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Notice of Appeal.

NOTICE OF APPEAL.

Filed January 28, 1927.

In Chancery of New Jersey

60/514

10

Between

THE MODEL PLAN AGENCY, a
New Jersey corporation,
Complainant,

and

ISRAEL DIMOND and MILLIE
DIMOND,
Defendants.

On Bill, etc.

*Notice of
Appeal.*

20

The complainant, The Model Plan Agency, hereby appeals from the final decree made by the Chancellor on the advice of Vice-Chancellor Maja Leon Berry, in the above-entitled cause, on the twenty-fifth day of January, 1927, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

30

Dated, January 27, 1927.

CORN & SILVERMAN,
Solicitors for and of Counsel with Complainant.

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

JOS. J. CORN,
Of Counsel with Complainant.

40

New Jersey State Library

Petition of Appeal.

Service of the within notice is hereby acknowledged this 27th day of January, 1927.

HOOD, LAFFERTY & CAMPBELL,
Solicitors of Defendants.

10

PETITION OF APPEAL.

Filed February 17, 1927.

New Jersey Court of Errors and Appeals

THE MODEL PLAN AGENCY, a
New Jersey corporation,
Complainant-Appellant,

20

vs.

ISRAEL DIMOND and MILLIE DI-
MOND,
Defendants-Appellees.

*On Appeal
from the
Court of
Chancery.*

*Petition of
Appeal.*

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

30 The petition of The Model Plan Agency, a New Jersey corporation, the appellant in the above-entitled cause, respectfully shows that:

40 1. Petitioner finds itself aggrieved by a final decree made in the Court of Chancery of the State of New Jersey by His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, on the advice of Vice-Chancellor Maja Leon Berry, bearing date January 25, 1927, in a certain cause in said Court of Chancery, wherein the said The Model Plan Agency was complainant and the said Israel Dimond and

Petition of Appeal.

Millie Dimond were defendants, in this respect, to wit, that the said decree adjudges that:

(a) The complainant is not entitled to the relief sought and prayed for by it in its Bill of Complaint.

(b) The complainant's bill be dismissed.

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

1. The Court erred in refusing to strike out defendants' answer.

2. There was no evidence to sustain the Court's finding that the defendants and their predecessors in title have been in actual and undisputed possession of the lands in question. 20

3. There was no evidence to sustain the Court's finding that the defendants' title to the premises in question is good and marketable.

4. The Court erred in finding that defendants' title to the premises in question is not derived from adverse possession.

5. The Court erred in refusing to impress as a lien on the premises in question, the deposit of Twenty-five hundred dollars (\$2,500) paid by appellant to appellee, with interest from the date of payment. 30

CORN & SILVERMAN,
Solicitors for and of Counsel with Appellant.

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Answer to Petition of Appeal.

ANSWER TO PETITION OF APPEAL.

Filed February 23, 1927.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10	THE MODEL PLAN AGENCY, a New Jersey corporation, <i>Complainant-Appellant,</i> <i>vs.</i> ISRAEL DIMOND and MILLIE DI- MOND, <i>Defendants-Appellees.</i>	}	<i>On Appeal from Court of Chancery.</i> <i>Answer to Petition of Appeal.</i>
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20 The answer of Israel Dimond and Millie Dimond, the above named appellees, to the petition of appeal of The Model Plan Agency, a New Jersey corporation, the above-named appellant.

30 These appellees, not admitting the truth of all or any of the matters in said petition of appeal contained, for answer thereto, nevertheless, admit that a decree was on January 25, 1927, made and entered in the Court of Chancery of New Jersey in the above entitled cause for the purpose in said petition mentioned and as therein set forth, but as to the substance and form of said decree, these appellees beg leave to refer thereto when the same shall be produced.

These appellees are advised and believe that the said decree is agreeable to equity, and they pray that the same may be affirmed, with costs to be taxed in favor of these appellees.

40 HOOD, LAFFERTY & CAMPBELL,
Solicitors for and of Counsel with Appellees.

Bill of Complaint.

BILL OF COMPLAINT.

Filed April 17, 1926.

IN CHANCERY OF NEW JERSEY.

*To the Honorable Edwin Robert Walker, Chan-
cellor of the State of New Jersey:* 10

Complainant, The Model Plan Agency, a corporation of the State of New Jersey having its principal office in the City of Newark, County of Essex and State of New Jersey, says that:

1. On January 12, 1926, complainant and Israel Dimond and Millie Dimond, the defendants to this suit, entered into an agreement for the sale by the defendants and the purchase by complainant of the premises at the northeast corner of Central avenue and Newark street, in the City of Newark, County of Essex and State of New Jersey, a true copy of which agreement is hereto annexed and made part hereof and marked "Exhibit A." 20

2. The lands and premises therein agreed to be conveyed are:

30 ALL lot, tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the City of Newark in the County of Essex and State of New Jersey:

BEGINNING at the northeast corner of Central Avenue and Newark Street; thence north 26 degrees 16 minutes east along Newark Street 58.96 feet; thence south 63 degrees 44 minutes east 80.80 feet; thence south 20 degrees 18 minutes west 53.25 feet to the north line of Central Avenue; thence along the same north 67 degrees 35 minutes west 86.55 feet to the place of BEGINNING. 40

Bill of Complaint.

3. On execution of said agreement complainant paid to defendants the sum of \$2,500, the receipt therefor being contained in said agreement.

10 4. On April 15, 1926, between the hours and at the place set forth in said agreement, complainant was ready, willing and able to consummate said agreement and to comply with all the terms and provisions of said agreement on its part to be performed, upon like compliance by the defendants.

5. Defendants did then and there fail and refuse to comply with the terms and provisions of said agreement on their part to be performed, in that the title to said lands and premises was derived through adverse possession, in the following particulars and respects:

20 (a) As to that portion of the premises situated at the northeasterly corner of Central avenue and Newark street, measuring northerly along Newark street 30 feet, then easterly parallel or nearly so with Central avenue 72 feet 6 inches, then southerly parallel or nearly so with Newark street 30 feet, and then westerly along Central avenue 75 feet.

30 I. By deed dated October 10, 1836, and recorded in Book Q 4 of Essex County deeds, page 226, this portion was conveyed to Henry Drayton.

II. The title in the same is still in the said Henry Drayton or his heirs-at-law or devisees.

III. Neither the defendants nor their predecessors in the chain of title are the heirs-at-law or devisees of the said Henry Drayton.

40 IV. Defendants hold this portion adversely to Henry Drayton or his heirs-at-law or devisees.

Bill of Complaint.

(b) As to a portion of the premises triangular in shape, beginning at Central avenue 52 feet east of Newark street, then east along Central avenue 2 feet, then northerly about 60 feet to the north boundary of the premises, and then southerly about 60 feet to the beginning.

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I. On January 28, 1869, Terrence Devine and John McCrane, executors of the last will and testament of Winifred Slattery and Emma Jane Kinsey, William Kinsey and Edmund Kinsey, were the record owners in fee simple of lands containing the northerly half of this portion.

II. By deed dated January 18, 1867, and recorded in Book G 13 of Essex County Deeds page 464, there was conveyed to Thomas Degnen, one of the predecessors in the defendants' chain of title, lands whose easterly boundary ran from a point in Central avenue 52 feet east of Newark street and northerly parallel with Newark street 60 feet.

20

III. By deed dated December 23, 1875, and recorded in Book N 18 of Essex County Deeds page 444, there was conveyed to said Thomas Degnen, one of the predecessors in the defendants' chain of title, lands whose westerly boundary ran from a point in Central avenue 54 feet east of Newark street and northerly parallel or nearly so with Newark street 59 feet more or less.

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IV. The title in said triangular portion is still in the said Terrence Devine and John McCrane, executors of the last will and testament of Winifred Slattery, and Emma Jane Kinsey, William Kinsey and Edmund Kinsey, or one

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Bill of Complaint.

or more of them, or their successors in title, heirs-at-law or devisees.

10 V. Neither the defendants nor their predecessors in the chain of title are the successors in title, heirs-at-law or devisees of the said Terrence Devine and John McCrane, executors under the last will and testament of Winifred Slattery, and Emma Jane Kinsey, William Kinsey and Edmund Kinsey, or one of them, or their successors in title, heirs-at-law or devisees.

20 VI. Defendants hold this portion adversely to Terrence Devine, and John McCrane, executors of the last will and testament of Winifred Slattery, and Emma Jane Kinsey, William Kinsey and Edmund Kinsey, or their successors in title, heirs-at-law or devisees.

(c) As to a portion of the premises beginning at Central avenue 75 feet east of Newark street, then easterly along Central avenue 11.55 feet, then northerly at right angles or nearly so to Central avenue 59 feet more or less, then westerly at right angles or nearly so to Newark street 10.80 feet, then southerly 59 feet more or less to the beginning.

30 I. On October 5, 1833, John W. Innis and Aaron Ward, or one of them, were the record owners, in fee simple, of lands in which this portion was included.

II. The title in the same is still in the said John W. Innis and Aaron Ward, or one of them, or their or his heirs-at-law or devisees.

40 III. Neither the defendants nor their predecessors in the chain of title are the heirs-at-law or devisees of the said John W. Innis nor Aaron Ward.

Bill of Complaint.

IV. Defendants hold this portion adversely to John W. Innis and Aaron Ward, or one of them, or their or his heirs-at-law or devisees.

6. For the reasons aforesaid, complainant has elected to rescind said agreement and has demanded from defendants return of the deposit of \$2,500 paid by it, and interest thereon, and defendants have refused and still refuse to return the same. 10

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

1. That Israel Dimond and Millie Dimond, who are the defendants to this suit, may answer this bill of complaint and each statement therein made; 20

2. That an account may be taken of the amount due to complainant from defendants by reason of the deposit paid by complainant to defendants;

3. That the amount so found due be impressed as a lien on the lands and premises embraced in said agreement;

4. That defendants or one or more of them, may be decreed to pay complainant the amount so found due, with interest and costs, by a short day to be appointed by this Court; and that in default of such payment they, and each of them, be debarred and foreclosed of all equity of redemption in said lands; or 30

5. That a decree may be made for the sale of said lands and premises embraced in said agreement to pay to complainant the amount so found due, with interest and costs; 40

Bill of Complaint—Exhibit A.

6. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this Court may make in the premises.

CORN & SILVERMAN,
Solicitors for and of Counsel
with Complainant.

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Exhibit "A".

ARTICLES OF AGREEMENT, made the twelfth day of January in the year of Our Lord One Thousand Nine Hundred and Twenty-six, BETWEEN Israel Dimond and Millie Dimond, his wife, of the City of Newark, in the County of Essex and State of New Jersey party of the first part; AND Model Plan Agency, a corporation of the State of New Jersey, with its principal office located in the City of Newark in the County of Essex and State of New Jersey party of the second part:

20

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Seventy Five Thousand Dollars, lawful money of the United States, to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they the said party of the first part, will well and sufficiently convey to the said party of the second part, its successors and assigns, by Deed of Warranty free from all encumbrances, except as hereinafter mentioned, on or before the

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Bill of Complaint—Exhibit A.

fifteenth day of April, 1926, next ensuing the date hereof, all lot, tract or parcel of land and premises, hereinafter particularly described situate, lying and being in the City of Newark in the County of Essex and State of New Jersey.

Beginning at the northeast corner of Central Avenue and Newark Street; thence north 26 degrees 16 minutes east along Newark Street 58.96 feet; thence south 63 degrees 44 minutes east 80.80 feet; thence south 20 degrees 18 minutes west 53.25 feet to the north line of Central Avenue; thence along the same north 67 degrees 35 minutes west 86.55 feet to the place of Beginning. This description being according to a survey made by Lehlbach Brothers on November 15, 1906; together with the building now thereon. (A 67-286)

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20

Conveyance to be made subject to the encroachments as shown on Schedule B of a Guaranty of Title to said property issued by the Fidelity Union Trust Company issued to Israel Dimond July 10, 1922. Conveyance is also to be made subject to existing monthly tenancies for the apartments and to existing leases for the stores, all of which excepting one, expire on or before December 1, 1926, the exception being the lease held by Harry and Edwin Braender which has a privilege of renewal to May 1, 1927.

30

Parties of the first part shall have the privilege of letting the two stores now vacant, the corner store at a rental of \$150 per month for a term not exceeding three years, and the vacant store on Newark Street at a monthly rental of not less than \$40 per month for a period not exceeding three years, and if said vacant store is rented for a cafe, there shall be a security of

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Bill of Complaint—Exhibit A.

\$500. The said new leases shall contain a provision of subordination to any subsequent mortgages to be placed on said premises.

The encroachments referred to above are as shown on the survey of said premises made by C. F. Lemassena, dated June 19, 1922.

10 It is hereby agreed, that the building now erected on said premises do not violate restrictions of record, if any.

All securities paid on the leases shall upon consummation of this agreement, be paid over by the party of the first part to the party of the second part.

20 In the event the party of the second part desires, it may procure a new first mortgage not to exceed the sum of Forty Thousand Dollars, paying to the party of the first part, in addition to the purchase price aforesaid, one-half of the difference between the actual and withdrawal values of the profits in said Richmond Building and Loan Association. If the said first mortgage shall exceed Forth Thousand Dollars, the purchase money mortgage herein mentioned shall be diminished by the excess, which is to be paid by the party of the first part.

30 AND the said party of the second part, for itself, its successors and assigns, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that it the said party of the second part will pay and satisfy or cause to be paid and satisfied unto the said party of the first part, the said sum of Seventy Five Thousand Dollars, lawful money as aforesaid, as and for the purchase money of the foregoing

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Bill of Complaint—Exhibit A.

described land and premises, in the following manner, that is to say:

On Execution of this agreement for which this is also a receipt. Twenty Five Hundred Dollars\$2500
On Delivery of deed, cash, Seventeen Thousand Five Hundred Dollars.....17500

10

By assuming the mortgage at present a lien on the premises, and pay the same according to the terms thereof Thirty Thousand Dollars (which mortgage is held by the Richmond Building and Loan Association, the party of the second part to pay the full value of the shares in said Building and Loan Association).

On Bond and Mortgage, same containing usual interest, tax, assessment, insurance and installment default clauses and an agreement not to claim credit on the interest payable on bond and mortgage, by reason of any tax assessed or to be assessed against the premises, with interest at six % payable semi-annually for three years \$15000. payable as follows: One thousand dollars one year from its date; one thousand dollars two years from its date and the balance of thirteen thousand dollars in three years from its date; said bond and mortgage to contain a thirty days interest and installment of principal and sixty days tax, assessment and prior mortgage default clauses, also insurance clause, said bond and mortgage to be drawn by the attorney for the parties of the first part at the expense of the party of the second part who shall pay for stamps and recording also; and the balance of the purchase price to be paid in cash on the day and date of settlement and delivery of deed.

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Bill of Complaint—Exhibit A.

Time is made the essence of this agreement; but if the party of the second part shall on or before April 15th, 1926 pay to the party of the first part an additional sum of twenty five hundred dollars on account of the purchase price, then the time for settlement shall be extended to
 10 May 15th, 1926 as to which last mentioned date time is also made the essence of this agreement. In the event that such extension is taken by the party of the second part, the settlement shall be as of May 15th, but the party of the second part shall pay to the party of the first part the sum of One Hundred and Fifty Dollars as and for the rent of the corner store from April 15th to May 15th if said store is still vacant and forty dollars for the rent of the
 20 Newark Street store from April 15th to May 15th if said store is still vacant.

Should the party of the first part be able to rent the corner store but be obliged to take a lesser rent than \$150 per month he may take such lower rental for a period of not exceeding six months.

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

And the said party of the first part hereby agrees to pay to a commission of % on the purchase price aforesaid, said commission to be paid in consideration of services rendered in consummating this sale; said commission to become due and payable upon the execution of

40 AND IT IS FURTHER AGREED, by the parties to these presents, that the said party

Bill of Complaint—Exhibit A.

of the second part, its successors and assigns, may enter into and upon the said land and premises on the date and day of settlement next ensuing the date hereof and from thence take the rents, issues and profits to its and their use.

AND IT IS FURTHER AGREED, by the parties hereto that the said Deed of Warranty shall be delivered at the Law Office of Nathan Erlich, #31 Clinton Street, Newark, New Jersey between the hours of ten o'clock in the forenoon and four o'clock in the afternoon on the said date and day of settlement next ensuing the date hereof. 10

The rents of said premises, insurance premiums, water rents, taxes and interest on Mortgage if any, shall be adjusted, apportioned and allowed as of the day of delivery of said deed. 20

Gas and electric fixtures, gas stoves, hot water heaters, and chandeliers, carpets, linoleum, mats and matting in halls, screens, shades, awnings, ash cans, heating apparatus, if any, and all other personal appurtenant to or used in operation of said premises is represented to be owned by seller and is included in this sale.

The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part. 30

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

It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed 40

Bill of Complaint—Exhibit A.

therefor and that there are no encroachments thereon excepting as hereinbefore set forth; and that the buildings are free of structural violations of the State Board of Tenement House Supervision.

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

The premises above described are sold subject to restrictions appearing of record, if any, and zoning ordinances of the City of Newark, if valid.

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

30 AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective, heris, executors and administrators, and they hereby agree to pay, upon failure to perform the same the sum of
40 which they hereby fix and settle as liquidated damages therefor.

Bill of Complaint—Exhibit A.

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

Israel Dimond (L. S.)
Millie Dimond (L. S.)

Signed, seal and delivered 10
in the presence of

four lines stricken out
before execution
Richard E. Kohn

The Model Plan Agency
By Max Littman
Secretary

By Isaac Bruck 20
President

In consideration of mutual promises and agreement herein stated, we hereby agree to extend the date for the delivery of deed and execution of this contract to
at the same hour and place

Witness our hands and seals this day
of A. D. 30

Answer.

(a) The lands described in paragraph (a) of paragraph 5 of the bill were conveyed by Aaron Ward to Henry Drayton by deed dated October 10, 1836, and recorded November 10, 1836, in the Clerk's Office of Essex County in Book Q-4 of Deeds for said county, page 226, etc.

10 (b) Said Drayton gave to said Ward a mortgage on said lands to secure the sum of \$90, which mortgage was dated October 10, 1836, and registered in said Clerk's Office on November 10, 1836, in Book B-2 of Mortgages for said county, page 330.

20 (c) Said Aaron Ward died intestate, and his administrator, Aaron B. Ward, assigned said mortgage to The American Mutual Fire and Marine Insurance Company by assignment dated July 3, 1860, and recorded on the same day in said Clerk's Office in Book B-5 of Assignments of Mortgages for said county, page 405.

(d) One Edmund Slattery died in the year 1854 seized of said lands, and by his will, duly probated in the Surrogate's Office of Essex County, devised the same to his wife, Winifred Slattery, for life, and upon her death to his son, Harvey Slattery.

30 (c) Harvey Slattery, in consideration of the sum of \$50, conveyed his remainder interest in said lands to his mother, Winifred Slattery, by deed dated October 2, 1854, and recorded the same day in Book 204 of Deeds for Essex County, page 325, etc.

40 (f) By virtue of an order of the Orphans' Court of the County of Essex, dated October 30, 1866, Terrence Devine and John McGrane, executors of the last will and testament of Winifred Slattery, deceased, in consideration of

Answer.

\$1,400 conveyed said lands, and other lands, to Thomas Degnen by deed dated January 28, 1867, and recorded January 30, 1867, in the Clerk's Office of the County of Essex in Book G-13 of Deeds for said county, page 464, etc.

(g) By assignment dated June 8, 1870, and recorded June 14, 1870, in Book B-13 of Assignments of Mortgages for Essex County, page 320, The American Mutual Fire and Marine Insurance Company assigned the above mentioned mortgage to Thomas Degnen, who then became at least a mortgagee in possession. 10

(h) Thomas Degnan and wife conveyed said lands to Emanuel Beitman by deed dated January 23, 1907, and recorded on the same day in the Register's Office of the County of Essex in Book N-41 of Deeds for said county, page 83, etc. 20

(i) Said Emanuel Beitman and wife conveyed said lands to William H. A. Schaefer by deed dated January 31, 1907, and recorded in the Register's Office of Essex County on February 1, 1907, in Book M-41 of Deeds for said county.

(j) Frederic L. Wolf, substituted administrator with the will annexed of William H. A. Schaefer, deceased, conveyed said lands to Isadore Segal by deed dated September 15, 1921, and recorded September 19, 1921, in the Register's Office of Essex County in Book S-65 of Deeds for said county, page 277. 30

(k) Said Isadore Segal, single, conveyed said lands to Philmar Construction Corporation by deed dated September 15, 1921, and recorded in the Register's Office of Essex County on September 19, 1921, in Book S-65 of Deeds for said county, page 278, and by confirmatory deed re- 40

Answer.

corded in said office in Book A-67 of Deeds for said county, page 200, etc.

(1) Said Philmar Construction Corporation conveyed said lands to defendant, Israel Dimond, by deed dated June 1, 1922, and recorded July 10, 1922, in the Register's Office of Essex County
10 in Book A-67 of Deeds for said county, page 286.

Answering subdivisions (b) I, II, III, IV, V and VI say that the conveyances described in the answer to subparagraph (a) of paragraph 5 embraced the lands described in subparagraph (b) of paragraph 5 of complainant's bill; that the third course in the deed from Terence Devine and John McGrane, executors of the last will and testament of Winifred Slattery, deceased, intersected the northerly line of Central avenue
20 at a point 54 feet east of the easterly line of Newark street, and that the fourth course in said deed, while giving the distance to Newark street as 52 feet, nevertheless fixed Newark street as the monument.

Answering subdivisions (c) I, II, III and IV, they say that:

(a) Edmund Slattery died in the year 1854, seized of the lands described in subparagraph
30 (c) of paragraph 5 of the bill, and by his will devised said lands to his daughter, Emma Jane Kinsey, for life, and upon her death to his grandson, Edmund Kinsey.

(b) Said Emma Jane Kinsey and William Kinsey, her husband, and Edmund Kinsey, in consideration of \$1,200 conveyed said lands to Thomas Degnen by deed dated September 23, 1875, and recorded in the Register's Office of Essex County on January 4, 1876, in Book N-18
40 of Deeds for said county, page 444, etc.

Answer.

(c) The title to said lands devolved upon the defendant, Israel Dimond, by the conveyances set forth in answer to subdivision (a) of paragraph 5 of the bill.

6. They deny that the complainant has any legal or equitable right to rescind said contract.
10

THESE DEFENDANTS FURTHER
ANSWERING SAY:

7. That they and their predecessors in title have been in occupancy of all of the lands described in paragraph 2 of the bill, and that such occupancy has been uninterrupted and continued for more than 60 years prior to January 12, 1926, and these defendants are still in possession of said lands as owners thereof.
20

8. That they and their predecessors in title have been in possession of the lands described in paragraph 2 of the bill for more than 30 years prior to January 12, 1926, and that said possession was obtained by their predecessor in title by fair bona fide purchase of said lands of person or persons in possession thereof and supposed to have had a legal right and title thereto, and these defendants are still in possession of said lands as owners thereof.
30

9. That a suit is now pending in the Circuit Court of Essex County wherein The Model Plan Agency is plaintiff and these defendants are defendants, which suit is brought for the purpose of recovering the sum of \$2,500 paid on account of said contract and fees for examining said title and disbursements alleged to be of the value of \$632.50, and that the same objections to the title
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Replication.

are stated in the complaint in said law action as are set forth in the bill in this cause.

HOOD, LAFFERTY & CAMPBELL,
Solicitors of the Defendants,
Israel Dimond and Millie Dimond.

10

REPLICATION.

Filed June 8, 1926.

IN CHANCERY OF NEW JERSEY.

Between

20

THE MODEL PLAN AGENCY, a
New Jersey corporation,
Complainant,

and

ISRAEL DIMOND and MILLIE
DIMOND,
Defendants.

On Bill, etc.
Replication.

30 Plaintiff replying to the defendants' answer, says that:

1. It joins issue on defendants' answer.
2. As to the answers to paragraph 5-(a) of the complaint;
 - (a) It admits section (a).
 - (b) It admits section (b).
 - (c) It admits section (c).
 - (d) As to the allegations contained in section (d), it admits that one Edmund Slattery died in

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Replication.

the year 1854, and denies that he was seized of said lands, and has not sufficient knowledge or information whereof to form a belief as to the remainder of the section.

(e) It admits the conveyance mentioned in section (e), but denies that Harvey Slattery had any remainder interest in said lands.

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(f) It admits the conveyance mentioned in section (f).

(g) It admits the assignment mentioned in section (g), and has not sufficient knowledge or information whereof to form a belief as to the remainder of the section.

(h) It admits the conveyance mentioned in section (h).

(i) It admits the conveyance mentioned in section (i).

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(j) It admits the conveyance mentioned in section (j).

(k) It admits the conveyance mentioned in section (k).

(l) It admits the conveyance mentioned in section (l).

3. As to the answers to paragraph 5-(b) of the complaint:

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(a) It denies the sufficiency of defendants' answer.

4. As to the answers to paragraph 5-(c) of the complaint:

(a) It admits that Edmund Slattery died in the year 1854, and denies that he was seized of the lands, and has not sufficient knowledge or information whereof to form a belief as to the remainder of section (a).

40

Replication.

(b) It admits the conveyance mentioned in section (b).

(c) It admits the conveyance referred to in section (c), but denies that the title to said lands devolved upon the defendant, Israel Dimond, by said conveyances.

10 5. It has not sufficient knowledge or information whereof to form a belief as to paragraph 7 of the answer.

6. It has not sufficient knowledge or information whereof to form a belief as to paragraph 8 of the answer.

7. It admits the pendency of the suit mentioned in paragraph 9 of the answer but alleges that the purpose of said suit is to recover \$10,000
20 damages for the fraud of defendants in misrepresenting the title to said premises to complainant's damage.

8. Complainant will object, at the hearing, that the defendants' answer does not disclose a proper defense to this action.

CORN & SILVERMAN,
Solicitors for Complainant.

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Opening Discussion.

IN CHANCERY OF NEW JERSEY.

Between

THE MODEL PLAN AGENCY, a
New Jersey corporation,
Complainant,

and

ISRAEL DIMOND, *et al.*,
Defendants.

10

Transcript of testimony taken in the above cause before Hon. Maja Leon Berry, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, on?

20

Appearances:

Messrs. Corn & Silverman for complainant.

Messrs. Hood, Lafferty & Campbell, for defendants.

Mr. Corn: We have a written stipulation, which is offered in evidence.

(Marked Exhibit C. 1.)

Mr. Corn: The agreement is also admitted.

The Court: This is not a complete stipulation
of facts?

30

Mr. Corn: No, it is a stipulation as to the deeds and mortgages—what their contents would be, if they were produced here in court.

The Court: There is an admission also of the contract of sale of the property, which is offered in evidence.

(Contract marked Exhibit C. 2.)

Mr. Corn: As to Lot No. 92, the record shows
that in 1836 the property was conveyed by Aaron

40

Opening Discussion.

Ward to Henry Drayton. Henry Drayton gave back to Ward a purchase money mortgage for \$90. This mortgage was assigned finally, in 1870, to Thomas Degnen.

10 The record discloses no deed out of Drayton or his heirs, nor any foreclosure proceedings or other proceedings taken on the mortgage finally acquired by Thomas Degnen.

That is the first item which we claim is adverse possession, inasmuch as we hold that the record title is still in Drayton, insofar as Lot No. 92 is concerned.

20 The next portion of the premises which we claim to be held by adverse possession is that part which will lie between the easterly line on Plat B and the westerly line on Plat C; that is, the easterly line on Plat B is located at a point 52 feet from Newark street; whereas, the westerly line of Plat C is located 54 feet from Newark street. This was derived as follows: There was a deed in 1867, given by Devine, as executor of Winifred Slattery, deceased, to Degnen. The description in this deed commences at the intersection of Newark street and what is now Central avenue, running 60 feet along Newark street; then at right angles to Newark street 54 feet; 30 thence parallel with Newark street 60 feet, and then along Central avenue 52 feet to the place of beginning. This is a misdescription, but it is so recited in the deed.

The Court: That would make the fourth course 54 feet instead of 52?

40 Mr. Corn: That is to say, if the lines are considered parallel; that is, if the mistake came in marking it 54, and the word "parallel" was correct. On the other hand, if the word "parallel"

Opening Discussion.

was not correct, and put in there, and should not be, then 52 would be correct.

The Court: But it is there. They are both there; the monument governs. If the third line is parallel, then the next line must be 54 feet long.

Mr. Corn: That would be, if it wasn't for the reading of the next deed. 10

In 1867 this property which is shown on Plat B was acquired by Degnen. In 1875—

The Court: As I look at this abstract, Degnen had no conveyance of any portion of Lot 92 or lot—

Mr. Corn: Except insofar as you might say the deed from Devine to Degnen, which would include all that is shown on Plat B, although we claim that Devine had no paper title. 20

The next deed which is plotted out on Plat C 20 is a deed from Kinsey to Degnen, and commences 54 feet from Newark street and running along the easterly line of property of said party of the first part, the party of the first part in that deed being Kinsey. If Degnen's line ran down 54 feet along Central avenue, then that deed should describe it as along the easterly line of property of the party of the second part.

30 Next, in 1867, he acquired that shown on Plat B, and at the time he got title to the premises shown on Plat C, he already owned the westerly portion, and therefore from the wording of the two deeds, we claim that there is such a question as would raise a reasonable doubt, and we still claim that that strip with that triangle two feet resting on Central avenue, running back, is adversely held.

40 Mr. Lafferty: Our records show the party of the second part, instead of the party of the first part.

Opening Discussion.

Mr. Corn: The last item of adverse possession is that which is shown on Plat A, lying between the solid line and the dotted line on the east, a distance of about eleven feet on Central avenue.

10 Inasmuch as this isn't admitted, I will state that we will seek to prove that the title in that strip was possessed in Aaron Ward or John W. Inness; that their division line came somewhere in there, and that there have been no conveyances out of either of them.

20 The conveyance in 1875, you will note from Plat C, runs along Central avenue a total ultimate distance of 85 feet. Even considering that there is no adverse possession in either case, which would leave a distance of 1.55 feet on Central avenue, for which there is no deed anywhere until, as the record shows, in 1907, when Degnen conveys out the premises which he got as shown on Plat B and C, he then conveys that which is shown on Plat D, taking possession of that 1.55, for which at no time did he have a deed.

30 We have consented, for the purpose of this suit, that Degnen had adverse possession, or rather he had open, notorious and continued possession, enough to indicate that he had adverse possession since he got the deeds to the property, which is for the part B in 1867 and part C in 1875.

The Court: You mean he has had actual possession?

Mr. Corn: Yes.

40 We are not obligated to take the title under the agreement, which is that we are not to take title which is derived through adverse possession.

Opening Discussion.

In the replication we have reserved the right to dismiss the answer filed.

Mr. Lafferty: Aaron Ward seems to have been the owner of Lots 92 and 93, as shown on this marked Plat A. He conveyed 92 to Henry—

The Court: Just one moment. Do I understand that it is admitted that Aaron Ward 10 originally owned everything that is shown on Plat D?

Mr. Lafferty: No, Mr. Corn does not admit that.

The Court: But you admit that he had record title to everything shown on Plat A inside of the heavy line?

Mr. Corn: Yes.

The Court: But that he did not own that portion lying to the eastward and enclosed within the dotted lines? 20

Mr. Lafferty: Yes, that is right.

The Court: Do you contend that he did?

Mr. Lafferty: No, sir; we don't contend that he did. We contend, though, that this property, all the land that is shown on Plat D, was in the possession of one Slattery, who died and by his will devised Lots 92 and 93—I won't say that, 30 because I think there has been a division of it, so that it makes those lots 54 feet deep instead of, as they are shown here, 75—shown on Plat C—devised this to his wife for life, and the remainder to his son. And the easterly part of Plat C, he devised to his daughter, Mrs. Kinsey. That was in 1854. From that time down there is a perfect chain of title covering all of this land.

The Court: Both sides admit that, don't they? 40

Opening Discussion.

Mr. Corn: Since 1907, that is the deed out of Degnen; that is the first time that Plat D is described as a whole.

Mr. Lafferty: Lot 93 was owned by Slattery. There is no question about that.

The Court: Out of Aaron Ward?

10 Mr. Lafferty: By mean conveyances from Aaron Ward. The title comes down from Aaron Ward.

Now, we come to the deed from the executors of Mrs. Slattery to Thomas Degnen, and that is, as your Honor has suggested, that if the line is drawn parallel, the distance must be 54 feet.

20 Then the deed from Kinsey to Degnen. I might say that the deed from Slattery's executors to Degnen was in 1867. The deed from Kinsey to Degnen was in 1875, and that deed begins at a point in the northerly line of Central avenue 54 feet east of Newark street, which would be the very point in which a line drawn parallel to Newark street in the old Degnen deed would have intersected.

30 In the stipulation it seems we have stipulated along the line of the party of the first part, but our records show here the party of the second part. Our records show along the east line of the party of the second part. I don't think, however, that that makes any difference, because if the old Degnen line ran parallel with Newark street, it would intersect Central avenue at a point 54 feet east, and it would run to Central avenue.

There is no triangle there of two feet, as Mr. Corn has contended.

40 Then that deed itself runs, beginning in the northerly line of Central avenue 54 feet east

Opening Discussion.

from Newark street, along the easterly line of land of the party of the second part 59 feet to Lot No. 94 on map of property of Aaron Ward; thence easterly along said Lot 94, 26 feet to Hugh Carroll's lot.

Hugh Carroll's lot as a matter of fact was more than 26 feet. 10

The Court: Then it would come to it.

Mr. Lafferty: Thence easterly along the same 59 feet, more or less, to said avenue; thence westerly along said avenue 31 feet to the point or place of beginning.

The Court: You contend that the space shown between the heavy line and the dotted line on the easterly side of this property—

Mr. Lafferty: Plat C.

The Court: —would be included in the distance between the 26-foot point on the easterly line of the Carroll lot? 20

Mr. Lafferty: Yes.

The Court: And therefore it would go, because the boundaries govern?

Mr. Lafferty: Yes.

The Court: Then as I understand it, the first point to be determined is whether the present owner's title to Lot No. 92 is derived from adverse possession. That is the first thing, isn't it? 30

Mr. Corn: Yes.

The Court: And your claim on that is that the Aaron Ward mortgage was never foreclosed, and there was never any conveyance out of Aaron Ward's mortgage for that particular lot?

Mr. Corn: Yes.

The Court: Now, as to Lot 93.

Mr. Corn: That is all right. 40

Opening Discussion.

The Court: I understand there is a complete record title down to date?

Mr. Corn: We admit that. That is the only portion that there is a complete record title of.

The Court: I am not quite clear about this.

10 For instance, on Plat A, the distance was about eleven feet, I think.

Mr. Corn: That was taken from the plotting of the deeds, not from actual survey, but plotting from deeds superimposed over the survey of the land which we were supposed to get.

The Court: Then in Plat B, the distance between the heavy line and dotted line on the easterly line was about 33 feet, and on the next plat, Plat C, it is 31 feet?

20 Mr. Lafferty: That is between the two heavy lines.

The Court: It is 31 feet and a fraction 1.10 I think you said.

Mr. Corn: 1.55.

The Court: Why is there any discrepancy between Plat A and Plat B or Plat C?

30 Mr. Corn: Because they were simply taken by possession and then deeds given. The reason why there is a discrepancy between Plats A and B is because B and C are really one. That is, they were derived through the estate of Winifred Slattery; B, by deed from the executors, and C, by deed from the heirs.

The Court: I understand that, but Lots 92 and 93 are referred to as lots shown on the Aaron Ward Map, and they are supposed to be 75 feet in depth by 30 feet in width each.

40 Mr. Corn: Yes.

Opening Discussion.

from Newark street, along the easterly line of land of the party of the second part 59 feet to Lot No. 94 on map of property of Aaron Ward; thence easterly along said Lot 94, 26 feet to Hugh Carroll's lot.

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The Court: I understand that, but Lots 92 and 93 are referred to as lots shown on the Aaron Ward Map, and they are supposed to be 75 feet in depth by 30 feet in width each.

40 Mr. Corn: Yes.

Motion to Strike Out Defense.

The Court: You admit that Lot 93, the record title is good from Aaron Ward down to date?

Mr. Corn: We do.

The Court: If that is so, why isn't this dividing line Plat B at a distance of 52 or 54 feet, whatever it may be, from Newark street? 10 Has in the meantime Lot 93 been divided?

Mr. Corn: Lot 93 was divided, yes, sir. What actually seems to have occurred, is that Slattery, who owned Lot 93, took 92 to possession and then divided Lots 92 and 93 by a line and then later took another piece to the east by possession, and stretched the 75 feet in 85 feet.

The Court: The division which Slattery made was a division by will?

Mr. Corn: Yes, a will confirmed by deeds. 20

Mr. Lafferty: I think it is agreed that Degnen and those claiming under him have been in possession of all the lands described on Plat D from the date of the deeds to him, the westerly part—1867 for the westerly part and 1875 for the easterly part, and we have a stipulation as to that.

We have a witness here and we will endeavor to prove and will prove that the Slatteries were in possession of the property more than sixty 30 years ago, and it was through the Slatteries that Degnen claimed and the now owner claims.

The Court: You may proceed with the testimony, if you are ready.

Mr. Corn: I would like to make a motion now to strike out the defense as given in the answer; the first defense being that the present owner and his predecessors in title were in possession for sixty years. We claim that that is no defense 40

Motion to Strike Out Defense.

whatever to this action. That is exactly what we have provided we shall not have—a possessory title. We are to have what is not a possessory title. They set up as a bar to our action that the predecessors in title or Dimond had possession. That is not sufficient. In our complaint we admit they had possession. We say they had adverse possession. If they had possession or didn't have possession, it is not a defense to this particular action. We are not in this action claiming that their title is not good or marketable. That is not the issue. The only issue here is, is this title one derived through adverse possession or is it not? If it is derived through adverse possession, we have, under the terms of our agreement, the right to rescind and demand a lien on the property for our deposit. If it is not an adverse possession title, but is a paper title, then we have no right in this court. Therefore, I hold the defense in this case of possession is not a good defense to the action, because that is exactly what we have provided against in our agreement.

The Court: What have you to say?

Mr. Hood: The problem for decision here is what is meant by adverse possession. What do we mean when we enter into a contract and say that the title should not be one by adverse possession, and having determined that, is this title one of that character? We say that the title under the laws of New Jersey—the title to this property is absolutely good, from two points of view.

The Court: They don't deny that.

Mr. Hood: But if you please, a moment; one is under the sixty-year statute of limitation; the other is under the thirty-year statute of limita-

Motion to Strike Out Defense.

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The Court: They don't deny that.

Mr. Hood: But if you please, a moment; one is under the sixty-year statute of limitation; the other is under the thirty-year statute of limita-

Motion to Strike Out Defense.

tion. The one takes us back to 1852, and that meant sixty years from that, so that from that point of view, in the year 1912, there was under the statute an absolutely perfect title in the language of the statute. The other is the thirty years limitation, which begins in the one case in 1867, and in the second case, in 1875, which would take you up to 1905, or 1897 on the record to the two pieces, and as to that statute says "that it shall be a perfect title."

In either event you see you have what under the law of the State, if I am right in my contention, has been a perfect title under the thirty-year statute, for more than twenty years; under the sixty-year possession, for more than twelve years. And that being the situation, is that what is meant by a stipulation in the contract, that it is not a title derived from adverse possession? Isn't there a limit somewhere sometime?

The Court: Let me ask you this: When you say a title derived from adverse possession, don't you have reference to the title of the man from whom you are buying?

Mr. Hood: That is my notion about it, and I think that is the common understanding of it.

The Court: That is my understanding, but you and I both may be wrong. My theory of that sort of a provision in a contract is that the title of the vendor himself is not based on an adverse possession. In other words, that would even go to this extent, that if the title of his predecessors in title began within the twenty-year period, prior to his contract, that that would be considered under that sort of a contract to be a title based upon an adverse possession. But if the title had been perfected prior to the twenty-year period before the settlement was to take place,

Emil R. Silverman, direct.

then the title would be based upon a record title which was perfect at that time. Now, that would be my theory offhand, but I may be altogether wrong, and you may be also.

Mr. Hood: That is the view I wanted to present to your Honor. Your Honor has stated it
10 much more correctly than I can state it, but it cannot be that the theory that is presented to your Honor by the complainants in this case can be a sound theory.

The Court: Complainant's counsel says if there is adverse possession anywhere along the line interminably as far back as he wants to search—

Mr. Hood: Of course, someone in New Jersey took it by occupation at sometime, and by
20 possession there has got to be a limit in time. Where is the limit? We say we have a title which has once reached the stage that it is a perfect title, a good marketable title, and that stage is reached before the vendor in the agreement makes his contract.

The Court: I am inclined to agree with you. That is the whole point in the case, but I will not decide it now. I will deny the motion to
30 strike out the answer. I think the whole matter should be decided together. If you have any testimony now to submit, I will hear it.

EMIL R. SILVERMAN, sworn for complainant.

Direct examination by Mr. Corn.

Q Are you a master of this court? A Yes.

Q Have you examined the title to the premises at the corner of Newark street and Central
40 avenue, Newark? A I have.

Caroline A. Johnson, direct.

Q Can you say in whom, in 1835, the title was vested in that portion which is shown to the east of the solid line on Plat A, between the solid line and dotted line?

Mr. Hood: You mean what the record shows?

Mr. Corn: Yes. 10

A I can.

Q In whom does the record disclose the title was vested in that piece? A John W. Ennis.

Q Have you examined the record for any conveyance out of Ennis for that piece? A I have.

Q Have you found any? A I have not.

Q Have you examined the records out of the heirs and devisees of John W. Ennis for that
20 piece? A Yes.

Q Have you found any deed out of him for that piece? A I have not.

Mr. Hood: No questions.

COMPLAINANT RESTS.

CAROLINE A. JOHNSON, a witness called on
30 behalf of the defendant.

The Witness: I will swear as by me and my Lord as my soul liveth, I will tell you the truth.

The Court: I think that will be sufficient.

Direct examination by Mr. Lafferty.

Q You reside in Newark, Mrs. Johnson? A
40 I do, and was born right here in Newark.

Caroline A. Johnson, direct.

Q Where in Newark do you now reside? A What you call Nesbitt street, the upper end.

Q Where do you reside at the present time?

A 34 Newark street; I have been there eighty years or seventy-five years.

10 Q Were you acquainted with the property at the northeast corner of what is now Central avenue and Newark street? A I was; I played there, ate there; ate the cherries there and lived in the little house during the war—the Civil war; sewed on knapsacks and tents for the soldiers during the 60's, and when I married—before I married, I moved away; after I married, I moved back, and my youngest boy was born there in 1872.

The Court: How old are you, Madam?

20 The Witness: Last January I was eighty years of age.

Q Now, you say you have lived in the little house on Central avenue. A I did.

30 Q What do you mean by the little house on Central avenue? A I will tell you. There were three houses; there was one facing Newark street, and then there was another one attached to this one facing Newark street, but that faced Central avenue, and there was a little house separate, an alleyway between. I lived in the one with the alleyway between.

Q In what direction from the two houses was that, Mrs. Johnson? A Here was Newark street (indicating).

Q Was it east of Newark street? A You call it east, I suppose.

40 Q Toward Newark street, and what was the next street below, toward Broad street? A Lock street.

Caroline A. Johnson, direct.

Q Then it was between Newark and Lock street? A Yes, but afterwards there was Dey street come in there—no, it was Lock street. Lock street was the next street to Newark street.

Q You know where the school house is situated, on Central avenue? A Yes, but that wasn't on the street then. It was only a little 10 lane at that time.

Q And the house in which you lived was between Newark street and the school house? Where the school house now is? A Yes.

Q The school house was not there at that time? A No. Nor Dey street was not there.

Q Did you ever know a lady by the name of Winifred Slattery? A Well, now, you say "Winifred"; I never heard her called Winifred, but I heard her called Slattery. We never called her anything but "the old lady of the house in Newark Street," and we would go there and get cherries. Mrs. Slater—her children, when they grew up, they would not go by the name of Slattery. Why, the only way I could tell you and swear that she was a Slattery, her cousin told me—her cousin, Mrs. Clancy, told me—I was saying something about Grandmother Slater, and she said, "Indeed, her name is not Slater"; I said, "What is it?" She said, "Slattery." 20 30 When I came home, I said to the old lady, "Do you know what Mrs. Clancy said about you? She said your name is not Slater; it is Slattery." She almost ate my head off because the children changed the name to Slater.

Q You knew this lady, then, who was known and whose children were known under the name of Slater? A Yes.

Q And her name was Slattery? A Slattery. 40

Caroline A. Johnson, direct.

Q When did you first know her; how old were you? A About five years of age.

Q Where did she live at that time? A Right in the front house on Newark street, facing Newark street.

Q You mean the house corner of Newark street and Central avenue? 10

Mr. Corn: I object.

The Court: She said the front house.

A The front house, facing Newark street.

Q There were two houses on Newark street.

A Two? Only one. Here is the front house on Newark street, and then you had to go down—maybe the other one was attached to the front one, but it was on Central avenue; it was two separate houses, but one faced Central avenue and one faced Newark street. The one on the corner faced Newark street, and that was the one the old lady lived in with her children. 20

Q The one at the corner of Newark and Central avenue? A Yes.

Q And there is where she lived when you first knew her? A Yes.

Q And you were then, you say, about five years of age? A Yes. 30

Q Did she afterwards move from that house, and if so, where? A She afterwards moved to the middle house, and from there she moved to the third house, upstairs.

Q On what street? A We called it Inness street; it is called Central avenue. I have been waiting for you to say the word "Inness," but I didn't hear you say it. We called it Inness.

Q It was then called Inness street and is now called Central avenue? A Yes. 40

Caroline A. Johnson, direct.

The Court: Is the third house you mentioned the one you lived in?

The Witness: Yes, with my father. We had three rooms downstairs and she lived upstairs in two rooms, upstairs above us.

The Court: She lived in all three of them, according to her testimony? I mean by "she", Mrs. Slattery. 10

Mr. Lafferty: Yes.

Q Do you remember the names of the children of Mrs. Slattery? A Mary Sherman was the oldest; Edmund Slater was the second; Emma Jane was the third, and Harvey was the fourth.

Q Do you know whom Emma Jane married? A Kinsey—a man by the name of Kinsey. His people lived on Norfolk street; we used to call it Chatham street. 20

Q Was the son's name Harvey? A He was the youngest child.

Q It wasn't Thomas? A Oh, I forgot Thomas. I forgot Thomas. Tom Slater, oh.

Q You remember Thomas now? A Oh, yes; oh, yes; he was the sport of the family. 30

The Court: The support or the sport?

The Witness: No, the sport. Oh, I forgot all about him.

Q Was Thomas the oldest or the youngest child? A No, Harvey was the youngest and Mary was the oldest and Edmund was second, and Thomas was next, and Emma Jane next, and Harvey next. Oh, I don't see how I forgot Tom. It has been a good while ago. 40

Caroline A. Johnson, direct.

Q Do you remember Edmund Slattery, the father of these children? A The old gent himself?

Q Yes. A No, I don't remember him. It just seems like a dream to me, a little old man, but for certain I cannot say.

10 Q You don't recall anything about his death?
A No, nothing at all. The only death I recall is Harvey, and my mother died at that time and there was a mix-up at the funeral; instead of the coaches coming to us, they went to him and we had to wait until they come home from their funeral to come to ours.

Q Now, Mrs. Johnson, as I understand you, the Slatteries lived first in the corner house at Central avenue and Newark street, and then
20 later Mrs. Slattery lived in the next house fronting on Central avenue? A Yes.

Q And later in the third house? A Yes.

Q And that was the one in which you lived?
A Yes.

Q With your father? A Yes.

Q And you say that was during the Civil War? A That was during the Civil War.

Q Did you subsequently live in any one of these houses? A That one that I am telling
30 you about, the little one; I never lived in any of the others.

Q How long did you live in the little house?
A About four years; four or five years.

Q And then you were living with your father? A Yes, I wasn't married then.

Q After you were married did you occupy any of those houses? A That one I had, the little house, what I call the little house, I had the whole house, upstairs and downstairs, after I
40 was married, because I used to growl and

Caroline A. Johnson, direct.

grumble that I had to go on the outside to go upstairs; there was no inside way.

Q How long did you live there? A Maybe eight years; maybe eight years—oh, I am wrong, maybe twelve or thirteen years, because my husband was janitor in the Central Avenue school.

Q And during the time that you lived there
10 after you were married, who was the owner of the property? A Mr. Degnan.

Mr. Corn: I object.

Q Whom did you pay your rent to? A Mr. Degnan, Mr. Thomas Degnan.

Q When you first lived there. A To Mrs. Slater herself.

Q You paid the rent to Mrs. Slater herself?
A Yes. 20

Q Do you know the condition of the property as it presently exists? A No way at all; you gave me all the information; I didn't know who it belonged to or nothing.

Q I don't mean the owner; the condition of the property, is the property in practically the same condition as it was when you were there?
A Explain that to me; I don't know what you mean. 30

Q Are the buildings the same as they were?
A Oh, no.

Q What happened after you were there? A They were all torn down and a big one built up; the two little ones are torn down. The whole three are torn down, and Degnan built out this way (indicating) and he built down that way and built higher houses.

The Court: Degnan built?

The Witness: Yes. 40

Caroline A. Johnson, direct.

Q And are the same buildings there which Degnan built? A They are the same.

Q Do you know when Degnan built? A Oh, no, I am wrong again. The house on Newark street is changed; it was a tenement house and now they have stores in there.

10 Q That is only the interior that has been changed; the building is the same? A The building is the same.

Q And that was built by Mr. Degnan? A Yes.

Q Do you recall when that was, Mrs. Johnson? A Well, I don't think I can just—I know, though, it wasn't—oh, yes, it was, because—yes, it was in the seventies, because I went there the latter part of 1870; I went there and he was building them then.

20 Q And the buildings that are there now, are they in the same location that they were at the time that he rebuilt them? A Yes, the same place. It is still Central avenue and Newark street.

The Court: Do you mean you went there the latter part of 1870?

30 The Witness: Yes, sir, I did. I was married then. I lived there when I was a girl; during the sixties I moved away from there, and married and come back again afterwards in the seventies.

Q What time in the seventies? A It must have been, because my youngest child was born in 1872, so it must have been between 1870 and 1871.

40 Q Your youngest child was born in the house? A Yes.

Caroline A. Johnson, cross.

Q Then it was shortly after that that Mr. Degnan tore these buildings down, as I understand, and built the buildings that are there now? A Yes.

Cross examination by Mr. Silverman.

10 Q You first moved into that house facing on Central avenue after the Civil War? A No, during the Civil War, because I will tell you how I am so particular about it: I sewed on knapsacks and tents for the soldier boys.

Q That was when you were a little girl? A Well, I was fifteen or sixteen.

Q You moved from there? A I moved away to another place.

20 Q When you moved from the house facing on Central avenue, who lived there with you? A The old lady lived upstairs in the house with me.

Q By "the old lady" you mean Mrs. Slattery? A Mrs. Slattery.

Q You moved away and you came back? A I came back after I got married.

Q In the year 1870 or 1871? A Yes.

30 Q And was Mrs. Slattery still living there? A No, she was living in the little house; no, she was dead.

Q Was there any other person living there when you came back? A I had the little house all by myself.

The Court: That little house faced on Central avenue, between the school and Newark street?

The Witness: Yes.

Caroline A. Johnson, cross.

Q Can you tell us how far away from the school that house was? A One house in between us, whatever the depth of that is, one house between.

Q Who lived there, do you know? A A man by the name of—I know it well.

10

Mr. Lafferty: Is his first name Hugh?

The Witness: Hugh. Can't I recall them, where my boys and they used to fight like tigers?

Q Carroll? A Hugh Carroll.

Q And between Carroll's house and the house in which you lived, there was an alley? A No, mine was right up against the Carroll house; the alleyway on this side (indicating).

20

Q Isn't there an alley there now between the house that was once Carroll's and the house that you lived in? A No, not that I know of. You know I don't pay no attention to it now.

Q But you are sure there was no alley? A No, positively no, because there was only the one alley, and that was on the Degnan side, and Mr. Degnan wanted his front house tenants to go through and go through my alleyway, and I fought him and said they couldn't do it.

30

Q Did the Carrolls have an alley? A No.

Q You are sure about that? A I don't remember that.

Q Do you remember a gentleman by the name of Henry Drayton? A No. I cannot go no further back than Mrs. Slattery, or Mrs. Slater.

40

Caroline A. Johnson, re-direct.

Re-direct examination by Mr. Lafferty.

Q Mrs. Johnson, can you see these outlines? A Yes, I can.

Q You see these lines? A Yes; that is Degnan (indicating).

Q And this is Kinsey? A Now, I never knew that. Emma Jane had the shed of that other property. You are enlightening me on that, but I know the old man left a will and left it to Emma Jane.

10

Q Is that a fairly accurate picture of the way the buildings were at the time when you lived there? A I cannot see the little house.

Q Here is the little house (indicating). A Oh, there; there was one attached in there between that little one and this one (indicating). That is the other house on Newark street. We came in here (indicating), then come back here (indicating).

20

Q That is the next property? A Yes.

Q Who is this one here? A Thomas Degnan. That little corner don't seem to be—because we came in Newark street here, and then there was a little house, and then here was the one that I lived in, and there was an alley between.

30

The Court: Of course, that corner house had been built up.

Mr. Lafferty: This is an 1873 atlas which the witness has referred to—an atlas of the City of Newark of 1873.

Witness: One faced Newark street and two faced Central avenue.

Q Mrs. Johnson, I show you an atlas of the City of Newark of 1873, plate showing the fif-

40

Caroline A. Johnson, re-direct.

teenth ward, and on which is shown property at the corner—northeast corner of Central avenue and Newark street. On Central avenue there appears to be a house—

Mr. Corn: I will object to this.

10

Q (Continuing.) —there appears to be a house under the name of John Kinsey, and at the corner of Central avenue and Newark street there is another house, and adjoining that house on Newark street there is another house under the name of Thomas Degnan. I will ask you to look at that atlas and tell me whether or not the location of the buildings shown on these three lots are approximately correct? A Oh, they are.

20

Mr. Corn: I object to the refreshing of this witness' memory, with this atlas, or map before her. I think she should testify from her memory.

The Court: Your objection is overruled, if that is the only ground.

Mr. Lafferty: I would like to introduce that map in evidence.

30

The Court: Is it a city atlas?

Mr. Lafferty: Yes, atlas of the City of Newark.

The Court: It is an old map?

Mr. Lafferty: Yes, 1873.

The Court: I will admit it.

Mr. Lafferty: The map is page 106.

BOTH SIDES REST.

40

Exhibit C. 1.

Exhibit C. 1.

IN CHANCERY OF NEW JERSEY.

60/514

Between

THE MODEL PLAN AGENCY, a
New Jersey corporation,
Complainant,

and

ISRAEL DIMOND, *et als*
Defendants.

10

On Bill, etc.
Stipulation.

It is hereby stipulated and agreed by and between Corn & Silverman, solicitors of complainant, and Hood, Lafferty & Campbell, solicitors of defendants, that the abstracts of deeds, mortgages, assignments and wills hereinafter mentioned shall, on the trial of this cause, be used with the same effect as if the originals thereof were produced in Court.

20

Dated at Newark, N. J., November 8, 1926.

CORN & SILVERMAN

Solicitors of Complainant

30

HOOD, LAFFERTY & CAMPBELL

Solicitors of Defendants.

40

Exhibit C. 1.

WARRANTY DEED

10 Aaron Ward Book Q 4—226
 to Cons. \$180
 Henry Drayton Dated Oct. 10, 1836
 Ack'd Oct. 31, 1836
 Rec'd Nov. 10, 1836

Premises in the City of Newark.

BEGINNING on east side of Newark Street 520 feet to the south from the corner of Sussex Avenue; thence running south 59 degrees east 72 feet 6 inches; thence south 26 degrees west 30 feet; thence north 59 degrees west 75 feet to Newark street; thence along same north 31 degrees east 30 feet to the place of BEGINNING.

20 Being designated as lot #92 on map of lots sold September 26, 1836 by the said Aaron Ward.

There is no record in the Essex County Surrogate's Office of the death of Henry Drayton.

MORTGAGE

30 Henry Drayton and Book B 2—330
 Jane, his wife Cons. \$90.
 to Dated Oct. 10, 1836
 Aaron Ward Ack'd Nov. 7, 1836
 Reg'd. Nov. 10, 1836

Premises in the City of Newark, N. J.

Same as Q 4—226 of deeds.

Aaron Ward died intestate prior to March 4, 1854 for on that day administration of his estate was issued to Aaron B. Ward. See Book B 398.

40

Exhibit C. 1.

ASSIGNMENT

Aaron B. Ward, admin. Book 5—405
 of Aaron Ward, dec'd. Cons. \$1.
 to Dated July 3, 1860
 American Mutual Fire Ack'd July 3, 1860
 and Marine Ins. Co. Rec'd July 3, 1860 10
 Assigns mortgage B 2—330.
 Covenants \$90. due.

ASSIGNMENT OF MORTGAGE

The American Mutual Book 13—320
 Fire & Marine Ins. Co. Cons. \$1.
 to Dated June 8, 1870
 Thomas Degmen Ack'd June 8, 1870 20
 Rec'd June 14, 1870

Assigns mortgage dated October 10, 1836 made by Henry Drayton and Jane his wife to Aaron Ward and by the administrator of the said Aaron Ward assigned to us in Book 5—405 said mortgage made for sum of \$90 in Book B 2—330.
 Covenants \$90. due.

30

40

Exhibit C. 1.

WARRANTY DEED

Joseph A. Bowles, and Book C 11—540
 Sarah D. his wife Cons. \$100.
 to Dated April 5, 1852
 Edmond Slattery Ack'd April 5, 1852
 10 Rec'd July 3, 1860
 G. F. H. F.

Premises in the City of Newark, N. J.

BEGINNING on east side of Newark Street, 490 feet to the south from the corner of Sussex Avenue; thence running south 59 degrees east 70 feet; thence south 26 degrees west 30 feet; thence north 59 degrees west 72 feet 6 inches to Newark Street; thence along the same north 31 degrees east 30 feet to the place of BEGINNING.

20 Being lot #93 on map of lots sold Sept. 26, 1836.

Recites A 7—107.

WILL

Last Will Docket #5103.
 of Book K 550
 30 Edmond Slattery Dated Mar. 30, 1854
 Prob. Oct. 2, 1854
 Winifred Slattery, Ex.

2nd gives all real estate to wife, Winifred, for life.

3d: After the decease of my wife, Winifred Slattery I order that my real estate be divided as follows: fiz: I do bequeath to my youngest son Harvey Slattery the house and lot on which we reside together with the one adjacent on the
 40 north side fronting on Newark Street being 60

Exhibit C. 1.

feet front and rear and 54 feet in depth and to his heirs, executors and assigns.

4th: The house and lot adjacent the afore-said property on the east side I give and bequeath to my youngest daughter, Emma Jane Slattery otherwise Emma Jane Kinsey during her natural life. After the decease of the afore-said Emma Jane Kinsey, I do order that the said property shall become the rightful property of Edmond Kinsey my grandson and the 3rd son of said Emma Jane Kinsey. 10

5th: I authorize and empower my executors hereinafter named to sell the lot of land adjacent those already described on the south side for the contemplated purpose of opening or continuing Ennis Street.

7th: I give and bequeath to my sons Edmond and Thomas Slattery each the sum of \$1.00 currency of U. S. of America and I hereby appoint my beloved wife Winifred Slattery and my trusty friend and son in law Joseph Sherman to my executors to this my Last Will and Testament. 20

BARGAIN & SALE DEED 30

Harvey Slattery Book D 9—325
 to (C vs. G)
 Winifred Slattery Cons. \$50.
 Dated Oct. 2, 1854
 Ack'd Oct. 2, 1854
 Rec'd Oct. 2, 1854
 G. F. H. F.

Premises in the City of Newark, N. J.

Being all the land and Real Estate bequeathed to the said Harvey Slattery in and by Last Will 40

Exhibit C. 1.

and Testament of Edmund Slattery late of County of Essex deceased and set forth and described in said last will as follows:

3rd: "After the decease of my wife, Winifred, I order that my real estate be divided as follows: viz: I do bequeath to my youngest son Harvey the house and lot on which we reside together with the one adjacent on the north side fronting on Newark Street, being 60 feet front and rear and 54 feet in depth and to his executors and assigns.

WILL

20 Last Will of Winifred Slattery who died Mar. 6, 1866 Docket #10713 Book O—283 Dated May 18, 1857 Pro. Mar. 22, 1858 Terence Devine, John McCrane, Executors.

30 1st: Orders all just debts and funeral expenses paid. Item: I give and bequeath to my beloved son Edmund Slattery and to his legal heirs all my personal property and house furniture. Together with my real estate which was bequeathed to my son Harvey by my husband Edmund Slattery, being the same described in my husband's last will. The same being conveyed to me by my son Harvey before his decease in a quit claim deed dated Oct. 2, 1854 as the said deed will specify my son Edmond of course to pay the legacies specified in my husband's will. It is my will and I do so order that my son Edmund shall pay or cause to be paid 40 the further sum of \$200. to my daughter Emma

Exhibit C. 1.

Jane Kenzie her heirs or assigns within the term of two years after my decease. Provided that in case my son Edmond should die without leaving legal issue it is then my will and do so order it that the said real estate shall become the property of my daughter, Emma Jane, Emma Jane Kenzie and to her heirs and assigns forever. I do give and bequeath to my daughter Mary Sherman and my son Thomas each the sum of \$1.00 to be paid on demand any time after my decease. Lastly I do hereby appoint my trusty and well beloved friends Terence Devine and John McCrane of the City of Newark, N. J., executors of this my Last Will and Testament.

EXECUTOR'S DEED

Terrence Devine and John McCrane, exrs. of Winifred Slattery, dec'd to Thomas Degmen Book G 13—464 Cons. \$1400. Dated Jan. 28, 1867 Ack'd Jan. 29, 1867 Rec'd Jan. 30, 1867 G. F. H. F.

Premises in the City of Newark, N. J. Recites order of Orphan Court dated October 30, 1866.

BEGINNING at the northeasterly corner of Newark and Enness Streets; thence along Newark Street northerly 60 feet; thence easterly at right angles to Newark Street 54 feet; thence southerly parallel with Newark Street 60 feet to Inness Street; thence along Inness Street westerly 52 feet to the place of BEGINNING.

Recites deed 204—325.

Exhibit C. 1.

WARRANTY DEED

10 Emma Jane Kinsey and Dated Dec. 23, 1875
 William Kinsey, her Ack'd Dec. 29, 1875
 husband, and Ed- Rec'd Jan. 14, 1876
 mund Kinsey, bach- Cons. \$1200.
 elor G. F. H. F.
 to
 Thomas Degnen Book N 18—444

Premises in the City of Newark, N. J.

20 BEGINNING in the north line of Central Avenue distant 54 feet easterly from Newark Street; and along easterly line of property of said party of the second part, 59 feet to lot #94 on the map of the Aaron Ward property; thence easterly along said lot #94, 26 feet to Hugh Carrolls lots; thence southerly along the same 59 feet more or less to Central Avenue; thence along the same westerly 31 feet to the place of BEGINNING.

Recites bequest to party of the first part in will K—550.

WARRANTY DEED

30 Thomas Degnen and Book N 41—83
 Mary Degnen, his wife Cons. \$1. et al
 to Dated Jan. 23, 1907
 Emanuel Beitman Ack'd Jan. 23, 1907
 Rec'd Jan. 23, 1907
 G. F. H. F.

Premises in the City of Newark, N. J.

40 BEGINNING at northeast corner of Central Avenue and Newark Street; thence running north 26 degrees 16 minutes east along Newark Street 58.96 feet; thence south 63 degrees 44 minutes

Exhibit C. 1.

east 80.80 feet; thence south 20 degrees 18 minutes west 53.25 feet to the northerly line of Central Avenue; thence along same north 67 degrees 35 minutes west 86.55 feet to the place of BEGINNING.

Recites deeds N. 18—444 and G 13—464.

Subject to all existing tenancies.

10

WARRANTY DEED

Emanuel Beitman and Book M 41—274
 Hattie Beitman, his Dated Jan. 31, 1907
 wife Ack'd Jan. 31, 1907
 to Rec'd Feb. 1, 1907
 William H. A. Schaefer Cons. \$1. et al
 G. F. H. F.

20

Premises in the City of Newark, N. J.

Same as N 41—83.

Subject to a mortgage of \$10,000 held by Thomas Degnan assumed.

Subject to existing tenancies.

Note: Mortgage W 20—163 cancelled Mar. 16, 1921.

30

WILL

Last Will #240 U
 of Book Y 3—333
 William H. A. Schaefer Dated Mar. 23, 1907
 who *died* July 13,, Prob. July 25, 1907
 1907

9th: I nominate and appoint and constitute my wife Frances Schaefer, Executrix, and F. Albert Hahn and Daniel Mugler, Executors, of 40

Exhibit C. 1.

this my Last Will and Testament, and I do give to my executors and to the survivor or survivors of them, full power and authority to grant, bargain, sell and convey any or all of my lands to any person or persons in fee simple or otherwise at public or private sale at such times and upon such terms as they shall think of it.

10

Recites death of executors of William H. A. Schaefer, deceased and appoints Frederic L. Wolf sub. admr. with will annexed of said William H. A. Schaefer, deceased.

Dated July 7, 1920.

PETITION

20 In Re Estate of William H. A. Schaefer On Petition for approval of sale of lands by admin. with will annexed.

Recites will and death of Executor therein named and power of sale granted to said executors.

Recites that William H. A. Schaefer died seized of the premises in question.

30 Recites appointed of Frederic L. Wolf, sub. admin. with will annexed.

Recites that Frederic L. Wolf petitioner, has been offered \$16,000 in cash for premises in question by Isadore Segal.

Residuary legatees approved sale by signing petition.

July 15, 1921 Appearance and consent filed.

Sept. 9, 1921, Notice of Intention to apply for confirmation of sale and proof of mailing of notice filed.

40

Exhibit C. 1.

EXECUTOR'S DEED

Frederic L. Wolf, Substituted Administrator with the Will annexed of William H. A. Schaefer, deceased to Isadore Segal Book S. 65 pge. 277 Cons. \$16,000. Dated Sept. 15, 1921 Ack'd Sept. 15, 1921 Rec'd Sept. 15, 1921 10

Conveys premises in the City of Newark, and the same as described in Deed N 41 p 83

Recites:—being the same premises conveyed to the said William H. A. Schaefer, in his lifetime, by Emanuel Beitman and wife, by deed dated January 31, 1907 and recorded in the Register's Office of Essex County in Book M 41 of Deeds for said County page 274 etc., and of which the said William H. A. Schaefer died seized on or about July 13, 1907, leaving a Last Will and Testament duly probated in the Surrogate's Office of Essex County on July 25, 1907. 20

Conveyed subject to existing tenancies, such restrictions as there may be, if any, and such violations, if any, of the New Jersey Tenement House Act, or municipal ordinances or regulations as there may be. 30

40

4

ATE "C"

Ex. C. 1.

PLATE "D"

ARK STREET

NEWARK STREET

CENTRAL AVENUE

N26°16'E 58.96

S63°44'E 80.80

S67°35'E 86.55

N20°18'E 53.25

of property of said party
the first part

59'

LOT #94
As per Ward Map
26'

59±

Hugh Carroll's lot

ed N18-444
sey to Degnen
12/23/75

Deed N41-23
Degnen to Beitman
1/23/07

Stipulation.

IN CHANCERY OF NEW JERSEY.

60—514

Between

THE MODEL PLAN AGENCY, a
New Jersey corporation,
Complainant,

and

ISRAEL DIMOND and MILLIE
DIMOND,
Defendants.

On Bill, &c.
Stipulation. 10

The solicitors of the complainant and the defendants hereby stipulate and agree for the purposes of this suit only as follows: 20

1. That on January 28, 1867, Terrence Devine and John McCrane, Executors under the last will and testament of Winifred Slattery, deceased, executed and delivered to Thomas Degnen a deed for the following described premises, situate in the City of Newark, County of Essex and State of New Jersey:

“BEGINNING at the Northeasterly corner of Newark and Inness Streets (now Central Avenue); thence along Newark Street Northerly 60 feet; thence Easterly at right angles to Newark Street 54 feet; thence Southerly parallel with Newark Street 60 feet to Inness Street; thence along Inness Street 52 feet to the place of BEGINNING.” 30

2. That Emma Jane Kinsey and William Kinsey, her husband, and Edmund Kinsey, bachelor, on December 23, 1875 executed and delivered to Thomas Degnen a deed for the following 40

Stipulation.

described premises, situate in the City of Newark, aforesaid:

10 "BEGINNING in the Northerly line of Central Avenue distant 54 feet Easterly from Newark Street and along Easterly line of property of the said party of the first part 59 feet to lot 94 on map of the Aaron Ward property; thence easterly along said lot 94, 26 feet to Hugh Carroll's lot; thence Southerly along the same 59 feet, more or less, to Central Avenue; thence along the same Westerly 31 feet to the place of BE-

20 3. That said Thomas Degnen was a bona fide purchaser of said lands from the grantors named in said deeds, and as such purchaser occupied and held the parcel of land described in the contract of sale dated January 12, 1926: that he entered upon and continued in possession of said lands uninterruptedly until he conveyed the same to Emanuel Beitman by deed dated and recorded January 23, 1907.

30 4. That said Emanuel Beitman was a bona fide purchaser of said lands from the said Thomas Degnen, who was in possession thereof, and that said Beitman entered upon and continued in possession of said lands uninterruptedly until he conveyed the same to William H. A. Schaefer by deed dated January 31, 1907 and recorded February 1, 1907.

40 5. That said William H. A. Schaefer was a bona fide purchaser of said lands from said Emanuel Beitman, who was in possession thereof, and that said William H. A. Schaefer, his heirs or devisees, entered upon and continued in possession of said lands uninterruptedly until con-

Stipulation.

veyance was made by Frederic L. Wolf, substituted administrator with the Will annexed of William H. A. Schaefer, deceased, in execution of a power of sale, to Isadore Segal by deed dated September 15, 1921 and recorded on that date, which sale was approved of by the Essex County Orphans' Court.

10 6. That said Isadore Segal was a bona fide purchaser of said lands from said Frederic L. Wolf, substituted administrator with the Will annexed of William H. A. Schaefer, deceased, and that said decedent and those claiming under him were in possession thereof, and that said Isadore Segal entered upon and continued in possession of said lands uninterruptedly until he conveyed the same to Philmar Construction Co. by deed dated September 15, 1921 and recorded September 19, 1921.

20 7. That said Philmar Construction Co. was a bona fide purchaser of said lands from said Isadore Segal, who was in possession thereof and that it entered upon and continued in possession of said lands uninterruptedly until it conveyed the same to Israel Dimond by deed dated June 1, 1922 and recorded July 10, 1922.

30 8. That said Israel Dimond was a bona fide purchaser of said lands from said Philmar Construction Co. who was in possession thereof, and that he, the said Dimond, entered upon and has continued in possession of said lands uninterruptedly from the date of the deed to him to the present time.

HOOD, LAFFERTY & CAMPBELL,
Solicitors of Complainant.

CORN & SILVERMAN,
Solicitors of Defendants. 40

Conclusions of Vice-Chancellor.

From the stipulation above recited, it conclusively appears that the defendant and his predecessors in title have been in actual and undisputed possession of the lands which were the subject of the contract for at least sixty-three years and that that possession was taken by a bona fide purchaser under a grant which is of record. Record title to the lands in question is therefore complete from 1867 to date. The provisions of Sections 28 and 29, Vol. 3 C. S., p. 3172, are pertinent to this inquiry. These sections as they appear in the Compiled Statutes were originally enacted in 1787 and were continued in that form through the various revisions, including that of 1877, where they were included in an act entitled "An Act for the limitation of suits respecting title to lands." Section 1 of the Act of 1787, now Section 28 of the Revision, reads as follows:

"That sixty years' actual possession of any lands, tenements, or other real estate, *uninterruptedly continued by occupancy, descent, conveyance or otherwise, in whatever way or manner such possession might have commenced, or have been continued, shall vest a full and complete right and title in every actual possessor of occupier of such lands, tenements, or other real estate,* and shall be a good and sufficient bar to all claims that may be made, or actions commenced by any person or persons whatever, for the recovery of any such lands, tenements, or other real estate."

Section 2 of the same act, now Section 29 of the Revision, so far as pertinent to this issue, reads as follows:

"That thirty years, actual possession of any lands, tenements or other real estate, un-

Conclusions of Vice-Chancellor.

interruptedly continued as aforesaid, wherever such possession commenced, or is founded upon a proprietary right duly laid thereon, and recorded in the surveyor-general's office of the division in which such location was made, or in the secretary's office, agreeably to law, *or wherever such possession was obtained by a fair bona fide purchase of such lands, tenements, or other real estate, of any person or persons whatever, in possession, and supposed to have a legal right and title thereto, or of the agent or agents of such person or persons, shall be a good and sufficient bar to all prior locations, rights, titles, conveyances, or claims whatever, not followed by actual possession as aforesaid, and shall vest an absolute right and title in the actual possessor and occupier of all such lands, tenements, or other real estate; * * **"

Section 28 of the Revision was amended in 1922 (See Cum. Supp. to Comp. Statutes, p. 1816) to read as follows:

"Thirty years' actual possession of any lands, tenements or other real estate, excepting woodlands or uncultivated tracts and that sixty years' actual possession of any woodlands or uncultivated tracts, uninterruptedly continued by occupancy, descent, conveyance or otherwise, in whatever way or manner such possession might have commenced, or have been continued, shall vest a full and complete right and title in every actual possessor or occupier of such lands, tenements, or other real estate, and shall be a good and sufficient bar to all claims that may be made, or actions commenced by any

Conclusions of Vice-Chancellor.

person or persons whatsoever, for the recovery of any such lands, tenements, or other real estate."

10 It therefore conclusively appears that in view of the provisions of that statute the defendant's title is good and marketable, and indeed, no question as to the validity of the title or its marketability is raised by the complainant. As already suggested complainant's whole case is based upon his assertion that defendant's title is based on adverse possession. This being so, the burden of proof of the fact so asserted is on the complainant. He complains that the defendant offers no proof of adverse possession and that in the stipulation prepared by defendant's counsel the fact of adverse possession, as such, was not declared. The burden of proof rests upon the complainant. He should not expect the defendant to prove his case for him, and it was probably due to no oversight on the part of defendant's counsel that adverse possession was not stipulated. Rather, it would appear that this is the result of design. It will be noted that under Section 1 of the revision of 1877, sixty years' actual possession uninterruptedly continued, etc. in whatever manner such possession might have commenced, confers a perfect title. This has now been modified to provide for thirty years' possession except as to woodland and uncultivated tracts with respect to which sixty years' possession is still necessary; but under section 2 of that act thirty years' actual possession "wherever such possession was obtained by a fair, bona fide purchase of such lands * * * of any person * * * supposed to have a legal right and title thereto," confers a perfect title. 30 The stipulation above quoted, together with other 40

Conclusions of Vice-Chancellor.

evidence submitted, brings this case directly within this provision of Section 2. Such a title is not necessarily based upon adverse possession. It might very well have been based upon a grant to the person "in possession and supposed to have a legal right and title" and such grant may have been lost. These two sections of the statute of limitations are entirely independent of each other and neither conflict with nor modifies the other. The defendant may avail himself of the rights conferred by either section or by both. *Spottiswoode v. Morris and Essex Railroad Co.*, 61 N. J. L. 322. The defendant acquired title to the premises in question in 1922 from a grantor whose title was based not upon adverse possession but upon an absolute title which had accrued to prior grantors under the statute many years before. Complainant requests a construction of the words "Adverse possession" as used in the contract of sale, but I do not feel called upon to construe those words further than to say that they do not refer to or contemplate any such situation as is presented by the facts now before the Court. I need only say that the defendant's title does not rest in adverse possession within the meaning of the words as used in the contract. If it can be said that defendant's title rests in adverse possession, however remotely, I may say that I am of the opinion that the words "adverse possession" as used in this contract, mean a more *immediate* adverse possession than that disclosed by the evidence in this cause. If these words were given the construction for which the complainant contends, it is quite probable that a large majority of the titles in this state would rest in adverse possession. The purpose of the term "adverse possession" in the contract was 10 20 30 40

Conclusions of Vice-Chancellor.

not, in my judgment, to afford an excuse for non-performance but rather to insure the vendee a good title not subject to successful attack in the courts. The defendant is unquestionably in a position to convey such a title. The contract does not require a complete record title back to the proprietors and if such had been required by the complainant provision therefore could have been made in the contract. In view of the conclusions hereinabove expressed it does not appear necessary to further discuss any of the points raised by the opposing briefs. I will advise a decree dismissing the bill of complaint with costs.

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Heard November 30, 1926.

Submitted December 18, 1926.

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Decided January 3, 1927.

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Final Decree.

FINAL DECREE.

Filed January 25, 1927.

IN CHANCERY OF NEW JERSEY.

60—514

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Between

THE MODEL PLAN AGENCY, a
New Jersey corporation,
Complainant,

and

ISRAEL DIMOND and MILLIE
DIMOND,
Defendants.

On Bill, &c.

Final Decree.

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This cause coming on to be heard in the presence of Corn & Silverman, solicitors of the complainant, and of Hood, Lafferty & Campbell, solicitors of the defendants, and the Court having examined the pleadings and stipulations, and having taken proofs in open court, and having duly considered such pleadings, stipulations and proofs and the arguments of respective counsel; and it appearing to the Court that the complainant is not entitled to the relief sought and prayed for by it in its bill of complaint:

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It Is on this Twenty-fifth day of January, Nineteen Hundred and Twenty-seven, by the Chancellor, ORDERED, ADJUDGED and DECREED that the complainant's bill be and the same is hereby dismissed with costs.

And it is further ORDERED that a counsel fee of One hundred fifty dollars be and and the same

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Final Decree.

is hereby allowed to the defendants to be taxed in their bill of costs against the complainant.

10 And it is further ORDERED and DECREED that the complainant pay to the defendants the costs of this suit to be taxed, and that an execution issue therefor according to the practice of this Court.

E. R. WALKER,
C.

Respectfully advised,

MAJA LEON BERRY,
V.-C.

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7/71 MAY.T.1927

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

New Jersey Court of Errors and Appeals

THE MODEL PLAN AGENCY,
Complainant-Appellant,

vs.

ISRAEL DIMOND and MILLIE
DIMOND,
Defendants-Appellees.

*On Appeal
from
Chancery
Court.*

BRIEF OF APPELLANT.

Facts.

This appeal is from a final decree dismissing appellant's bill for rescission and for impression of a lien for down money.

Appellant and appellees, on January 12, 1925, entered into an agreement for the sale to the former by the latter of premises at the northeast corner of Central avenue and Newark street, Newark, New Jersey. A plotting of the property is incorporated in the State of Case, at page 64, to the plates of which reference is hereinafter made.

The agreement provided that:

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

Appellant contends that appellees' title, if they have any, is of the kind provided against, and can be sustained only on the ground of adverse possession. Good title in appellees is conceded only as to lot 93, plate A.

According to the public records, before 1836 the title to lots 92 and 93, plate A, was in Aaron Ward, and the title to the part to the east up to the dotted line (representing the easterly line of the premises agreed to be conveyed) was in John W. Inniss.

There is no record of any deed out of John W. Inniss or his heir or devisees for that part of the premises, and the paper title is still in him or them.

As to lot 92, in 1836 this was conveyed by Ward to Henry Drayton, who executed to the former a purchase money mortgage for \$90, which mortgage was finally, in 1870, assigned to Thomas Degnen, and which mortgage was not foreclosed. The paper title to this lot is still in Henry Drayton, except as effected by the mortgage.

In 1854 Edmond Slattery died, seized, according to the records, only of lot 93. However, by his will (State of Case, p. 54) he disposed of a lot, 60 feet on Newark street by 54 feet in depth, to Harvey Slattery and a lot adjacent on the east to Emma Jane Kinsey for life with remainder to Edmond Kinsey. Harvey Slattery forthwith conveyed to Winifred Slattery all the real estate bequeathed to him under that will. In 1866 Winifred Slattery died and the following year her executors conveyed the part shown on Plate B to Thomas Degnen. In 1875 Emma Jane Kinsey and Edmond Kinsey conveyed the part shown on Plate C to Thomas Degnen. In 1907 Thomas Degnen conveyed the premises as shown on Plate D to appellees' predecessor in title.

By stipulation (State of Case, p. 65) it was admitted, only for the purpose of this suit, that Thomas Degnen held uninterrupted possession

from 1867 to 1907 of the part shown on Plate B and from 1875 to 1907 of the part shown on Plate C, and that appellees and their predecessors in title since 1907 are and were in uninterrupted possession of the entire premises.

ARGUMENT.

The grounds of appeal are: (1) The Court erred in refusing to strike out defendant's answer; (2) there was no evidence to sustain the Court's finding that the defendants and their predecessors in title have been in actual and undisputed possession of the lands in question; (3) there was no evidence to sustain the Court's finding that the defendants' title to the premises in question is good and marketable; (4) the Court erred in finding that defendants' title to the premises in question is not derived from adverse possession; (5) the Court erred in refusing to impress as a lien on the premises in question, the deposit of Twenty-five hundred dollars (\$2,500) paid by appellant to appellee, with interest from the date of payment.

As the appeal is almost entirely concerned with the question of what is a "title derived from adverse possession," it may not be amiss to consider the entire matter now, with the various applications later arranged under the specific grounds of appeal.

(a) First, what is a title? "Title," in reference to property, is that which constitutes a just cause of exclusive possession, or which is the foundation of ownership of property (38 Cyc. 336). Deeds, wills, etc., are the evidences of, or of the transfer of, title.

Title is the means whereby a man hath the just possession of his property, 2 Black-

stone Com. 195. Deeds and other instruments of conveyance are the muniments or evidence of title. *Holcombe v. Trenton*, 80 N. J. E. 122.

"Title" in common acceptance, and when used in reference to real property, implies an estate in fee. When we speak of a man as having title to certain lands, the ordinary understanding is that he is the owner of the fee. *Thompson*, Real Property, Sec. 2315.

In regal acceptance title has respect to that which is the foundation of ownership. 22 R. C. L. 54.

"Title," as between vendor and purchaser, is the legal estate in fee. *Jones v. Gardner*, 10 Johns (N. Y.) 269.

"Title" is a regular chain of transfer from or under the sovereignty of the soil. *Rice v. Willis*, 87 Fed. 626.

A complete title consists of possession, right of possession and right of property. These component parts, may reside in different persons at the same time, in which case they collectively, but not individually, have title in fee.

Blackstone analyses a complete title as including the three elements of possession, right of possession, and right of property. *Brady v. Carteret*, 82 N. J. E. 620.

It is an ancient maxim of the law that no title is completely good unless the right of possession be joined with the right of property; which right is then denominated a double right. And when to this double right the actual possession is also united, then, and then only, is the title completely legal. 2 Blackstone Com. 199.

If a disseisor turns me out of possession of my lands, he thereby gains a mere naked possession, and I still retain the right of possession, and right of property. If the disseisor dies, and the lands descend to his son, the son gains an apparent right of possession; but I still retain the actual right

of both possession and property. If I acquiesce for thirty years, without bringing my action to recover possession of the lands, the son gains the actual right of possession, and I retain nothing but the mere right of property. And even this right of property will fail, or at least it will be without a remedy unless I pursue it within the space of sixty years. Hence it will follow that one man may have the possession, another the right of possession and a third the right of property. 2 Blackstone Com. 198.

Those several constituent parts of title may be divided and distributed among several persons, so that one may have the possession, another the right of possession and the third the right of property, but unless all are united in one and the same party there cannot be that consolidated right which forms a complete title. *Donovan v. Pitcher*, 53 Ala. 411.

The evidence of title may be very various as by descent, by deed, by record, by devise, and by many other modes. A deed duly executed, is only a mode of transfer, by the operation of which the law conveys the estate; and if this instrument of conveyance becomes accidentally lost or destroyed, the title still remains permanent and immovable.

Botsford v. Morehouse, 4 Conn. 550.

With respect their progressive development, titles are classed as: (1) Naked possession, (2) Right of possession, (3) Right of property without possession, (4) Right of property united with possession (2 Blackstone Com. 195).

In the absence of other evidence of title, a presumption is said to arise that the title rests in the person in peaceable possession of the land, and the occupant need introduce no other evidence in his behalf. In case, however, the paper title is shown to be in another than the occupant, it devolves upon

the latter to show that he has in some manner acquired that title.

2 C. J. 288.

A chain of title is the succession of deeds or other instruments by which one traces the title back to its original source (*Maturi v. Fay*, 96 N. J. E. 472).

(b) What are title "derived from"? In this State all titles were originally derived from the King of England. The first item in every chain of title in New Jersey is the grant in 1664 from the King to the Duke of York, next a conveyance the same year from the Duke to Berkely and Carteret, the proprietors (See *Cornelius v. Giberson*, 25 N. J. L. 1, for the history). A complete title is therefore one which can be traced to the King, through the proprietors.

The legality and solidity of titles derived from the King or the proprietors have never been questioned.

Tucker v. White, 1 N. J. L. 94.

It is a fundamental principle in the English law that the sovereign was the original proprietor of all the land in the kingdom. Thompson, Real property, sec. 2670.

With reference the ethics of deriving title, one class arises from a right and the other from a wrong—by virtue of a contract or a tort, a lawful consideration or an unlawful trespass. Titles are evidenced either by matters of record (deeds, wills, administrators, etc.) or by matters not of record (open, notorious, continued, hostile, exclusive possession).

(c) What is "adverse possession"? It is a new title, obtained by a possession by virtue of the Statute of Limitations.

Title by adverse possession is the title by which the possessor of land, after a certain

period of exclusive possession, acquires by such possession a fee simple estate therein.

Robinson, Elementary Law (New Ed.) sec. 120.

Adverse possession is a possession of another's land which, when accompanied by certain acts and circumstances, will vest title in the possessor.

2 C. J. 50.

Such title is not considered as having been derived from the former record owner.

The effect of the statutes (of limitations as to adverse possession) generally is, not to transfer the fee to lands from the true owner to the occupier, but to destroy the remedy of the true owner for their recovery by action, and to vest an absolute right of exclusive possession in the occupier as against the true owner and all the world, and a right which is transferable and vests in the grantees a right to the lands as full and complete as could be conferred by the owner of the fee. In a word, it vests in the occupier a title to the premises by possessor, which is in every respect equal to a conveyance of the fee.

Wood, Limitation of Actions (3rd Ed.) sec. 254.

(d) As to the interpretation of "title not derived from adverse possession," as provided in the agreement, we must look to the legal meaning.

The present case does not involve the meaning of words in a conversation between laymen, but of words used in a formal written instrument, the purpose of which is to express the mutual rights and obligations of the parties to it. In construing such instruments the general rule, subject to few exceptions, is that the words contained therein shall be given their ordinary legal significance.

Propper v. Colson, 86 N. J. E. 399.

The expression in question, put in affirmative form, means "title derived from record," or, in simpler language, "record title." Applying the word "any," which occurs twice in the sentence, the phrase then reads a "title not derived from any adverse possession."

A title derived from adverse possession is one where a necessary link in the chain consists of adverse possession. It is a title which depends for validity on the Statute of Limitations.

The statute of limitations is the source of title by adverse possession. It is held to be not grounded upon the presumption of a grant; but is the fiat of the legislature cutting off the right to maintain suit.

1 Bouvier, Law Dictionary (3rd Ed.) 152.

It is therefore easily to be seen that appellees' title is derived from adverse possession, for the very defenses interposed by them to uphold their title are the provisions of the Statute of Limitations.

In this State, title by adverse possession may be derived from any one or more of four sections of our Statute of Limitations:

Sec. 16—Right to entry barred twenty years after right accrued; time of infancy or insanity not computed;

Sec. 18—Mortgagee in possession twenty years after default bars equity of redemption;

Sec. 28—Sixty years actual possession, uninterrupted, vests title;

Sec. 29—Thirty years actual possession, uninterrupted, founded on color of title, vests title; time of infancy, *femme covert*, *non compos*, imprisonment or in foreign

country not computed until five years after removal of disability.

Section 28 was amended (P. L. 1922, p. 315) to sixty years for woodlands and uncultivated lands, and thirty years for other realty. As appellees do not rely on the thirty year period of this amendment, we will not brief the question whether or not the amendment can apply to an actual possession completed or commenced before it was enacted.

An apparent difference in these sections is the period of possession—twenty, thirty and sixty years. Another is the mode of acquiring possession—trespass, mortgage and purchase under color of title. And the third is of disabilities of the owner—a mortgagee or a possessor for sixty years is not concerned with such disabilities. With regard the extent of the land, a possession under sections 16 and 28 is only of that physically held, while under sections 18 and 29 the holding is co-extensive with the description in the mortgage or the writing conveying the "color of title."

A mere possession, no matter for how long continued, cannot ripen into a title.

The difficulty in plaintiff's case is his failure to show adverse possession. He has contented himself with showing peaceful possession. He seems to think that a failure of the rightful owner to make claim is the same as a claim of adverse right made by him and his predecessors in title. It is, however, well settled that mere possession without claim of right or intent to disseise the real owner, is not enough to constitute adverse possession.

Myers v. Polkman, 89 N. J. L. 390.

The presumption * * * is that possession is always presumed to be held in subordina-

tion to the legal title. By reason of this presumption, the mere holding of the lands by another, however long continued, is not sufficient evidence of title by prescription, but must be aided by other testimony by which the inference may reasonably be drawn that such possession was maintained in hostility to the title of the true owner.

Folkman v. Myers, 93 N. J. E. 208.

A mortgagee in possession acquires no title whatsoever in the mortgaged premises merely by his mortgage and possession.

The common law rule that a mortgage created an immediate estate in the mortgagee, and vested in him immediately, upon the execution and delivery of the mortgage, an actual estate with a right of possession, subject only to be defeated by the payment of the mortgage money, has not been adopted by our courts.

Stewart v. Fairchild, 91 N. J. E. 86.

The title of the mortgaged premises remains in the mortgagor until the sheriff's deed is actually delivered to the purchaser.

Myers v. Brown, 92 N. J. E. 348, 93 N. J. E. 196.

Possession is always presumed to be held in subordination to be legal title.

Mason v. Home, 90 N. J. E. 455. *Johanson v. Atlantic*, 73 N. J. L. 767.

So long as the relation of mortgagor and mortgagee exists, the possession of the mortgagee is not adverse to the mortgagor, and the statute of limitations must, from its commencement, have been taken under the engagement, which equity always implied, to account as a bailiff of the rents and profits to the mortgagor and to apply them to the discharge of the mortgage debt.

1 Cyc. 1071.

Except through foreclosure proceedings, a mortgagee can acquire title only by adverse possession for twenty years after default—by virtue of the Statute of Limitations. The difference between section 16 of that act barring the right of entry, and section 18 barring the equity of redemption—or, in other words, between a trespasser and a mortgagee in possession after default, each holding for twenty years—is that as against the former infancy or insanity of the owner stays the running, while as against the latter no disabilities of the owner will prevent the bar at the end of the twenty year period. But as positively as the possession under section 16 must be adverse to the owner, so must the possession under section 18 be adverse to the mortgagor or his assigns.

A mortgagee going into possession as tenant, cannot set up his own mortgage title because he cannot dispute his landlord's title. The facts show the mortgagee entered into the possession under the mortgagor and adverse to the title of the mortgagor.

Bates v. Conrow, 11 N. J. E. 137.

Nothing contained in any of these or other sections of the Statute of Limitations, nor (have we found) in any other of the laws of this state, expressly refers to an "adverse" possession. The word used in the sixty and the thirty year act is "actual." But "actual" means "adverse," when applied to possession.

One of the rules which apply to acts of limitation generally, which has been recognized in the courts of England, and in all others where the rules established in those courts have been adopted, is that possession, to give title, must be adverse. The word is not, indeed, to be found in the statutes, but the plainest dictates of common justice required that it should be im-

plied. It would shock the sense of right which must be felt equally by legislatures and by judges, if a possession which was permissive and entirely consistent with the title of another should silently bar that title.

Depew v. Colton, 60 N. J. E. 454.

Actual possession of land consists in exercising acts of dominion over it and making the ordinary use of it. The only rule of general applicability is that the acts relied upon to establish possession must always be as distinct as the character of the land reasonably admits of, and must be exercised with sufficient continuity to acquaint the owner, should he visit the land, with the fact that a claim of ownership adverse to his title is being asserted.

Dodge v. Lavin, 34 R. I. 409.

It is therefore clear that sections 28 and 29, by requiring possession to be "actual," make an adverse possession a condition to obtaining title; a possession which is not adverse cannot satisfy the requirements of either of these sections, or of sections 16 or 18.

An adverse claimant must clearly prove that his possession was actual, exclusive, adverse, hostile, visible, notorious, and continued.

Where plaintiff shows a clear documentary title to the premises in dispute, the burden is on the defendants to establish the fact of adverse possession beyond a reasonable doubt.

Rowland v. Updike, 28 N. J. L. 101.

The principles on which the doctrine of adverse possession rests, are well settled. The possession must be actual and exclusive—adverse and hostile—visible and notorious—continued and uninterrupted.

Foulke v. Bond, 41 N. J. L. 527.

Possession is presumed to be in the holder of the legal title. Adverse possession must be made out clearly and positively by a preponderance of evidence.

Mason v. Home, 90 N. J. E. 455, *supra*.

It is a settled rule that the doctrine of adverse possession is to be taken strictly; it is not to be made out by inference, but by clear and positive proof. Every presumption is in favor of possession in subordination to the title of the true owner. A party claiming title by adverse possession always claims in derogation of the right of the real owner. He admits the legal title in another. To sustain a title by adverse possession the defendant must prove a continued, open, visible and exclusive possession. His possession, moreover, must be marked by definite boundaries, designated either upon the land itself or by the description in his deed.

Cornelius v. Giberson, 25 N. J. L. 1, *supra*.

The general rule is that where the possession of land is separated from the title, the law will not presume that the possession is adverse, but every presumption is in favor of the possession in subordination to the title of the true owner.

Johanson v. Atlantic, 73 N. J. L. 767, *supra*.

The burden was on defendant to prove that the possession by himself and his father was hostile, and to do so he was compelled incidentally to prove that their possession was not permissive. There was no legal presumption that the possession by defendant and his father was hostile or inconsistent with the legal title.

Northern v. Demarest, 94 N. J. L. 68.

Point 1—The Court erred in refusing to strike out defendants' answer.

(a) The first denial in the answer (State of Case, p. 19) is of tender of performance by appellant. This matter was taken up at the trial. However, it is immaterial whether or not appellant made tender, for tender is not required where the vendor cannot convey the agreed title.

Naugle v. McVoy, 96 N. J. L. 515;
Herman v. Ebert, 98 N. J. L. 653;
Moran v. Borello, 132 Atl. 510;
Dichter v. Isaacson, 132 Atl. 481.

(b) The answer alleges that Thomas Degnen became a mortgagee in possession (State of Case, p. 21, sec. g). This refers only to lot 92, plate A. From this it would seem to be appellees' contention that thereby he became vested with the title. But for this to be at all available there must be an allegation of possession for twenty years after default (Sec. 18 of Statute of Limitations), and the date of default should have been stated. "Default," as applied to a mortgage, is not the same as its due date; for mortgages may be in default (for non-payment of interest, taxes, etc.) before maturity stated, and many mortgages (as for instance those to savings banks) are in full force long after the due date expressed. And no proof of default was offered at the trial, so the answer, in this respect, is not aided by the evidence. The Court can as little assume a default as that the mortgage, when assigned to Thomas Degnen (thirty-four years after it was made), was unenforceable in that more than twenty years had flown since any payment of principal or interest was made on the mortgage or its validity and existence otherwise acknowledged by the owners.

Yet even had the required possession and default been alleged or proved, this would not be a defense to the action, for such possession must necessarily, to make title, have been adverse to the owner of the fee so that the title of the holder of the mortgage would then have been derived from an adverse possession.

(c) The answer discloses, as to lot 92, title in Henry Drayton in 1836 (State of Case, p. 20, sec. a) and next a conveyance by Thomas Degnen in 1907 (State of Case, p. 21, sec. h). There is no showing, except through the mortgage made by Drayton and assigned to Degnen, how the title came out of the former into the latter; hence it must be assumed there was no connection, except through the mortgage. Disregarding the effect of an adverse possession by the holder of the mortgage, a title can never be derived from a mortgage except by foreclosure; and no foreclosure of this mortgage is alleged, or proved. And if regard is had to the effect of Degnen's adverse possession (if such it was), the answer should have alleged a default and twenty years' possession thereafter; and even then it would disclose a title derived from a prohibited source per the agreement.

Two persons cannot be severally seized in fee at the same time, of the same tract of land.

Saxton v. Hunt, 20 N. J. L. 487.

If appellees' contention that a mortgagee in possession invariably acquires title after twenty years, regardless of default or whether the possession was permissive or hostile, is correct, it would create for them an embarrassing situation if some shrewd person were to buy up this \$90 mortgage (which is still open of record) from Degnen's heirs, lease the premises for twenty

years and at the end of the term emerge as the owner by virtue thereof.

(d) The answer admits (State of Case, p. 22) a discrepancy of two feet in the frontage on Central avenue. This discrepancy is demonstrated by joining the plot on Plate B to that on Plate C. Appellees insist that Newark street is fixed as a monument. The deed from the executors to Degnen (State of Case, p. 57) is not capable of correct plotting—either the third course is not parallel to Newark street or the fourth course is not 52 feet long. Unless the Court will hold that angles are preferred over distances (and to neither this nor the contrary effect have we found any decision) the records prior to 1907 in the chain of title claimed by appellees show a fatal defect, as to a triangle having a base of two feet on Central avenue and lying between 52 and 54 feet from Newark street.

Purchasers will not be required to take, where record title contains a notice to any purchaser that the title to the land in question might become subject to litigation.

Breitman v. Jaehnal, 132 Atl. 291.

That may be a good title at law, which a court of equity, in the exercise of its discretionary power, will not force on an unwilling purchaser. Every purchaser of land has a right to demand a title which shall put him in all reasonable security, and which shall protect him from anxiety, lest annoying, if not successful suits be brought against him, and probably take from him or his representatives, land upon which money was invested. He should have a title which shall enable him not only to hold his land, but to hold it in peace; and if he wishes to sell it, to be reasonably

sure that no flaw or doubt will come up to disturb its marketable value.

Dobbs v. Narcross, 24 N. J. E. 327;

Tillotson v. Gesner, 33 N. J. E. 313;

Cornell v. Andrews, 35 N. J. E. 7.

It is no doubt settled that monuments govern over courses and distances. But in the instant case the only monuments are Central avenue and Newark street. Nor is the distance in the fourth course designated as "more or less." The rule that monuments control would not be violated if it be said either that the third course is not parallel to Newark street or the fourth course does not run 52 feet to the place of beginning; the fourth course should more likely be held to be correct for it runs to the intersection of both monuments—Newark Street and Central Avenue. In cases in which the Court was heretofore called upon to aid a description, it will no doubt be found that the element of adverse possession played a considerable part; but in the instant case, because of the particular provision in the agreement, that element is not available to join the two parts of the premises.

(e) The first defense is that appellees and their predecessors in title had been in uninterrupted and continued occupancy for over sixty years, and were still in possession as owners. As shown, an occupancy or possession, even though uninterrupted and continued, and for over sixty years, cannot pass the title. The possession, to come under section 28, must have been "actual," which is the same as "adverse." And a title derived from adverse possession is what appellant provided it shall not be obliged to take, and by its bill here it declines to accept such title.

(f) The next defense is that appellees and their predecessors in title had been in possession for over thirty years by purchase from persons in possession and supposed to have legal title. This is insufficient to show title. In accordance with section 29, this defense should have alleged (1) an "actual" possession, (2) an "uninterrupted" possession, and (3) the non-existence of the enumerated disabilities of the owners; and if properly alleged and proved, appellees' title would have been derived from adverse possession, and hence not sufficient under the agreement.

(g) The last defense is the pendency of a suit in the Essex Circuit Court for recovery of the down money. As appellees have offered no proof in support of this defense it may be assumed they have abandoned it. However, this action was brought to impress a lien—an equitable remedy unenforceable in the Essex Circuit Court. Only another action in the Chancery Court, between the same parties, for the same remedy, in the same subject-matter, can bar this suit.

The pending of a suit at law between the same parties and for the identical object of the Chancery suit, is no bar to the Chancery suit.

Fulton v. Golden, 25 N. J. E. 353.

Point 2—There was no evidence to sustain the Court's finding that the defendants and their predecessors in title have been in actual and undisputed possession of the lands in question.

Both the sixty-year and the thirty-year provision of our Statute of Limitations require the possession to be "actual." This, as shown, means "adverse."

Disregarding the provision of the agreement as to an adverse title, appellant contends that appellees' title, as proved in this case, is unmarketable and not good. The stipulation as to possession (State of Case, p. 65) was evidently carefully drawn by appellees' attorney and is concerned only with continued and uninterrupted possession. No allegation is made or proved by appellees of the other elements of good adverse holding—exclusiveness, hostility, notoriousness, visibility.

There is nothing in the testimony of appellees' witness that is inconsistent with Slattery and Degnen holding as lessees, subletting parts of the premises to the witness and to others.

Point 3—There was no evidence to sustain the Court's finding that the defendants' title to the premises in question is good and marketable.

Where, as here, appellant shows a clear documentary title to the premises in another, appellees, in order for their possessory title to prevail, must prove all the essentials of an adverse holding beyond a reasonable doubt; for every presumption is resolved in favor of their possession being in subordination to the title of the record owner.

No proof whatsoever was offered that their possession was adverse, hostile, notorious or exclusive.

There is no proof of a decree quieting the title to these lands; the only witness called to substantiate appellees' claim was eighty years old, and may soon not be available to testify.

Specific performance will not be decreed if complainant's proof of title was testi-

mony by living witnesses to show adverse possession.

Elmora v. Binder, 97 N. J. E. 126;

Sulk v. Tumulty, 77 N. J. E. 97;

Kohltrepp v. Ram, 79 N. J. E. 386.

Except as to lot 93, good title cannot be made in appellees. There is no evidence that the lines of Newark street or Central avenue have changed, so the presumption must be that these lines were heretofore the same as they are now. The two foot discrepancy on Central avenue is not explained. Appellees' record title in the part to the east of lots 92 and 93, Plate A, does not start until 1875; the will of Edmond Slattery (State of Case, p. 54) does not help, for he has title only to lot 93 yet devised a lot 60 feet on Newark street by 54 feet deep and another lot (of indefinite size) on the east—there is less reason to believe he intended to devise lands to the south of lot 93 than to the north of that lot; for if his will intended to pass what is shown on Plates B and C, it is natural to suppose he would have referred to these two lots as fronting on Inness Street, what is now Central Avenue. Appellees' record title to the part to the east of the heavy line on Plate C does not start until 1907.

Point 4—The Court erred in finding that defendants' title to the premises in question was not derived from adverse possession.

Except as to lot 93 the first deed in defendants' title containing an understandable description was in 1867 plotted on Plate B. The next deed was in 1875 plotted on Plate C, and the last deed was in 1907 of the whole premises shown on Plate D.

This title, such as it is, of defendants cannot be sustained except by virtue of the Statute of Limitations. Defendants defended under that Statute. If at this late date sections 16, 18, 28 and 29 of the Statute were declared unconstitutional, defendants would have no legal title whatsoever to the premises, other than lot 93. Their title is necessarily predicated on possession, adverse or permissive.

Point 5—The Court erred in refusing to impress as a lien on the premises in question, the deposit of \$2,500 paid by appellant to appellees, with interest from the date of payment.

Appellant is entitled to rescind for the reasons that appellees' title was not as provided for by the agreement, except as to lot 93:

- (1) Their title, if at all good, is derived from adverse possession;
- (2) Their title is not good, as they have not proved adverse possession;
- (3) The legal title to the premises is not in appellees;
- (4) No default in the mortgage on lot 92 was proved;
- (5) No color of title for thirty years was proved for the easterly part (1.55 feet front and .80 feet rear);
- (6) No color of title for thirty years was proved for the middle two-foot triangle.

Specifically as to the title, appellant has proved that, according to the record, title to lot 92 is in Henry Drayton; that title to the easterly part (86.55 less 75 or 11.55 feet front on Central avenue by 80.80 less 70 or 10.80 feet rear) is in John W. Inness; that two parts of the property

do not meet leaving a triangle of two feet base on Central avenue, title to which is in the grantors named in either or both of the deeds to Degnen; that for this triangle "color of title" cannot apply, for it first was included in a description in 1907; that for the most easterly part (86.55 less 85 or 1.55 feet front by 80.80 less 80 or .80 feet rear) no "color of title" can be spelled out for it was not included in appellees' chain of title until 1907.

Entry under color of title is evidence of the nature of the entry, and if the deed which gives the colorable title contains a description by metes and bounds it is evidence of the extent of the claim of title in virtue of which the entry is made.

Foulke v. Bond, 41 N. J. L. 527, *supra*.

Appellees have not proved good title (except to lot 93), whether by conveyances or adverse possession or otherwise. Their title is shown as based only on mere possession, and a part through a mortgage made in 1836, a part through a deed in 1867 and a part through a deed in 1875. Neither that mortgage, nor either of those deeds, embrace the most easterly strip last described in the last paragraph.

Even assuming that appellees' title is good and marketable, appellant is nevertheless entitled to its bargain—a title not derived from any adverse possession—or return of its deposit. Appellees should not be permitted to say "you must take the title, because it is merchantable, even though it is derived from adverse possession—or lose your deposit." While it is no doubt true that not many titles in this State are readily traceable into the proprietors, this does not necessarily mean they are adverse titles. If founded on deeds, etc., which have been lost or destroyed, our Statutes (P. L. 1898,

p. 694) provide the method by which the same may be established and proved. Yet again, it is more difficult for the one attacking a title on the ground of its adverse derivation to obtain proof of the earlier record title than for the possessor to supply the missing link in the chain connecting such record owner with the possessor or his predecessors.

At any rate the Court cannot and should not make a new agreement for the parties. If it is the vendee's eccentricity to bargain for a purple cow or a title not derived from adverse possession, he need not accept what may be "just as good." But, from the practical side, it is easy to understand why the prospective purchaser does not desire a title derived from such source. Such titles are inferior in character to record titles (27 R. C. L. 225). They are difficult of proof; and although the purchaser may consider the proof offered sufficient to support the title, a court may later be of a different opinion, or the witnesses may die or not be available when again wanted. In some states, as Arkansas, such titles have been uniformly held unmarketable. The present trend is unfavorable to adverse titles for in most states which adopted the Torrens System of title registration, express provision is made that no adverse possession can be asserted against a registered title. The legal title in the premises may be vested in the State or the public, against whom no adverse possession may be set up (*Reutler v. Ramsin*, 91 N. J. L. 262). Disabilities of the legal owner may not have been removed; as illustrated by the hypothetical case occasionally toyed with where, at the time an adverse occupancy commences, the legal title is in an infant or lunatic, who dies before attaining his

majority or reason leaving a child, who dies similarly leaving a child.

Titles by adverse possession are in disfavor with persons contemplating the purchase of property, and with the courts.

Crocker v. Gouraud, 224 N. Y. 343;

Lincoln v. Schneider, 174 N. Y. Supp. 529.

Under the Torrens System no adverse possession can ever ripen into title.

Thompson, Real Property, sec. 960.

It is a well-known fact that most buildings in the centers of large cities encroach on the street or on adjoining premises. Yet this does not influence our courts in deciding that, where the contract provides against encroachments, any overlap, however trivial, is valid cause for rescinding.

Vendors should not agree to convey such titles as they cannot deliver. The instant case is not one of relief of the vendors for impossibility of performance; the impossibility of freedom from adverse possession in appellees' title existed at the time of the agreement of sale.

As to the proof, here the appellees rested until appellant found an outstanding early record title, which did not continue on into appellees' title; then, and only then, it became necessary for appellees to provide the missing link, if they could, or suffer their title or claim of title to be based on adverse possession.

Appellant is not obliged to accept the title offered.

A purchaser who contracts for a good record title is not obliged to accept the title which was bad of record, although capable

of being made good by evidence showing adverse possession for the statutory period.

Howe v. Coates, 97 Minn. 385;

Carolan v. Yoran, 107 App. Div. (N. Y.) 488;

Fagan v. Hook, 134 Iowa 381;

Noyes v. Johnson, 139 Mass. 436;

Bear v. Fletcher, 252 Ill. 206;

Givin v. Calegaris, 139 Cal. 384;

Bruce v. Wolfe, 102 Mo. App. 384;

Zunker v. Kuehn, 113 Wisc. 421;

Chew v. Tome, 93 Ind. 244.

Where a purchaser has contracted for a good title of record, he will not be compelled to take a title depending upon adverse possession under the statute of limitations, although it may be a good title, as that would be to enforce a different contract from that of the parties.

Thompson, Real Property, Sec. 4296 b.

Where a contract expressly or impliedly calls for a record title, a title by adverse possession, prescription or limitations is not sufficient.

39 Cyc. 1460.

Where the vendor expressly agrees to furnish the purchaser with a perfect chain of title or a title of record, his agreement is not complied with if such a title is not furnished, though his title may have been perfected by adverse possession and lapse of time, since a good documentary title or title of record is of a higher character and more desirable than one dependent on extrinsic circumstances to be established by parol evidence.

27 R. C. L. 225.

If the contract expressly stipulates as to the character of the title to be furnished by the vendor, the courts give effect thereto and require that the title offered con-

form to such stipulation. If it does not do so it is immaterial that may in fact be a good or marketable title.

27 R. C. L. 199.

There is a distinction between cases in which there were no specific covenants and where there are; the court cannot disregard the clause of the contract. To do so would be to draw a new contract for the parties, on which their minds have never met, and that is a policy that courts have uniformly refrained from acting upon.

Herring v. Esposito, 94 N. J. E. 348.

Goldstein v. Ehrlick, 98 N. J. E. 52.

Can the phrase "title not derived from adverse possession" be restricted to mean a covenant of the vendors in that respect no further back than themselves? We think not. Vendors' grantor, not being the State, title was not derived from him but was derived through him. And of what concern is it to a purchaser to know only how the vendor derived title from the latter's grantor; the purchaser is interested in obtaining a good, marketable title, free from trouble and worry. In the present case the vendee contracted to receive, not only a good title, but one which did not depend for its validity on possession or tax sale—the two kinds of title which are universally avoided by prudent buyers of realty, as witness the insertion of the clause in question in the printed "long form" agreements now extensively used in this State.

Title consists of possession, right of possession and right of property. Appellees' possession is admitted. Their right of possession can come from a grant from the sovereign state transferred to them (which is not the case here) or from the wrong committed by them or their

predecessors in squatting on the land adversely to the true owners for the statutory period (which is the case here).

Appellees' title, good or bad, is derived from adverse possession. Until the Statute of Limitations had run, they and their predecessors had no title—they were only trespassers; if the agreement in question was to have been consummated before the sixty and thirty year periods of occupancy claimed by appellees has expired, appellant could of course have rejected the title offered without relying on the special clause, for the vendors could not "well and sufficiently convey" as they would have had no title.

The vendors must be presumed to know the condition of their title, and the purchaser provides in the agreement against the contingency of being compelled to take a title good in law but undesirable for other reasons, such as are generally conceded to be undesirable or such as are perhaps by-products of the vendee's peculiarity. The phrase in question contains no limit in point of time of commencement of adverse title or in the number of instruments in the title. What difference can it make to a purchaser whether it was the vendors or their predecessors who entered into possession adversely—if he did not object to an adverse title, the time when it began is immaterial, and if he did object to such title the time of commencement was likewise immaterial. In *Potter v. Lumsden* (93 N. J. E. 476) this court speaks of complainant's "title by adverse possession" being sustained by a showing of adverse possession in complainant and the preceding grantors. Likewise in *Burrichter v. Wishnefsky* (135 Atl. 890) and *Foulke v. Bond*, *supra*, this Court said "the party relying on title derived from

such source (adverse possession) must prove possession in himself or in those under whom he claims."

When one speaks of quieting a title, he does not limit the period to the date of the last deed. A cloud may be removed, though the property may have changed hands many times since the cloud was formed. Appellees, by their answer, do not take this restricted meaning of the phrase, for they trace their title back through many conveyances.

Appellant respectfully submits that the Vice-Chancellor misapprehended the law and facts in several respects, as indicated in his opinion.

(1) It is evident, from throughout the opinion, the Court considered that if appellees' title was derived from possession, the provision in the agreement against adverse possession would not apply; in other words, that a mere possession is superior to an adverse possession as a means of acquiring title. The very opposite, however, is the law. To give proper effect to the provision, it means that the title offered shall not be based on possession, even if such possession is adverse. As shown, possession is an indication of title where no other title is proved by the adversary; adverse possession provides a title which cuts off the rights of the former owners. In the former case the presumption of title is overcome by proving a deed, devise, etc., to any one, no matter how far back or for how long the paper holder may have slept on his rights; in the latter case the title of the adverse possessor completely wipes out that of the paper owner.

(2) The Court applied the rule of monuments governing over distances (State of Case,

p. 69), although the facts as to the two-foot triangle show no inconsistency between the monument and the distance. The defect arises from an apparent error in the designation of two courses, but which course can be said to be correct and which incorrect is pure speculation; one must be and both may be wrong, but there is nothing in the proof to aid the description.

(3) The Court found record title to the lands complete from 1867 to date (p. 70). This is true only of the part shown on Plate B, and the balance of lot 93. And there is but 59 years from 1867 to 1926, the year of consummation of the agreement.

(4) The Court declared that the burden of proof was on complainant to prove that defendants' title was based on adverse possession (p. 72). All that was necessary for plaintiff to prove was that the paper title was not in defendants, as was here done, and it then became the duty of defendants to prove the continuation of the paper title into them or the acquisition of the title by the only other means—an adverse possession for the statutory period—neither of which they did. Complainant satisfied its burden of proof by showing the defendants' title of record to be defective and incomplete, whereupon the burden shifted to defendants to cure the defect and supply the missing links or prove an adverse title; failing to do so, their title is unmarketable, and if they have proved an adverse possession their title was not the kind complainant was entitled to have.

(5) The Court decided that title derived under section 2 of the 1877 Revision (now section 29 of our Statute of Limitations) was not necessarily based upon adverse possession (p. 73). Yet

the essential of the section is an "actual" possession, which is synonymous with an "adverse" possession (*Depew v. Colton, supra*). True, the defendants may avail themselves of either or both of sections 28 and 29; but each calls for an actual (*i. e.*, adverse) possession—if the occupier has color he need wait only thirty years, instead of sixty years without color, and he may hold part of the land by color and the balance without color.

(6) The Court inferred that defendants' title may have been obtained under a lost grant (p. 73). No evidence of such grant was offered. The doctrine of lost grant is but a legal fiction, overcome by the slightest proof of a lawful owner. It is but an academic invention to indicate a continuity in the title from the paper owner to the possessor of lands. Where a person has been long in possession and no other outstanding title is shown, the Court may infer in him a lot grant; as, by analogy, the title to personal property by the finder when the owner cannot be found. In the instant case, however, appellant has proved the ownership to be in persons other than appellees by the best kind of evidence—documents of record. Certainly the owner of property should not be divested of title on a mere theory or speculation that the possessor may have from the owner a grant not produced at the trial or not proved or even suggested by any of the evidence.

(7) The Court (p. 73) correctly stated, as far as the statement carried, that the purpose of the term "adverse possession" in the contract was to insure the vendee a good title not subject to successful attack in the courts. It was intended to insure the vendee a title more desirable than a "good and marketable" one im-

plied in agreements of sale. It was for a good and marketable title not dependant in any necessary respect on possession, whether adverse or not. The provision negatived titles resting on oral testimony—service of notices, entry, etc., as to tax titles and possession open, hostile, etc., as to adverse titles. The only acceptable titles remaining were those acquired through deeds, wills, sales by order of Court and other instruments apparent of record, and those acquired through inheritance; in the latter case, as administration is usually taken of intestate estates where realty is left, one might include a title by inheritance among those of record.

(8) The Court intimated that the provision of the agreement was not to afford an excuse for non-performance by the vendee (p. 73). There is nothing in the pleadings or testimony to show that appellant is using this provision as an excuse, instead of cause, for non-performance. But the Court cannot inquire into the reason to such extent: if the title is not as agreed appellant is entitled to rescind, otherwise not.

Appellant would not be compelled to perform the agreement, with the state of appellees' title as shown, hence the former is justified in rescinding.

A valid reason for refusing specific performance warrants a rescission of the contract.

Goldstein v. Ehrick, 97 N. J. E. 52, *supra*.

For the foregoing reasons appellant respectfully contends that the decree appealed from be reversed, and that a decree be directed to be entered in the Court of Chancery for appellant for

rescission and impression on the premises of a
lien for the deposit of \$2,500 and interest from
January 12, 1926.

CORN & SILVERMAN,
Solicitors and Counsel of Appellant.

Service of three copies of the within brief
as of time is hereby acknowledged this
24th day of May, 1927.

71 MAY.T.1927

Solicitors of Appellant

New Jersey Court of Errors and Appeals

THE MODEL PLAN AGENCY, a New
Jersey Corporation,
Complainant-Appellant,

v.

ISRAEL DIMOND and MILLIE
DIMOND,
Defendants-Respondents.

On Appeal from
Decree of Court
of Chancery.

BRIEF OF DEFENDANTS-RESPONDENTS.

Facts.

The bill was filed for the rescission of a contract wherein the defendants-respondents agreed to convey to the complainant-appellant the lands delineated as Plate "D" on Exhibit "C-1," a photostatic copy of which exhibit is attached to the state of case. The contract contained the following provision:

"It is expressly understood and agreed that the title to the lands and premises hereby agreed to be conveyed is not derived from
* * * adverse possession."

The defendants-respondents and their predecessors in title have been in possession of all of the lands agreed to be conveyed under an unbroken chain of title since 1854.

It is admitted (Stipulation, State of Case, pp. 65, 66 and 67) that defendants-respondents and their predecessors in title were bona fide purchasers of said lands, and that they have been in continu-

ous and uninterrupted possession of the westerly portion thereof since conveyance to Thomas Degnen by deed dated January 28, 1867, and of the easterly portion since the conveyance to said Degnen on December 23, 1875.

Edmund Slattery by his will, probated October 2, 1854, devised the westerly portion of said lands to his wife, Winifred Slattery, for life, with remainder to his son, Harvey, and the easterly portion thereof to his said wife for life, then to his daughter, Emma Jane Kinsey, for life, with remainder to his grandson, Edmund Kinsey. See will of Edmund Slattery, state of case, page 54.

Seventy-five years ago Winifred Slattery was in possession, not only of Lot No. 92 as shown on Plate "A," Exhibit "C-1," but of all the lands respondents agreed to convey, as appears from the testimony of Caroline A. Johnson, a lady of eighty years of age. It appears from her uncontradicted testimony (Case, pp. 39-45) that she had known the property in question since she was five years of age; that originally there were three houses on the tract of land, one at the corner of Inness Street (now Central Avenue) and Newark Street, facing Newark Street, and two facing Central Avenue; that during the Civil War she lived with her father in one of the houses; that after her marriage, she again lived in the same house for a number of years; that Mrs. Winifred Slattery first occupied the corner house, then the house next to the corner facing Central Avenue, and later a part of the house occupied by witness and her father; that when witness again occupied the house after her marriage, Thomas Degnen was the owner thereof; that when she and her father occupied said property, they paid rent to Winifred Slattery; and when she later occupied the house she paid rent to Thomas Degnen.

Harvey Slattery conveyed his remainder interest in the westerly portion of said lands to his mother, Winifred Slattery, by deed dated October 2, 1854 (State of Case, p. 55).

The executors of Winifred Slattery, deceased, conveyed the westerly portion of said lands to Thomas Degnen by deed dated January 28, 1867 (State of Case, p. 57).

Emma Jane Kinsey, with her husband and son, Edmund Kinsey, conveyed the easterly portion of said lands to said Degnen by deed dated December 23, 1875 (State of Case, p. 58).

The tract shown on Plate "A," Exhibit "C-1" as Lot No. 92, was conveyed by Aaron Ward to one Henry Drayton by deed dated October 10, 1836. There is no deed of record out of Drayton for said lot. Drayton mortgaged said lot to Aaron Ward, which mortgage was by mesne assignments assigned to Thomas Degnen on June 8, 1870,—three years after he had obtained deed from the executors of Slattery for the westerly portion of said lands.

**Objections to the Title Raised by the
Complainant-Appellant.**

1. That there is no record title out of Drayton for Lot No. 92 as shown on Plate "A," Exhibit "C-1."
2. That there is a triangular strip, having a base of two feet on Central Avenue and its apex at the northerly line of the whole tract, that was not embraced in either the deed from the executors of Winifred Slattery, deceased, to said Degnen, or the deed from the Kinseys to Degnen.
3. That the deed from the Kinseys to Degnen did not convey all the lands described in said contract lying east of a line drawn parallel with

Newark Street and distant 54 feet easterly therefrom. The Kinsey deed is delineated within the solid lines on Plate "C" of Exhibit "C-1" and the broken line on the easterly side is the easterly line of the lands agreed to be conveyed.

We will take up the objections to the title in the order above stated.

POINT I.

To appellant's first objection that there is no record title out of Drayton for Lot No. 92 as shown on Plate "A," Exhibit "C-1," respondents say:

There is a complete record title out of Drayton through Degnen's possession as mortgagee for more than twenty years.

There is nothing to show, nor is there any presumption, that the mortgage given by Drayton to Ward in 1836 was not in 1870—the date of the assignment to Degnen—a valid lien against the property, and in the absence of proof to the contrary, it must be presumed that the mortgage was, though old, a valid lien.

If the deeds to Degnen were effectual in conveying to him the title to the lands, then when he acquired the mortgage it would merge in his legal title; if such deeds were ineffective to convey the legal title, then he became a mortgagee in possession.

"Even where one is a trespasser in the first instance, and while holding in this way takes an assignment of a mortgage, it would seem, after forfeiture, at least, that the mortgagor's consent to his holding possession would be inferred from the mortgage itself" (1 *Jones, Mortgages*, Sec. 715).

Madison Avenue Baptist Church v. Oliver St. Baptist Church, 73 N. Y. 82.

Although a mortgagee in this state cannot take possession of the mortgaged premises before default, after default his "estate has all the incidents of a common law title, and he has the right to the possession of the mortgaged premises."

Stewart v. Fairchild, 91 N. J. E. 86, 88, cited by appellant.

After default, possession by the mortgagee for twenty years bars the equity of redemption of the mortgagor and those claiming under him.

3 *C. S.*, p. 3170, Sec. 18;
Chapin v. Wright, 41 N. J. E. 438;
Cohn v. Plass, 85 N. J. E. 153.

There is a *prima facie* presumption that being in possession under the mortgage, Degnen was there by reason of default of the mortgagor,

Den v. Wright, 7 N. J. L. 175, 178,

and the burden of proving that the mortgagor was not in default is upon appellant.

Having entered upon the land and held it as a mortgagee for a period of thirty-seven years, Degnen acquired a complete title to Lot No. 92 on Plate "A" by reason of *C. S.*, p. 3170, Sec. 18,

Chapin v. Wright, *supra*;
Cohn v. Plass, *supra*,

and this title is not one based upon adverse possession, but is a good record title.

In *Brown v. Berry*, 89 N. J. E. 230, the Court of Errors affirmed the opinion of Vice-Chancellor STEVENSON in which he said (p. 236):

"It is unnecessary to cite the authorities which hold that where a mortgagee takes possession under his mortgage, and holds possession for twenty years with no payment of interest and no agreement modifying the

transaction, the equity of redemption is extinguished. Sometimes this title which the mortgagee in possession acquires has been confused with a title by adverse possession. It is not the adverse possession which ripens into an absolute title in the case of a mortgagee. The mortgagee is in possession under a conveyance in fee. Anciently, the mortgagor lost all title in case the condition was not performed by him within the time stated, *i. e.*, in case the money was not paid according to the condition of the mortgage. Our law now allows the mortgagor to redeem within twenty years and limits him to that period.
* * *

"After the expiration of twenty years from the correct date * * * the defendants lost their right to redeem and the complainant lost his right to foreclose, and the complainant, in my judgment, plainly is in possession under his mortgage deed, and under that deed holds an absolute title in fee, the equity of redemption formerly in the defendants having expired."

Having been in possession longer than the statutory period under the mortgage and no tolling of the statute having been shown, Degnen acquired complete record title to the premises in dispute.

POINT II.

Answering appellant's second objection to the title, respondents say that the triangular strip of land having a base of two feet on Central Avenue and its apex at the northerly line of the whole tract is embraced in the deed from the executors of Winifred Slattery, deceased, to Thomas Degnen. This deed conveyed the following lands:

"Beginning at the northeasterly corner of Newark and Inness Streets (now Central Avenue); thence along Newark Street northerly

60 feet; thence easterly at right angles to Newark Street 54 feet; thence southerly and parallel with Newark Street 60 feet to Inness Street; and thence along Inness Street westerly 52 feet to the place of Beginning." (State of Case, p. 57.)

It is self-evident that the third line in the deed above described would intersect Inness Street (now Central Avenue) at a point 54 feet easterly from Newark Street. Newark Street, being a monument, the monument would control the distance and the deed should be interpreted as 54 feet to the point or place of beginning.

"In case there is no error or inconsistency in the boundaries described in a deed until the last line is reached, which is declared to run a given course and distance 'to the place of beginning,' but the given course and distance would not bring it to that point, nor complete the inclosure of any land, the course and distance of the last line should be rejected as erroneous, and effect given to the more certain designation, 'thence to the place of beginning.'"

4 *Thompson Real Property*, Sec. 3138;
Owings v. Freeman, 48 Minn. 483; 51 N. W. 476.

In *Platt v. Bente*, 49 N. J. L. 679, it was held that a call in a deed for a line running from a street at right angles thereto is not varied because the next call is for a distance of 30 feet, more or less, from the end of the line to a monument, when in fact the end of the line run at right angles is 33 feet 6 inches from the monument.

The deed from the executors of Slattery to Degnen, therefore, included the triangle between 52 and 54 feet on Central Avenue.

POINT III.

Answering appellant's third objection to the title, it is submitted the deed from the Kinseys to Degen conveys all the land from a line drawn parallel with Newark Street and distant 54 feet easterly therefrom to the broken line on the easterly side of Plate "C" of Exhibit "C-1" which is the easterly line of the lands agreed to be conveyed.

The Kinsey deed conveyed the following lands (State of Case, p. 58):

"BEGINNING in the north line of Central Avenue distant 54 feet easterly from Newark Street; and along easterly line of property of said party of the second part, 59 feet to lot #94 on the map of the Aaron Ward property; thence easterly along said lot #94, 26 feet to Hugh Carroll's lots; thence southerly along the same 59 feet, more or less to Central Avenue; thence along the same westerly 31 feet to the place of BEGINNING."

Hugh Carroll's line is the dotted line shown on Plate "C" of Exhibit "C-1."

"If there are no monuments or marks upon the ground, a call for the adjoining land prevails in case there is any discrepancy between such call and the courses and distances given. The adjoining land in that case becomes a monument which controls courses and distances."

4 Thompson Real Property, Sec. 3136;
Land Co. v. Saunders, 103 U. S. 316, 26 L. Ed. 546.

It, therefore, follows that Hugh Carroll's line, being a monument, governs the course and distance of the second line of the Kinsey deed, and that the third course must run along Hugh Carroll's line. This deed, therefore, embraces the lands lying between the solid line on Plate "C," Exhibit "C-1" and the broken line thereon.

POINT IV.

Under the contract, appellant is not entitled to a complete record title.

A provision that the title is not derived from adverse possession does not mean that there must be a perfect record title as the appellant contends.

It is quite evident that a continuous chain of unrecorded deeds would satisfy the terms of the contract of sale. Moreover, it is a well-known fact that the early records of Essex County were destroyed by fire, and that, therefore, there is not a perfect record title in Essex County. We cannot presume, therefore, that this provision was inserted for the purpose of enabling the appellant to rescind the contract if it should decide not to go on with it. The true meaning of the phrase in the contract "not derived from adverse possession"—and that placed thereon by the bar generally—we think, is that it is a title derived from actual and exclusive, adverse and hostile, visible or notorious, continued possession for the full period of twenty years through the operation of C. S. p. 3169, Sections 16 and 17, where the holding was tortious in the beginning and continued as such until the statute ripened such holding into a title, and that it does not mean a title where the holder thereof, or those under whom he claims, by conveyance, devise or descent, entered into possession under a *bona fide* conveyance and the full term of the statute quieting his title against the world has run.

The title of respondents is derived through the operation of C. S. p. 3172, Sections 28 and 29. Title based upon Sections 28 and 29 is not a title based upon adverse possession.

These sections are not, strictly speaking, statutes

of limitation. The preamble of that act is as follows:

“Whereas the laws now in force for the limitation of suits respecting real estate are found insufficient to answer the good purposes of quieting claims and securing title—therefore.”

Our present twenty-year statute of limitations was originally passed in 1799, and was entitled “An Act for the Limitation of Actions.”

Section 1 of the act of 1787, now Section 28, *C. S.* p. 3172, is as follows:

“That sixty years’ actual possession of any lands, tenements, or other real estate, uninterruptedly continued by occupancy, descent, conveyance or otherwise, in whatever way or manner such possession might have commenced, or have been continued, shall vest a full and complete right and title in every actual possessor or occupier of such lands, tenements, or other real estate, and shall be a good and sufficient bar to all claims that may be made, or actions commenced by any person or persons whatever, for the recovery of any such lands, tenements, or other real estate.”

Section 2 of the same act, now Section 29, *C. S.* page 3172, provides:

“That thirty years’ actual possession of any lands, tenements or other real estate, uninterruptedly continued as aforesaid * * * wherever such possession was obtained by a fair *bona fide* purchase of such lands, tenements, or other real estate, of any person or persons whatever, in possession, and supposed to have a legal right and title thereto * * * shall be a good and sufficient bar to all prior locations, rights, titles, conveyances or claims whatever, not followed by actual possession as aforesaid, and shall vest an absolute right and title in the actual possessor and occupier of all such lands, tenements, or other real es-

tate; provided always, that if any person or persons, having a right or title to lands, tenements, or other real estate, shall, at the time of the said right or title first descended or accrued, be within the age of twenty-one years, *feme covert*, *non compos*, imprisoned, or without the United States of America, then such person or persons, and his and their heir and heirs, may, notwithstanding the aforesaid times are expired, be entitled to his or their action for the same, so as such person or persons, or his or their heirs, commence or sue forth his or their action within five years after his or their full age, discoverture, coming of sound mind, enlargement out of prison, or coming within any of the United States, and at no time after; and provided also, that any citizen or citizens of this or any other of the United States, and his or their heirs, having right or title to any lands, tenements, or other real estate within this state, may, notwithstanding the aforesaid times are expired, commence his or their action for such lands, tenements, or other real estate, at any time within five years next after the passing of this act, and not afterwards.”

Section 16 and 17, *C. S.* page 3169, are as follows:

“That no person who now hath, or hereafter may have, any right, or title of entry into any lands, tenements, or hereditaments, shall make any entry therein, but within twenty years next after such right or title shall accrue; and such person shall be barred from any entry afterwards; provided, always, that the time during which the person who hath or shall have such right or title of entry, shall have been under the age of twenty-one years, or insane, shall not be taken or computed as part of the said limited period of twenty years.”

“That every real, possessory, ancestral, mixed or other action, for any lands, tene-

ments or hereditaments, shall be brought or instituted within twenty years next after the right or title thereto, or cause of such action shall accrue, and not after; provided, always, that the time during which the person who hath or shall have such right or title, or cause of action, shall have been under the age of twenty-one years, or insane, shall not be taken or computed as part of the said limited period of twenty years."

It will be seen from the reading of Sections 16 and 17 of the act for the limitation of actions, that such sections do not purport to vest a title in a person who has held adversely for twenty years. Section 16 deprives the person not in possession thereof of the right of re-entry, and Section 17 deprives such person of any right of action for the lands. But notwithstanding this fact, our courts have held that twenty years' adverse possession confers the fee upon the person who has so held adversely. *Spottiswoode v. Morris & Essex Railroad Company*, 61 N. J. L. 322; affirmed by the Court of Errors and Appeals, 63 N. J. L. 667.

The Act of 1787 and the Act of 1846 were re-enacted and became laws under the revision of 1877.

Prior thereto the Statute of 1799, re-enacted in 1846, had been interpreted by our courts as meaning that the possession to defeat the right of action must have been notorious, continued and exclusive for the full period of twenty years.

Cornelius v. Giberson, 25 N. J. L. 1.

Therefore, when the Statute of 1846 was re-enacted by the revision of 1877, Sections 16 and 17 had been interpreted by the courts as requiring the occupant to show that he had been in *actual and exclusive, adverse and hostile, visible or notorious, continued and uninterrupted possession*

of the land for the full period of twenty years, and since the Act of 1846 and the Act of 1787 were re-enacted at the same time by the revision of 1877, the Legislature must have known and intended that the respective sections should apply to different conditions and serve different purposes. It being clear that twenty years' adverse possession vests in the one so occupying the lands, the fee, then, what could have been the purpose of re-enacting the Act of 1787 (now Sections 28 and 29) if possession thereunder must still be adverse?

In *Spottiswoode v. Morris & Essex Railroad Co.*, 61 N. J. L. 322, 328, Justice DEPUE, in speaking for the Supreme Court, and after quoting the 1787 act, now Sections 28 and 29, says:

"Possession obtained and held as prescribed by the first section of this act will confer a title paramount to the claims or rights of all other persons. Such a possession will bar the issue in tail, as well as the tenant in tail, against whom it commenced its operation. *Wright v. Scott*, 4 Wash. (U. S.) 16, 24. Possession in conformity with the second section of the act will also confer a valid title, not only against the tenant in tail, but also all persons claiming by descent *per formam doni* through him. *Croxall v. Sherrerd*, 5 Wall. 268, 287. The section last referred to in using the words 'all prior locations, rights, titles and conveyances or claims,' in describing the title extinguished by such possession, restricts the operation of that section to titles or claims in existence prior to the thirty years' possession, and consequently the statute under that section will not begin to run against a reversioner or remainderman until after the estate for life is terminated. *Pinckney v. Burrage*, 2 Vroom 21.

"The first section of the act of 1787 does not apply to this case—the plaintiff making no title under a possession for sixty years. Nor is the second section of the act pertinent to the

consideration of this case—a fair bona fide purchase from a person supposed to have a legal right and title and a possession of thirty years thereunder not being within this issue. The legislation that applies to this subject is section 16 of the act of 1874 (*Gen. Stat.*, p. 1977), which was section 9 of the act of February 7th, 1799 (*Rev. L.*, p. 411). Neither of these sections—sections 1 and 2 of the act of 1787 and section 9 of the act of 1799—conflicts with or modifies the other. If the case presented is within the first section of the act of 1787 or within the second section, or within section 9 of the act of 1799, a party may avail himself of the rights conferred by this legislation respectively and severally.”

It, therefore, seems clear that a title is put at rest and effectually quieted if the one in possession and those under whom he claims have been in possession for the full period of sixty years; and that such title is also put at rest and quieted in thirty years, except against reversioners and remaindermen whose right of entry had not accrued prior to thirty years, and the persons mentioned in the proviso of Section 2 of the Act of 1787, if the original possession was taken by a fair *bona fide* purchase from a person in possession and supposed to have had a legal right and title thereto; and in neither instance is it necessary for the entry and holding to be tortious as in the case of adverse possession. There is no record or evidence of a deed, lease or will made by Drayton. Therefore, there can be no reversioner or remainderman.

Title based upon either Section 28 or 29 is not based upon adverse possession, but upon the presumption of a grant or conveyance from long continued possession.

The authorities of foreign jurisdictions and text writers, in referring to title acquired through the

operation of the Statutes of Limitations, deal with strict Statutes of Limitation, *i. e.*, where the holding was originally tortious and the holding has been open, notorious, exclusive, hostile and continued for the statutory period.

“The doctrine, occasionally asserted, that the long continued possession of land by one claiming as owner gives rise to the presumption of a valid conveyance to him or to the person under whom he claims, though ordinarily similar in its practical results to the statutes of limitation, is entirely independent thereof (2 *Tiffany Real Property*, p. 1920).”

“Third and lastly, a presumption may arise from long continued peaceable possession of land, accompanied by the usual acts of ownership, regardless of the period prescribed for acquiring title by adverse possession in its technical sense or by prescription, that the outstanding paper title was in fact conveyed to the occupant by a grant which has been lost * * *.”

“This presumption is independent of the statute of limitations and is not affected thereby” (2 *C. J.* 289).

The distinction between the presumption of a grant arising from long continued possession and adverse possession is also made in *Brassfield v. Walker*, 7 B. Mon. (Ky.), 96; *Trustees of Wadsworthville Poor School v. Jennings*, 40 S. C. 168, 18 S. E. 257 (rehearing denied in 18 S. E. 891); and *Abrams v. Rhoner*, 44 Hun (N. Y.) 507.

In the last case one Bayard through whom plaintiff derived his title had in 1771 conveyed the premises in question to third parties. In 1797 said Bayard conveyed the same premises to plaintiff's predecessors in title. Plaintiff and his grantors have been in actual possession of the premises from the date of the deed in 1797 until the making of the contract (about 1885). No convey-

ance out of the grantees under the 1771 deed was ever found or ever heard of. The Court said in such a case:

"The presumption must be conclusive that the grantees named in that deed must have reconveyed to Nicholas Bayard before he conveyed to his daughters and their husbands in 1797, or that the conveyance of 1771 never had an operative delivery to the grantees therein named (*Woolsey v. Morss*, 19 Hun 273, and the numerous cases referred to in the opinion in that case; *Jackson v. McCall*, 10 John. 377; *Jackson v. Moore*, 13 John. 516; *Ottinger v. Strasburger*, 33 Hun 468).

"But aside from this presumption, the plaintiff established a title by adverse possession * * *."

See also,

Maupin, Marketable Title to Real Estate (3rd Ed.), page 814.

Title based upon presumption of grant or conveyance differs from one based upon adverse possession in the following respects:

1. One of the essential elements of title by adverse possession is that the disseisor must knowingly intend to disseise the rightful owner of the land.

Folkman v. Myers, 93 N. J. E. 208;
Myers v. Folkman, 89 N. J. L. 390;
DeLuca v. Melin, 134 Atl. Rep. 735.

Title based upon presumption of grant or conveyance "involves a presumption of the rightfulness of one's possession."

2 *Tiffany Real Property*, p. 1920;
2 *C. J.*, 290;
United States v. Chavez, 175 U. S. 509;
Trustees of Wadsworthville Poor School v. Jennings, supra.

Section 28, C. S. 3172, is, after all, a statute, not of limitations in the strict sense, but of presumptions. Under Section 28 one in possession of lands under a perfect chain of title extending back for sixty years would not be required to show in an action of ejectment that he and his predecessors in title for the statutory period knowingly and intentionally disseised the original owner.

Under Section 29 of our act a *bona fide* purchaser of lands from one in possession and believed to be the owner thereof and who had continued in possession for the full period of thirty years, would not be compelled in an action of ejectment (except against reversioners and remaindermen whose right of entry later accrued, and the persons excepted in the statute) to show that he knowingly and intentionally disseised anyone.

2. "The presumption applies to subjects not within the operation of the statute (of limitations) or expressly excluded therefrom, and hence applies to incorporeal hereditaments." (2 *C. J.* 290.)

So in *Trustees of Wadsworthville Poor School v. Jennings, supra*, although the statute of limitations excluded land held by school corporations from its operation, it was held that title could be acquired against them by presumption of a grant; and

3. A conveyance from the state may be presumed, although the statute of limitations will not ordinarily run against the state.

2 *Tiffany Real Property*, p. 1922;
2 *C. J.* 290;
State v. Dickinson, 129 Mich. 221, 88 N. W. 621;
Jarboe v. McAtee, 7 B. Mon. (Ky) 279;
United States v. Chavez, supra.

Title by virtue of Sections 28 and 29 may also be considered a title by prescription which differs from title by adverse possession in that it is under a claim of right and does not originate in fraud.

Burdell v. Bland, 66 Ga. 169.

It is thus evident that a title based upon Sections 28 or 29 is like a title by presumed grant and not one by adverse possession which is based upon the statute of limitations.

Moreover the Court will not decree specific performance where the vendor's title is based upon adverse possession, *Sulk v. Tumulty*, 77 N. J. E. 97, yet in the case of *Day v. Kingsland*, 57 N. J. E. 134, the facts were that the record holder of the title claimed under a partition sale. In the bill for partition it was alleged that the property was owned by Daniel Riggs, who died seized thereof in the year 1786. That he devised the same to his son, Benjamin, and his heirs, with the provision that if he died without issue that the lands given to Benjamin "shall fall to my surviving heirs." That Benjamin died in 1854 without issue. Elias, John and Rachel Bruen, three children of Hannah Bruen, a deceased daughter of Daniel Riggs, moved to Philadelphia more than thirty years prior to the filing of the bill, and had not been heard from in that time, and that Elias, John and Rachel Bruen had long since departed this life without leaving lawful issue. They were not included as defendants in the partition proceedings, and the defendants objected to taking title on that account.

EMERY, V. C., says:

"I had occasion to consider the decisions of our court in reference to the question of marketable title in *Lippincott v. Wikoff*, 9 Dick. Ch. Rep. 107. Where the alleged doubt in relation to the title is one of fact, as in this case,

the rule which has been settled by our courts is that the court will never compel a purchaser to take a title where the point on which it depends is too doubtful to be settled without litigation or where the purchase would expose him to hazard of such proceedings." Citing cases. "No proof whatever has been offered in this case showing the existence of either of the three children of Hannah or of any heirs of either of them at the time of the partition proceedings, and in the absence of any evidence in this suit rendering it probable that they or their heirs were then in existence and should have been made parties, the vendee cannot set up the failure to make them parties in order to avoid the contract. The mere possibility of the existence of these heirs or persons claiming under them, based on suspicion or conjecture and without the production of any evidence to support the conjecture is not sufficient to relieve the vendee * * *.

"A second answer to the objection to the title is furnished by the proofs made in the present case showing adverse possession for over forty years by the complainant and those under whom she claims. This possession, originating under a *bona fide* purchase, will, under our limitation act, bar all adverse claims arising under the supposed heirs unless they arise under the provisos, or one of them. These heirs, or persons claiming under them, cannot be brought within the proviso of the act, except upon the supposition of the occurrence of an entire series of circumstances so remote and improbable that in the absence of any proof upon the subject, the mere assumption of their probable occurrence cannot be made the basis of judicial determination that the title is clouded * * *.

"In the absence of proof suggesting the probability of the happening of the series of contingencies upon which any possible claim under the provisos must be based, it must be held that the occurrence of the entire series of contingencies is so remote and improbable as not to render the title unmarketable."

In the case of *Hummer v. Buerk*, 90 N. J. E. 97, the facts were that there was a break in the chain of title which occurred more than sixty years prior to the contract of sale, but there was a chain of title for more than sixty years. The proofs showed possession in the persons claiming under the chain for 54 years. BACKES, V. C., says:

"It must be assumed at this distant date that Butler at that time was in possession under his title, good or bad, and that he went into possession forthwith after he got the deed, more than sixty years ago * * *."

"Now it is obvious that the provision of section 28 operating upon the unbroken adverse possession for more than sixty years sets at complete rest the complainant's title. And aside from this, the operation of section 29 upon the complainant's personal possession of more than thirty years certifies his absolute ownership."

There is a *prima facie* presumption both that Edmund Slattery was in possession of all the lands at the time of his death in 1854, and that those claiming under him were in possession when they executed and delivered deeds to Thomas Degnen—the first of which was in 1867, and the second in 1875. And since it was stipulated that Degnen and those claiming under him went into possession upon receiving their respective deeds, it follows that we have an actual and continuous possession of the lands for more than 60 years, and that title to the premises was put at rest both under Sections 28 and 29 of C. S. 3172.

POINT V.

The burden of proof to show that respondent's title is based upon adverse possession is upon appellant.

It does not follow as a matter of law that because there is no deed of record in Edmund Slattery for Lot No. 92 as shown on "Plate A," Exhibit "C-1," and for the tract lying between the easterly solid line and the dotted line shown on said "Plate A," that no conveyance was made to him therefor. He may have failed to record his deed.

A person in possession of lands is *prima facie* presumed to be the owner thereof. The rule in ejectment that the plaintiff, if he recover at all, must do so upon the strength of his own title and not upon the weakness of the defendant's title, is simply a statement of the rule that possession is *prima facie* proof of ownership. In ejectment the defendant is always in possession, and therefore, has *prima facie* title. Consequently, the plaintiff in ejectment, being out of possession, must trace his title to someone shown to be in possession of the property, or failing that, to the Council of Proprietors.

The same doctrine will be seen in the cases of *Day v. Kingsland*, 57 N. J. E. 134, and *Hummer v. Buerk*, 90 N. J. E. 97. In *Day v. Kingsland*, in dealing with the possibility of heirs of the persons alleged to have died without heirs, the Vice-Chancellor says:

"The mere possibility of the existence of these heirs or persons claiming under them, based on suspicion or conjecture and without the production of any evidence to support the conjecture is not sufficient to relieve the vendee * * *."

And again, in dealing with the so-called thirty-year statute of limitations, he says:

"These heirs, or persons claiming under them, cannot be brought within the proviso of the act, except upon the supposition of the occurrence of an entire series of circumstances

so remote and improbable that in the absence of any proof upon the subject, the mere assumption of their probable occurrence cannot be made the basis of judicial determination that the title is clouded * * *."

He further says:

"In the absence of proof suggesting the probability of the happening of the series of contingencies upon which any possible claim under the provisos must be based, it must be held that the occurrence of the entire series of contingencies is so remote and improbable as not to render the title unmarketable."

And in the same case, in citing *Greenblatt v. Herrmann*, 144 N. Y. 13, he says:

"It was held in this case that where the record title was good, the burden was upon the vendee to show the facts making the title doubtful, and also the possibility of the existence of heirs based upon any claim and not on proof of any facts to support it, did not raise a reasonable doubt as to the validity of a title good upon the record."

In *Hummer v. Buerk*, BACKES, V. C., says:

"It must be assumed at this distant date that Butler at that time was in possession under his title, good or bad, and that he went into possession forthwith after he got the deed, more than sixty years ago * * *."

We are aware that in *Licari v. Carr*, 84 N. J. L. 345, 349, Justice BERGEN, speaking for the Court of Errors and Appeals, said:

"Where the plaintiff in ejectment shows a paper title to the lands demanded with possession thereof by the plaintiff, or his predecessors in title under whom he claims, a *prima facie* case is made against one who has no paper title and who rests his right to possession upon an entry subsequent to the com-

mencement of the paper title and possession thereunder, and imposes on him the burden of establishing his right to possession. *Calatro v. Schavel*, 43 Vroom 458. Possession as a presumption of law is intended only in favor of the true owner, and every presumption is in favor of possession in subordination to his title. *Foulke v. Bond*, 12 Vroom 527-547."

This is simply another way of stating the rule that one who relies upon adverse possession as against a perfect paper title must show that such possession was actual and exclusive, adverse and hostile, visible or notorious, continued and uninterrupted for twenty full years, and is not in conflict with the rule above stated that a person in possession of the lands is *prima facie* presumed to be the owner thereof.

The stipulation shows that Degnen and those claiming under him were in actual and exclusive possession of the lands from the date of the conveyances to Degnen in 1867 and 1875. The proof shows that Winifred Slattery was in possession.

It, therefore, appears conclusively that respondents and their predecessors in title have been in actual and uninterrupted possession of the premises for at least sixty-three years and that by operation of Sections 28 and 29 respondents have a perfect title. Having shown that respondents and their predecessors have been in actual possession for that period of time, the burden is upon the appellant to show that it is adverse. It cannot expect us to prove its case.

Where title is acquired by presumed grant, the presumption is one of law and fact similar to the presumption of payment of a mortgage by lapse of time, and the presumption, having once been established, can only be overcome by showing that such was not the case.

Trustees of Wadsworthville Poor School v. Jennings, supra.

Appellant has not shown anything besides the possible break in record title to support his case of adverse possession. But this is not sufficient to overcome the operation of Sections 28 and 29, C. S. 3172.

Nor does it follow as a matter of law that the so-called eleven feet between the easterly solid line as shown on "Plate A" and the dotted line were not embraced within the deed from Ward to Drayton. It will be remembered that the deed was made in 1836. It may be that the easterly line of Newark Street was then eleven feet easterly of its present line, and if so, the so-called eleven feet would be within the descriptions in the deeds from Ward. At this late date it is believed that no one can now locate the line of Newark Street as recognized or established in 1836. Apparently, the practical location of the boundaries were the same as the present location.

POINT VI.

Appellant insists that it is not obliged to take a title based upon adverse possession and cites cases supporting them.

An examination of these cases will show that they were cases where the vendor had agreed to give a good record title, or to furnish a perfect chain of title, or agreed that the buildings were within the property lines, but that they do not involve the question here at issue.

But by the contract, appellant is not entitled to a perfect record title, it is entitled to get a title not based upon adverse possession, and, assuming that the title is marketable, the burden is on appellant to show that the title did not comply with the terms of the contract. The appellant holds the affirmative and is bound to establish affirmatively the facts upon which a judgment in its favor must rest.

In this case, there is nothing established except a possible gap in the record. The title was in Ward in 1836. It was claimed to be in Slattery by his will which was probated in 1854; but Slattery's will bears dated in 1852, so that from the record it appears that he asserted title in 1852. Only sixteen years elapsed between 1836 and 1852, and only eighteen years elapsed between 1836 and 1854, so that Slattery could not have acquired title by adverse possession. It is, under these circumstances, probable that Slattery had title, even if the title did not appear on the record. Had the contract in this case called for a record title, possibly something could have been said in favor of the complainant's contention though we doubt that very much could have been said that would have justified the complainant's rejection of the title; but the contract did not call for a title of record; it called for a marketable title but excluded title derived from adverse possession, and it is insisted that the fact that the title is derived from adverse possession is a fact to be established by the complainant from the evidence and that the evidence does not establish it.

In opening his case, counsel excluded any claims except those relating to the description of the land and the break in the chain of title. It did not raise the question of marketable title at the trial. Respondents presented their case upon appellant's opening and have a right to have the matter considered as presented in court and not by the brief.

It is respectfully submitted that respondents' title is unimpeachable and is not derived through adverse possession.

HOOD, LAFFERTY & CAMPBELL,
Solicitors for and of Counsel
with Respondents.

