at bar, not to reform and then enforce, but to interpret or, in other words, to identify the subject matter, to point out the identity of the "first mortgage" referred to in the contract.

But, even if it cannot be said that the contract is to be interpreted as referring to *the* first mortgage which was to be given by appellant to its vendor, respondent had the right to elect, the terms of the contract being definite and certain to the extent that the mortgage was to be a mortgage for \$70,000 and that it was to run for five years, to take the property subject to *the* mortgage for \$70,000 which was placed on the property by appellant. The only term of the mortgage that apparently was omitted was the interest and in such a case the courts will presume 6%, *Cavanna v. Brooks*, 97 N. J. Eq. 329, at p. 334.

Appellant complains because the court by its decree did not, for the reasons stated in its conclusions headed "Directions as to the terms of final decree," (p. 112) oblige respondent to

take subject to the amortization features of the mortgage for \$70,000. But with respect to the *amount* of the first mortgage and the period, the contract between the parties was not at all indefinite. The amount was fixed at \$70,000 and the length of time fixed at five years, and the rate of interest, 6%, was supplied by the law.

It cannot be urged that the offer of complainant made in the amendment to the bill of February 21, 1927, to take the property "subject to the first mortgage now a lien upon said lands and premises, whatever the terms of said first mortgage may be" prevents respondent from obtaining that which, by the express terms of the contract it is entitled to, *i. e.*, a credit of \$70,000 for a term of five years, if the court should consider, under all the circumstances of the case, that that is the equitable relief to which respondent is entitled.

As to the terms of the first mortgage, not expressed in the contract, defendant is obliged to take subject to the terms of whatever mortgage there may be upon the premises but both appellant and respondent are bound by such terms as *are* expressly set forth in the contract and if, in fact, appellant has so encumbered the property as to make it impossible that respondent may take subject to *such* a mortgage, the burden is upon appellant to take such steps as it may to give respondent as near the credit to which it is entitled by the express terms of the contract as is possible and that is all that the decree does.

King v. Ruchman, 24 N. J. Eq. 556;

Joseph v. Skehan, 6 N. J. Adv. Rep. 1498.

IV.

Complainant's payment of an additional \$4,000 on account of the purchase price was not sufficient part performance to take this case out of the statute of frauds (p. 14).

It was never argued that it was. The payment of \$4,000. which was made by respondent and accepted by appellant on September 1, 1926, the date fixed for the signing of the "formal contract," without any "formal contract" being signed, was used as evidence that the parties intended the contract of August 21, 1925, to be a binding and subsisting agreement and that, if appellant was entitled, under the contract of August 21, 1925, to have a "formal" contract executed, it waived that right by accepting this \$4,000 and retaining it and not tendering it back until it filed its answer and cross bill on April 28, 1927. The payment of \$4,000 was not used by the Vice-Chancellor for any other purpose (p. 87).

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V.

Appellant should not have been denied interest and carrying charges accrued prior to the amendment of complainant's bill (p. 14).

The decree, upon this branch, of the case, is in strict accord with *Joseph v. Skehan*, 6 N. J. Adv. Rep. 1498. I do not agree with appellant that the paper sued upon is, on its face, incomplete. If it was, it is not the fact that respondent did not offer to make the omissions good until it filed its amendment to the bill on February 21, 1927. Respondent was always ready to perform and the delay in the filing of the bill for specific performance, which was not

filed until January 26, 1927, was in nowise due to respondent. Appellant could not have been compelled by respondent to convey title until it had itself taken title. It declined to take title from its vendor Tait, as tendered by Tait, upon the ground that it was entitled to an abatement. The suit instituted by it was not determined until November 22, 1926, and then it was determined adversely to appellant and it was obliged to take title, under the decree, as it had originally been tendered by Tait. It did not take title until December 1926, and, almost immediately thereafter, this bill was filed by respondent. Respondent filed its bill so soon as it could and the delay was not for the benefit of respondent but for the benefit of appellant. Appellant now seeks to charge respondent with the result of delay which was incurred solely (for its appellant's) benefit and for delay when he could not have instituted suit sooner than he did.

*Amended App. 15-16
of paragraph 9*

VI.

Appellant's prayer for rescission should have been granted because of the mistake as to the true area of the property (p. 15).

VII.

The precedents cited and relied upon by the learned Vice-Chancellor as warranting a decree for abatement in this case, are not applicable on the facts in this case (p. 23).

Appellant suggests that there was a mutual mistake of fact with respect to acreage, without any fraud or misrepresentation by either party, and that, therefore, appellant is entitled to rescission. If the suggestion of appellant be

accepted, then there never can be abatement, but must always be rescission, in every case in which there is a misrepresentation as to the area of the property to be conveyed, unless the misrepresentation by the vendor is fraudulent. Appellant avoids making this statement for no case can be found to support it, but the effect of what he says is indicated by the Vice-Chancellor as just that (p. 104).

Appellant naively suggests that, because when it made the representation that it was selling 195 acres, it believed that it had 195 acres to sell, *it* was laboring under a mistake and, because respondent, to whom the representation was made, believed the statement that appellant had 195 acres to sell, *it* was also laboring under a mistake and, therefore, the minds of the parties never met and there never was a contract and rescission should be granted upon the ground of mutual mistake. Appellant attempts to sustain his argument of mistake by reference to the map which appellant showed respondent indicating the acreage as 195 acres. But it overlooks the fact that there was no mistake of respondent. He thought he was buying 195 acres and he thought so because it was represented by appellant that that was the acreage to be sold.

There was no mistake as to the identity of the property sold. It was the particular tract of ground pointed out and only that. The mistake was in the fixation of price and that was caused by the representation of appellant that the tract contained 195 acres.

Appellant refers to *Lafayette Building Corporation v. Tait*, 100 N. J. Eq. 73, and states that, because of the deficiency in acreage, appel-

lant was held to be entitled "to have its bill (for specific performance with abatement) dismissed, the contract rescinded, and its deposit money returned, or at its option, it might take the property and pay the full price."

But appellant ignores the fact that, *in that case*, appellant was the *vendee* and in this case it is the vendor. The decision in *Lafayette Building Corporation v. Tait*, 100 N. J. Eq. 73, denying abatement, was based upon the ground that Tait and appellant did *not* contract with respect to acreage but with respect to the parcel of ground as such, whereas, in the case at bar, the court below has held that appellant and respondent *did* contract *with respect to acreage and not with respect to the plot as a whole*. And no serious argument is made that the court below erred in so holding.

Appellant suggests (p. 16) that, because both parties considered the identity of the subject matter of the sale to be the property appellant was to purchase from Tait, respondent is bound to take *that* property and pay the full price without abatement. It might as well have argued that in no case can there be abatement for I do not suppose that property is ever purchased without the parties having in mind a particular parcel. If the property is purchased by acreage and the acreage is deficient abatement is allowed although the vendee has seen and gone over the property. All that appellant says goes to the determination of the question of fact—did they intend a particular parcel, irrespective of area or did they intend a particular parcel of a certain area?

Appellant, notwithstanding the flat contradiction of the witnesses on this point, attempts to explain away the contradictions by the state-

ment that they looked at the situation from different angles.

The difficulty is that the Vice-Chancellor has held as a fact, and he gives his reasons for that holding (pp. 101, 102), that the price was fixed upon the basis of acreage, and appellant does not consider the evidence to the extent which would be necessary, I submit, to indicate that the Vice-Chancellor was wrong.

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Appellant suggests that none of the case cited by the Vice-Chancellor apply because they are only applicable "to cases in which there are contracts where the minds of the parties have met." Conceded; but, if the Vice-Chancellor is correct, the minds of the parties *did* meet in the case at bar.

Appellant has difficulty in distinguishing *Triplett v. Ivins*, 93 N. J. Eq. 202, but does so upon the ground that the vendor "chose to enter into a contract agreeing to sell the land as his own, although the misrepresentation was not a deliberate fraud."

Not only was the misrepresentation not a deliberate fraud *but both parties* believed "that defendant was the sole owner of the land," bona fide so believed. It subsequently transpired that all vendor had was a life estate and yet a decree was made, at the suit of the vendee, for the conveyance of that life estate for its value "on the basis of the contract price as the value of an absolute estate in fee," in other words, with abatement. There could not be a stronger case of what appellant choses to call mistake and yet abatement was allowed.

Appellant does not refer to *Potter v. Lumsden*, 93 N. J. Eq. page 476. This court affirmed Vice-

Chancellor Fielder on his opinion, in which the Vice-Chancellor had said, at page 480:

“The rule is that where a vendor fraudulently represents the number of acres to be greater than the actual number and thereby induces the vendee to agree to pay more for the tract than he otherwise would, the vendee may refuse to perform the contract, or *where there is no proof of fraud, but the difference between the actual and the estimated or represented quantity of land is so great as to clearly warrant the conclusion that a mistake has been made by the parties and that the vendee would not have contracted to pay so large a purchase price had he known the true facts, abatement of the purchase price will be made.* Melick *v.* Dayton, 34 N. J. Eq. 245; Frenche *v.* Chancellor, 51 N. J. Eq. 624; Straus *v.* Norris, 78 N. J. Eq. 488; Hostetter *v.* Merrick, 112 Atl. Rep. 487.”

It is true that this case was a vendor's case, but *Triplett v. Ivins*, 93 N. J. Eq. 202, was a vendee's case.

It seems to me that the law is so well established in this State by the recent cases of *Triplett v. Ivins*, 93 N. J. Eq. 202 and *Potter v. Lumsden*, 93 N. J. Eq. 476, that it is useless to refer to other authorities. The Vice-Chancellor carefully considers numerous cases at page 101, etc., of the record, and I submit that appellant does not effectively distinguish them. There *have* been cases in which abatement has been denied but they have been of special hardship, and mere mistake on the part of the vendor has never been considered such a hardship.

As in the case of *Wheatly v. Slade*, 4 Sim. 126, 58 English Reprint, 48, where the vendor owning but 9/16 of an estate agreed, by mistake, to sell the whole and the abatement of the pur-

chase price would have meant that the vendor would have received nothing because a third person had a lien upon the land for a debt which would exhaust all the purchase money. This was recognized as a case of peculiar hardship.

There is no such suggestion present in the case at bar. If appellant is paid what it is entitled to upon the basis of the acreage which can actually be conveyed, it will still have a profit upon the land. Its purchase price was \$85,000. Under the decree it will receive \$92,000. There is no peculiar hardship in being deprived of a part of an anticipated profit.

Compensation has been allowed in cases where the deficiency has been very great.

In *Horrocks v. Rigby*, 9 Ch. D. 180, the deduction for an encumbrance allowed was greater than the agreed price.

Oceanic Steam Navigation Co. v. Sutherberry, 16 Ch. D. 236, the deduction was one-third of the purchase price.

In *Burrow v. Scammell*, 19 Ch. D. 175, the deduction was one-half of the purchase price.

In *Wilkinson v. Kneeland*, 125 Mich. 261, 84 N. W. 142, the same.

In *Napier v. Darlington*, 70 Pa. St. 64, the deduction was two-fifths of the purchase price.

On page 29, appellant refers to the rule which requires a prompt election to rescind as if it were based upon the doctrine of laches or a change in position. The rule requiring prompt election of rescission is not based upon laches, it is based upon election. This has been clearly pointed out in many decisions of this court.

Faulkner v. Wassmer, 77 N. J. Eq. 537;

Reed v. Benzine-ated Soap Co., 81 N. J. Eq. 182;

Arnold v. Hagerman, 45 N. J. Eq. 186;

Ginsberg v. Wolters, 94 N. J. Eq. 535;

Robertson v. Criterion Cons. Co., 140 Atl. 574.

As stated above, if there was any mistake, appellant knew it when it filed its bill to enforce its contract with Tait, January 9, 1926.

It did not rescind. On the contrary, it retained the \$1,000 which it had received on August 21, 1925 at the time of the signing of the agreement and the \$4,000 which it had received on September 1, 1925, and gave no notice of rescission, nor did it tender the money back until it filed its answer and cross bill in this case on *April 28, 1927*. In the meantime, it had held respondent bound, negotiated with him as to closing of title, etc., never intimating that it intended to rescind, if it had the right.

Under the long line of cases heretofore referred to, its mere delay is conduct evidence of an election not to rescind and, having once elected, by that conduct evidence, it cannot reelect.

VIII.

It is respectfully submitted that the decree brought up is in all its parts agreeable to equity and should be affirmed.

Respectfully submitted,

MERRITT LANE,
Of Counsel with Respondent.

