

ferent from the first count. Regardless of the formal difference of the theories of counts, the substance is the same. A person was injured due to the negligence of the defendant and under conditions where the defendant owed a duty to the plaintiff to have properly repaired the porch, she having partly undertaken to perform same.

It is therefore earnestly submitted that the lower Court should be reversed, that the second and third counts be permitted to stand, and that the case be remitted.

Respectfully submitted,
SAMUEL MORRIS,
Attorney for Plaintiff-Appellant.

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Bill of Complaint.

COMPLAINT.

In Chancery of New Jersey

Between

JOHN D. GOLDBERG,
Complainant,

and

MARY LEVY,
Defendant.

On Bill for 10
Specific
Performance.
Complaint.

To the Honorable EDWIN ROBERT WALKER, Chan-
cellor of the State of New Jersey:

The complainant, John D. Goldberg, of the
City of Newark, in the County of Essex and
State of New Jersey, respectfully shows: 20

1. That on the 2nd day of June, 1925, the
said Mary Levy, who is a widow, of the City of
Newark, entered into a certain contract in writ-
ing, a true copy of which is hereunto annexed
and made a part hereof, whereby she agreed to
convey to the Constructo Realty Co., a corpora-
tion, for the sum of Fifty-eight Hundred Dollars
(\$5,800) by deed of warranty, on or before the
first day of August, 1925, all that certain tract
or parcel of land and premises situate, lying and
being in the City of Newark, in the County of
Essex and State of New Jersey, and being com-
monly known and designated as No. 56 Jones
street, and more particularly described as fol-
lows: 30

BEGINNING at a point distant three hun-
dred feet eight inches northerly on the east-
erly line of Jones Street from the corner, 40

Bill of Complaint.

10 which corner is formed by the intersection with the northerly line of the Springfield Turnpike; thence (1) running easterly at right angles with Jones Street ninety feet more or less to the fence; thence (2) north-
 10 erly along the fence twenty-five feet; thence (3) westerly parallel with the first course ninety feet more or less to Jones Street; thence (4) southerly along the easterly line of Jones Street twenty-five feet to the place of BEGINNING.

The said contract, after having been duly signed, executed and acknowledged on the said 2nd day of June, 1925, was, on the 23rd day of November, 1925, recorded in the Register's Office of said County of Essex and State of New Jersey.

20 2. That the sum of Three Hundred (\$300) Dollars of the consideration for said lands, as mentioned in Paragraph 1 hereof, was duly paid by the Constructo Realty Co., a corporation, to the said Mary Levy, the defendant herein, upon the execution and delivery of the said contract, and that on the 11th day of June, 1925, the complainant, John D. Goldberg, paid the sum of Two Hundred and Fifty (\$250) Dollars unto the Constructo Realty Co., a corporation, and in consid-
 30 eration thereof, the said Constructo Realty Co., a corporation, assigned, sold, transferred and set over the said agreement for the sale and purchase of the said property unto your complainant, John D. Goldberg, and delivered the said agreement for the purchase of said property unto your complainant, and of which assignment the said Mary Levy had notice thereof.

40 3. That the lands mentioned and described in the aforesaid contract of sale consists of an im-

Bill of Complaint.

proved city building lot, with a building thereon, and which lot is twenty-five feet more or less frontage on Jones street and ninety feet more or less in depth and twenty-five feet more or less in rear, and is known and designated as No. 56 Jones street. That since the execution of said contract and the assignment of said contract unto
 10 your complainant, John D. Goldberg, your complainant has been ready, willing, anxious and demanded the conveyance of the said tract of land and was ready to tender and does hereby tender the full purchase price in accordance with the terms of the said contract, but that the said defendant refused and still does refuse to convey and carry out the said contract in accordance with the terms thereof, and that your complainant is desirous to obtain the conveyance of the
 20 said tract of land and premises hereinabove described, contracted to be conveyed to your complainant as aforesaid, but that the said defendant refuses to convey and carry out the said contract in accordance with the terms thereof.

4. Your orator further shows unto your Honor that since the execution of said contract the building then on said tract of land has been removed, and that the said tract of land is bare
 30 of any building, and wherefore your orator prays that a due and proper sum be allowed to your orator as an abatement by way of compensation by reason of the removal of the said building on the said tract of land hereinabove described.

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

1. That the said Mary Levy, who is a widow and who is the defendant in this suit, may
 40 answer this bill of complaint, and each statement

Bill of Complaint.

therein made without oath; oath is hereby expressly waived.

10 2. That the said Mary Levy may be decreed specifically to perform the said agreement, entered into by her with the said Constructo Realty Co., a corporation, and which agreement was
20 10 duly assigned by the said Constructo Realty Co., a corporation, unto your complainant, and that a proper sum be allowed to your complainant as an abatement by way of compensation for the building so removed from the said tract of land since the making and execution of the said agreement, the said complainant tendering himself ready and willing and hereby offering specifically to perform the said agreement on his part with
20 20 an abatement by way of compensation by reason of the aforesaid removal, destroying and demolishing of the said building heretofore on said tract of land, so contracted to be conveyed by the said defendant.

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

30 WILLIAM GREENFIELD,
Solicitor for and of Counsel
with the Complainant.

40 ARTICLES OF AGREEMENT, made the second day of June, in the year of our Lord One Thousand Nine Hundred and Twenty-five, Between MARY LEVY, widow, of the City of Newark in the County of Essex and State of New Jersey, party of the first part; And CONSTRUCTO REALTY Co., a corporation, of the City of Newark, in the

Bill of Complaint.

County of Essex and State of New Jersey, party of the second part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Five Thousand Eight Hundred (\$5,800.00) Dollars, 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 she 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 on or before the 1st day of August next ensuing the date hereof, all that certain lot, tract, or parcel, of land and premises, hereinafter particularly described situate, lying and being in the City of Newark in the County of Essex, State of New Jersey.

Being commonly known and designated as #56 Jones St. description to be the same as in deed to party of first part from her grantor.

In consideration of 6/11/25 of two hundred and fifty dollars paid to me by John D. Goldberg. We hereby assign this agreement.

CONSTRUCTO REALTY CO. 30

By Louis Susskind, Pres.

Witness—M. H. Bluberg.

Attest:

Joseph Susskind,
Secy.

AND the said Constructo Realty Co., its successors and assigns, and for itself, doth covenant, promise and agree to and with the said 40

Bill of Complaint.

party of the first part, her heirs, executors, administrators and assigns, that the said party of the second part, will pay and satisfy, or cause to be paid and satisfied, unto the said party of the first part, the said sum of five thousand eight hundred (\$5,800.00) dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

- 10 On Execution of this agreement for which this is also a receipt..... \$ 300.
- On delivery of deed, cash or certified check \$2500.
- 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 6% payable semi-annually for 1½ years \$2000.
- 20 By assuming the mortgage at present a lien on the premises, and paying the same according to the terms thereof \$1000.
- 30

Said purchase money mortgage to have a covenant permitting party of the second part, its successors or assigns to secure a new first mortgage not more than \$3800.00, and said purchase money mortgage is to be postponed to the lien of such new first mortgage.

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

40

Bill of Complaint.

not on any representations made as to character or quality.

And the said party of the first part hereby agrees to pay to the authorized agent a commission of % on the purchase price aforesaid, said commission to be paid in consideration of services rendered in consummating this sale. 10

AND IT IS FURTHER AGREED by the parties to these presents, that the said party of the second part, its successors or assigns, may enter into and upon the said land and premises on the 1st day of August 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 and received at office of Joseph Susskind, 972 Broad St., Newark, N. J., between the hours of 10 in the forenoon and 4 o'clock in the afternoon on the said 1st day of August next ensuing the date hereof. 20

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.

Gas and electric fixtures and chandeliers, carpets, linoleum, mats and matting in halls, ash cans and heating apparatus, if any, are included in this sale. 30

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

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part, shall repair the damage before the date set for delivery of said deed or make an

40

Bill of Complaint.

appropriate deduction from the purchase price herein stated.

10 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 therefor, and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations, to be shown by the report of the Secretary, where such ordinances and regulations apply.

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

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

her
MARY X LEVY
mark

CONSTRUCTO REALTY CO.
By Louis Susskind, Pres.

30 Signed, Sealed and Delivered
in the Presence of

ESTHER ROSENFELD.

Attest:

Joseph Susskind, Secy.

Bill of Complaint.

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

BE IT REMEMBERED, That on this 2nd day of June, in the year of our Lord One Thousand Nine Hundred and Twenty-five, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared Mary Levy, widow, who, I am satisfied, is the grantor mentioned in the within instrument to whom I first made known the contents thereof, and thereupon she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed.

JOSEPH SUSSKIND,
A Master in Chancery of New Jersey.

20

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Answer of Defendant Mary Levy.

ANSWER OF DEFENDANT MARY LEVY.

IN CHANCERY OF NEW JERSEY.

| | | |
|----|--|--|
| 10 | <p><i>Between</i></p> <p>JOHN D. GOLDBERG, <i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>MARY LEVY and HARRY BERGER, <i>Defendants.</i></p> | <p><i>On Bill, etc.</i></p> <p><i>Answer of</i></p> <p><i>Defendant</i></p> <p><i>Mary Levy.</i></p> |
|----|--|--|

The answer of defendant Mary Levy.

20 This defendant, Mary Levy, answering the bill of complaint, says that:

1. Paragraph 1 is admitted.

2. Paragraph 2 is admitted except that this defendant has no knowledge of the allegation alleging payment of \$250.00 to the Constructo Realty Co.

30 3. Answering paragraph 3 this defendant alleges that the land described in the contract of sale mentioned in said paragraph was not at the time of making of said contract, an improved city building lot, and was not so represented for the reason that the building erected thereon was condemned by the proper officials of the City of Newark and its demolition ordered by said officials of which fact said complainant had notice. This defendant denies that complainant has at any time since the assignment to him of said contract, been ready or willing, anxious or
40 demanded the conveyance to him of said tract of

Answer of Defendant Mary Levy.

land, pursuant to the terms of said contract but to the contrary, said complainant had persistently refused to accept a conveyance of said land when demanded by this defendant, in pursuance of said contract; and said complainant has requested that this defendant oblige him, the said complainant, by returning to him the deposit paid to this defendant pursuant to said contract. On September 25, 1925, this defendant caused a notice to be mailed to said complainant, by registered mail, requesting him to accept a conveyance of said land pursuant to said contract, said notice fixing a time for the delivery of said conveyance, but complainant ignored said notice and refused to accept a conveyance of said land.

4. Answering paragraph 4 of the complaint, this defendant says that the building on said land was demolished by order of the department of buildings of the City of Newark for the reason that said building had been condemned as dangerous and not fit for habitance, and complainant had knowledge of the necessity of demolishing said building at the time he secured an assignment of said contract.

5. Complainant had breached said contract for sale of said land by refusing to accept a conveyance therefor, but when complainant discovered, about four months after the time stated in said contract for the closing of title, that the value of said land had risen and was almost double in value, and that this defendant had made a contract with defendant Harry Berger, for the sale of said land for \$10,000.00, complainant recorded said contract which he held by assignment on November 21, 1925, at 3:12 P. M.

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Answer of Defendant Mary Levy.

6. Defendant Harry Berger recorded the contract made between him and this defendant for the sale of said land, on November 21, 1925, at 1:12 P. M.

10 7. Said Harry Berger is a bona fide purchaser of said land, and as to him, said contract made with Constructo Realty Co., and by it assigned to complainant is void pursuant to paragraph 116 of "An Act respecting conveyances" (Revision of 1898) section 1, for the reason that a suit by complainant for specific performance of said contract held by him, was not commenced within three months after the date fixed in such agreement for its consummation.

20 JOSEPH SUSSKIND,
Solicitor of Defendant, Mary Levy.

20

30

40

Petition of Mary Levy.

PETITION OF MARY LEVY.

IN CHANCERY OF NEW JERSEY.

Between

JOHN D. GOLDBERG,

Complainant,

and

MARY LEVY,

Defendant.

On Bill, &c.
Petition.

10

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

The petition of Mary Levy, defendant in the above-named cause, respectfully shows that:

20

1. On November 27, 1925, the bill of complaint was filed, seeking specific performance of a contract for the sale of land in the City of Newark, which contract was made by Mary Levy, petitioner, and Constructo Realty Company, a New Jersey corporation, which corporation assigned its rights under said contract to said complainant.

2. Said aforementioned contract was dated June 2, 1925, the time set in said contract for the delivery of title was August 1, 1925, and said contract was recorded November 23, 1925, at 3:12 P. M., in the Register's Office of the County of Essex in Book T 72, page 594.

30

3. On November 21, 1925, petitioner entered into a contract of sale for said land with Harry Berger of the City of Newark for the reason that said John D. Goldberg had refused to perform the said mentioned contract made with the

40

Petition of Mary Levy.

Constructo Realty Company; said Harry Berger recorded the contract made by petitioner with him, in the Register's Office of the County of Essex, on November 23, 1925, at 1:12 P. M.

4. By reason of the aforesaid contract made between petitioner and said Harry Berger, said
10 Harry Berger has acquired an interest in said land which the decree in this cause will effect.

5. By reason of the failure to make said Harry Berger a defendant in this cause, petitioner is prevented from making a proper, legal and equitable defense to the cause of action alleged in the bill of complaint.

Your petitioner therefore prays that said Harry Berger be made a party defendant to the
20 bill of complaint.

(Signed) JOSEPH SUSSKIND,
Solicitor of Petitioner.

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

MARY LEVY, being duly sworn according to law, on her oath deposes and says, that she is
30 the petitioner in the foregoing petition named and that the matters and things therein contained are true.

her
MARY X LEVY.
mark

Sworn and subscribed to before me
this 24th day of March, 1926.

SAMUEL YAWITZ. (Signed)
40 M. C. C. of N. J.

Affidavit of Joseph Susskind.

AFFIDAVIT.

IN CHANCERY OF NEW JERSEY.

Between
JOHN D. GOLDBERG,
Complainant,
and
MARY LEVY,
Defendant. } On Bill, &c. 10
Affidavit.

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

JOSEPH SUSSKIND, being duly sworn according to law, on his oath deposes and says: 20

He is the solicitor for the defendant, Mary Levy; that he was present at the making of the agreement mentioned in the foregoing petition made between Mary Levy and the Constructo Realty Company. That he was present at the assignment of said contract by the Constructo Realty Company to John D. Goldberg.

Deponent further states that he did examine the records of the Register's Office of the County of Essex and did find on record said contract, which was recorded on the 23rd day of November, 1925, at 3:12 P. M., in Book T 72 of Deeds, page 594. 30

Deponent further states that he was present at the making of the contract of sale mentioned in the foregoing petition, which contract was made between Mary Levy and one Harry Berger. Deponent further states that he examined the records of the Register's Office of the County of Essex and did find there recorded said con- 40

Affidavit of Joseph Susskind.

tract, which contract was recorded on November 23rd, 1925, at 1:12 P. M., in Book P 73 of Deeds, page 92.

(Signed) JOSEPH SUSSKIND.

10 Sworn and subscribed to before me
this 24th day of March, 1926.

SAMUEL YAWITZ,
M. C. C. of N. J.

20

30

40

Order.

ORDER.

IN CHANCERY OF NEW JERSEY.

| | | | |
|--|---|----------------------|----|
| <i>Between</i> | } | <i>On Bill, etc.</i> | 10 |
| JOHN D. GOLDBERG, <i>Complainant,</i> | | | |
| <i>and</i> | | | |
| MARY LEVY, <i>Defendant.</i> | | | |

Upon reading the petition of Mary Levy, defendant in the above cause, and the affidavits thereto annexed, which petition prays for an order to make one Harry Berger, a defendant in the above-entitled cause for the reason that said Harry Berger had acquired an interest in the lands, for the sale of which specific performance is sought by the complainant, which interest was acquired before the filing of the bill of complaint herein, and it appearing that due notice of this application has been given to the complainant and said Harry Berger, and having heard the argument of Joseph Susskind, Esq., solicitor of defendant, Mary Levy, William Greenfield, Esq., solicitor of complainant, and William J. Kearns, Esq., solicitor of Harry Berger, and I finding that said Harry Berger is a necessary party to these proceedings;

It is, on this 12th day of April, 1926, ORDERED that said Harry Berger be and he hereby is made a defendant in the above-entitled cause; and it is further

ORDERED that said Harry Berger file his answer to the bill of complaint or take such other

20

30

40

Order.

steps in these proceedings as he shall see fit on or before the 3rd day of May, 1926.

Respectfully advised,

(Signed) MAJA LEON BERRY,
V.-C.

10 I hereby consent to the entry of the foregoing order.

April 7, 1926.

WM. J. KEARNS,
Solicitor of Harry Berger.

20

30

40

John D. Goldberg, direct.

IN CHANCERY OF NEW JERSEY.

May 24, 1926.

Between

JOHN D. GOLDBERG,
Complainant,

and

MARY LEVY,
Defendant.

10

Transcript of shorthand notes of testimony taken in the above-entitled cause before his Honor, Alonzo Church, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of William Greenfield, Esq., for complainant; Joseph Susskind, Esq., (by Lionel Kristeller, Esq.), for defendant Mary Levy; William J. Kearns, Esq., for defendant Harry Berger.

20

JOHN D. GOLDBERG, sworn for the complainant.

Direct examination by Mr. Greenfield.

30

Q Mr. Goldberg, you live in Newark? A Yes, sir.

Q And you are in the real estate business? A Yes, sir.

Q And have been so for a number of years? A Yes, sir.

Q Do you know Mary Levy? A Yes, sir.

Q And I show you a contract and ask you if you have ever seen this document before? A Yes, sir.

40

John D. Goldberg, direct.

Q Is that the contract you purchased from the Constructo Realty Co.? A Yes, sir.

Q And who signed this? A Susskind.

Q What Susskind? A Louis Susskind.

Q Louis Susskind and— A Joseph Susskind.

10 Q Joseph Susskind is secretary of the Constructo Realty Company, is he? A Yes, sir.

Mr. Greenfield: I offer that in evidence.
(Paper marked Exhibit C. 1.)

Q Now, after you had purchased this contract, what did you do, in pursuance of this contract, to take title; what did you do? A I didn't get you clearly.

20 Q What did you do after you bought the contract? A I give it to Mr. Stalford, my lawyer.

Q And were you advised anything concerning that title? A Yes, sir.

Mr. Kearns: I object.

Q By whom?

Mr. Kearns: I object. It was immaterial at that time.

30 The Court: What is the question?

(Question read as follows: "Were you advised anything concerning that title? Answer: Yes, sir.")

The Court: I will allow it.

Q By whom were you told? Who told you about the title? A Mr. Stalford.

40 Q And after you received the information from Mr. Stalford, what did you do, if anything?

John D. Goldberg, direct.

Whom did you go up to see? A I went up to see—Mr. Stalford took me up to Mrs. Levy on Fourteenth street.

Q And did you see her? A Yes, sir.

Q What did you say to her? A I wanted the property.

Q What did she say? A She didn't say anything. 10

Q Well, she answered something? A See her lawyer, she said.

Q What? A See her lawyer.

Q Well, whom did she say represents her? A Mr. Susskind.

Q Please give the first name; there are two Susskinds here. A Joe Susskind.

Q Joe Susskind? A Yes, sir. 20

Q Now, after she told you to go to see her lawyer, did you go to see him? A I went down with Mr. Stalford, and Mr. Stalford went over to see Mr. Joe Susskind.

Q I am asking you what did you do? Do not tell me what Stalford did. A I went down.

Q Did you go with Mr. Stalford to see Susskind? A I went down with Mr. Stalford, yes.

Q Did you talk with Mr. Susskind? A I talked with Mr. Susskind. 30

Q What was said? A He said he can't give title on account of some defect of the title.

Q Did he say what the defects were? A Bonds, bail bonds.

Q Bail bonds. What did you do then? What took place after that? A Well, I went out.

Q Well, did you—was it agreed to take it in a later date, or what was done? A He said it was agreed when we clear off that it will—he will give me my title. 40

John D. Goldberg, direct.

Q And were you ready to take title? A Yes, sir.

Mr. Kristeller: I object to that.

The Court: What did you do towards—

10 Q What did you do to take the title? At least, what did you do besides that? A Went up to my lawyer and I told him I would like to have title to the property up there and he said he got in touch later on with Mr. Susskind and they—and he can't get it clear then.

Q Did you have the money then to take title? A Absolutely; I always had the money ready to take title. I always had it.

20 Q And you are ready and willing to take title now? A Yes, sir.

Q What building and loan did you apply to? A Well, I just—I think it is the Grand, if I am not mistaken; Mr. Louis Susskind is the president of the building and loan and Mr. Joe Susskind is the counsel and they took a ten-dollar fee off me, granted me the loan; that is the conditions that they give me the contract—they give me the loan.

30 Q Now, did Mr. Susskind after—were you advised that a loan was granted? A Yes, sir.

Q By whom? A By Joey Susskind.

Q And what did Mr. Susskind say to you, if anything, about putting a loan on that property? A He said he couldn't give me the loan, he couldn't give me the property because the bail bond is not off and he wants to clear it off and he will get in touch with my lawyer. That is all I know.

40 Q And that is why it was postponed from time to time? A Yes, sir.

John D. Goldberg, cross.

Cross examination by Mr. Kristeller.

Q You say you talked with Susskind? A Yes, sir.

Q And Susskind told you he would not give you the loan? A No, he—he did give me the loan.

10 Q Where is Susskind's office? A On Broad street.

Q Where? A 8—I couldn't tell you the number. It is way down near the Elks' down there. I can't exactly tell, I exactly don't know.

Q What building is it in? A I exactly don't recall the name of the building, but I know the building.

20 Q You know the building? A Yes. I think it is seven-something; I can't just exactly recall offhand.

Q How many times were you in his office? A I was in his office about two or three times.

Q Sure of that? A Absolutely.

Q And you are also certain that Susskind told you he could not give you the loan? A Mr. Susskind said the loan was granted.

Q No, I am not asking you that. A He could not give me the loan, no, because the bail bond was not clear.

30 Q Didn't he tell you that all the bail bonds were off except one and that he was perfectly satisfied to grant the loan—just a minute—didn't he tell you that all the bail bonds were off and that he was ready to advance the money and you told him you did not want the property any more? A No, sir.

40 Q Well, now, when was this time he told you that he would not give you the loan? A That was sometimes around the first of August or a little later in August. We were supposed to

John D. Goldberg, cross.

10 take title. I was up there and said to Louis, "I want to have that property." And I said, "Joey can't give me the property because everything is not clear." And he said, "Go down and see Joe." And I went back twice. I went back to see Joe and Joe told me the same thing. He said the minute he can clear that off he will be glad to give me the property.

Q He did clear it off, didn't he? A As far as I know, he did not.

Q Didn't he tell you he cleared it off? A Trying to clear it away.

Q When was the last time he told you he was trying to clear it off? A The last time was sometimes in September.

20 Q Did you get a letter from George and Samuel Cohen? (To counsel): Have you got that letter? A From whom?

Mr. Kristeller: Dated September 25th. Have you got that, Mr. Greenfield?

Mr. Greenfield: I don't know. I will look it up.

Mr. Kristeller: That was the notice that was served to produce.

30 Mr. Greenfield: I do not think I have any such letters. I have Susskind's letters.

We have no such letter.

Q You got a letter from George and Samuel Cohen, didn't you? A What Cohen is that, may I ask you?

Mr. Kristeller: I will withdraw the question and ask you if that is your signature.

40 Witness: Yes, sir.

John D. Goldberg, cross.

Q Have you a letter that came with this card from George and Samuel Cohen? A I know I got a letter sometime, but I don't know—

Q I show you a copy. A Yes; I received a letter.

Mr. Kristeller: I will ask that the carbon 10 and the registry receipt be marked for identification.

(Two letters marked D. 1 for identification.)

Q What did you do after you got this letter?

A I saw my lawyer.

Q And what did he do, do you know? Did he do anything? A I told my lawyer to go ahead, they must be ready to take title, and I told Mr. Stalford to go ahead and I am ready 20 to take title.

Q Did you have the cash? A Yes, sir.

Q Did you bring it to the office of Joseph Susskind? A No; I brought it to the office of Stalford.

Q Did you sign any mortgage that was required by your contract? A I would like to get that clear, if you please. 30

The Court: Read the question.

(Question read as follows: "Did you sign any mortgage that was required by your contract?")

Witness: I did not sign any mortgage, no.

Q Did you sign any bond as required by your contract? A Well, I didn't get any to sign. 40

William Stalford, direct.

Q I didn't ask you whether you got any? A No.

Q I asked you whether you signed any. Did you at any time prior to or subsequent to August the 1st attend at the office of Mr. Susskind with the cash and with the bond and mortgage signed and executed, ready to close this title? A No; I did not.

Q Did you on October 1st attend at the office of Mr. Susskind to close this title? A No.

Mr. Kristeller: That is all.

Re-direct examination by Mr. Greenfield.

Q And the reason you did not is because—

Mr. Kristeller: I object to that.

The Court: Yes.

Q Why didn't you appear? A Because Mr. Stalford told me he was in touch with Mr. Susskind—

Mr. Kristeller: I object to what Mr. Stalford tells you.

Q Did you go to see Susskind? A No; I didn't go to see Susskind.

WILLIAM STALFORD, sworn for the complainant.

Direct examination by Mr. Greenfield.

Q Mr. Stalford, you are an attorney at law?

A I am.

William Stalford, direct.

Q And did you have anything to do in the property transaction on 56 Jones street? A I represented John D. Goldberg.

Q What did you do? A Well, of course, there wasn't much for me to do because he applied to a building and loan for a loan on it and, as far as searching the title, they took care of that and—

Q When you say "they"—who? A I don't recall the name of the building and loan.

Q When you say that "they took care," who was it? A Joseph Susskind, the attorney for the building and loan.

Q Did you ever go to see Mr. Susskind? A Yes. Mr. Susskind called at my office and asked me if I had any search papers on that and I happened to have an old abstract of title on that, which I let him have on that, and he also informed me that he is going to search the property for the building and loan which was—guaranteed on behalf of John D. Goldberg.

Q Then what next took place? A And he proceeded to make the search. Well, after waiting several weeks I got in touch with Mr. Susskind to find out whether he has completed his search and he is ready to take title and he told me the first time he is not completed yet, and I waited a little longer and got in touch with him again and he has told me he has finished his search, but there is a number of bail bonds on the property made by Mary Levy and for that reason he can't pass that title until those bail bonds are cleared off.

Q Did you get the report about those bail bonds? A I requested a search from Charles Jones' office to ascertain just what bail bonds were on there. I did that for my own information, although Mr. Susskind had a similar one.

William Stalford, direct.

Q (Counsel hands witness paper.) A And this is the copy of the original report of the search that I received from Charles Jones' office.

Q Did you ever take that up with Mr. Susskind? A Yes, sir. And I took you up and found these were the same bonds open of record that he had on a similar report from—I don't
10 remember whether it was Charles Jones' office.

Q Dated? A The 18th of September, 1925.

Mr. Greenfield: The 18th of September, 1925. I offer that in evidence.

(Paper marked Exhibit C. 2.)

Q Now, did you have any examination about the bail bonds lately? A Yes; I just made one here lately.

Q I show you this report. A Yes. On the
20 19th day of May, 1926, I made another search to find out whether any of these bail bonds had been cancelled off since that time.

Q And did you find— A And I find that one is open against Mary Levy entered in the United States District Court September 22, 1925, in the amount of \$1,000.

Q Still open of record? A Still open of
30 record.

Mr. Greenfield: I offer that.

Mr. Kristeller: I object to that as being after the breach of the contract, if any.

The Court: I will receive it.

Mr. Kristeller: I ask an exception.

(Paper marked Exhibit C. 3.)

Q Did you, Mr. Stalford, ascertain when the
40 other bail bonds were cancelled? A I did.

William Stalford, direct.

Q When? A They were canceled off September the 22nd, 1925.

Q How many were there, do you recall? A There were about four of them.

Q So, on August the 1st, 1925, the date fixed for closing title, all those bail bonds were still open of record? A They were. 10

Q Now, Mr. Stalford, did you ever go to see Mrs. Levy about this mortgage? A I did.

Q With whom? A I went up with John D. Goldberg.

Q Where? A And wanted to know what she intended to do on it.

Q Did you see her? A Yes, sir.

Q And what did she say? A She said—she didn't know nothing—to see Mr. Louis Susskind—Joseph Susskind, he is her attorney, and
20 to take it up with him.

Q Did you take it up with him? A I have taken the matter up with Mr. Susskind, Joseph Susskind, numerous times, about eight or nine times, and I asked him what he intended—he also informed me at that time that he represented Mary Levy and he is taking care of her trying to get these bail bonds canceled off the record, and he just—he said he can get them off, but would get in touch with me as soon as he can get them off. He kept putting this off from
30 time to time and that is the way the thing dragged on.

Q And were you—otherwise were you and Mr. Goldberg ready to take the title? A At all times.

Q And, as far as you know, they are ready to take title now? A Absolutely.

Q Did you at any time try to locate Mrs. Levy after that? A No; after she told me to see Mr.
40

William Stalford, cross.

Joseph Susskind, I always took the matter up with Mr. Joseph Susskind.

Q When did you first hear about this sale of property to Mr. Berger? A I didn't know nothing about that.

Q Well, you heard it since you filed the bill?

10 A Yes; since that time.

Cross examination by Mr. Kristeller.

Q How many times would you say that you had spoken to Mr. Susskind? A How many times?

Q Yes. How many times? A About eight or nine times.

Q Eight or nine times. One of the times was around August the 1st when this title was to close, wasn't it? A On June the 1st?

Q August the 1st. A August the 1st, yes.

Q At that time what did Susskind tell you? A He told me that the bail bonds were on record and for that reason he cannot pass the title.

Q Didn't he tell you around August 1st that he had not finished his search yet? A No; he was ready about that time.

Q He was. And what brought you back the second time? A Why, he told me, he says, "Leave it go for a little while until I get a chance to clean it up, because I represent Mary Levy, and," he says, "I am trying to clear those bonds off and being I represent the building and loan and Mary Levy, why, I will take care of everything."

Q When you got this search, which is marked D. 2, didn't you show that to Mr. Susskind? A No; I never showed him that.

Q Never showed him that? A No. As a matter of fact, he, before the time—August 1st—

40

William Stalford, cross.

told me about bail bonds, and after it ran into September and I saw he was holding out the bail bonds, I wanted to find out if that was so, and I went ahead and had that search made.

Q Didn't you tell Susskind that you wanted to get out of the deal? A No.

Q At any time? A No.

10

Q Did he ever show you the cancellation of those bonds? A No; he never did.

Q You never saw this paper before? A Never showed me this. He never showed me any of his papers.

Mr. Kristeller: I ask this be marked for identification.

(Paper marked D. 2 for identification.)

20

Q Did you see this letter that Mr. Goldberg has identified, dated September 25th? A I don't recall. Probably might have received it. I don't know.

Q Didn't Susskind ever tell you that he was ready to advance his money and for you to come down and close the title with your client? A Oh, absolutely not.

Q Absolutely not. Did you ever have the money ready and tender it to Mr. Susskind at his office? A I informed Mr. Susskind that we were getting impatient; we have our money laying aside for that and it has been dragging on and it is not drawing any interest.

30

Q I am asking you, did you take the money over to Mr. Susskind's office and make a tender of the purchase price? A Well, he always—

Q Did you? Yes or no. A Well, no.

Q Did you ever take with you any bond and mortgage duly executed by Goldberg and set a

40

William Stalford, cross.

date to close the title? A Well, he never set the date for title closing.

Q Didn't he set October 1st, in this letter to Goldberg, that you think you may have seen? Isn't there a date fixed in here, in D. 1 for identification? A Well, I don't recall the contents of the letter or from whom it was.

Q Did Goldberg tell you he had received this letter? A He informed me he received a certain letter.

Q Did he tell you there was a date in it for closing the title? A I do not recall.

Q But you did not go over on October 1st to close the title? A I went before that.

Q No. I asked you, on October 1st? A I went before October 1st.

Q Did you go to Susskind's office on October 1st to close this title? A I went before October 1st.

Q (By the Court.) Did you go on October 1st, on that particular date? A I don't recall whether it was on that particular date, too, because I have been over there so often.

Q Did you go with Goldberg? A Was that letter from Susskind?

Q The letter was from George Cohen. Did you go with Goldberg on October 1st to Susskind's office with the money and prepare to close the title? A Yes, sir; on—

Q After this letter was received? A On one day right after that letter we did go over ready to close the title.

Q Yes. A And Mr. Susskind then told me he is not—in no position to close that title yet, until those bail bonds are cancelled off.

Q Yes. Now, isn't it a fact that these bail bonds were canceled on September 22, 1925?

Joseph Susskind, direct.

A At that time I didn't know it was on the 22nd—

Q I didn't ask you whether you knew it. I asked you if it is not a fact.

Mr. Greenfield: It is a fact.

Q And yet you want us to understand that after this letter you and Goldberg went to Susskind's office to close this title and that Susskind told you that the bail bonds had not yet been cancelled; is that what he told you? A Yes, sir.

Q And that was after the date of this letter? A Yes, after the date of this letter, yes.

Mr. Kristeller: That is all.

The Court: That is all.

Mr. Greenfield: That is all. That is our case, the Court please.

The Court: All right.

Mr. Kearns: Shall I go on with my case now? I am asking for specific performance, too, as against this same defendant.

The Court: No; I think you better dispose of this.

Mr. Kearns: Yes, first.

The Court: Yes, first.

JOSEPH SUSSKIND, sworn for the defendant.

Direct examination by Mr. Kristeller.

Q Mr. Susskind, you are a member of the Bar of the State of New Jersey? A I am.

Q And you practice in Newark? A I do.

Joseph Susskind, direct.

Q Did you have any transaction with John D. Goldberg, the complainant in this case? A I did.

Q And are you the Joseph Susskind who signed as secretary of the Constructo Realty Company this assignment of the contract marked C. 1? A Yes, sir.

10 Q Will you tell us what, if anything, happened after June the 11th, when this assignment was made to John D. Goldberg? A Goldberg made an application in the Famous Building & Loan Association, of which I am counsel, for a loan of thirty-eight hundred dollars, which was granted. The application was made in the name of the Goldberg-Bernstein Company Corporation.

20 Q Who made the application? A John Goldberg. The loan was granted and I started searching the title to the property. Do you want me to continue?

Q After you made the search or before you had completed the search, who came to see you about this property? A Who? No one came to see me from the purchaser's side.

Q Until when? A Why, no one ever came to see me from the—my conversations with Mr. Stalford were over the telephone.

30 Q Was Goldberg ever in your office? A He never was in my office.

Q Was Stalford in your office? A Stalford never was in my office.

Q I am talking about this particular matter. A He was not about this particular matter, or, I believe, any other matter.

40 Q And when did you get in touch with Stalford about this loan? A Why, sometime—I never got in touch with him in the beginning. He got in touch with me some time around August the 24th or 25th.

Joseph Susskind, direct.

Q Yes? A And he asked me whether I found anything in the title which would give Goldberg an opportunity to withdraw from the contract.

Q What did you tell him? A I told him that I represented Mary Levy and that I didn't see very well how I could tell him that, but there was some recognizances on their record which we were ready to clean up at the moment. We wanted to close title. 10

Q Did they ever come to see you about closing title, either Goldberg or Stalford? A I informed him I was ready to close title several times over the phone and he refused to arrange for a date for closing title.

Q And did you thereafter cause this letter to be sent by George and Samuel Cohen? A Yes, sir, I did. 20

Mr. Kristeller: I now offer the letter and registry receipt in evidence.

The Court: All right; it will be received. (Paper originally marked D. 1 for identification now marked Exhibit D. 1.)

Q Were the recognizances that are described on Exhibit C. 2 cancelled of record by you? A Yes, they were. 30

Q And is this a certified copy of the cancellation? A It is.

Mr. Kristeller: I offer that in evidence.

The Court: It will be received.

(Paper marked D. 2.)

Q Now, pursuant to this letter, or, pursuant to any telephone conversation, did Stalford and Goldberg ever appear at your office in accord- 40

Joseph Susskind, direct.

ance with the terms of the contract to take title to the property on Jones street which is in suit here? A They did not appear.

The Court: Let me see the letter.

10 Q Did you ever hear from Stalford or see Stalford after the date of that letter, which is September 23rd? A Yes, sir.

Q Did you ever tell Stalford after the date of that letter that the recognizance in the Federal Court in this exhibit had not been cancelled? A I did not. In fact, I said they were cancelled. He spoke to me at that time and asked me whether I could convince Mary Levy to give him back the deposit. He asked that at the time he personally was interested in the deal as a partner.

20 Q And has the recognizance mentioned on Exhibit C. 3, which is dated after the recognizance on these exhibits, been cancelled of record? A Yes; it was cancelled Saturday morning.

Q And is this the cancellation? A Yes.

Mr. Kristeller: I offer that.

(Paper marked Exhibit D. 3.)

30 Q Did you have any other talks with Stalford or Goldberg with respect to the taking of title to the Jones street property other than you have mentioned? A Why, I had a talk after the filing of the bill of complaint with Mr. Stalford, when I met him casually.

Q Anything said about this—

The Court: No, not after the complaint.

40 Mr. Kristeller: Not after the complaint.

Joseph Susskind, cross.

Q Now, after October 1, 1925, did your company endeavor to dispose of this property? A After what date?

Q October 1, 1925. A No. The company felt that it had assigned this contract and felt that it had nothing more to do with it unless the vendor saw fit to compel it to perform.

10 Q I see. And later did you notify the vendor that you would not go through with your end?

Mr. Greenfield: I object to that.

The Court: It is leading.

Mr. Greenfield: Not only leading. Of course we are not bound by what the vendor who sold the contract to us does. They could not bind us.

20 Q Was anybody in your office to close the title to this property pursuant to this notice in which you made time the essence of the contract? A No, sir.

Mr. Greenfield: He didn't make it.

Cross examination by Mr. Greenfield.

Q Mr. Susskind, you represented Mrs. Levy? 30 A Yes, sir.

Q And who was Cohen & Cohen? A They are lawyers here in Newark.

Q Where are they? A 738 Broad street.

Q And you represented Mrs. Levy up to the 22nd day of September? A I represented her after that.

Q And did you represent her after the notice from Cohen & Cohen? A Yes, sir.

Q In the same transaction? A Yes, sir. 40

Joseph Susskind, cross.

Q Can you state how Cohen & Cohen happened to write that letter? A Yes, sir.

Q How? A I was personally acquainted with the Goldbergs and they were personally acquainted with me. In fact, they know me since my boyhood and they seemed to take my letters, or, rather, my conversations, as a joke, so I said they had to close the title or otherwise they would lose their deposit, so I thought I would ask another firm of attorneys to write a letter so that they would know that we meant business.

Q In other words, you engaged another attorney to write the letter? A Yes; I engaged the attorney to write a letter.

Q The attorney representing you? A Yes.

Q Well, did you know on the date that you sent a letter that there was still an open recognizance? A On the date that I sent that letter?

Q Did you know that? A I didn't know it.

Q Do you know now that there is still open a recognizance of one thousand dollars to the Federal Government? A There is no such recognizance open.

Q Entered into September 22nd, Mary Levy principal and John Levy surety? A That was cancelled last Saturday.

Q That was cancelled last Saturday? A Yes, I cancelled it.

Q So on October 1st it was open? A It was open, yes.

Q And it was open up to last Saturday? A It was open up to last Saturday.

Q Now, as counsel for a building and loan, Mr. Susskind, would you approve title and pay the money out with this recognizance open? A I could have proven the title and withheld the amount of money involved in the recognizance.

Joseph Susskind, cross.

Q Then you would consider that as a loan against the property, wouldn't you? A It absolutely is a loan against the property, yes.

Q Then up until September 22, 1925, there were four recognizances of one thousand dollars each? A Yes, sir.

Q Open of record against that property? A Yes, sir.

Q And that was twenty-two days after the date fixed for the passing of title, was it?

The Court: Yes.

A Well, I suppose I can figure it out.

Q Isn't that the fact?

The Court: Well, we can figure that out.

Q Yes. All right. A month and twenty-two days. Now, Mr. Susskind, do you recall an inquiry was made of you where Mrs. Levy could be found for the purpose of serving papers on her?

Mr. Kristeller: I object to that—immaterial.

The Court: I will allow it.

A I have no remembrance of it.

Q Now, don't you remember that I called you up and told you that the sheriff had difficulty in locating Mrs. Levy and would like to serve the papers on her so we could get to trial? A If I recall now, I think it was after I had spoken to you about the *lis pendens* and Mr. Kearns had raised the question.

Q And I asked you about that? A That was the first time.

Mary Levy, direct.

Q And you said you did not know where she was? A No. I said she could be served on Mulberry street.

Q On Mulberry street? A Yes, sir.

Q Didn't I then tell you that the sheriff was there three or four times and they deny that any
10 Mary Levy lived there? A Well, I said I knew nothing about that.

Q I see. A Possibly.

Mr. Greenfield: That is all.

Mr. Kristeller: That is all. Mrs. Levy.

MARY LEVY, sworn for the defendant.

20 *Direct examination* by Mr. Kristeller.

Q Mrs. Levy, you are Mary Levy who owns this property on Jones street? A Yes.

Q And you are a widow? A Yes.

Q Do you know this gentleman here, Mr. Stalford? (Stand up.) Do you know this gentleman? A Yes, I know him.

Q Was he ever up to your house? A Never.

30 Q Never was. Where did you see him? A Mine daughter's house he wanted to buy for four thousand dollars the lot he wanted to buy it.

Q Wait a minute. He was at your daughter's house? A My daughter's house.

Q Were you there? A Yes, in bed with a nurse.

Q Did he come in the room when you were in bed? A Yes, he come to see me in bed.

Q Did he talk to you about this property?
40 A Tell, I told him I can't do nothing now.

Mary Levy, cross.

Q When was this? A That was before the realty company buy it.

Q Before they bought it? A Before they bought it.

Q Well, now, after they bought it— A After they bought it I didn't see him, I didn't see him.

Q Mr. Goldberg, was he up to your house after the realty company bought the property?

A Is that Goldberg? I never saw him before.

Q Was he up to your house after the realty company bought the property? A Never; I didn't see him.

Q And Stalford was up there before they bought it? A Before they bought it.

Q How long were you sick? A I was sick six months in bed; I just come out.

Q Was Stalford ever your lawyer? A No.

A Voice: Yes, he was.

Witness: Yes, he bought the lot; his father sold me the lot.

Q Whose father? A His father.

Q Stalford's? A Yes. In Jones street.

Q After you sold to Mr. Susskind's father did you see Stalford? A No; didn't see him.

Cross examination by Mr. Greenfield.

Q Where have you been living, Mrs. Levy? A I go by my one daughter—three daughters.

Q Whereabouts were you living during the summer since 1925? A Well, I come here from Long Branch to settle the lot, but I didn't see no money.

Q When did you come in? A The 29th of August, the 1st I got to go settle and pay the

Mary Levy, cross.

money and I need the money very bad and I come in to take money and nobody give me a cent.

Q Were you told about those bails? A What bails? I don't know nothing about bails.

Q Well, you got bail a number of times or somebody gave bail for you; is that right? A
10 I think I gave bail; I don't remember who the bail for; my son-in-law, something like that.

Q Mrs. Levy— A Yes.

Q —you knew of the fact that you— A Yes, sir.

Q —you gave bail— Wait until I look at that. I don't know how that works. A I don't know. I can't read, you know. I don't know.

Q You know that bail was given you as principal on October 3, 1922, for one thousand dollars to the United States of America? A Well,
20 I want to give my mortgage.

Q Wait a minute. Were you told about that? A Yes.

Q Were you also told about—that is after you entered into this contract— A Yes.

Q —that there was also a bail given for you, you as principal and the same indemnity company as surety for one thousand dollars, entered July 18, 1924. You knew that, didn't you? A
30 Business is business.

Q Of course it is business. A I don't know.

Q But you knew that? A I do not.

Q Eh? A I did not. I did not.

Q Didn't you know that you had to give bail for one thousand dollars? A No, I did not.

Q You didn't know that? A No.

Q Did you know anything about Max Lefski gave bail—that you gave bail for Max Lefski on August 9, 1924, one thousand dollars in the
40 United States of America? A I don't remember.

Mary Levy, cross.

Q You don't remember that, either? A No.

Q Do you know whether there is another bail? A Yes.

Q On December 3, 1924, Max Lefski, as principal, and you, Mary Levy, as surety, for one thousand dollars? A And I want to give you a mortgage, six thousand dollars. 10

Q Wait a minute. Do you know that? You knew that? A No.

Q You gave bail and somebody gave bail for you; isn't that right? A I don't know. I can't read.

Q Of course, that is business. A But I want to give you a mortgage. I didn't want cash money.

Q Did you know, Mrs. Levy— A Yes, yes; I want to get a mortgage and they swindled me.

Q —on December 22, 1925? A Yes, what
20 happened there?

Q —you gave—John Levy gave bail for you? A He did.

Q To the United States of America for one thousand dollars? A Yes.

Q You know that, don't you? A I don't know.

Q What? A I don't know what happened there. 30

Q Why didn't you know that you appeared before— A Well, I trust him for four thousand dollars.

Q Just a minute. Didn't you know that you appeared before the Court— A Wanted them to give me money; that is all I want to have them give me the money.

Q All you want is the money? Oh, yes; I believe that. A When I gave you a mortgage I gave you a mortgage, you have got the mortgage. I didn't want the money—I don't want— 40

Mary Levy, re-direct.

Q And don't you know that that bail— A Yes.

Q Just a moment. A Yes, \$2,500 I need; I was sick.

Q I know you needed the money. A And you didn't give me a nickel.

10 Q Of course not. A Well, you didn't want—

The Court: Wait a minute.

Q Just wait a minute. Don't you know, Mrs. Levy— A Yes.

Q —that this bail, dated September 22, 1925, where John Levy was your surety— A Yes.

Q —was not cancelled until last Saturday? A Yes; they take—

20 Q As Mr. Susskind said. A They took me to the court.

Q Oh, they took you to court? A Oh, I don't know.

Re-direct examination by Mr. Kristeller.

Q You said they didn't want to take the property? A No; they didn't want to.

30 Q Who told you they didn't want to? A Susskind and everybody told me.

Q Who is "everybody"? A Stalford.

Q What did Stalford tell to you? A Telled to me they want \$600 instead of \$300 and I went to the architect. I want to build on it.

Q When did Stalford tell you that they didn't want the property? A They told me, the old man, I met him in the bank and they says they don't want the property.

40 Q I am talking about this Stalford, not his father. A Well, he say he didn't want it.

Louis Susskind, direct.

Q When did he say it? A He say about four months after or six months after; I don't remember.

Q Where did you see him? A I see him on the street and I say, "Can't you sell the lot?"

Q This Stalford here? A No; the father.

10 Q I am not asking you about the old man; I am asking you about this man. A No; he didn't want it.

By Mr. Greenfield.

Q Why did this Stalford tell you he didn't want it? A They didn't tell me—they told me they didn't want it.

LOUIS SUSSKIND, sworn for the defendant. 20

Direct examination by Mr. Kristeller.

Q Mr. Susskind, you are president of the Constructo Realty Company? A Yes, sir.

Q And you entered into this contract with Mary Levy on behalf of the company, the contract being C. 1? A Yes, sir.

30 Q And did you also enter into, on behalf of your company, the assignment to John D. Goldberg? A Yes, sir.

Q Can you tell us under what circumstances you sold or assigned this contract to Goldberg?

Mr. Greenfield: I object to that as immaterial.

The Court: Why is it material?

Mr. Kristeller: It is going to lead up to conversations, sir, immediately afterwards when the talk came of closing this contract. 40

Louis Susskind, direct.

The Court: I do not think it is necessary to go into the—

Mr. Kristeller: All right.

Q After the contract had been assigned, Mr. Susskind, did you see Mr. Goldberg at any time?

10 A Yes, sir.

Q Tell us about when you saw him. A Why, he came and asked me to get him a building and loan mortgage on that property.

Q All right, now, so we all understand it. What business are you in? A I am in the clothing, retail clothing business.

Q And where is your place of business? A On Springfield avenue.

Q Near what? A Corner of Charlton street.

20 Q And where did you see Goldberg, in your place of business or on the street or where? A In my place of business.

Q He came with you then and he asked you to get a building and loan? A Yes.

30 Q Now tell us about when with respect to the date of the contract that was. A Well, that was—I promised him when he bought that property, well, if he needed a building and loan that I would use my best efforts so he would get it, and sometimes after he told me that he wanted a building and loan mortgage and I believe he filed an application and I had the building and loan grant him a loan.

Q What building and loan? A The Famous.

Q And you are an officer of that building and loan? A President.

Q And did you see him any time after the application was ganted, after the loan had been granted? A Yes.

40 Q Where? A Why, he was in my store occasionally.

Louis Susskind, direct.

Q And did he say anything about this contract in this property? A Why, he told me that he had that property swapped in for some other property and a little time after that he told me the other fellow is backing out.

Q Anything else? A That is all I think I can remember. 10

Q Did you see him any time after the 1st of August when this contract was supposed to have been closed? A Well, I—he told me they wouldn't take the property.

Q Who wouldn't? A Goldberg.

Q Goldberg told you he wouldn't take it or somebody else wouldn't take it? A Well, presumed that the other fellow didn't take title.

Mr. Greenfield: I object to presumption and move to strike it out. 20

Mr. Kristeller: No objection.

The Court: Strike it out.

Q What did Goldberg say to you, if anything, about taking title from Mrs. Levy? That is what I want, not what somebody else told you. A He told me that they would not take the property. 30

Q And did he ask you anything about his money? A Yes; he wanted me to use my efforts to see what—whether I couldn't get his deposit back.

Q From who? A From Mrs. Levy.

Q What did you say to him? A I told him I would try.

Q Now, did you report back to him after you tried? A Yes; I told him that I seen the son, Mrs. Levy's son, and had him negotiate and she wouldn't give him the deposit back. 40

Louis Susskind, direct.

Q Now, did you see him any other time after October 1st when this title was supposed to close?

A Yes, sir.

Q When? A Why, he was in my store several times.

10 Q Did you ever tell him that you were selling the property? A I don't understand the question.

Q Did you ever tell him that the property was going to be sold over again, that you had lost your contract? A Why, no; I didn't tell him that.

Q Did you ever tell Goldberg that Mrs. Levy had sold this property—

Mr. Greenfield: I object, if the Court please. It is entirely leading.

20 The Court: Yes.

Q Did you ever tell Goldberg that this property had been sold?

Mr. Greenfield: I object to that.

The Court: That is leading.

30 Q Did you ever tell Goldberg anything about that property?

The Court: That is all right.

A Why, yes; I told him that the property was sold and brought a big price over what he was supposed to take it for.

Q When did you tell him that? A Why, that must have been sometimes around the end of the year 1925.

40 Mr. Kristeller: That is all.

Abraham Goldberg, direct.

Cross examination by Mr. Greenfield.

Q Now, Mr. Susskind. A Yes, sir.

Q You say Goldberg negotiated and asked you to get the deposit back? A Yes, sir.

Q Hadn't you seen him and offered him \$600 to get it back if he will relinquish it? A 10 No, sir.

Q At any time? A No, sir.

Q Did you see Abe Goldberg, a brother of John? A Yes.

Q Didn't you tell him that you could get \$600? A No, sir.

Q If he would relinquish the contract? A No, sir.

Mr. Greenfield: Do you want the original? I will admit that. 20

Mr. Kristeller: I desire to offer in evidence—I will have the original here in a minute, Mr. Kearns will have it—the original contract between Mary Levy and Harry Berger, dated November 21, 1925, recorded in the office of the Register of Essex County on November 23, 1925, at 1:12 P. M., in P 73 of Deeds, pages 92 and 93. With that I rest. 30

Mr. Greenfield: Now, Abe Goldberg.

ABRAHAM GOLDBERG, sworn for the complainant.

Direct examination by Mr. Greenfield.

Q Do you know Mr. Louis Susskind? A I do, well. 40

Abraham Goldberg, direct.

Q Did you ever talk to him concerning that Mary Levy property on Jones street? A Yes, sir, I am well acquainted because my brother bought the property.

Q All right. What did you say to him? Did he ever offer you \$600 if John Goldberg would
10 relinquish that contract? A He—

Mr. Kristeller: I object. It was not Mr. Goldberg.

The Court: How about that being a leading question?

Mr. Greenfield: Well, it is rebuttal.

The Court: That doesn't make any difference.

Mr. Greenfield: Very well. I will withdraw that question. I will reframe the question.
20

The Court: Just ask him what he said.

Q What did Mr. Susskind say to you and what did you say to him concerning the contract of this 46 Jones street property? A Why, I had stopped several times in Louis Susskind's clothing store and I asked him, "What has become of the property with Levy what you sold my brother?" "Well," he says to me, he says, "there is a lot of bonds on it now at the present time," he says, the first time I seen him, and he says, "It will have to take a little time and be cleaned up and you will get the property, the loan is granted," he says, "and I keep my promise what I done." That is several days—some-time later I stopped in again and Louis Susskind said to me, "Abe Goldberg," he says, "I think
30
40 you ought to take your \$600 back, 550 and your

Motion to Dismiss Bill of Complaint.

expense, and make the thing square." That is the words he says to me.

Q What did you say? A I said, "I want the property; my brother wants the property."

Cross examination by Mr. Kristeller.

Q Louis Susskind is in the clothing business?
A Yes, sir. 10

Q He told you all about these bonds? A Yes, he spoke to me about the bonds because we had confidence; I knew Louis Susskind. I worked for Louis Susskind; we took all confidence in Louis Susskind.

Q I mean, he told you about these legal matters? A Yes, because he was president of the building and loan, he says, "And I can't pass the things until the things are straightened out," the words he says to me. 20

Mr. Greenfield: That is our case.

Mr. Kristeller: Your Honor please, I move to dismiss the bill of complaint on the ground that the contract made with the Constructo Realty Company and assigned to Goldberg was recorded on November 23, 1925, at 3:12 P. M., which is more than three months after the date set for the closing of the title and pursuant to section 116 of the Conveyance Act, no suit having been commenced within the specified time, namely, three months, the contract is void; it appearing by the evidence now, that the contract to Harry Berger was recorded prior to the recording of this contract and therefore rights of judgment creditors subsequent purchasers and mortgagees for value
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Motion to Dismiss Bill of Complaint.

10 have intervened. The originals are now before you. The contract of the Constructo Realty Company being recorded November 23, 1925, at 3:12 P. M., the contract between Mary Levy and Harry Berger having been recorded at 1:12 of November 23, 1925. The bill filed and the suit instituted, as I remember it, in February of this year—you have them before you.

The Court: Yes. The complaint is filed November 27th.

20 Mr. Kristeller: Yes. And the lis pendens was filed November 25, 1925, and the bill filed November 27th, which is also out of time, the lis pendens having been filed prior to the actual filing of the bill and the issuance of the subpoena. The lis pendens act providing that lis pendens must be filed after the bill filed and not before. The case of *Gerba v. Mitruske* decides—

Mr. Greenfield: Where is that reported?

30 Mr. Kristeller: 84 New Jersey Equity 141, the opinion by Chief Justice Gummere in the Court of Appeals reads as follows: "The one hundred and sixteenth section of the act relating to conveyances provides that every agreement for the sale of land thereafter recorded shall be absolutely void as against subsequent judgment creditors of the vendor, and as against subsequent purchasers and mortgagees for value of the land, unless the vendee within three months after the date fixed in such agreement for its consummation shall commence suit for the specific performance of the said agreement or for its rescission."

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Motion to Dismiss Bill of Complaint.

We maintain, sir, that not having recorded the contract within the time limited, not having filed a proper lis pendens, that we are entitled to have this bill dismissed so that the prayer of the counter-claim on behalf of the other defendant, who is an innocent purchaser for value without notice, may be granted. You see, we are confronted now with having had these three months pass and having had no notice of any lis pendens; having had no proper tender made to us we went and sold the property and a recorded instrument is now on file prior to the contract of the complainant. We ask that the bill be dismissed as against us.

10

(Discussion.)

The Court: I think I had better take this matter under advisement. You better give me memorandums in this matter.

20

Mr. Greenfield: I suppose your Honor wants a copy of the transcript?

The Court: I think we ought to have the transcript.

Mr. Kearns: I have a cross-bill here, your Honor please, a counter-claim.

The Court: Is there any disposition on the part of Mrs. Levy to decline to live up to this second contract, if she is allowed to?

30

Mr. Kristeller: No, sir.

The Court: Then I do not see why it is necessary to put in the testimony. Now, assume that I decide in favor of Mr. Greenfield, why, then, she fails naturally, and if I decide against Mr. Greenfield and she is told to go ahead, it makes no difference, she undoubtedly will have to go ahead. I do not see that you have to put in any testimony.

40

Harry Berger, direct.

Mr. Kearns: Nothing about the condition of the record that we found—Mr. Berger recorded his contract the very day he received it. I have no knowledge—I will prove that he had no knowledge of this prior contract.

10 The Court: Well, if you want to put him on the stand and show that he had no knowledge of it, all right.

HARRY BERGER, sworn for the defendant.

Direct examination by Mr. Kearns.

20 Q Mr. Berger, you are the vendee named in a contract with Mary Levy, dated the 21st day of November last, are you? A Yes, sir.

Q Is this the contract which has been offered in evidence as Exhibit D. 4 made with Mary Levy? A Yes; that is the contract.

Q Yes. This contract was to be consummated on the 23rd day of February? A Yes, sir.

Q Of the present year? A Yes, sir; time being the essence.

30 Q Time was made of the essence? A Yes.

Q Did you yourself record this contract in the register's office of this county? A Yes, sir.

Q On what date and what time?

The Court: Well—

Mr. Greenfield: The deed speaks for itself. I do not dispute that, Mr. Kearns.

40 Mr. Kearns: At 1:12 o'clock in the afternoon of the 23rd of November, 1925, in Book F—Book P 73 at pages 92 and 93.

Harry Berger, direct.

Q Did you at the time this contract was delivered and at the time of the execution did you know—or at the time of recording did you know of the existence of any prior contract made by Mary Levy with any other person? A No, sir.

Q For the sale of this same property? A No, sir. 10

Q You agreed to pay her \$10,000 for this property? A Yes, sir.

Q And you paid her how much cash? A Five hundred cash.

Q You were to pay her thirty-five hundred in cash upon the day of the deed? A Yes, sir.

Q And the balance in a purchase money bond and mortgage?

The Court: That is all in the contract. 20

Q Did you make legal tender on the 23rd of February? A Yes; I did.

Q Of the cash in legal tender? A Thirty-five hundred dollars in legal tender.

Q Yes. And did you at the same time serve this paper upon her and her attorney, Mr. Susskind? A Yes; that is my signature.

Mr. Kearns: I will ask to have this paper admitted in evidence. 30

(Paper marked Exhibit D. 5.)

(Exhibit D. 5 read.)

Q Did Mr. Susskind ever tell you of the existence of a contract with Goldberg or with the Constructo Realty Company? A No, sir.

Q For this same property. Did you learn—how did you learn of the existence of such a contract, and when? A Well, about two weeks later Mr. Goldberg sent for me. 40

Harry Berger, direct.

Q Yes. A After this was on record and I entered in the contract and he told me that he had a previous contract.

Q Yes. A So I said, "That don't concern me. You will have to see my counsel, Mr. Kearns, about that."

10 Q Yes. Well, now, preparatory to taking title to this property, did you have an examination of the records made in this county? A Yes, sir.

Q Do you know whether they revealed the lis pendens or not? A I believe they revealed just one uncanceled bail bond and this lis pendens notice of the suit.

Q Do you know when that lis pendens was dated? Did you see that on record?

20 Mr. Greenfield: We don't dispute—
The Court: That is part of the record.

Q Was there an adjournment taken then for the passage of this title? A Yes, sir.

Q Then at Mr. Susskind's office from the 23rd of February to the 9th of March— A Yes, sir.

30 Q On the 9th of March did you make another tender? A Yes; appeared there and made a second tender.

Q And did you serve a paper at that time? A Yes, sir.

Q Is this a copy of the paper that you served? A Another notice.

Q Did you bring the cash with you, legal tender? A \$3,500 legal tender.

Q Who was present with you? A Yourself, my counsel, Mr. Max Spiritt.

40 Q This is addressed to Mary Levy—

Harry Berger, cross.

The Court: Don't read it.

Q And it is the same thing tendering the—yes—and calling your attention—there was one open recognizance, was there? A Yes, sir.

Q At that time. And we discussed—did we discuss at that time the lis pendens? A Yes. 10

Q With Mr.—yes, we did not—was there a deed ready for us there then? A Yes. Mr. Susskind, I believe, sent for Mr. Levy and Mr. Levy came in and had her execute a deed and make a sort of tender, but you, as my counsel, refused it, stating that there were certain legal defects in the title.

Q And there was a promise made to cancel the lis pendens? A To cancel the lis pendens and the bond. That is why the first postponement was given Mr. Susskind to give him time to do that. 20

Mr. Kearns: Yes. Now, that is all.

Cross examination by Mr. Greenfield.

Q Mr. Berger, there were two reasons you didn't want to take the title, is that right? A Yes.

Q One reason, the lis pendens? A Yes, sir. 30

Mr. Kristeller: I object to that as immaterial.

The Court: No; I think it is all right.

Q And the second reason was the uncanceled bond? A Yes, sir.

The Court: Now, you can send me memorandums. 40

Opinion.

OPINION.

IN CHANCERY OF NEW JERSEY.

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| <i>Between</i> JOHN D. GOLDBERG, <i>Complainant,</i> <i>and</i> MARY LEVY and HARRY BERGER, <i>Defendants.</i> | } } } } } } } } | <i>On Bill, etc.</i> <i>Opinion.</i> |
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William Greenfield for complainant.
 Joseph Susskind for defendant Mary Levy.

20 CHURCH, V.-C.

This bill is filed to compel the defendant, Mary Levy, to specifically perform a contract, dated June 2, 1925, wherein she agreed to sell property on Jones street, Newark, to the Constructo Realty Company, which contract was assigned to the complainant on June 11, 1925.

30 Defendants, in the first place, insist that complainants were never ready to take the title, and, in fact, abandoned the contract. The testimony shows that an application was made by complainant to a building and loan association for a loan on the property, but that Joseph Susskind, counsel for the association, and in this case counsel for defendant, Mary Levy, informed complainant that there were liens against the property, to wit, six bail bonds totaling \$6,000. The purchase price was \$5,800. Defendants had received a deposit of \$300. Some of these bail bonds were not cancelled until September 22,
 40 1925, and one for \$1,000 not until May 22, 1926,

Opinion.

two days before the trial of the cause and long after the filing of the bill. There is evidence that Goldberg made efforts to have the title cleared so that he could accept it, and I think the reason for the delay was the failure of the defendant to cancel the liens. In the course of the negotiations counsel for defendant wrote a letter to complainant demanding that he take title by a certain date, October 1, 1925, and seeking to make that date of the essence of the contract. I do not see how this can be effective as a defense inasmuch as there were still liens against the property which the defendant had not cancelled.

It also appears that May Levy entered into a contract of sale for the same property with one Harry Berger on November 21, 1925, recorded on November 1, 1925, at 1:12 P. M., two hours before the contract with complainant was recorded. Therefore it is contended that Berger was a bona fide purchaser for value without notice and is entitled to a deed under his contract. No deed was ever delivered to him and he paid no purchase money.

30 "To be a bona fide purchaser without notice the defendant must not only have agreed to purchase without notice of the complainant's previous agreement, but he must also have actually paid the purchase money and taken his deed without such notice." *Cromwell v. Clinton Realty Co.*, 67 N. J. Equity 540.

"Payment or its equivalent of the whole purchase money is essential to the defense of a bona fide purchaser. The execution of a bond and mortgage in payment is not sufficient." *Bridge-water vs. Ocean City Assen.*, 85 New Jersey Equity 379.

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Opinion.

Moreover, it is apparent that Berger must have had notice of the prior agreement between complainant and defendant. Joseph Susskind was the attorney who prepared the contract between Levy and Berger and Susskind was the attorney for the building and loan who informed complainant of the liens against the property when complainant went to him with his contract with Levy to perfect a loan. Susskind was Berger's attorney and Levy's and had notice of the prior contract, which I think was notice to Berger.

It also appears that Joseph Susskind, attorney for Mary Levy, himself took title to this property, taking a bargain and sale deed therefore on May 21, 1926, three days before the trial of this cause, and long after the *lis pendens* was filed and the case at issue. This fact was not disclosed at the trial and was brought to my attention after the cause was heard. I consider this a distinctly improper act on the part of counsel. He has assured me it was done merely to enable him to cancel the remaining bail bond. He assures me he will reconvey in accordance with my direction. I will not comment further on this transaction, but will advise a decree directing Mary Levy to convey the property to Goldberg and directing Susskind to make a similar conveyance.

*Final Decree.***FINAL DECREE.**

Filed September 23, 1926.

IN CHANCERY OF NEW JERSEY.

*Between*JOHN D. GOLDBERG,
*Complainant,**and*MARY LEVY and HARRY
BERGER,*Defendants.*

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*On Bill, etc.**Final Decree.*

This cause coming on to be heard in the presence of William Greenfield, Esquire, solicitor for and of counsel with complainant, John D. Goldberg, and Joseph Susskind, Esquire, solicitor of the defendant, Mary Levy, and William J. Kearns, Esquire, solicitor for and of counsel with Harry Berger, and the Court having examined the pleadings and having taken proofs orally in open court, and having heard and considered the arguments of the respective counsel;

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And it appearing to the satisfaction of the Court that, on the second day of June, 1925, the said Mary Levy (widow) entered into a contract in writing whereby she agreed to convey by deed of warranty the land and premises hereinafter described to the Constructo Realty Company for the sum of \$5,800, on or before the first day of August, 1925, to wit: ALL that certain tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the

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Final Decree.

City of Newark, in the County of Essex and State of New Jersey:

BEGINNING at a point distant three hundred feet eight inches northerly on the easterly line of Jones Street from the corner, which corner is formed by the intersection with the northerly line of the Springfield Turnpike; thence (1) running easterly at right angles with Jones Street ninety feet more or less to the fence; thence (2) northerly along the fence twenty-five feet; thence (3) westerly parallel with the first course ninety feet more or less to Jones Street; thence (4) southerly along the easterly line of Jones Street twenty-five feet to the place of BEGINNING.

20 And that \$300 was paid by the said Constructo Realty Company to the said Mary Levy upon the execution and delivery of said agreement.

30 And it further appearing to the Court that the balance purchase price was to be paid on the day and date of settlement and delivery of deed in manner following: On delivery of deed, cash or certified check of \$2,500, and a purchase money mortgage to be second in priority to a first mortgage of \$1,000, to secure the payment of \$2,000, with interest thereon at the rate of six per cent. per annum, payable semi-annually, for a period of one and one-half years, permitting the said Constructo Realty Company, its successors or assigns, to secure a new first mortgage not more than \$3,800, and which said purchase money mortgage of \$2,000 is to be postponed to the lien of such new first mortgage.

40 And it further appearing to the Court that the said Constructo Realty Company did, on the 11th day of June, 1925, sell and assign the said

Final Decree.

contract, subject to all the terms, covenants and conditions therein, unto the complainant, John D. Goldberg;

10 And it further appearing to the Court that the date fixed in the said contract bearing date June 2, 1925, for the conveyance of the said land and premises by the defendant, Mary Levy (widow), to the Constructo Realty Company, and which contract was assigned by the Constructo Realty Company, a corporation, to the complainant, of which assignment the said Mary Levy (widow) had notice thereof, was mutually postponed from time to time, by reason of the then subsisting liens on said land and premises, consisting of six recognizances of \$1,000, each executed by Mary Levy to the United States of America, in excess of the purchase price.

20 And it further appearing to the Court that the complainant, John D. Goldberg, was ready and willing to consummate said agreement in accordance with the terms and conditions contained therein, and demanded a conveyance of the said land and premises herein described in accordance with the terms of said contract entered into by Mary Levy (widow) and the Constructo Realty Company, on the second day of June, 1925, and which contract the said Constructo Realty Company assigned to this complainant on June 11, 1925, subject to all the terms, covenants and conditions therein contained.

30 And it further appearing to the Court that the liens and recognizances amounting to the sum of \$5,000 was not cancelled of record until the 22nd day of September, 1925; and it further appearing to the Court that a recognizance, to the extent of \$1,000, a lien open and uncanceled of

Final Decree.

record, remained a lien against the said property until May 22, 1926;

10 And it further appearing to the Court that the defendant, Mary Levy (widow) refused to convey the said land and premises herein described to the complainant, John D. Goldberg, in accordance with the terms of said contract;

20 And it further appearing to the Court that, on November 21, 1925, the said Mary Levy (widow) entered into a contract for the sale of said land and premises herein described, and to convey the same land and premises agreed to be conveyed to the complainant, with one Harry Berger, being the same land and premises agreed to convey to the complainant, and that Joseph Susskind, Esquire, attorney for Mary Levy (widow), also acting as attorney for Harry Berger, drew the contract entered into by Mary Levy and Harry Berger for the conveyance of the land and premises herein described, while the contract between the defendant, Mary Levy, and this complainant, John D. Goldberg, was still subsisting and in force;

30 And it further appearing to the Court that the complainant, John D. Goldberg, has always been and still is ready and willing to accept the conveyance of the said real estate as mentioned and described in the agreement entered into by Mary Levy (widow) as owner, on the second day of June, 1925, with the Constructo Realty Company, a corporation, and assigned by the Constructo Realty Company, a corporation, for a valuable consideration, to the complainant herein, John D. Goldberg, for the sale of said land and premises herein described, of which assignment the said Mary Levy had knowledge hereof.

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Final Decree.

And the Court being of the opinion that the complainant is entitled to specific performance of the contract as prayed for

10 It is thereupon, on this 21st day of September, 1926, ORDERED, ADJUDGED and DECREED that the said Harry Berger had knowledge of the subsisting agreement made and entered into by Mary Levy (widow) with the Constructo Realty Company, a corporation, and which contract had been assigned to the complainant by the Constructo Realty Company, at the time of the making and entering of the agreement between Mary Levy (widow) and Harry Berger, on the 21st day of November, 1925, acknowledged November 21, 1925, before Joseph Susskind, a Master in Chancery of New Jersey, and recorded November 23, 1925, in the Register's Office of Essex County in Book P 73 of deeds for said county, page 92, wherein and whereby the said Mary Levy agreed to convey to Harry Berger, and the said Harry Berger agreed to purchase the said land and premises, said contract is hereby declared null and void as to the property herein described and free and clear of said lien or pretended lien by virtue of said agreement made and entered into by and between Mary Levy (widow) and Harry Berger, and that the counter-claim of Harry Berger filed in the above cause be and the same is hereby dismissed with costs and counsel fee to be taxed.

40 And it is FURTHER ORDERED, ADJUDGED and DECREED, that the agreement between Mary Levy (widow) and the Constructo Realty Company, a corporation, bearing date June 2, 1925, and recorded in the Register's Office of Essex County in Book T 72 of deeds for said county, on pages 594-596, be specifically performed by Mary Levy

Final Decree.

(widow), one of the defendants herein, and that the said Mary Levy (widow) do make, execute and acknowledge in due form of law and deliver to the complainant, John D. Goldberg, on the fifth day of October, 1926, at three o'clock in the afternoon, at the office of William Greenfield, counsellor-at-law, 128-130 Market street, Newark, New Jersey, a good and sufficient deed of warranty for all that certain tract of land described herein, and deliver at the same time to John D. Goldberg possession of the said land and premises.

And it is FURTHER ORDERED, ADJUDGED and DECREED, that the sum of \$1,000 be deposited with Lionel Kristeller, Esquire, as security, to indemnify John D. Goldberg, complainant, from the lien of said recognizance to the United States of America in the sum of \$1,000, until said lien shall be removed and said land and premises freed and cleared of said recognizance;

And it is FURTHER ORDERED, ADJUDGED and DECREED, that John D. Goldberg execute a bond secured by mortgage on the foregoing described land and premises in the sum of \$2,000, which mortgage shall be second and subsequent in priority to a first mortgage of \$1,000, as part of the purchase price, for the purchase of said land and premises, and the balance sum whatever shall be due, after the apportionment of taxes, insurance, interest and rents, shall be paid in cash by the complainant, if any sum shall be due and owing to the defendant, Mary Levy (widow), one of the defendants herein.

And it is FURTHER ORDERED, ADJUDGED and DECREED, that Joseph Susskind, attorney, do execute a deed of conveyance of all his right, title and interest in the said land and premises unto

Final Decree.

John D. Goldberg, complainant herein, which he now pretends to have by virtue of the deed made and executed by Mary Levy (widow) to Joseph Susskind, bearing date May 21, 1926, acknowledged and recorded May 21, 1926, at 2:52 P. M., in the Register's Office of Essex County in Book P 74 of deeds for said county, page 104;

And it is FURTHER ORDERED, that the defendants, Mary Levy (widow) and Harry Berger, defendants herein, pay unto William Greenfield, Esquire, solicitor for and of counsel with the complainant, the sum of five hundred dollars as counsel fee, in addition thereto, taxed costs, to be taxed.

E. R. WALKER,

C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

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Notice of Appeal.

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

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| 10 | <i>Between</i> JOHN D. GOLDBERG, <i>Complainant,</i> <i>and</i> MARY LEVY and HARRY BERGER, <i>Defendants.</i> | } | <i>Notice of Appeal.</i> |
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The defendant, Mary Levy, hereby appeals from the final decree made in the above-entitled cause on the 21st day of September, 1926, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated, September 30, 1926.

JOSEPH SUSSKIND,
Solicitor for and of Counsel with
Defendant, Mary Levy.

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

JOSEPH SUSSKIND,
Of Counsel with Defendant, Mary Levy.

Amended Notice of Appeal.

AMENDED NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

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| 10 | <i>Between</i> JOHN D. GOLDBERG, <i>Complainant,</i> <i>and</i> MARY LEVY and HARRY BERGER, <i>Defendants.</i> | } | <i>Amended Notice of Appeal.</i> |
|----|--|---|----------------------------------|

The defendant, Mary Levy, hereby appeals from the final decree made in the above-entitled cause by Vice-Chancellor Church on the 21st day of September, 1926, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated, October 6, 1926.

JOSEPH SUSSKIND,
Solicitor for and of Counsel with
Defendant, Mary Levy.

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

JOSEPH SUSSKIND,
Of Counsel with Defendant, Mary Levy.

Petition of Appeal.

PETITION OF APPEAL.

New Jersey Court of Errors and Appeals

Between

10 JOHN D. GOLDBERG,
Complainant-Appellee,
and
 MARY LEVY and HARRY
 BERGER,
Defendants.
 (MARY LEVY,
Defendant-Appellant.)

*On Appeal
 from the
 Court of
 Chancery.
 Petition of
 Appeal.*

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

The petitioner, Mary Levy, appellant in the above-entitled cause, respectfully shows that:

1. Petitioner finds herself aggrieved by a final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 21st day of September, 1926, in a certain cause in
 30 said Court of Chancery, wherein the said John D. Goldberg was complainant, and the said Mary Levy and Harry Berger were defendants, in this respect, to wit, that the said decree adjudged that the defendant, Mary Levy, specifically perform an agreement made on June 2, 1925, whereby the said Mary Levy agreed to convey by deed of warranty certain lands and premises in the City of Newark, to the Constructo Realty Company, a corporation, and
 40 which contract was assigned by the Constructo

Petition of Appeal.

Realty Company, a corporation, to the complainant, John D. Goldberg, and that the said Mary Levy do make, execute and acknowledge in due form of law, and deliver to the complainant, John D. Goldberg, on the 5th day of October, 1926, at 3 o'clock in the afternoon at the office of William Greenfield, Esquire, counsellor-at-law, 128-130 Market street, Newark, New Jersey, a good and sufficient deed of warranty for all that certain land or tract described in said decree, and deliver at the same time to John D. Goldberg, possession of the said lands and premises; and further that the sum of \$1,000.00 be deposited with Lionel Kristeller, Esquire, as security, to indemnify John D. Goldberg, the complainant, from the lien of a recognizance to the United States of America in the sum of \$1,000.00 until said lien shall be removed and the said lands and premises freed and cleared of said recognizance; and further, that Joseph Susskind, Esquire, attorney, do execute a deed of conveyance of all his right, title and interest in said lands and premises, unto John D. Goldberg, complainant therein, "which he new pretends to have by virtue of the deed made and executed by Mary Levy (widow) to Joseph Susskind, bearing date May 21, 1926, acknowledged and recorded May 21, 1926, at 2:52 P. M. in the Register's Office of Essex County in Book P 74 of Deeds for said County, page 104;" and further that the defendants, Mary Levy (widow) and Harry Berger, defendants therein, pay unto William Greenfield, Esquire, solicitor for and of counsel with the complainant, the sum of \$500.00 as a counsel fee, in addition thereof tax costs to be taxed.

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Petition of Appeal.

2. The petitioner finds herself further aggrieved in that, the said decree declares as findings of fact, that the date, set in said contract bearing date June 2, 1925, for the conveyance of the said lands and premises, by the defendant Mary Levy (widow) to the Constructo Realty Company, a corporation, and which contract was assigned by the Constructo Realty Company, a corporation, to the complainant, and of which assignment the said Mary Levy (widow) had notice, was mutually postponed from time to time by reason of the then existing liens on said lands and premises consisting of six recognizances of \$1,000.00 each, executed by Mary Levy, to the United States of America, in excess of the purchase price, and that the complainant, John D. Goldberg, was ready, willing and able to consummate the said agreement in accordance with the terms and conditions contained therein, and demanded a conveyance of the said lands and premises described, in accordance with the terms of said contract entered into by Mary Levy (widow) and the Constructo Realty Company, a corporation, on the 2nd day of June, 1925; and further that the defendant Mary Levy refused to convey the said lands and premises to the complainant, John D. Goldberg, in accordance with the terms of said contract; and further that on November 21, 1925, the said Mary Levy (widow) entered into an agreement for the sale of said lands and premises therein described, and to convey the said lands and premises agreed to be conveyed to the complainant, with one Harry Berger, being the same lands and premises agreed to be conveyed to the complainant, and that Joseph Susskind, Esquire, attorney for Mary Levy (widow), also acting as attorney for Harry Berger, drew the

Petition of Appeal.

contract entered into by Mary Levy (widow) and Harry Berger for the conveyance of the lands and premises therein described, while the contract between the defendant, Mary Levy, and the complainant, John D. Goldberg, was still subsisting and in force; and further that the complainant, John D. Goldberg, has always been and still is ready and willing to accept a conveyance to said real estate as mentioned and described in the agreement entered into by Mary Levy (widow) as owner, on the 2nd day of June, 1925, with the Constructo Realty Company, a corporation, and assigned by the Constructo Realty Company, a corporation, for a valuable consideration, to the complainant herein, John D. Goldberg, for the sale of said premises therein described and of which assignment said Mary Levy had knowledge.

3. The petitioner appeals from the decree of the Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous in that said decree should have adjudged that said defendant, Mary Levy, was ready, willing and able to perform all conditions, covenants and agreements by her agreed to be performed, in the contract, dated June 2, 1925, and made with the Constructo Realty Company, a corporation, which contract was subsequently assigned to the complainant, John D. Goldberg, and that said complainant, John D. Goldberg, did refuse to accept a conveyance in accordance with said agreement, although requested to do so by the defendant, Mary Levy, and that the time for the conveyance of the said lands and premises by the defendant, Mary Levy, to the complainant, John D. Goldberg, was not mutually postponed from time to time, and that the existing

Petition of Appeal.

10 liens, on said premises at the time set for the conveyance, were capable of being removed at the time of closing of title or immediately thereafter; and further that the said John D. Goldberg, complainant, was not always ready, willing and able to accept the conveyance of said real estate according to the contract made with the defendant, Mary Levy.

20 4. The said decree is further erroneous in that it finds as a fact that Joseph Susskind, attorney for Mary Levy (widow), was also acting as attorney for Harry Berger. The said decree is further erroneous in that it declares null and void the contract made by defendant, Mary Levy (widow) with the defendant, Harry Berger, for the sale of the lands and premises described in the bill of complaint; and further that it decrees that a deposit of \$1,000.00 be made with Lionel Kristeller, Esquire, for the purpose of removing a lien, when in fact no lien is existing against the said lands and premises at the present time nor at the time of the making of the decree; and further said decree is erroneous in that it decrees that Joseph Susskind, attorney, do execute a deed of conveyance of all his right, title and interest in said lands and premises unto the complainant, John D. Goldberg, for the reason that said Joseph Susskind is not a party to said proceedings, and said provision is not based on any testimony produced at the hearing of this cause or in any legal and proper proceedings thereof; and further said decree is erroneous for the reason that it is ordered that the defendant, Mary Levy, this petitioner, together with the defendant, Harry Berger, pay unto the solicitor of complainant the sum of \$500.00 as a counsel fee, for the reason that said sum of \$500.00 for

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Petition of Appeal.

a counsel fee is greatly in excess of a proper fee to be allowed to the solicitor of complainant and that said order is an abuse of discretion.

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

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JOSEPH SUSSKIND,
Solicitor for and of Counsel with Appellant.

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Answer to Petition of Appeal.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

10 *Between*

JOHN D. GOLDBERG,
Complainant-Appellee,
and

MARY LEVY and HARRY
BERGER,
Defendants.

(MARY LEVY,
Defendant-Appellant.)

*On Appeal
from the
Court of
Chancery.*

*Answer to
Petition of
Appeal.*

20

The answer of John D. Goldberg, the above-named appellee, to the petition of appeal of Mary Levy, the above-named appellant.

30

This appellee, not admitting the truth of all or any of the matters in said petition of appeal contained, for answer thereto, nevertheless, admits that a final decree was, on the 21st day of September, 1926, made and entered in the Court of Chancery of New Jersey, in the above-entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to substance and form of said decree, this appellee begs leave to refer thereto when the same shall be produced.

40

This appellee is advised and believes that the said final decree dated the 21st day of September, 1926, is agreeable to equity, and he prays

Answer to Petition of Appeal.

that the same may be affirmed with costs to be taxed in favor of this appellee.

WM. GREENFIELD,
Solicitor for and of Counsel with
Complainant-Appellee.

I do hereby consent to the filing of the within answer as of due time. 10

JOSEPH SUSSKIND,
Solicitor for and of Counsel with
Defendant-Appellant.

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Exhibit C. 1.

EXHIBIT C. 1.

10 THIS AGREEMENT, made the 2nd day of June, in the year of our Lord One Thousand Nine Hundred and Twenty-five, between MARY LEVY (Widow), of the City of Newark in the County of Essex and State of New Jersey, party of the first part; and CONSTRUCTO REALTY Co., a corporation, of the City of Newark in the County of Essex and State of New Jersey, party of second part;

20 WITNESSETH, That the said party of the first part, for and in consideration of the sum of Five Thousand Eight Hundred (\$5,800) Dollars 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 she, 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 of all encumbrances, on or before the 1st day of August next ensuing the date hereof, ALL that certain lot, tract, or parcel of land and premises hereinafter particularly described situate, lying and being in the City of Newark in the County of Essex and State of New Jersey, being commonly known and designated as No. 56 Jones street, description to be same as in deed to party of the first part from her grantor.

6/11/25.

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Exhibit C. 1.

In consideration of Two Hundred and Fifty Dollars paid to us by John D. Goldberg we hereby assign this agreement.

CONSTRUCTO REALTY CO.,

By LOUIS SUSSKIND,

Pres. 10

Witness: M. H. Bleiberg.

Attest:

JOSEPH SUSSKIND,
(SEAL) Secy.

AND the said Constructo Realty Co. for itself and its successors and assigns, doth covenant, promise and agree to and with the said party of the first part, her 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 Five Thousand Eight Hundred (\$5,800) Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

| | | |
|--|---------|----|
| On execution of this agreement for which this is also a receipt..... | \$300 | |
| On delivery of deed, cash or certified check | \$2,500 | 30 |
| By assuming the mortgage at present a lien on the premises, and paying the same according to the terms thereof | \$1,000 | |
| 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 | | 40 |

New Jersey State Library

Exhibit C. 1.

on bond and mortgage, by reason of any tax assessed, or to be assessed against the premises, with interest at 6% payable semi-annually for one and one-half years..... \$2,000

10 Said purchase money mortgage to have a covenant permitting party of second part, its successors or assigns, to secure a new first mortgage, not more than \$3,800, and said purchase money mortgage is to be postponed to the lien of such new first mortgage.

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

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

30 AND IT IS FURTHER AGREED, by the parties to these presents, that the said part of the second part, its successors or assigns, may enter into and upon the said land and premises on the 1st day of August 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 and received at office of Joseph Susskind, 972 Broad St., Newark, N. J., between the hours of 10 o'clock in the forenoon and 4 o'clock in the afternoon on the said 1st day of August next ensuing the date hereof.

40 The rents of said premises, insurance premiums, water rents, taxes, and interest on Mort-

Exhibit C. 1.

gage, if any, shall be adjusted, apportioned and allowed as of the day of delivery of said deed.

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 property appurtenant to or used in the operation of said premises is represented to be owned by seller and is included in this sale. 10

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

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated. 20

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 therefor, and that there are no encroachments thereon, and that the buildings comply with municipal ordinances and regulations, to be shown by the report of the department or board enforcing the same where such ordinances, regulations and said act apply. 30

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

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

If at any time before the delivery of the deed the premises or any part thereof shall be or shall 40

Exhibit C. 1.

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

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

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

her
 MARY X LEVY. (L. S.)
 mark

30 Signed, Sealed and Delivered
 in the presence of

ESTHER ROSENFELD.

CONSTRUCTO REALTY CO.,

By LOUIS SUSSKIND, (SEAL)
 Pres.

Attest:

JOSEPH SUSSKIND,
 Secy.

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Exhibit C. 1.

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

BE IT REMEMBERED, That on this 2nd day of June in the year of our Lord One Thousand Nine Hundred and Twenty-five, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared MARY LEVY (Widow), who, I am satisfied, is the grantor mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon she acknowledged that, she signed, sealed and delivered the same as her voluntary act and deed, for the uses and purposes therein expressed.

JOSEPH SUSSKIND,
 A Master in Chancery of New Jersey.

CONTRACT

FOR SALE OF PROPERTY

Mary Levy
 to
 Constructo Realty Co.

Dated 19

Received in the Register's Office of the County of Essex, N. J., on the 23rd day of November, A. D. 1925, at 3:12 o'clock in the afternoon and recorded in Book T 72 of deeds for said County, pages 594, 596.

HOWARD S. DODD,
 Register.

WILLIAM STALFORD,
 130 Market Street,
 Newark, N. J.

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Exhibit C. 2.

EXHIBIT C. 2.

Title R. Co.

SEARCH
IN
DISTRICT COURT OF THE
UNITED STATES
DISTRICT OF NEW JERSEY

10

I, CHARLES JONES, an Attorney at Law of the District Court of the United States, for the District of New Jersey, do hereby certify that I have searched the Records of said Court, and I do not there find any Proceedings in Bankruptcy under the act of July 1st, 1898, nor do I there find remaining or unsatisfied of record, any Judgment, Decree or other Lien, except as below set forth against

20

Mary Levy for twenty years last past

Mary Levy Principal Recognizance
Newark, N. J. Entered Oct. 13, 1922
John Levy, Surety Amount \$1,000.00
to
United States of America

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Mary Levy, Principal Recognizance
Newark, N. J. Entered July 18, 1924
Sun Indemnity Co. Surety Amount \$1,000.00
to
United States of America

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Max Lefsky, Principal Recognizance
Mary Levy, Surety Entered Aug. 9, 1924
Newark, N. J. Amount \$1,000.00
to
United States of America

Exhibit C. 3.

Max Lefsky, Principal Recognizance
Mary Levy, Surety Entered Dec. 3, 1924
Newark, N. J. Amount \$1,000.00
to
United States of America

IN TESTIMONY WHEREOF, I have
hereto set my hand, this Eighteenth
(SEAL) day of September A. D. nineteen hundred and Twenty-five at 9 A. M.
Fees. \$.80

CHARLES JONES

EXHIBIT C. 3.

Title Reporting Co.

SEARCH
IN
DISTRICT COURT OF THE
UNITED STATES
DISTRICT OF NEW JERSEY

20

I, CHARLES JONES, an Attorney at Law of the District Court of the United States, for the District of New Jersey, do hereby certify that I have searched the Records of said Court, and I do not there find any Proceedings in Bankruptcy under the act of July 1st, 1898, nor do I there find remaining or unsatisfied of record, any Judgment, Decree or other Lien, except as below set forth against

30

Mary Levy for twenty years last past

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Exhibit C. 3.

Mary Levy Principal Recognizance
John Levy Surety Entered Sept. 22, 1925
Newark, N. J. Amount \$1,000.00
to
United States of America

10 ~~Mary Levy Principal Recognizance~~
~~Newark, N. J. Entered May 22, 1926~~
~~John Levy Surety Amount \$1,000.00~~
~~Newark, N. J.~~
~~to~~
~~United States of America~~

~~This search continued to Date with like result
as before stated.~~

~~Dated Sept. 29, 1926. 9 A. M.~~
~~Fees. \$30~~

20 ~~Charles Jones~~

IN TESTIMONY WHEREOF, I have
hereto set my hand, this Nineteenth
(SEAL) day of May A. D., nineteen hundred
and Twenty-six at 9 A. M.
Fees. \$.80

CHARLES JONES

~~Sheet #2~~
~~John Levy Principal Recognizance~~
30 ~~Newark, N. J. Entered Sept. 23, 1926~~
~~Mary Levy Surety Amount \$1000.00~~
~~Newark, N. J.~~
~~to~~
~~United States of America~~

~~David Sebersky Principal Recognizance~~
~~Newark, N. J. Entered Sept. 23, 1926~~
~~Mary Levy Surety Amount \$1000.00~~
~~Newark, N. J.~~
~~to~~
40 ~~United States of America~~

Exhibit D. 1.

EXHIBIT D. 1.

(Letter.)

September 25, 1925

Mr. John Goldberg,
142 Market Street,
Newark N. J. 10

Dear Sir:

We represent Mrs. Mary Levy, the owner of
56 Jones Street, Newark N. J. It appears that
you took an assignment of the contract to pur-
chase the same, and though the time set for
closing title is long past you have not as yet
evidenced your intention to take title.

Unless you take title by October 1, 1925 we
shall take such steps as are open to us in the
matter. The time set in this letter is of the
essence. 20

We trust that you will advise us of your in-
tentions immediately upon the receipt of this
letter.

Yours very truly,

George & Samuel Cohen

SC:PF

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Exhibit D. 1.

(U. S. Postcard)

POST OFFICE DEPARTMENT

Official Business

Registered Article

No. 50417

10

(Date stamp—Newark N. J. Sep 6 1925)

Return to G. & S. Cohen
(Name of Sender)Street and Number,
or Post Office Box, 738 Broad St.
Newark,
New Jersey.

Return Receipt

20

Received from the Postmaster the Registered
or Insured Article, the original number of which
appears on the face of this Card.John Goldberg
(Signature or name of addressee.)

Date of delivery 9/26 25

30

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*Exhibit D. 2.***EXHIBIT D. 2.**UNITED STATES OF AMERICA, }
DISTRICT OF NEW JERSEY. }^{ss.}

I, George T. Cranmer, Clerk of the District Court of the United States for the District of New Jersey, do hereby certify that the recognizance entered into by Mary Levy, Principal and John Levy, Surety for \$1000.00 on October 13, 1922 #8142; also recognizance entered into on July 18th, 1924 for \$1000.00 #14966 by Mary Levy, Principal and Sun Indemnity Co. Surety; also recognizance entered into on August 9, 1924 for \$1000.00 #15251 by Max Lefsky, Principal and Mary Levy, Surety; also recognizance entered into on Dec. 3, 1924 #16561 for \$1000.00 by Max Lefsky, Principal and Mary Levy, Surety have all this day been cancelled of record. as the same remains of record, and on file in my office.

IN TESTIMONY WHEREOF, I have hereto subscribed my name and affixed the seal of said Court, at Trenton, in said District, this twenty second day of September, A. D. nineteen hundred and twenty five.

G. T. CRANMER,
Clerk.

L. A. McGurty

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Exhibit D. 3.

EXHIBIT D. 3.

UNITED STATES OF AMERICA

DISTRICT OF NEW JERSEY

I, George T. Cranmer, Clerk of the District Court of the United States for the District of New Jersey, do hereby certify that the recognizance entered into on Sept. 22nd, 1925 by Mary Levy, Principal and John Levy, Surety for one-thousand dollars has this day been cancelled of record, No. 20570 as the same remains of record, and on file in my office.

IN TESTIMONY WHEREOF, I have hereto subscribed my name and affixed the seal of said Court, at Newark, in said District, this 22nd day of May, A. D. nineteen hundred and twenty-six.

G. T. CRANMER,
Clerk.

by L. A. McGurty

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Exhibit D. 4.

EXHIBIT D. 4.

THIS AGREEMENT made the 21st day of November, in the year of our Lord One Thousand Nine Hundred and twenty-five

BETWEEN Mary Levy, widow, of the City of Newark in the County of Essex and State of New Jersey party of the first part;

AND Harry Berger of the City of Newark in the County of Essex and State of New Jersey party of the second part;

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Ten thousand (\$10000.00) Dollars 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 she the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of Warranty free of all encumbrances except as hereinafter mentioned on or before the 23rd day of February next ensuing the date hereof, ALL that 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 a point distant 300 feet 8 inches northerly on the easterly line of Jones street from the corner, which corner is formed by the intersection with the northerly line of the Springfield Turnpike; thence (1) running easterly at right angles with Jones Street 90 feet, more or less, to the fence; thence (2) northerly along the fence 25 feet; thence (3) westerly

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Exhibit D. 4.

parallel with the first course 90 feet, more or less, to Jones Street; thence (4) southerly along the easterly line of Jones Street 25 feet to the place of BEGINNING.

Being the same premises as described in Deed N 57 page 409 of Deeds of Essex County and X10-515.

10 The time stated in this contract for the performance of the same shall be of the essence of this contract.

Being known as #56 Jones Street.

AND the said Harry Berger for himself and his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, her heirs, executors, administrators and assigns, that he 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 Ten thousand (\$10000.00) Dollars as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

| | | |
|----|---|-----------|
| | By deposit receipt whereof is hereby acknowledged, the sum of \$500.00.. | \$500.00 |
| | On Delivery of Deed, cash..... | \$3500.00 |
| 30 | 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, to be assessed against the premises, with interest at 6% payable semi-annually, for two years, which mortgage and bond shall contain a prepayment clause and shall be a purchase money mortgage | \$6000.00 |
| 40 | | |

Exhibit D. 4.

It is expressly understood and agreed that the title to the land hereby agreed to be conveyed is not derived from any proceedings or any act for the sale of land for the non-payment of taxes nor through adverse possession.

Conveyance subject to any encroachment of property on the south of premises to be conveyed, which encroachment is shown on survey made by Lehlbach Bros. dated June 27, 1916 and shows encroachment to be 14 hundredths of a foot. 10

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

And the said party of the first part hereby agrees to pay to the licensed and authorized agent John J. McSpirit, a commission of \$500.00 on the purchase price aforesaid, to be paid at the time of closing to title and only in the event that title actually passes and consideration fully paid. 20

AND IT IS FURTHER AGREED, by the parties to these presents, that the said part of the second part, his heirs and assigns, may enter into and upon the said land and premises on the day of settlement next ensuing the date hereof, and from thence take the rents, issues and profits to his and their use. 30

AND IT IS FURTHER AGREED, by the parties hereto, that the said deed shall be delivered and received at office of Joseph Susskind, 972 Broad Street, Newark, N. J. between the hours of 10 o'clock in the forenoon and 4 o'clock in the afternoon on the said 23rd day of February next ensuing the date hereof. 40

Exhibit D. 4.

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

her
MARY X LEVY.
mark

10

HARRY BERGER.

Signed, Sealed and Delivered
in the presence of
JOSEPH SUSSKIND.

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In consideration of mutual promises and agreements herein stated, we hereby agreed to extend the date for the delivery of deed and execution of this contract to March 9, 1926, at same hour and place and time still of the essence.

WITNESS our hands and seals this 23 day of Feb'y A. D. 1926.

her
MARY X LEVY.
mark

HARRY BERGER.

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

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BE IT REMEMBERED, that on this 21st day of November in the year of our Lord One Thousand Nine Hundred and twenty-five, before me the subscriber, A Master in chancery of New Jersey personally appeared Mary Levy, widow who, I am satisfied, is the grantor mentioned in the within Instrument to whom I first made known the contents thereof, and thereupon she acknowledged that she signed, sealed and delivered the

Exhibit D. 5.

same as her voluntary act and deed, for the uses and purposes therein expressed.

JOSEPH SUSSKIND,
M. C. C. of N. J.

Received in the Register's Office of the County of Essex N. J. on the 23rd day of November, A. D. 1925 at 1.12 o'clock in the afternoon, and Recorded in Book P-73 of Deeds for said County, on pages 92-93.

HOWARD S. DODD,
Register.

EXHIBIT D. 5.

To Mary Levy, or her Attorney;

Under the terms of your contract dated November 21, 1925, with the undersigned for the sale of property known as #56 Jones Street, I, Harry Berger, do hereby tender you on this 23rd day of February 1926, the sum of \$3,500.00 and a bond and mortgage, as provided in said contract, being a purchase money mortgage for the sum of \$6,000.00, which cash and bond and mortgage hereby tendered, together with the sum of \$500 paid as a deposit at the time of the execution of the said agreement of sale make the purchase price of the said property, to it, the sum of \$10,000.

I do hereby demand from you a deed of Warranty free from all encumbrances as provided in said agreement.

HARRY BERGER.

New Jersey Court of Errors and Appeals

Between

JOHN D. GOLDBERG,
Complainant-Respondent,

and

MARY LEVY and HARRY BER-
GER,

Defendants.

MARY LEVY,
Defendant-Appellant.

*On Appeal
from the
Court of
Chancery.*

BRIEF FOR APPELLANT.

Abstract of Case.

This is an appeal by Mary Levy from a decree dated September 21, 1926, decreeing specific performance of a contract made by said Mary Levy with the Constructo Realty Company, a corporation, on June 2, 1925, for the sale of certain premises on Jones street, in the City of Newark.

By assignment dated June 11, 1925, said Constructo Realty Company assigned its said contract to John D. Goldberg, complainant-respondent in this cause (Exhibit C. 1, State of Case, p. 72).

By letter dated September 25, 1925 (Exhibit D. 1, State of Case, p. 81), and which was received by the complainant-respondent on September 26, 1925, defendant-appellant Mary Levy informed John D. Goldberg, complainant-respondent, that unless he would take title to the premises agreed to be conveyed by her in said contract, by October 1, 1925, that such steps

would be taken as would be open to her in the matter and that the time set in said letter was of the essence. The letter requested advice as to the intention of the said John D. Goldberg, immediately upon the receipt of said letter. Said John D. Goldberg did not communicate with the said Mary Levy nor anyone representing her, in response to this letter (State of Case, p. 20).

On November 21, 1925, said Mary Levy entered into a subsequent contract with one, Harry Berger, a defendant in this case, for the sale of the same premises on Jones street, at an advanced price.

Prior to the mailing of the letter above referred to, to the complainant-respondent, John D. Goldberg, there were existing on record, as liens against the said premises, four certain recognizances to the United States of America, each in the sum of \$1,000.00. On September 22, 1925, before the receipt of said letter by John D. Goldberg, the said four recognizances were cancelled of record (Exhibit D. 2, State of Case, p. 83). On September 22, 1925, the very same day that the said four recognizances were cancelled of record, the said Mary Levy entered into a new recognizance to the United States of America in the sum of \$1,000.00 as principal. This recognizance was cancelled May 22, 1926 (Exhibit D. 3, State of Case, p. 84).

Specification of Errors.

One. The decree is erroneous in that it recites that the defendant-appellant, Mary Levy, refused to convey the said lands and premises to the complainant-respondent, John D. Goldberg, in accordance with the terms of said contract.

Two. The decree is erroneous in that it recites that the date fixed in the contract between Mary Levy and the Constructo Realty Company and assigned to John D. Goldberg, was mutually postponed from time to time by reason of the then subsisting liens on said lands and premises consisting of six recognizances of \$1,000.00 each.

Three. The decree is erroneous in that it orders that the sum of \$1,000.00 be deposited with Lionel Kristeller, Esq., as security to indemnify John D. Goldberg, complainant, from the lien of a recognizance to the United States of America in the sum of \$1,000.00 until said lien shall be removed and said lands shall be free and clear of said recognizance.

Four. The decree is erroneous in that it orders Joseph Susskind, attorney, to execute a deed of conveyance of all his right, title and interest in said lands and premises unto John D. Goldberg, complainant.

Five. The decree is further erroneous in that it orders the defendants to pay unto William Greenfield, Esq., solicitor for and of counsel with the complainant, the sum of \$500.00 as a counsel fee.

ARGUMENT.

As to refusal of Mary Levy to convey premises in accordance with the terms of the contract made by her and of which John D. Goldberg, complainant, was the assignee.

Mary Levy did not refuse to convey the said premises to the said John D. Goldberg until after his refusal to accept a conveyance in accordance with the terms of the contract. The letter of September 25, 1925, addressed to John

D. Goldberg (Exhibit D. 1, State of Case, p. 81), showed an express intention on the part of Mary Levy to convey the premises to complainant, John D. Goldberg, and the fact that the existing recognizances were cancelled on September 22, 1925, prior to the date of said letter, shows that there was an intention on the part of Mary Levy to clear the title record of said premises so as to make the same acceptable to the said John D. Goldberg.

The contract did not make the time of the essence, but the letter of September 25, 1925, addressed to complainant, John D. Goldberg, did make the date therein set forth for the closing of title as of the essence. This the defendant, Mary Levy, had the right to do.

King v. Ruckman, 20 N. J. Eq. 316.

The fact appears from the testimony that upon receipt of the said letter dated September 25, 1925 (Exhibit D. 1) the complainant, John D. Goldberg, did nothing toward closing of the title in accordance with the demand of said letter.

As to the mutual postponement of the date fixed in the contract for the closing of title because of existing recognizances.

There is nothing in the testimony to show that the date for closing of title as set forth in the contract was mutually postponed from time to time because of the existence of recognizances, liens against said premises. The fact is that the complainant, John D. Goldberg, had continually refused to accept title to the said premises, although the defendant, Mary Levy, was anxious to close title and evidenced her intention of closing it by cancelling the recognizances open of record on September 22, 1925. In the opinion, the Vice-Chancellor excuses the refusal of com-

plainant to close title or to accept title from the defendant, Mary Levy, because of liens not cancelled. The liens referred to by the Vice-Chancellor are the recognizances aforementioned. The recognizances were capable of being cancelled or removed as liens against the premises, agreed to be conveyed by the defendant, Mary Levy, and this was demonstrated by the fact that on September 22, 1925, four recognizances, liens against said premises, were cancelled of record and that was five days prior to the receipt by the complainant of the notice that he take title pursuant to the terms of the contract. On September 26, 1925, the day that the complainant received the letter (Exhibit D. 1) notifying him to accept title to the premises, there was open on record and a lien against said premises only one recognizance, which was in the sum of \$1,000.00 to the United States of America and which could have been satisfied by depositing with the clerk of the United States District Court for the District of New Jersey the sum of \$1,000.00 in cash or could have been satisfied by surrendering the defendant, Mary Levy, who was the principal of said recognizance. By cooperation of the said complainant, John D. Goldberg, with the said defendant, Mary Levy, the said John D. Goldberg could have withheld the sum of \$1,000.00 from the purchase price until the day after the recording of a deed from Mary Levy unto him and said Mary Levy could have been surrendered to the United States District Court for the District of New Jersey and her recognizance cancelled and she could have then been re-bailed by her bailor and in that manner effect a cancellation of the recognizance.

Where the contract for the sale of land calls for a conveyance free from encumbrances in the

absence of an unwillingness on the part of the vendor to have the encumbrances discharged from the purchase price at the time of the conveyance, equity will not entertain a bill for specific performance to compel the vendor to discharge the encumbrances from his funds prior to the passing of title. *Van Keuren v. Siedler*, ⁷³~~72~~ N. J. Eq. 239.

The vendee of real estate to be conveyed clear of encumbrances has no right to repudiate his contract because the vendor has not paid off encumbrances before the time fixed for settlement. All that such vendee is entitled to is to have the encumbrances removed at the time of such settlement, and the fact that such encumbrances are to be satisfied at the settlement out of the purchase money to be then paid by him instead of out of other funds, is a matter in which he has no legal concern. *Kadow v. Cronin*, 97 N. J. L. 301.

As to that part of the decree which orders the defendant to deposit with Lionel Kristeller, Esq., \$1,000.00 until the recognizance in that sum to the United States of America is cancelled.

Exhibit D. 3 (State of Case, p. 84) is a certificate by the Clerk of the District Court of the United States for the District of New Jersey certifying that the recognizance entered into on September 22, 1925, by Mary Levy, principal, and John Levy, surety, for \$1,000.00 was cancelled on May 22, 1926, which was two days before the hearing before the Vice-Chancellor in this case. This recognizance was cancelled to demonstrate to the Vice-Chancellor that the recognizance could be cancelled at will by the defendant, Mary Levy. At the time of the hearing before the Vice-Chancellor, no recognizance

was open of record which was a lien against said premises. It is, therefore, error to order that \$1,000.00 be withheld out of the moneys due to the defendant, Mary Levy, to cancel a recognizance when in fact no such recognizance, a lien against said premises, exists.

As to that part of the decree ordering Joseph Susskind to execute a conveyance.

There is no testimony in this cause relating to a conveyance to Joseph Susskind. Joseph Susskind is the solicitor for Mary Levy, defendant. In order to cancel the recognizance dated September 22, 1925, in the sum of \$1,000.00, which was the only recognizance open of record and a lien against said premises immediately prior to May 22, 1926, the defendant, Mary Levy, conveyed said premises to her attorney for the purpose of cancelling the said recognizance, which cancellation was effected by surrendering the said defendant, Mary Levy, to the United States District Court for the District of New Jersey after said conveyance to her attorney had been recorded. She was immediately rebailed by her bailor. That act effected the cancellation of said recognizance and said conveyance was made only for that purpose. The Vice-Chancellor, whose attention was called to said conveyance after the hearing, was assured by Joseph Susskind, solicitor for Mary Levy, that he would convey title to said premises which was held by him in trust, to whomsoever a decree would be directed, except that said conveyance would naturally await the outcome of any appeal. No testimony was taken as to this conveyance nor was the said Joseph Susskind made a party to said suit at any time.

A decree cannot be made as to any who are not parties to the suit. *Armstrong v. Armstrong*, 19 N. J. Eq. 357.

As to the allowance of \$500.00 as a counsel fee to the solicitor for the complainant.

The time consumed for the hearing of this cause was not more than an hour and a half. Prior to the hearing there were two motions which the solicitor for complainant attended, in neither of which was he the successful party. The entire matter involved a parcel of land of which the contract price as set forth in complainant's contract was \$5,800.00, and the total cash involved was \$2,500.00. The Vice-Chancellor allowed as a counsel fee the sum of \$500.00, which is ten times the size of counsel fee ordinarily allowed in a simple case in the Court of Chancery.

The allowance of counsel fee in the Court of Chancery is in the discretion of the Chancellor or the Vice-Chancellor hearing the cause, but the allowance in this case is, on its face, an abuse of such discretion, the sum allowed being 20% of the amount of cash provided for in the contract of sale sought to be enforced.

It is respectfully submitted that the entire decree should be reversed.

JOSEPH SUSSKIND,
Solicitor for and of Counsel
with Defendant-Appellant.

New Jersey Court of Errors and Appeals

Between

JOHN D. GOLDBERG,
Complainant-Appellee,

and

MARY LEVY and HARRY
BERGER,

Defendants,

MARY LEVY,
Defendant-Appellant.

On Bill etc.

*On Appeal
from Court
of Chancery.*

BRIEF FOR COMPLAINANT-APPELLEE.

Facts.

This is an appeal from a decree entered in the Court of Chancery on the opinion of the learned Vice-Chancellor Alonzo Church, on October 10, 1926. See pages 52 to 54 inclusive of the printed State of the Case. It is to be noted that the bill was filed on November 27, 1925, by the complainant for specific performance demanding that the defendant, Mary Levy, convey the property to the complainant, described in the bill of complaint, in accordance with the terms of her agreement entered into by her and the Constructo Realty Co., dated June 2, 1925, and which contract was on June 11, 1925, in due form assigned by the Constructo Realty Co. to the complainant (See Exhibit C. 1, pp. 72 and 73 of the printed State of the Case).

The complainant agreed to purchase the property for \$5,800, by virtue of said contract assigned to him of which fact, the defendant, Mary Levy, had knowledge thereof. Immediately

upon purchasing the agreement from the Constructo Realty Co., which company was and is composed of Louis Susskind, president, and Joseph Susskind, secretary, the said Louis Susskind, at the time of assigning the contract to the complainant, promised that he would and did obtain a loan for him from the building and loan association of which he is president (See testimony of John D. Goldberg, p. 16, folio 20). Joseph Susskind, a brother of Louis Susskind, was secretary of the Constructo Realty Co., counsel for the building and loan association which granted the loan on the property in question, and counsel for Mary Levy, the defendant, and in due time said Joseph Susskind, as counsel for said building and loan association examined the title to the property for the purpose of approving said loan, in accordance with the agreement (See Exhibit C. 1, pp. 72-73, of the printed State of the Case). The title was to be consummated August 1, 1925. The complainant was always ready and anxious to consummate the contract and take title on August 1, 1925. Joseph Susskind, attorney, then for the first time informed the complainant, that he could not approve the title, by reason of bail bond liens, amounting from \$5,000 to \$6,000 against the property in question (See testimony of John D. Goldberg, p. 17, fol. 40; p. 18, fol. 10). The said Mary Levy, defendant, herein, either being principal or surety on said bonds to the Federal Government (See Exhibits C. 2 and 3, pp. 78, 79 and 80, of the printed State of the Case), and Joseph Susskind her attorney, from time to time postponed the passing of title, by reason of said bail bonds, although complainant made repeated inquiries and demands that the title be cleared. That the title, at the time of the trial before

the learned Vice-Chancellor Church, was not clear, but was encumbered not only by the bail bonds amounting to \$6,000, but also by a mortgage of \$2,000, in the aggregate sum of \$8,000. The purchase price being \$5,800, on which the defendant, Mary Levy, received a deposit of \$300, leaving a balance of \$5,500, with liens against the property in question, amounting to the aggregate sum of \$8,000.

After considerable negotiations and demands for the closing of title and repeated postponements on the part of defendant's counsel, we find that on November 21, 1925, two and one-half months after the date fixed for the passing of title (Joseph Susskind continually promising complainant to have the title cleared), the defendant, Mary Levy, enters into an agreement for the sale of the same property to one, Harry Berger. The significance of this, is that Joseph Susskind, who continuously postponed the passing of title to complainant, by reason of the bail bond liens, draws the agreement for the sale of the same property with Harry Berger, takes the acknowledgment, which agreement is recorded in the Register's office of Essex County on November 23, 1925 (See p. 43 of the printed State of the Case as Exhibit D. 4, page 85, of printed State of Case), in which it appears that the purchase price is \$10,000, with the full knowledge of the fact, that the complainant was relying on him to clear the title of the liens (See testimony of John D. Goldberg, pp. 14 and 15 of the printed State of the Case). The bill was filed on November 27, 1925, by the complainant against Mary Levy, demanding specific performance. After the said bill was filed, again we have Joseph Susskind, presenting to the Court

a petition, in the name of Mary Levy, defendant, requesting that Berger be made a party defendant to the suit, on which petition, an order was signed by the Vice-Chancellor, admitting Berger as a party defendant. (See Exhibits D. 4, p. 85, the contract between Mary Levy, defendant, and Berger, and Exhibit D. 5, p. 89, of the printed State of the Case.)

POINT I.

The defense is two-fold.

First: That the defendant was ready to convey, but that the complainant refused to accept title.

Second: That the property was sold to an innocent purchaser for value.

Upon examination of the State of the Case, nowhere do we find that the defendant ever prepared and tendered a deed to the complainant in accordance with the terms of the contract so as to put the complainant in default. On the contrary, we find on pages 14 and 15, of the printed State of the Case, the testimony of John D. Goldberg, wherein it positively appears that the complainant repeatedly requested counsel for the defendant to clear the title of the liens in question, so that the same may be closed, and counsel for the defendant repeatedly promised that he would take care of it, particularly testimony (top of p. 15, fols. 10 to 30, inclusive, of the printed State of the Case), wherein the complainant interviewed the defendant, and she in turn referred him to her lawyer, Joseph Susskind (Testimony

of John D. Goldberg, complainant, pp. 14 and 15, of the printed State of the Case):

“Q After you received the information from Mr. Stalford, what did you do, if anything? Whom did you go up to see? A I went up to see—Mr. Stalford took me up to Mrs. Levy on Fourteenth street.

Q And did you see her? A Yes, sir.

Q What did you say to her? A I wanted the property.

Q What did she say? A She didn't say anything.

Q Well, she answered something? A See her lawyer, she said.

Q What? A See her lawyer.

Q Well, whom did she say represents her? A Mr. Susskind.

Q Please give the first name; there are two Susskinds here. A Joe Susskind.

Q Joe Susskind? A Yes, sir.”

On page 16, John D. Goldberg, complainant, testifies further:

“Q And you are ready and willing to take title now? A Yes, sir.

Q What building and loan did you apply to? A Well, I just—I think it is the Grand, if I am not mistaken; Mr. Louis Susskind is the president of the building and loan and Mr. Joe Susskind is the counsel and they took a ten-dollar fee off me, granted me the loan; that is the conditions that they give me the contract—they give me the loan.

Q Now, did Mr. Susskind after—were you advised that a loan was granted? A Yes, sir.

Q By whom? A By Joe Susskind.

Q And what did Mr. Susskind say to you, if anything, about putting a loan on that property? A He said he couldn't give me the loan, he couldn't give me the property because the bail bond is not off and he wants to clear it off and he will get in touch with my lawyer. That is all I know.”

If the property was subject to liens on the date fixed for passing of title, namely, August 1, 1925, and encumbered up to and inclusive November, 1925, up to the time of filing the bill of complaint, surely, the defendant cannot put the complainant in default, until the property was cleared of the liens, deed tendered and refusal on the part of the complainant. The mere fact, that the title might have been cleared on the date of the hearing before the Vice-Chancellor is no defence to the bill of complaint filed in behalf of the complainant. On that particular point, I desire to call the Court's attention to the case of *Agens v. Koch*, 74 New Jersey Equity p. 528, opinion by *learned Vice-Chancellor Emery*.

In that case a bill was filed by the vendors for specific performance, and the defense was that the complainant was not entitled to a decree by reason of the delay. The defendant in his answer states that he could not ask for specific performance, by reason of the fact, that there were two judgments against the property. In paragraph 1, of the syllabus, the Court says:

"That two judgments were on record against vendors was a valid objection to their title to land."

In the case at bar, we have five bail bond liens in the sum of \$1,000 each, and a \$2,000 mortgage against the property. It is true, that we were to pay off that mortgage, but nevertheless, we could not raise any money on the property owing to prior liens, viz: bail bonds. Hence, a total encumbrance between \$7,000 and \$8,000. On what theory, counsel can put the complaint in default, is beyond me. The fact that the property was cleared on the day of trial is no defense as

testified to by Joseph Susskind (p. 32, of the printed State of the Case), as follows:

"Q In other words, you engaged another attorney to write the letter? A Yes; I engaged the attorney to write a letter.

Q The attorney representing you? A Yes.

Q Well, did you know on the date that you sent a letter that there was still an open recognizance? A On the date that I sent that letter?

Q Did you know that? A I didn't know it.

Q Do you know now that there is still open a recognizance of one thousand dollars to the Federal Government? A There is no such recognizance open.

Q Entered into September 22nd, Mary Levy, principal and John Levy, surety? A That was cancelled last Saturday.

Q That was cancelled last Saturday? A Yes, I cancelled it.

Q So, on October 1st it was open? A It was open, yes.

Q And it was open up to last Saturday? A It was open up to last Saturday.

Q Now, as counsel for a building and loan, Mr. Susskind, would you approve title and pay the money out with this recognizance open? A I could have proven the title and withheld the amount of money involved in the recognizance."

Page 33, Joseph Susskind testifies further:

"Q Then you would consider that as a lien against the property wouldn't you? A It absolutely is a lien against the property, yes.

Q Then up until September 22, 1925, there were four recognizances of one thousand dollars each? A Yes, sir.

Q Open of record against that property? A Yes, sir."

In the face of that testimony, defendant's counsel represented the building and loan asso-

ciation, and represented the defendant, therefore, the complainant depended upon him to pass title. On what theory, the complainant was in default is beyond my comprehension. It was *mere subterfuge* to evade the obligation of the contract when a *new purchaser* came around and offered a *higher price* for the same property and nothing more. It was an attempt to evade the obligation entered into by Mary Levy, defendant.

The facts in the case, are beyond any doubt, that the defendant was never at any time ready, able or willing to convey the property in accordance with the terms of the contract, and her inability, wantonly and willfully persisted and became more positive, when she had the opportunity to sell the property to someone else at an advanced price. The decree for the complainant should be affirmed with costs.

POINT II.

The next question raised at the trial of the cause, although, I have not defendant's brief, but which I assume will be his argument, as that was his argument before the learned Vice-Chancellor, that Harry Berger was an innocent purchaser for value, as cited by him in the case of *Gerba v. Mitruske*, 84 N. J. Equity p. 141:

"The 116th section of the act relating to conveyances (Comp. Stat. p. 1573) provides that every agreement for the sale of land thereafter recorded shall be *absolutely void as against subsequent judgment creditors of the vendor*, and as against subsequent purchasers and mortgagees for value of the lands, unless the vendee within three months after the date fixed in such agreement for its consummation shall commence suit for the specific performance of the said agreement or for its rescission. By force of

this statutory provision the agreement between the complainant and Kish became void on the 24th day of January, 1912, so far as *subsequent purchasers* were concerned, unless Kish on or before that day commenced suit as required by the statute. This he did *not then do, or at any time thereafter*; and, so, although his agreement was in force at the time of the filing, it had become null and void as to the defendant before the filing of the latter's answer."

Counsel for the defendant at the hearing before the Vice-Chancellor cited the case of *Gerba v. Mitruske*, 84 N. J. Equity p. 141. On what theory can the defendant claim that this case is an authority for the Court to deny the complainant relief prayed for, is beyond the comprehension of complainant's counsel. As the defendant contends by reason of the fact, that at the time of filing the bill, the contract was void, by reason of lapse of time, namely, more than three months passed from the date fixed for settlement in said contract to the date of filing said bill.

The Court will perceive that in the case herein cited, *Gerba v. Mitruske, supra*, the vendor filed a bill compelling the second contracting party (vendee) Mitruske to take title, to the property in accordance with his agreement. The defendant (vendee) refused to take title claiming that Gerba had entered into a contract with one Kish, and that contract was on record, therefore a lien on the property, and he, complainant, could not give a free and clear title. The Court held by reason of the fact, that Kish never instituted any proceedings for specific performance, never claimed title to the property, therefore, that contract, by virtue of the statute was void. Mitruske, being the purchaser, agreeing to purchase,

the Kish contract was not binding upon him, and therefore, it was a clear title.

With the case at bar, the distinction is so apparent, that counsel for the complainant thinks that it is rather an affront on the part of counsel for the defendant to ask the learned Court to consider that case as an authority and deny the complainant in the case at bar, relief compelling the vendor (defendant) to perform her contract. The Court will bear in mind that Harry Berger, one of the defendants herein, has never taken title to the property, never paid the consideration, nor was the deed delivered to him. It was so held in the case of *Cranwell v. Clinton Realty Co.*, 67 New Jersey Equity p. 540, at p. 550. Opinion by Garrison, V.-C.:

“The rule is well established that a purchaser with notice of a prior equity, superior to the rights of his grantor, takes the place of the grantor, and is bound to do that which he was bound in equity to do. Such a purchaser can be compelled specifically to perform the agreement by conveying the land in the same manner and to the same extent as the grantor would have been compelled to do had he retained the legal title.”

The learned Vice-Chancellor further says:

“And to be a bona fide purchaser without notice, the defendant must not only have agreed to purchase without notice of the complainant's previous agreement, but he must also have actually paid the purchase money and taken his deed without such notice. *Dean v. Anderson*, 34 N. J. Eq. 503.”

Counsel desires to call the Court's attention to the case of *Toplan v. Hoover, et al.*, Vol. 5, Pamphlet 3, of January 15, 1927, New Jersey Advance Reports. Opinion by Ingersoll, V.-C.:

“To be a bona fide purchaser without notice the purchaser must not only have

agreed to purchase without notice, but he must also have actually paid the purchase money, and taken his deed without such notice.”

In the case at bar, Harry Berger, did not take title, no deed was delivered to him, and no purchase money had been paid over to Mary Levy. Furthermore that Berger was not an innocent purchaser, is an admitted fact, by reason of the fact, that he is contented with the final decree entered on the opinion of Vice-Chancellor Church. He does not find fault with the opinion and decree by reason of the fact he is not a party to the appeal from the decree. Hence, under the decisions herein referred to, Berger is not an *innocent bona fide purchaser for value*. It is respectfully submitted that the decree should be affirmed with costs and counsel fee against the defendant-appellant.

POINT III.

Counsel for defendant may argue, as he did before the Vice-Chancellor that we waited too long to ask the defendant to specifically perform her contract, by instituting proceedings in November, 1925, three and one-half months after the date fixed and agreed upon. But the Court will perceive this fact, that the hearing was held on May 24, 1926, and three days before the hearing before the Vice-Chancellor, there were still open liens against the property in question. On what theory the complainant is guilty of laches, is beyond complainant's counsel's comprehension, as stated in the case of *Gerba v. Mitruske, supra*, page 143, wherein the Court says:

“The prevailing rule, with relation to cases of this kind, is that where the time of

performance is not of the essence of the contract the complainant is entitled to a decree, if a *clear title can be given by him at the time of the making thereof*. The rights of the parties in the present case must therefore depend upon whether time was of the essence of this particular contract. We think it was not. As a general rule, in equity, time is not deemed to be of the essence of the contract unless the parties have expressly so treated it, or it necessarily follows from the nature and circumstances of the contract; and, so, equity will enforce the specific performance of agreements after the time fixed for their performance has been suffered to pass by the party asking for the intervention of the court, unless the facts submitted show that the parties to the contract intended that time so fixed should be of its essence."

No such conditions are in the contract, in the case at bar, nor is it in the mouth of the defendant to say, by reason of this delay, which was caused by her, by reason of the numerous liens against the property, that the complainant should stand the loss. It was not his delay, on the contrary, as testified to by Lawyer Stalford (pp. 20 to 26, inclusive, of the printed State of the Case), that he called at Mrs. Levy's home with the complainant, requesting a conveyance of the property, and requesting that the property be cleared of the liens. It is true that the defendant denies that the complainant, John D. Goldberg, and William Stalford called at her house. It stands beyond contradiction that the property was encumbered by liens (See Exhibits C. 2 and C. 3, pp. 78, 79, 80, of the printed State of the Case). When the complainant found that the defendant on one pretext or another failed to cancel the liens and refused to convey the property, he did the next best thing, by filing a

bill in chancery, demanding specific performance of the contract. That alone does not signify that the complainant was not willing, able, or ready to take title.

POINT IV.

Law on question of Innocent Purchaser for value.

In this State that has been firmly established and to define what an innocent purchaser for value means, I desire to call the Court's attention to the case of *Cramwell v. Clinton Realty Co.*, 67 N. J. Equity page 540, *supra*:

"And to be a bona fide purchaser without notice, the defendant must not only have agreed to purchase without notice of the complainant's previous agreement, but he must also have actually paid the purchase money and taken his deed without such notice."

Bridgewater v. Ocean City Association, 85 New Jersey Equity page 379, opinion by learned Vice-Chancellor Backes.

Paragraph 5, of the syllabus:

"Payment, or its equivalent, of the whole purchase money, is essential to the defence of a bona fide purchaser. The execution of a bond and mortgage in payment is not sufficient."

See *Toplan v. Hoover, et al.*, *supra*.

In the case at bar, not only was the purchase money not paid, but not even a bond and mortgage was executed. Nothing was done. Although a tender was made, that tender was made upon condition, as shown by Exhibit D. 5, p. 89, of the printed State of the Case. The tender was made in February, 1926, only upon

condition that the recognizance then a lien against the property, be cancelled. Hence it corroborates the complainant, that the defendant was never ready or able to convey the property in accordance with the terms of the contract on date specified or on any subsequent date. If she could have cancelled the bail bond liens, she had failed to do so. The motive for that being the advanced price that she was to receive for the property, if she could have defeated the complainant before the Court of Equity, in which she has utterly failed. It is respectfully submitted that the decree should be affirmed with costs and counsel fee.

POINT V.

Counsel for complainant desires to call the Court's attention to Paragraph 2, of the Petition of Appeal, wherein the defendant finds herself aggrieved, in that, the said decree declares as findings of fact, that the date set in said contract bearing date June 2, 1925, for the conveyance of the said lands and premises by the defendant, Mary Levy (widow) to the Constructo Realty Company, a corporation, and which contract was assigned by the Constructo Realty Company, a corporation, to the complainant, and of which assignment the said Mary Levy (widow) had notice, was mutually postponed from time to time by reason of the then existing liens on said lands and premises consisting of six recognizances of \$1,000 each, executed by Mary Levy to the United States of America, in excess of the purchase price.

May I ask counsel for the defendant in what respect was that finding error? It seems to me that he has omitted the facts proven by Exhibits

C. 2 and C. 3, pp. 78, 79 and 80, of the printed State of the Case, wherein it appears, by virtue of a Federal Court search bearing date September 18, 1925, four recognizances uncanceled of record of \$1,000 each, and the date fixed for passing of title was August 1, 1925. Exhibit C. 3, dated May 19, 1926, Federal Court search, and continued to September 29, 1926, we find four recognizances uncanceled of record \$1,000 each, a total of \$4,000, and yet, counsel for the defendant expected complainant to take title and expected the Court to assume that, contrary to the existing facts, the title was free and clear and that the complainant was in default. I do not quite comprehend the ingenuity of counsel for the defendant in his argument and contention that the defendant was ready, willing and able to convey the property in accordance with the terms of the contract, *free and clear of encumbrances with encumbrances existing* in the sum of \$8,000 against the said premises, where the purchase price is \$5,800.

The agreement for the sale of the property (p. 73, of the printed State of the Case), provides as follows:

| | |
|--|---------|
| On execution of this agreement for which this is also a receipt..... | \$ 300 |
| On delivery of deed, cash or certified check | \$2,500 |
| By assuming the mortgage at present a lien on the premises, and paying the same according to the terms thereof | \$1,000 |
| On bond and mortgage second in priority to first mortgage, for one and one-half years | \$2,000 |

Hence, the only cash we were obliged to pay to the defendant was \$2,500 in addition to the \$300

received as a deposit, whereas, there were \$8,000 liens against the property.

Paragraph 3 of the Petition of Appeal reads as follows:

"The petitioner appeals from the decree of the Chancellor, which decrees as aforesaid, upon the ground that the same is erroneous in that said decree should have adjudged that said defendant, Mary Levy, was ready, willing and able to perform all conditions, covenants and agreements by her agreed to be performed, in the contract, dated June 2, 1925, and made with the Constructo Realty Company, a corporation, which contract was subsequently assigned to the complainant, John D. Goldberg."

Yet, by his own testimony, and by the evidence, Exhibits C. 2 and C. 3, as late as September 18, 1925; May 19, 1926; and September 29, 1926, there were uncanceled recognizances against the property, and yet, the defendant was right, and the Court should have so found. The contention on the part of the defendant is too apparent to require any argument to refute the same.

Paragraph 4, of the Petition of Appeal (p. 68, of the printed State of the Case), avers as follows:

"The said decree is further erroneous in that it finds as a fact that Joseph Susskind attorney for Mary Levy (widow) was also acting as attorney for Harry Berger. The said decree is further erroneous in that it declares null and void the contract made by defendant, Mary Levy (widow), with the defendant, Harry Berger, for the sale of the lands and premises described in the bill of complaint; and further that it decrees that a deposit of \$1,000 be made with Lionel Kristeller, Esq., for the purpose of removing a lien, when in fact no lien is existing

against the said lands and premises at the present time, nor at the time of the making of the decree; and further said decree is erroneous in that it decrees that Joseph Susskind, attorney, do execute a deed of conveyance of all his right, title and interest in said lands and premises unto the complainant, John D. Goldberg, for the reason that said Joseph Susskind is not a party to said proceedings, and said provision is not based on any testimony produced at the hearing of this cause or in any legal and proper proceedings thereof; and further said decree is erroneous for the reason that it is ordered that the defendant, Mary Levy, this petitioner, together with the defendant, Harry Berger, pay unto the solicitor of complainant the sum of \$500 as a counsel fee."

Counsel for complainant most strenuously argues that Mr. Susskind who will not deny that three days before the hearing before the Vice-Chancellor to be exact, May 21, 1926, Mary Levy, the defendant, conveyed the property to him, which deed was recorded on the same day. At the trial, nowhere does it appear in Susskind's testimony, wherein and whereby he advised the Court or anybody, that he, Joseph Susskind has taken title to the property in question. After the briefs were submitted and by mere coincidence, the Court's attention was called to the fact, that counsel for the defendant has taken title in his own name. Further encumbering the property, by putting it out of the complainant's reach, by his, Joseph Susskind's conduct. The Vice-Chancellor called upon Susskind for an explanation, and he admitted that he had taken title as trustee, with the understanding, but nothing in writing, nothing on record, or any written document, that he will convey the property to whomever the Court will decree. That

promise was made to the Vice-Chancellor and in order to obviate the necessity of filing a new petition or new bill, compelling Susskind to convey the property, the Vice-Chancellor embodied that provision in his opinion and decree, so that Susskind would carry out this promise to the Vice-Chancellor, namely, execute a deed, relinquishing his interest in the property.

It is respectfully submitted that if Susskind intended to carry out his promise to the Vice-Chancellor, there can be no harm done to him, nor can he sustain any loss, injury or damages, by executing a deed of bargain and sale or any other deed, wherein and whereby he would relinquish all his interest in the property. Why Joseph Susskind should find fault, when he is required to perform a fair, honest and equitable act, is beyond complainant's comprehension. It is respectfully submitted that this contention is too flimsy to require any further argument.

Counsel for defendant, again finds fault with the decree of the Vice-Chancellor, wherein it requires Berger and Mary Levy to pay \$500 counsel fee. Why Susskind should suddenly become champion of Berger is beyond me. The \$500 counsel fee is certainly reasonable, considering the expense, trouble, search fees, preparation of the trial, and submitting of briefs to the Vice-Chancellor. On the contrary, Susskind was at the time the decree was advised and approved by the Vice-Chancellor, represented by able counsel, while he was not present when the decree was signed. Mr. Susskind appeared by Lionel Kristeller, who was present, and so was Mr. Kearns, counsel for Berger, when the decree was signed and all parties acquiesced to it.

Since preparing complainant-appellee's brief, after waiting within a few days of the opening day of the term of this court, counsel for complainant-appellee was favored with appellant's brief. Therefore, I wish to add this in reply thereto, particularly, to the case cited by appellant, *Kadow v. Cronin*, 97 New Jersey Law page 301. This suit was instituted by the vendee to recover a deposit paid on account of the purchase price, setting forth as a reason, that the vendor was not ready to convey the property in accordance with the terms of the contract. In the case at bar, the vendee did not institute suit to recover his deposit, but instituted suit, asking for conveyance of the property in accordance with the terms of the contract. The appellant (vendor) at no time tendered a deed and asked for the purchase price, and was in fact, at no time ready to tender a deed in accordance with the terms of the contract. As admitted by counsel for appellant, the bail bond was not cancelled until sometime after the date fixed. It is respectfully submitted after the default on the part of the appellant (vendor), she cannot select her own date, to make time the essence of her contract. Even though she did make *time* the essence of her contract, to wit: October 1, 1925, by letter written by Cohn and Cohn, there was still an uncanceled bond as admitted by defendant's counsel in his brief. Counsel for defendant lays particular stress on the letter sent to the complainant-appellee (See Exhibit D. 1, p. 81, of the printed State of the Case). Nowhere does it appear that the complainant-appellee was informed of the fact that the defendant has or caused to be cancelled the five recognizances (See Exhibits C. 2 and C. 3, pp. 78, 79 and 81, of the

printed State of the Case), and continued so until the day and date of trial.

Counsel for defendant finds fault with the decree, by reason of the fact that \$1,000 was to be deposited for the cancellation of that bail bond, on the ground that he, Joseph Susskind had taken title to the property, cancelled the bond and then rebailed Mary Levy, the defendant. The fact, that he held title for her benefit, which in no way was disclosed by way of declaration or document, but was admitted by him that the property belongs to Mary Levy. The contention before the Vice-Chancellor was, that the bail bond would still continue to be a lien, and that was the reason why the \$1,000 was ordered to be deposited, until the cancellation of the bail bond.

Counsel for defendant in his brief cites the case of *Van Keuren v. Siedler*, as reported in Book 72, N. J. Eq. p. 239, which should be 66 Atlantic Reporter, p. 920, as an authority for reversal of the decree. In that case a bill was filed for specific performance of a contract wherein defendant agreed to convey to complainant certain land in Jersey City, free and clear of incumbrances. The bill avers the existence of a mortgage and certain unpaid taxes on the land in question. It also appears in the opinion that there was a prior contract of record, *opinion by Leaming, V.-C.:*

“The contract which complainant now seeks to enforce entitles him to demand a marketable title, and the title to the land in question is clearly unmarketable so long as the prior recorded contract of sale remains an apparent binding contract. But the difficulty at this time encountered is that complainant having entered into his contract with constructive notice of the existence of

the prior contract is not entitled to a conveyance of the land if in fact the prior contract is still alive; and no judicial ascertainment of that fact can be had in this suit because the Realty Development Company is not a party. A decree requiring defendant to convey the land to complainant would, in consequence, be necessarily based upon an assumed fact which cannot be inquired into in this suit. The same considerations manifestly render it impossible for this court to grant any relief under the present bill.”

Counsel for complainant-appellee desires to call the Court's attention to the dictum in that case, wherein the learned Vice-Chancellor says:

“It may not be inappropriate to suggest, for the consideration of complainant, the possibility of relief through a bill against both defendant and the development company based upon a claim of the invalidity of the prior contract and seeking a cancellation of the record and specific performance.”

In the case at bar, there was no prior contract of record. Assuming, but not admitting, there was, Berger, one of the defendants, is satisfied with the decree. In other words, he says, in so many words, “I am not a bona fide purchaser for value.”

It is respectfully submitted on all the facts, evidence and law herein cited, the decree should be affirmed with costs and counsel fee.

WILLIAM GREENFIELD,
Solicitor for and of Counsel
with Complainant-Appellee.

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