

New Jersey Court of Errors and Appeals.

JAMES BOWEN,
Complainant-Respondent,

vs.

GEORGE A. PURSEL, *et al.*,
Defendants-Appellants.

On Appeal from
the Court of
Chancery.

**REPLY BRIEF
FOR DEFENDANTS-APPELLANTS.**

Counsel for the Complainant-Respondent states in his brief that the questions involved are

1. Whether the alleged lease of Pursel to Green is valid, and
2. Whether the Agreement of Sale was consummated by the Pursels on Sunday.

We submit that the questions submitted to the court by this appeal may be more accurately stated as follows:

1. Whether the Agreement of Sale was executed and delivered by the parties thereto under a mutual mistake of law which was induced by Respondent's attorney.
2. Whether, in view of the fact that the Agreement of Sale was both executed and acknowledged on Sunday, it will be specifically performed, four of the six parties of the first part to such agreement being married women.

I.

The agreement of sale was executed by the parties thereto under a mutual mistake of law induced by the action of Respondent's attorney.

The learned Vice Chancellor expressed the opinion that if the agreement in question were executed and delivered by the parties under a mutual mistake of law which was occasioned by Respondent's attorney the Appellants should not be required to specifically perform it. (See Case, p. 43, l. 30; see also cases cited on p. 12 of Appellants' Main Brief.) This is apparently conceded by counsel for the Respondent. The Court of Chancery, however, granted the motion to strike the answer because it found that the belief that the lease or grant of fishing rights made by the Appellants to Green was invalid, was not a mistaken belief. This belief was induced by the advice given by Respondent's attorney and if this advice was mistaken advice then the agreement was executed and delivered under a mutual mistake which was attributable to the Respondent.

This mistake, as alleged in the answer, was that all of the parties to the sales agreement believed that Green had no rights under the lease or grant of fishing rights in the Pequest River (hereinafter called the "fishing agreement"). This lease or grant was made on June 12, 1922, for a period of ten years from date and was signed by George Pursel individually and as agent of his co-tenants. It is clear that if Green had any rights under this agreement as against all or any of the Appellants the Appellants could not give the Respondent the immediate and absolute interest in the land which they agreed to give and would, there-

fore, incur a liability under their agreement or under the warranties in the deed given pursuant thereto which would not have been incurred but for Green's rights under the fishing agreement. The Agreement of Sale requires the Appellants to give to the Respondent a deed

"for the conveying and assuring to him or them the fee simple of the said premises free from all encumbrances and free of and from all right, title, interest or claim, in law or in equity, of any person or persons whatsoever subject only to the right or interest of Arthur Gardner, the farmer, tenant and occupant of said lands and premises in and to the same whose term as such began April 1, 1925 and ends April 1, 1926; that said party of the second part, his heirs and assigns, to have the immediate and exclusive possession of said lands and premises from the date of signing this agreement and said party of the second part is hereby given the right and authority to exclude all other person or persons therefrom except said Arthur Gardner."

It may be observed in passing that although Respondent's attorney had advised the Appellants that the fishing agreement was invalid the Agreement of Sale was artfully drawn (presumably by him) so as to make the Appellants agree to give the Respondent a title free and clear of any rights which Green might have and so as to make them liable on the covenants in the deed if it did not pass such title. The Appellants, in signing and delivering the Agreement of Sale, relied solely upon this attorney's advice that the fishing agreement was invalid.

The representation made by Respondent's counsel to George Pursel was as follows: At the time the fishing agreement was shown to him he said that he did not think that it was valid.

“that he would examine his law books; that if he found that said fishing agreement was valid the complainant would not want the farm as he desired the fishing privilege in the Pequest Creek; that if he, complainant’s attorney, after such examination of his law books, found that said fishing agreement was invalid he would send to said George A. Pursel an agreement for the sale of said farm for the sum of \$6,000. to the complainant, together with instructions regarding the execution thereof by these defendants and would also send a check for the \$600. which was to be paid by the complainant on the signing of said agreement of sale.” (Case p. 15, ll. 18-30.)

He subsequently sent such agreement with a check for \$600. to the Appellant, George A. Pursel, (Case, p. 16, l. 1, *et seq.*). This Appellant then told his co-appellants what Respondent’s attorney had told him and in reliance upon this representation the Agreement of Sale was executed by all of the Appellants (Case, p. 16, l. 17, *et seq.*).

The answer alleges (Case, p. 17, l. 6, *et seq.*) that this was a representation by Respondent’s attorney to the Appellants that he had, after examination of his law books, found the said fishing agreement was invalid as a matter of law and that the Appellants did not seek any other legal advice but relied upon said representation of Respondent’s attorney and believed that said fishing agreement was invalid and, therefore, signed and acknowledged said Agreement of Sale.

It also alleges that the Respondent, when he executed said Agreement of sale, believed and relied upon said representation that said fishing agreement was invalid (Case, p. 17, l. 15, *et seq.*).

Paragraph 21 of the answer alleges that at the time the signed agreement was delivered to Respondent’s attorney in the presence of Respon-

dent, said attorney again told the Appellant, George A. Pursel in the presence of Respondent, that said fishing agreement was invalid (Case, p. 17, l. 30, *et seq.*).

In view of the above quoted provisions of the Agreement of Sale which required the Appellants to assume all the risk of liability in the event that Green's interest under the fishing agreement should disable them from giving the Respondent a clear title and immediate exclusive possession it was but natural that they should desire to be assured, before executing and delivering the agreement, that they were in a position where they could give such a title and such possession notwithstanding the previous execution and delivery of the fishing agreement. The Appellant, George Pursel, therefore, showed the Respondent's attorney the deed to Mrs. Pursel, which was the foundation of their title, and showed him a copy of the fishing agreement so that he would be in a position to give them such advice. The Respondent's attorney, whom they had every reason to believe was qualified to advise them on this question, undertook so to do. He did not rely upon his first impression of the law but assured them that he would examine the authorities and determine the validity of the fishing agreement. The obligations in the Agreement of Sale which were assumed by all parties were, therefore, assumed by them upon the assurance given them by Respondent's attorney, after investigation of the law and the facts, that Green had no rights under the fishing agreement which would prevent the Appellants from giving clear title and immediate exclusive possession to the Respondent. If, therefore, Green had any rights under the fishing agreement the execution and delivery of the sales agreement was induced by a mistake of law for which the Respondent is solely responsible.

The fishing agreement was not invalid.

The ground upon which Respondent's solicitor insists that the fishing agreement was invalid is that it was a lease for ten years signed by one of the tenants in common in behalf of himself and his co-tenants and that while he had authority from them to sign a lease his authority was not in writing and, therefore, (as he states) it was void as to the co-tenants who did not sign under the Statute of Frauds. He asserts that a grant by one tenant in common of a portion of the estate held in common is invalid as against his co-tenants. This was the ground upon which the decision of the learned Vice Chancellor was based.

Conceding, for the purpose of argument, that the fishing agreement was within Section 1 of the Statute of Frauds and that it did not bind the co-tenants who did not sign it because George only had parole authority to sign as their agent, we submit that the agreement nevertheless was valid **as to the interest of George in the premises and was binding upon him.** This position is sustained by the three decisions in this State which consider this question.

In *Holcomb v. Coryell*, 11 N. J. E. 548, the Court of Chancery, speaking of a deed given by one co-tenant conveying a portion of the land owned in common by metes and bounds, said:

“Now it is very true that one tenant in common cannot prejudice his co-tenants by a conveyance of a part of the land by metes and bounds. Such a deed cannot give to the grantee the exclusive title to the portion conveyed, any more than the co-tenant, who is the grantor, can select any particular part of the land, and appropriate it as his exclusive moiety. *But as against the grantor, and those claiming under him, the grant is good. They*

are estopped by it. The co-tenant cannot complain of it, unless when it operates to his prejudice; and then his rights will be protected. *Porter v. Hill*, 9 Mass. 34; *Bartlet v. Harlow*, 12 Mass. 348; *Varnum v. Abbott, et al.*, 12 Mass. 475; 2 Ohio 113." (Italics ours).

In *Boston Franklinite Co. v. Condit and Torrey*, 19 N. J. E. 394, Chancellor Zabriskie, speaking of a deed made by one tenant in common, said:

"The third position of the defendants is, that if the conveyance to Edsall and Fowler was valid, Fowler being a tenant in common, could not, as against Edsall, convey his right to any specified portion of the premises, or any right in the same, to the prejudice of his co-tenant. This seems to be the established rule of law. *Such deed will be held to bind the grantor, but as to his co-tenant it is void.* The reason is, that it would prejudice the right of the co-tenant to a partition." (Italics ours).

In *Keneaster v. Erb*, 83 N. J. E. 625, Miss Landis was a tenant in common of a large tract of land with Mrs. Keneaster. Miss Landis conveyed a portion of this tract by metes and bounds. It was held that the conveyances made by Miss Landis did not in any way prejudice Mrs. Keneaster's right to a partition but that the rights of those holding under the deed from Miss Landis would be protected as against her. The court, speaking by Mr. Chief Justice Gummere, said:

"That right was not affected, much less destroyed, by the wrongful conveyance of approximately two-sevenths of that tract by Miss Landis. *Holcomb v. Coryell*, 11 N. J. Eq. 548; *Boston Franklinite Co. v. Condit, et al.* 19 N. J. Eq. 394. If she had sought partition of the whole tract, under the conditions exhibited in the present case, such partition

would have been directed, of course, upon equitable terms. In other words, the interests of those parties who hold under the Landis conveyance, and have, in good faith, improved the property embraced therein, would have been protected to the same extent as Miss Landis' rights would have been if she had made such betterments herself for the purpose of improving the property, and not for the purpose of embarrassing her cotenant or encumbering her estate; for they would be subrogated to her rights. That she would be protected is entirely settled by the decisions in this state; and such protection would usually be afforded either by assigning to her the portion of the land upon which the improvements have been made, at the value of the land, without the improvements, or, if that could not be done, then by compensation directed to be made to her for them."

To the same effect see

Martens et al v. O'Connor, 76 N. W. Rep. 774, (Supreme Court of Wisconsin), in which the Supreme Court of Wisconsin, speaking of a lease made by four of eight co-tenants, said:

"As to the adult O'Connors, the paper set out in the complaint is ample to cover their interests. To us it is very plain that they adopted and consented to all the covenants and agreements of the original lease, and that, as to their three-sevenths interest in the land, it became a valid and binding contract. The law is well settled, however, that a license to use or lease of land by some of several tenants in common owning land is invalid as to the others who do not join therein. *Tipping v. Robbins*, 64 Wis. 546, 25 N. W. 713; *Tainter v. Cole*, 120 Mass. 162. Such a lease is not void as to those who execute it, but is voidable by the tenants in common who have not joined in it. So far as it appears in the complaint, the lease was a valid and bind-

ing contract as to the interest in the land held by all of the defendants O'Connor. They and each of them were bound to defend and protect the plaintiffs so far as their interests were concerned. There is nothing in the complaint which shows that the infant owners, or any one legally empowered to act for them, had ever taken any action to avoid this lease. Therefore, as to this demurring defendant, the plaintiffs were in peaceable possession of the premises, and he had no right to enter into a conspiracy with the other defendants to harass or dispossess them." (Italics ours.)

In *Cunningham v. Pattee & others*, 99 Mass. 248, a lease was made to two tenants in common, one of whom underlet. The sublease purported to be from both tenants but was signed by one only. Subsequently the co-tenant who had not signed the sublease assigned his interest in the premises to the tenant who had signed the sublease. The sublease contained a provision for renewal which the sublessor sought to avoid on the ground that it had not been signed by both tenants in common and was therefore void. The court said:

"A lease or deed, by one tenant in common to a stranger, of a portion of the joint estate, although voidable by the cotenants who do not join therein, is valid between the parties and against all persons unless so avoided. If the title of the cotenant entitled to disaffirm the conveyance becomes vested in the one by whom it was executed, the newly acquired title of the lessor or grantor will inure by estoppel to the benefit of the lessee or grantee. *Keay v. Goodwin*, 16 Mass. 1. *Rising v. Stannard*, 17 Mass. 282. *Johnson v. Stevens*, 7 Cush. 431. *DeWitt v. Harvey*, 4 Gray, 491. The words 'lease, demise and let' amount to an implied covenant for quiet enjoyment at least against the lessor himself. *Dexter v. Manley*, 4 Cush. 14. And under the description of

the premises in the lease, this covenant plainly applies to the whole store let, and is not limited to the undivided interest of Pattee therein. From these familiar principles it follows that, as soon as the title of Dalton was assigned to Pattee, it operated as a confirmation of the previous lease by Pattee to the plaintiff, whose rights as tenant were thenceforth as perfect as if her lease had been originally executed by both Dalton and Pattee."

We submit that from the foregoing citations of authority it clearly appears that a lease or conveyance of a part of the property held in common by one tenant in common is not void but that it does bind at least the interest of the tenant in common who signs the lease.

If it be conceded that the appellants who did not sign the fishing agreement would have been entitled to a partition of the land without regard thereto, it does not follow that a deed joined in by all of the co-tenants would convey title to their grantee free and clear of any claim under such agreement.

Reference is again made to the case of *Keneaster v. Erb*, above cited. Is it conceivable that, under the circumstances present in that case, Miss Landis could have entirely defeated the rights of her grantees by joining with Mrs. Keneaster in a deed to a third person for all of the land formerly held in common by them? If such an attempt had been made would not the rights of Miss Landis' previous grantees have been protected by our courts? The case at bar involves the same principle. If tenants in common who have separately conveyed portions of the lands held in common may not absolutely defeat the rights of their grantees by subsequently joining in a conveyance to a third person of the entire tract, then the Respondents in this case could not defeat the

rights of Green by so doing and his fishing agreement was not entirely invalid.

It is one thing to say that a conveyance by one tenant in common of a part of the land held in common will not prejudice the rights of the other co-tenants to a partition. It is quite another and different thing to say that the co-tenant who has made such a conveyance can entirely defeat it by joining with his co-tenants in a subsequent conveyance of the entire tract.

This, in fact, is what was attempted in the case of *Mee v. Benedict*, 98 Mich. 260; 22 L. R. A. 641, cited on pages 17 *et seq.* of appellant's main brief. The court held that to permit this effort to succeed would be "to permit the grantors of the timber to perpetrate a legal fraud upon their vendees." Speaking of the duty of the co-tenants who had made the conveyance to take steps to procure a partition in order that the conveyance might become effective the court said:

"It would be a premium on fraud for a court of equity to admit its inability to compel the performance of this plain duty."

See also the quotation in the opinion in this case from Freeman on Co-tenancy, Section 199 (Not Section 200 as stated in the opinion) in which the learned author of that work states that such a conveyance is not void and cannot be treated as void even by the other co-tenants and that it does operate to transfer the interest of the grantor to the grantee.

See also

Pellow v. Arctic Iron Co., 164 Mich. 87,
cited in Appellant's Main Brief.

We submit, therefore, that the fishing agreement at least bound the interest of George Pursel

and that a conveyance from all of the co-tenants would pass the interest of George Pursel subject to the provisions of the fishing agreement and that, therefore, the deed by the co-tenants would not convey the title which they agreed to convey and would not give to the Respondent the exclusive and absolute possession which they agreed to give. When it is borne in mind that this agreement was induced solely by the mistaken advice of the attorney of the Respondent, we submit that this mutual mistake of law which was caused by such advice is a sufficient ground not only for refusing to the Respondent the remedy by specific performance, but also for setting aside the agreement based upon such mistake.

It is clearly alleged in the answer that all of the Respondents relied upon the advice given in executing and delivering the agreement. They are, therefore, entitled to have the agreement set aside because had the advice not been given they would not have executed it.

The fishing agreement operates to create a tenancy at will as against the co-tenants who did not sign it.

Assuming, as is contended by the Respondent and as was found by the Vice Chancellor, that the fishing agreement was a lease and that it was subject to the provisions of Section 1 of the Statute of Frauds it was not invalid under that Statute but has the force and effect of a lease at will as against the co-tenants who did not sign it. (See pages 27 and 28 of Appellant's main brief.) It could, therefore, not be terminated except upon notice given three months prior to the expiration

of one of the yearly periods (See cases cited on page 28 of Appellant's main brief). The interest of all of the Appellants was, therefore, bound by the fishing agreement at least for the period necessary to lawfully terminate a tenancy at will and during that period Green was entitled to the fishing privileges conferred by the agreement. This is very material for the Agreement of Sale, as has above been stated, provided that the Respondent should have "the immediate and exclusive possession of said lands and premises from the date of signing the agreement and should be given the right and authority to exclude all other person or persons therefrom (except the farmer tenant)." This, obviously, the Appellants would not have agreed to do had they been properly advised that the fishing agreement created a tenancy at will as against the tenants who did not sign, which could not be terminated except in the manner above stated.

We submit, therefore, that the reliance of the parties to the Agreement of Sale upon the representation that the fishing agreement was invalid was a mistake and that but for that mistake the Agreement of Sale would not have been made; that the fishing agreement was at least valid in that it bound the interest of George and that (without considering the question of confirmation by the joint tenants, which has been argued in Appellant's main brief), it was valid to create a tenancy at will as against the co-tenants who did not sign and that the appellants are therefore entitled to have the agreement set aside because founded on such mistake.

II.

The agreement of sale was invalid because executed and acknowledged on Sunday.

On pages 33 to 40 of our main brief this question is fully discussed.

The learned Vice Chancellor and counsel for the Respondent insist that notwithstanding the fact that the agreement was executed and acknowledged on Sunday it is nevertheless enforceable because it was delivered on Monday. The Respondent, however, at the time the agreement was delivered, was advised that it had been executed and acknowledged on Sunday (Case, p. 17, l. 20 *et seq.*).

Conceding for the purpose of argument, that the agreement was a valid agreement notwithstanding its execution on Sunday, we are still confronted with the question whether the agreement is enforceable by specific performance as against the married women who were parties thereto since it appears that it was acknowledged on Sunday. This point was not dealt with in the opinion of the learned Vice Chancellor and is not met by the argument of counsel for the Respondent.

In *Corby v. Drew*, 55 N. J. E. 387, the Court of Chancery in an opinion by Vice Chancellor Stevens, held that an agreement by a married woman to convey her lands would not be enforced against her in a decree for specific performance because a married woman's conveyance was invalid unless acknowledged by her as her voluntary act and deed and a conveyance which was compelled by the court could not be the voluntary act and deed of the grantor. In this case the court distinguished

between an action for damages for a breach of the agreement and a suit for specific performance.

After this decision was rendered, as pointed out by the same Vice Chancellor in *Ten Eyck v. Saville*, 64 N. J. E. 611, the Conveyance Act of 1898 was passed. Sec. 39 of this Act provided that agreements for sale made by married women duly acknowledged shall be good and effectual to convey or affect the lands. In the case last cited it was held that if the agreement of the married woman were duly acknowledged it would, by virtue of the provisions of this statute, be enforceable in equity. The court said in part:

“The act of 1898 for the first time, at least in terms, gives full effect to *her agreement* to convey, but only if that agreement be acknowledged. * * * It must always be remembered, in dealing with this subject, that, in the case of married women, the policy of our law has always been to make the acknowledgment of *the essence* of the transaction, and not merely the evidence or proof of it.”

Since the decision of this case the statute which required a married woman to acknowledge an agreement to convey or a conveyance of her lands separately from her husband has been changed but notwithstanding this change the Court of Chancery has held that an agreement to convey lands by a married woman is not enforceable in equity unless acknowledged.

In *Chassman v. Wiese*, 90 N. J. E. 108, Vice Chancellor Backes said:

“Counsel for the complainant argues that this modification removes the protection that the separate examination formerly gave to a married woman as against her husband’s compulsion and sweeps away the reason upon

which *Corby v. Drew* and the later cases were decided. This is only partly true. The barriers were let down, but not altogether. The statute (section 39, as amended) still requires an acknowledgment by a married woman in order to effectuate a conveyance of her land, and it is as much *of the essence of her conveyance* as it was before the separate examination was dispensed with. The principle underlying the cases is still applicable and the decisions are controlling." (Italics ours.)

In *Schwabinger v. Saxon*, 92 N. J. E. 461, this court adopting an opinion by Vice Chancellor Fielder, citing *Chassman v. Wiese*, 90 N. J. E. 108, held that a contract to convey by a married woman, although containing an acknowledgment in due form, was not enforceable because it appeared that the agreement to convey was not entirely filled in when signed and acknowledged by the married woman and because, therefore, the certificate was false.

We submit, therefore, that it is clearly established by the decisions of this State that an agreement by a married woman to convey lands which has not been acknowledged as required by our statute, although valid in so far as an action for damages is concerned is not enforceable by specific performance. It is conceded that the acknowledgments in this case were taken on Sunday. The acknowledgments, therefore, were invalid and could not become valid by reason of the delivery of the deed on the following day. So far as this defect is concerned, it may be conceded for the purpose of argument, that the agreement was valid but not enforceable by specific performance because the acknowledgment was invalid.

III.

The remedy by specific performance is a discretionary one and Respondent, under the circumstances of this case, is not entitled thereto.

The facts in this case show that when the Respondent sought to purchase the farm of the Appellants the Appellant, George Pursel, representing himself and his co-tenants, frankly told Respondent's attorney of the existence of the fishing agreement, giving him a copy thereof, and that this attorney persuaded him and his co-tenants to disregard their obligations under the prior agreement and to sign an Agreement of Sale which obligated them to convey the property free and clear of Green's rights. While counsel for the Respondent criticises the Appellants because they were so readily persuaded to disregard what he styles their moral obligation, sight should not be lost of the fact that he induced them to disregard this obligation and advised them that the agreement which they had made and for which they had been paid was invalid and that this was done for the sole purpose of securing the Agreement of Sale which he now seeks to enforce.

After having signed and delivered the Agreement of Sale in reliance upon this advice the Appellants consulted other counsel and were advised that they were obliged, as a matter of law, to respect the obligations previously assumed by them and they have, therefore, undertaken the defense of this suit. Their position in urging before this court the validity of their prior agreement and the consequent invalidity of the Agreement of Sale because based upon the mistaken view that the prior agreement was invalid cannot, we submit, be

subject to unfavorable criticism. If they prevail on this ground they will not be able to sell the property to any other purchaser except subject to the rights of Green under the fishing agreement. They are, therefore, asking this court to protect them in the performance of their prior obligations and they appeal to this court with greater confidence because the situation in which they now find themselves is attributable solely to the mistaken advice given them by Respondent's attorney upon which they relied in doing what he desired them to do.

We submit that it is inequitable for the Respondent, under these circumstances, to come into a court of equity to secure the benefit of a contract which would not have been made but for misrepresentations made by his attorney which induced the signing of the contract.

If it be conceded that the misrepresentations were honestly made, it is nevertheless inequitable that the Respondent should be permitted to secure a benefit based on his mistaken advice as to the law.

An application for the specific performance of a contract is always addressed to the sound discretion of the court and will not be granted where it is inequitable so to do.

In *St. John the Baptist Greek Catholic Church v. Baron* (not officially reported), 73 Atl. 422, Vice Chancellor Howell said:

“I may perhaps begin my judgment by reminding counsel of the equitable character of this proceeding. There is no proceeding, no jurisdiction, no form of remedy that is administered by a court of equity that is quite so much within the purely sound equitable dis-

cretion of the court as is the action of specific performance of contracts. I do not mean to say that it rests in the capricious discretion of the court, but in the sound, judicial discretion of the court, whether in any case the decree of specific performance will be awarded or not. It is a purely equitable jurisdiction. It will not be used for the purpose of inflicting hardship upon anybody upon either party to the suit. It will not be used for the purpose of forcing an unmarketable title or a title about which there is any doubt, or, if there is any equitable circumstance which would militate against the decree, the court would consider that equitable circumstance and give judgment accordingly, and it may grant the relief upon such terms and conditions as it may deem to be equitable and just."

In *Plummer v. Keppler*, 26 N. J. E. 481, the Court of Chancery said:

"The remedy by specific performance is discretionary; the question is not, what must the court do, but what, in view of all the circumstances of the case in judgment, should it do to further justice."

In *Blake v. Flatley*, 44 N. J. E. 228, this court said:

"But it is also held that courts of equity will not interfere to decree a specific performance except in cases where it would be strictly equitable to make such a decree. Whether, therefore, the contract shall be enforced specifically, must rest in the sound and reasonable discretion of the court, depending on the equity of the particular case and the nature of the objections to it."

It is respectfully submitted that the decree of the Court of Chancery striking out the answer and the counterclaim and decreeing specific performance of the contract should be reversed.

Respectfully submitted,

O. D. *Mc*CONNELL

Solicitor of Defendants-Appellants.

JOSIAH STRYKER,
Of Counsel.

NEW JERSEY COURT OF ERRORS AND
APPEALS.

Between	}	On Appeal from	10
James Bowen, Complainant-Appellee,		Court of Chancery.	
and		Brief of Defendants-	
George A. Pursel, et al, Defendants-Appellants.		Appellants.	

STATEMENT OF THE CASE. 20

This appeal comes up by reason of an order and decree made by the Court of Chancery on November 24, 1925, upon a motion of the complainant, James Bowen, to strike out the answer and counterclaim filed by the defendants in the cause, George A. Pursel, Frank A. Pursel, Alice P. Skinner and Arthur M. Skinner, her husband, Catherine Schmidt and John Schmidt, her husband, Elizabeth P. Armstrong and Martin V. Armstrong, her husband, and Vida E. Cook and Carl Cook, her husband. 30

The bill alleges that the defendants entered into an alleged agreement in writing with complainant, dated April 3, 1925, wherein they agreed to convey

to complainant for the sum of \$6,000 by deed of warranty on or before June 1, 1925, a certain farm consisting of three tracts of land, situated in Oxford Township, Warren County, in this State, and containing 217.46 acres, more or less, in fee simple, free from all encumbrances, and free of and from all right, title, interest or claim in law or in equity of any person or persons whatsoever, subject only to the right or interest of Arthur Gardner, the farmer, tenant and occupant of said farm, whose term began April 1, 1925, and ends April 1, 1926; that said agreement, duly executed and acknowledged by the defendants, was by them delivered to complainant at Jersey City on April 6, 1925; that complainant agreed to pay the defendants said purchase price of \$6,000 by the payment of \$600 on the signing of the agreement and by the payment of the remaining \$5,400 upon delivery of the deed; that complainant paid the defendants said sum of \$600, and was ready and willing to pay the remainder of the purchase price at the time and place aforesaid, but the defendants refused to deliver the deed. The bill prays for a specific performance of the alleged agreement of sale and an accounting of the rents, issues and profits of the farm from June 1, 1925. An incomplete copy of the alleged agreement, the certificates of the acknowledgments being omitted, is attached to the bill. A complete copy of the alleged agreement, which will be hereinafter referred to as the "agreement of sale" is attached to the answer and counter-claim. The agreement of sale contains the following provision: "Said Party of the Second Part, his heirs and assigns, to have the immediate and exclusive possession of said lands and premises from the date of signing this Agreement, and said Party of the Second Part is hereby given the right and authority to exclude all

other person or persons therefrom, except said Arthur Gardner." (State of Case, pp. 1—9.)

The allegations of the answer are, briefly, as follows:

The defendants signed and acknowledged the alleged agreement of sale on April 5, 1925, which was on Sunday, but the certificates of the acknowledgments were dated April 6, 1925, by the officers taking the same, of all of which complainant had due notice on April 6, 1925. The defendants Alice P. Skinner, Catherine Schmidt, Elizabeth P. Armstrong and Vida E. Cook were married women on Sunday, April 5, 1925, when they signed and acknowledged said agreement of sale, and, therefore, the same is not acknowledged by them according to law and is not binding upon them, of all of which the complainant had due notice on April 6, 1925. The complainant executed said agreement of sale in duplicate on April 3, 1925, and, on April 4, 1925, paid said sum of \$600 to the defendant, George A. Pursel, who had said sum, on his own behalf and on behalf of the rest of the defendants, when the agreement of sale was signed and acknowledged by them on Sunday, April 5, 1925, and the agreement of sale was executed in violation of law and is therefore null and void. The farm in question, which is referred to as the "Emma Pursel farm," descended to the defendants, George A. Pursel, Frank A. Pursel, Alice P. Skinner, Catherine Schmidt, Elizabeth P. Armstrong and Vida E. Cook, as tenants in common, upon the death of their mother, Emma Pursel, intestate, in January, 1905, subject to the estate by the courtesy of their father, David F. Pursel, therein. One of the boundaries of the Emma Pursel farm is the Pequest Creek, which borders on

the farm for about a mile. David F. Pursel, the father, died on June 8, 1914, and, from the time of his death, George A. Pursel, with the acquiescence of the other tenants in common, took the entire charge and management of the Emma Pursel farm, as well as two other farms which descended to said children as tenants in common on the death of their father, and made leases and agreements respecting the same. After the death of David F. Pursel, George A. Pursel

10 made agreements at divers times with one Andrew J. Green, whereby he gave to said Green the right or privilege of fishing in that portion of the Pequest Creek which belongs to the Emma Pursel farm. George A. Pursel, individually and for the heirs-at-law of Emma Pursel, executed and acknowledged an agreement with said Green, dated June 12, 1922, wherein the exclusive fishing right or privilege of the Pequest Creek on the Emma Pursel farm was given

20 to said Green for the term of ten years, commencing April 1, 1923, at the rental of \$200 for said term, of which \$100 was payable on the execution and delivery of said agreement, and the remaining \$100 was payable on April 1, 1928. Said agreement, which is referred to as the "fishing agreement," was recorded in the Warren County Clerk's Office on July 3, 1922, in Book 226 of Deeds, pages 398, etc., and a copy thereof is annexed to the answer. Green paid said

30 sum of \$100 to George A. Pursel, who deposited the same in a bank account standing in the names of himself and his brother, Frank A. Pursel, as administrators of his father, David F. Pursel, deceased. In this same bank account have also been deposited the income of said three farms since the death of David F. Pursel, and out of the same have been paid the taxes and other expenses pertaining to the farms, and, by agreement between the tenants in common, the net

balance of money remaining in this bank account is to be divided among the tenants in common after all of the farms have been sold, the tenants in common in the meantime having had the privilege of drawing upon the bank balance as they desired, and they have actually drawn upon the same from time to time. In March, 1925, complainant and his solicitor in this cause, who is referred to as "complainant's attorney," met George A. Pursel, and complainant informed George A. Pursel that he desired to buy the Emma Pursel farm. Said Pursel presented to complainant's attorney in the presence of complainant said fishing agreement and also Emma Pursel's deed for the farm. Complainant's attorney examined these papers and stated that he did not think that the fishing agreement was valid; that he would examine his law books; that, if he found that the fishing agreement was valid, the complainant would not want the farm, as he desired the fishing privilege in the Pequest Creek; that if he, complainant's attorney, after such examination of his law books, found that said fishing agreement was invalid, he would send to said Pursel an agreement for the sale of the farm to the complainant for the sum of \$6,000, together with instructions regarding the execution thereof by the defendants, and would also send a check for the \$600 which was to be paid upon the signing of the agreement of sale. Complainant's attorney took away with him the fishing agreement and deed. On or about April 4, 1925, said Pursel received a letter from complainant's attorney, bearing date April 3, 1925, enclosing the agreement of sale in duplicate, which had been signed and acknowledged by complainant on April 3, 1925, and also complainant's check for the \$600, the letter requesting these defendants to execute the agreement of sale and giving instructions regarding the execution

- thereof. Before the agreement of sale was signed and acknowledged by the defendants in duplicate on Sunday, April 5, 1925, George A. Pursel informed the other tenants in common of the aforesaid statements made by complainant's attorney in reference to the validity of the fishing agreement, and also his statement that, if he found that the fishing agreement was invalid, he would send the agreement, with the check for the \$600 and instructions, as aforesaid. The
- 10 above-mentioned statements and acts of complainant's attorney were a representation to the defendants that the former had, after examining his law books, found that the fishing agreement was invalid as a matter of law, and the defendants did not seek any other legal advice, but relied upon said representation, and believing that said fishing agreement was invalid, therefore signed and acknowledged said agreement of sale. The complainant, when he executed said agreement of sale, also believed and relied upon said representation.
- 20 On April 6, 1925, George A. Pursel gave a duplicate copy of the agreement of sale to complainant's attorney, in the presence of complainant, and at the same time informed both of them that the same had been signed and acknowledged by them on Sunday, April 5, 1925, notwithstanding that the certificates of acknowledgment were dated April 6, 1925. When George A. Pursel gave said duplicate copy to complainant's attorney, complainant's attorney again stated that the fishing agreement was invalid. Shortly after
- 30 the execution of the agreement of sale, complainant took possession of the Emma Pursel farm and has had possession thereof ever since. A little later the defendants, for the first time, sought independent legal advice, and were advised that the fishing agreement is not invalid. The agreement of sale was therefore executed by complainant and defendants under a

mutual mistake of law, in that both parties relied upon the representation of complainant's attorney that the fishing agreement was invalid as a matter of law. The defendants thereupon refused to give the deed for the premises, and, before the complainant's suit was commenced, duly tendered the complainant the \$600 paid by him, which he refused to accept.

The counter-claim alleges substantially the same facts above mentioned that are stated in the answer, and in addition sets up that said Green claims that the fishing agreement is valid, that an adjudication of the matters alleged in the counter-claim may require the determination by the court of the question of the validity of the fishing agreement, and that therefore Green is a proper and necessary party to the action under the counter-claim. The counter-claim prays for an answer by the complainant and by Green as a third party, that the agreement of sale may be decreed to be null and void, and that the complainant account for and pay to the defendants the rents, issues and profits of the Emma Pursel farm from the time that he took possession thereof, and that a subpoena issue to Andrew J. Green. (State of Case, pp. 10—37.)

The motion to strike out the answer and counter-claim was made upon the following grounds:

1. The allegations of the answer disclose that:
 - (a) The alleged "fishing agreement" referred to therein was not authorized in writing or ratified by the heirs of Emma Pursel, and is therefore invalid;
 - (b) The "agreement of sale" in suit was not

executed by Complainant and Defendants under a mutual mistake of law;

- (c) The "agreement of sale" in suit was delivered by Defendants to Complainant on a secular day and, therefore, is not null and void because the Defendants signed and acknowledged it on Sunday;
 - 10 (d) The Defendants have no defense to the Complainant's bill of complaint.
2. The allegations of the counter-claim disclose that:
- (a) The alleged "fishing agreement" referred to therein was not authorized in writing or ratified by the heirs of Emma Pursel, and is therefore invalid;
 - 20 (b) The "agreement of sale" in suit was not executed by Complainant and Defendants under a mutual mistake of law;
 - (c) The "agreement of sale" in suit was delivered by Defendants to Complainant on a secular day and, therefore, is not null and void because the Defendants signed and acknowledged it on Sunday;
 - 30 (d) Andrew J. Green is not a proper party defendant to this suit;
 - (e) The Defendants have no cause of action or counter-claim against the Complainant.

3. The Defendants cannot litigate in this suit, the validity of the alleged "fishing agreement".

4. The alleged "mistake of law" set forth in the answer and counter-claim is neither a defense to Complainant's bill of complaint nor a ground for rescission of the "agreement of sale" in suit. (State of Case, pp. 38—40.)

The Court of Chancery held that the objections 10
to the answer and counter-claim were well founded, and made the said order and decree of November 24, 1925, striking out the answer and counter-claim and directing a specific performance of the agreement of sale, and an accounting of the rents, issues and profits since June 1, 1925, and the payment of costs by the defendants, including a counsel fee of \$250. (State of Case, pp. 41—50.)

20 GROUNDS OF APPEAL.

Said order and decree made by the Chancellor on November 24, 1925, should have adjudged that said answer discloses good grounds of defense to the said bill of complaint, and that said counter-claim discloses good cause of action against said appellee, and should have adjudged and decreed that the said motion of the appellee to strike out said answer and counter-claim be denied, with costs to the appellants. 30

The Chancellor should have adjudged that said Andrew J. Green is a proper party defendant to the action of said appellants under said counter-claim and should have allowed said Green to plead in the action under said counter-claim and protect his rights and

interests arising by virtue of said fishing agreement.

The Chancellor should have allowed said cause to be brought on for a hearing according to the usual practice of said Court of Chancery, and should have heard the proofs and evidence of the respective parties, and should have, after a full hearing as aforesaid, made an order or decree in accordance with the proofs and evidence presented at such hearing and the law applicable thereto.

The Chancellor, after full hearing, should have made such order or decree as would be binding upon said Andrew J. Green, and thereby protect the rights and interests of said appellants under the circumstances of the case.

The Chancellor should not have allowed costs to the appellee, including said counsel fee of \$250, which is unreasonable and excessive.

By making the said order and decree in the form and manner aforesaid, the Chancellor improperly and erroneously deprived said defendants of an opportunity to defend said suit, and also of an opportunity to obtain the remedies to which they were and are entitled by virtue of their said counter-claim.

(State of Case, pp. 47—50.)

30

(The appellants will not insist upon the other ground of appeal specified in the petition of appeal, to wit, that the decree was made without a decree **pro confesso** having been previously taken against the appellants and without any proofs or evidence being presented or taken in the cause. For that

reason the last-mentioned ground of appeal is not included in the foregoing specification of the grounds of appeal.)

ARGUMENT.

The discussion of the case will follow in general the order in which the grounds of objection to the answer and counter-claim are set forth in the notice of motion, which grounds are enumerated in detail in the statement of the case in this brief. 10

The appellants' argument is arranged under the following heads:

I. The answer discloses good grounds of defense to the bill of complaint.

II. The counter-claim discloses good cause of action against the appellee. 20

III. Said Andrew J. Green is a proper party defendant in the suit under the counter-claim, and his presence in the suit is necessary to protect the appellants.

IV. The Court of Chancery should have denied the appellee's motion, with costs, and should not have allowed costs to appellee, but should have permitted the cause to be brought to full hearing. 30

I.

THE ANSWER DISCLOSES GOOD GROUNDS
OF DEFENSE TO THE BILL OF COMPLAINT.

This motion admits every allegation in the answer and counter-claim which is well pleaded.

(1) The allegations of the answer show that
10 the agreement of sale was executed under a mutual
mistake of law, that said mistake was caused by the
representation of the appellee's attorney, and that the
appellee is seeking to take advantage thereof.

The allegations of the answer show that the ap-
pellants believed and relied upon the representation
of appellee's attorney that said fishing agreement of
Andrew J. Green was invalid; that they did not seek
any other legal advice; that by reason thereof, they
20 executed the agreement of sale; and that the appellee,
when he executed said agreement of sale, also believed
and relied upon said representation.

(State of Case, p. 17.)

If, therefore, the representation of appellee's at-
torney, that said fishing agreement was invalid, was
untrue, then the agreement of sale was executed under
a mutual mistake of law, and said mistake was caused
30 by the agent of the appellee. This court has held
that equity will grant relief in such cases.

Green vs. M. & E. R. R. Co., 12 N. J. Eq. 165;
aff. 15 N. J. Eq. 469.

Freichnecht vs. Meyer, 39 N. J. Eq. 551, 561.

The learned Vice-Chancellor expresses the opinion that a mutual mistake of law is sufficient ground upon which to annul a contract, and cites **Pomeroy's Equity Jurisprudence, sections 841 et seq.**

(State of Case, pp. 43, 44.)

The discussion of the validity of the fishing agreement at once raises the question as to its nature, as to whether it is a lease or not. It contains words of demise, but that fact is not controlling. 10

At this juncture it might be well to state that the word "Lease", which appears at the beginning of the fishing agreement, (State of Case, p. 28), was erroneously copied from the record of the fishing agreement in the Warren County Clerk's office. It has been found that the original agreement does not contain the word "Lease" at the beginning. 20

The learned Vice-Chancellor does not decide whether the fishing agreement is a lease or not. He cites the first section of the Statute of Frauds and Perjuries, (2 C. S. p. 2610), and apparently places the fishing agreement in the category of an uncertain interest in lands. (State of Case, p. 44.) This section of the Statute of Frauds and Perjuries reads as follows:

"1. That all leases, estates, interests of freehold or term of years, or any uncertain interests of, in, to, or out of any messuages, lands, tenements or hereditaments, made or created, or hereafter to be made or created, by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the 30

same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates notwithstanding; except nevertheless all leases not exceeding the term of three years from the making thereof."

10

For the sake of argument let us assume that the fishing agreement is a lease.

As a lease is a conveyance, (**Shimer vs. Phillipsburg**, 58 N. J. L. 506), the fishing agreement certainly conveyed to Green George A. Pursel's interest in the fishing right.

20 The learned Vice-Chancellor, in his opinion, says: "It is elementary that one tenant in common cannot bind the others by such an agreement as the one under consideration, either oral or written, except when he acts as the duly authorized agent of the others. (**Boston Franklinite Co. v. Condit & Torrey**, 19 N. J. Eq. 394)."

(State of Case, p. 44.)

30 In **Boston Franklinite Co. v. Condit & Torrey**, *supra*, one Fowler, who supposed that he was one of two tenants in common, conveyed certain tracts by metes and bounds, and "also all the iron, zinc, and other ores, on or within any of the lands of the said S. Fowler, in the County of Sussex." By several *mense* conveyances, this right to the ores was conveyed to The Boston Franklinite Co., and the latter

brought a suit in partition against the owner of the remainder of the premises. In that case, Chancellor Zabriskie held that Fowler had no title, and that, even if Fowler had had title, the Boston Franklinites Co. could not maintain a bill for partition. The Chancellor was very careful, however, to say, on page 400 of the opinion: "**Such deed will be held to bind the grantor**, but as to his co-tenant it is void. The reason is, that it would prejudice the right of the co-tenant to a partition." (Black face type is ours.) 10

Holcomb v. Coryell, 11 N. J. Eq. 548 is cited in the last-mentioned case. In **Holcomb v. Coryell**, a trustee, with several others, were tenants in common of a large tract of land. The trustee conveyed five acres thereof, by metes and bounds, to one Kohl. On pages 549 and 550 of the opinion, Chancellor Williamson says: "Now it is very true that one tenant in common cannot prejudice his co-tenants by a conveyance of a part of the land by metes and bounds. 20 Such a deed cannot give to the grantee the exclusive title to the portion conveyed, any more than the co-tenant, who is the grantor, can select any particular part of the land, and appropriate it as his exclusive moiety. But as against the grantor, and those claiming under him, the grant is good. They are estopped by it. The co-tenant cannot complain of it, unless when it operates to his prejudice; and then his rights will be protected. **Porter v. Hill**, 9 Mass. 34; **Bartlet v. Harlow**, 12 Mass. 348; **Varnum v. Abbott et al.**, 30 12 Mass. 475; 2 Ohio 113."

In **Keneaster v. Erb**, 83 N. J. Eq. 625, this court held that a deed by one tenant in common of a portion of the premises held in common, by metes and bounds, does not affect the right of the non-granting co-tenant

to a partition, but that such partition would be made upon equitable terms, and the rights of the grantee would be protected.

In the instant case no proceedings for a partition were taken by the other five co-tenants. There is nothing to indicate that they were dissatisfied with the making of the fishing agreement by their brother George to Green. On the contrary, for over two
10 years they acquiesced therein, although the fishing agreement, which was made on June 12, 1922, for the term of ten years, commencing on April 1, 1923, was duly recorded on July 3, 1922, in the office of the Clerk of Warren County in which the farm is located. (State of Case, p. 14.) At the solicitation of the appellee, and upon the representation of his attorney, all of the tenants in common executed the agreement of sale, which requires them to convey the farm to the appellee, not only free and clear of encumbrances,
20 but also "free of and from all right, title, interest or claim in law or in equity of any person or persons whatsoever, subject only to the right or interest of Arthur Gardner, the farmer, etc." (State of Case, pp. 15-17, 33.)

If the appellants are compelled to perform this agreement, it will be then beyond their power to ever have a partition of the premises made in a suit wherein Green would necessarily be made a defendant, and
30 wherein his rights under the fishing agreement would be protected. Hence the result of the learned Vice-Chancellor's decision would be to deprive Green of his rights without his having an opportunity to be heard in defense.

In a well-considered opinion in the Michigan Su-

preme Court, *Mee v. Benedict*, 98 Mich. 260; 22 L. R. A. 641, a similar situation arose. In that case the owners of twenty-three twenty-fourths of a tract of land conveyed all their right, title and interest in the timber on said land to the complainants. One Hart was the owner of the remaining one twenty-fourth, which was not conveyed to complainants. Subsequently those from whom the complainant's purchased, and also Hart, conveyed to the defendant Benedict. Benedict became the owner of the entire field, subject to any rights that the complainants might have in the timber. The complainants brought a suit for partition, and the court held that the complainants were entitled to relief. The following are some pertinent excerpts from the opinions: 10

“When the title rested in complainants’ grantors, they having conveyed their interest in the timber upon the lands, the only means of making that conveyance effectual to carry into effect the intent of the parties was for said grantors of timber to ask and obtain partition of the lands. This they had the right, and it was their duty, to do, and equity would require and compel action on their part to that end. To deny this would be to permit the grantors of the timber to perpetrate a legal fraud upon their vendees. They have received a consideration for the timber, and have granted all the timber upon the lands to the complainants. This clearly includes all interest which they acquire on partition. See *Cunningham v. Pattee*, 99 Mass. 250; *White v. Sayre*, 2 Ohio, 112; *Stark v. Barrett*, 15 Cal. 370; *Harlan v. Langham*, 69 Pa. 238; *Whitton v. Whitton*, 38 N. H. 133, 75 Am. Dec. 163; *Barnhart v. Campbell*, 50 Mo. 599; *Freem. Coten.* sections 206, 207, 199; and *Campau v. Godfrey*, 18 Mich. 32, 100 Am. Dec. 133. 20 30

“The question in this case is, Shall the grantor be permitted to retain the consideration, and say to the purchaser that, as he (the purchaser) cannot ask for partition of the timber distinct from a partition of the entire estate in common, therefore the title which thus he assumed to convey shall prove ineffectual? Are the rules of equity so unyielding as to sanction this monstrous injustice? We think not. We do not depart from the doctrine that such conveyance is

10 void as against the co-tenant, but it is void only in so far as it affects the co-tenant’s rights. He may give assent to the conveyance, and thereby make it effectual. It is void so far as that the co-tenant’s interests shall not be injuriously affected by the conveyance; but it is not void as against the grantor, and we think it is competent, under the general equity powers of the court, to compel the grantor of a special interest to take such steps as to make his conveyance effectual. It is within his power to do so. He has received the

20 consideration for the specific thing, to wit, the timber, to which his conveyance shall attach upon partition. He is in law and morals bound to take such steps as shall give effect to his conveyance. It would be a premium on fraud for a court of equity to admit its inability to compel the performance of this plain duty. The complainants having the right, it follows that it cannot be defeated by the fact that the entire title is now merged in Benedict. It is true that some of the cases speak of the transfer purporting to convey, by

30 metes and bounds, an estate less than the entire of that of the co-tenant, as being void as against the co-tenant, and this supposition of absolute invalidity has led to results in some cases not altogether just. But it seems to me the more correct way to state the result of the authorities is that such a conveyance is good as between the parties to it, but that it is not to

be permitted to affect injuriously the rights of the co-tenants. This results in nothing more than that, on partition, the co-tenant should be entitled to partition precisely as though no conveyance had been made. But it seems to me a manifest perversion of justice to say that, because the law declares that the co-tenant may not have his rights injuriously affected by such a conveyance, he may profit by the fact that he is a co-tenant, and that circumstance shall enable him to defeat the right vested in the grantees of his co-tenant. 10
Mr. Freeman, in his excellent work on Cotenancy, says: 'Although the deed does not impair the rights of the other co-tenants, it by no means follows that they may treat it as void, or entirely disregard it. While falling short of what it professes to be, it nevertheless operates on the interest of the grantor by transferring it to the grantee. The latter acquires rights which the co-tenants ought to be bound to respect. They ought not to be permitted to ignore his conveyance, and treat him as one having no interest 20
in the property.' *Freem. Coten. Section 200.*"

"But while the conveyance of a portion by one tenant in common may be disregarded by his co-tenant, if such co-tenant, or any other person, shall, with notice of the grantee's interest, choose to unite the different titles by purchasing the remaining interest of the grantor, he may be held to thereby assent to such conveyance by recognizing the right of the grantor to deed in parcels, and he will take the title of 30
the grantor subject to the rights of the prior grantee, which equity may compel him to recognize and satisfy. While a tenant in common may insist upon his own, he will not be permitted, in such a case, to collude with his co-tenant, or profit by his fraud. *Hartford & S. Ore Co. v. Miller, 41 Conn. 112;*

10 *Goodwin v. Keney*, 49 Conn. 563; *Adams v. Manning*, 51 Conn. 5; *Crocker v. Tiffany*, 9 R. I. 512; *Great Falls Co. v. Worster*, 15 N. H. 413. Hart saw fit to unite in himself the titles of all his co-tenants. He could only buy what they had left to sell, and, as he took these interests with the notice of the sale of the timber, he cannot justly claim such timber. By his act he has put it out of the power of the complainants' grantors to deliver this timber, but he cannot be said to have acquired the title to it. He has chosen to recognize the sale to the complainants by purchasing the remaining interest. His grantees are in no better position."

The case of *Mee v. Benedict*, *supra*, was cited with approval by the Michigan Supreme Court in the case of *Pellow v. Arctic Iron Company*, 164 Mich. 87.

20 The reasoning in *Mee v. Benedict*, *supra*, applies to the instant case. In the instant case everything indicates that the tenants in common were all satisfied with the fishing agreement, and that Green would undoubtedly have been unmolested in his enjoyment of his fishing right, if the appellee had not appeared upon the scene.

30 The latter informed George A. Pursel that he desired to buy the farm and that his object in doing so was to acquire the fishing right in the Pequest Creek. Thereupon Pursel presented to appellee's attorney, who was also present, the original deed of Emma J. Pursel for the farm and the original fishing agreement with Green. (State of Case, p. 15.) Pursel thus acted in good faith. By presenting these papers to appellee's attorney, he, in substance, said, "Here is the deed of our mother from whom we in-

herited the farm, and we are willing to sell the farm to you, but if you desire it for the fishing privilege, here is the fishing agreement whereby we have already given Green the fishing privilege for ten years, of which there are still eight years to run."

Every dictate of fairness should have influenced the appellee to respect the rights of Green under this fishing agreement. The fishing agreement had been made in good faith and for valuable consideration. One-half of the consideration had been paid and had been deposited by Pursel in the common bank account, which was to be ultimately divided among all six of the tenants in common, and upon which they had the right to draw and did draw from time to time. (State of Case, pp. 13, 14.) 10

But the appellee had been casting envious eyes upon the trout fishing privilege being exercised by Green in the Pequest Creek, and he determined to wrest this privilege from him, if possible. By virtue of the representation of appellee's attorney to the appellants that the fishing agreement was invalid upon which the appellants relied without seeking independent legal advice, the appellee obtained from the appellants the agreement of sale. By doing so, the appellee thought that he had secured the coveted fishing privilege, because the agreement of sale provides for the conveyance of the farm by the appellants to the appellee, free and clear of all encumbrances, and also free from all right, title, interest or claim of any person or persons whatsoever, except Gardner, the tenant of the farm. (State of Case, pp. 15-18, 33.) 20 30

The appellee had constructive notice of the fishing agreement by the record and also actual notice there-

of. The other five tenants in common, besides George A. Pursel, also had record notice thereof and they in addition received actual notice thereof, because George A. Pursel explained to them, before the agreement of sale was signed, all the details regarding the fishing agreement and the representation of appellee's attorney regarding the validity thereof. (State of Case, pp. 14-18.) **Pellow v. Arctic Iron Company, supra.**

10

The appellants believed the representation of appellee's attorney, and thought that the fishing agreement was absolutely invalid, that Green had no rights by virtue thereof, and that, on the sale of the premises, it would become merely a matter of refunding to Green such proportionate part of the compensation as would be represented by the unexpired portion of the term of the fishing agreement. If they had had any idea that the fishing agreement was valid, or that

20

Green had any rights whatsoever by virtue thereof, they would never have signed the agreement of sale. They had no intention whatever to disregard Green's rights under the fishing agreement, and much less to do anything that would deprive him of those rights.

30

On the other hand, the appellee designedly disregarded the fishing agreement and obtained the agreement of sale for the purpose of shutting out Green from exercising the fishing privilege. In this transaction Green was not made a party, was not consulted and his rights were absolutely ignored by the appellee. As the appellee, with notice of Green's interest, chose to unite the different titles by purchasing the remaining interest of George A. Pursel and the other five co-tenants, he thereby assented to and recognized the fishing agreement, and

purchased the premises subject to Green's rights. It was the intention of the appellee, when he obtained the signatures of the appellants to the agreement of sale, to shut out Green's interest under the fishing agreement, on the theory that it was an interest terminable at will. As a matter of fact, however, the fishing agreement was unquestionably valid as against George A. Pursel, Green's grantor, and the appellee, by his action, instead of destroying Green's rights thereunder, assented to and recognized them. 10

Mee v. Benedict, supra.

It must be borne in mind that in the case of **Boston Franklinite Co. v. Condit & Torrey, supra**, one of the tenants in common conveyed all the minerals in the land held in common. There can be no question but that these minerals were owned by all of the tenants in common. In the instant case there could be no tenancy in common in the fish in the Pequest Creek, for the reason that fish are *ferae naturae*, and cannot be the subject of private property. They belong to anyone who catches them. 20

Beach v. Morgan, 67 N. H. 529; 41 Atl. 349.

The right given by the fishing agreement is therefore a mere right of fishing in the Pequest Creek on the farm. A tenant in common has the right of selling or granting the profits and privileges pertaining to the premises held in common, so long as he or his grantee does not destroy the common property or oust the co-tenants. 30

Buchanan v. Jencks, 38 R. I. 443; 96 Atl. 307.

In the last-mentioned case, the plaintiffs and one Enoch Thayer were tenants in common of a wood lot, in which the interest of Thayer was one-third. Some time in the year 1911, Enoch Thayer sold to one H. O. Aldrich the standing timber and wood upon said lot, and authorized him to cut and remove the same. Thereafterwards the said Aldrich transferred to the defendant, Barton W. Jencks, all the right to cut and remove said timber and wood which he had
10 acquired from Thayer. It is not disputed that these sales and transfers were, in each case, made for a valuable consideration. Under these conditions, and acting under the authority thus conferred upon him, the defendant Jencks proceeded to and did cut and remove the timber and wood from the whole of said lot, whereupon the plaintiffs brought the present suit.

Justice Vincent says, in his opinion:

20 "It seems to us desirable to determine, in the first instance, whether or not Barton W. Jencks, through the several transfers before mentioned, acquired a right to enter upon this lot and cut wood and timber. It will not be disputed that one co-tenant, by an entry upon the common property, does not ipso facto become a trespasser. He may become a trespasser, as some of the authorities hold, if his entry is accompanied by acts which amount to an ouster of his co-tenants, or is followed by destruction of the common
30 property. Enoch Thayer, as a tenant in common of this wood lot, had the right to enter upon the same without becoming a trespasser, and he had the right to cut timber and wood there, provided his entry did not amount, as before suggested, to an ouster of his co-tenants, or involve the destruction of common property. Whether a co-tenant may be required to account

for his use of the common property, or what the rights of the other co-tenants may be as to an accounting, are questions which we are not called upon to consider in the present proceeding. We see no reason why a co-tenant, in the enjoyment of his rights as such, cannot authorize another to do whatever he might lawfully do himself. A contrary view, if followed to its logical conclusion, would restrict a co-tenant's enjoyment of the common property to the sphere of his own personal activities, and would deprive him of the aid of others whom he might desire or need to employ. A co-tenant has the right to divest himself of his entire interest in the common estate, and thus bring into association with his former co-tenants one who had theretofore been a stranger to the title, and this he can do independently and without the consent of the other interests. This being so, it would seem unreasonable to say that a co-tenant could not authorize another to go upon the common land, and do anything that he might do himself. We think therefore that in this case we must apply the same principles to the consideration of the acts of the defendant Jencks which we might have applied to Thayer, the co-tenant, had he, in person, committed the acts of which the plaintiffs now complain."

In the instant case there was no destruction of the common property and no ouster of the other tenants in common by virtue of the fishing agreement which George A. Pursel made with Green. Consequently, the matter resolves itself into a question of contribution of the consideration for the fishing agreement among the tenants in common, and that was taken care of by George A. Pursel's depositing the compensation in the bank account for the mutual benefit of all the tenants in common.

The fishing agreement was ratified by the five co-tenants of George A. Pursel. The learned Vice-Chancellor, in his opinion, cites the case of **Clement v. Young-McShea Amusement Company**, 70 N. J. Eq. 677. (State of Case, p. 44.) But the circumstances of that case are very different from those in the instant case. In **Clement v. Young-McShea Amusement Company**, Young was acting as an agent for a corporation. He was a stockholder and director of the corporation, and acted upon his own initiative in making leases. On several occasions, when Young wanted to make leases for longer terms than three years, two of the board of directors, consisting of three or perhaps four persons, declared themselves not willing that he should do so. In the instant case, however, we are not dealing with a corporation, but with six tenants in common. George A. Pursel, with the acquiescence and consent of the other five co-tenants, who were his brother and sisters, from 1914 had the entire charge and management of the Emma Pursel farm, as well as two other farms which descended to said six heirs as tenants in common on the death of their father, and made leases and agreements respecting the same. He made agreements at different times with Green for the privilege of fishing in the Pequest Creek. After the present fishing agreement was executed with Green, it was duly recorded. The other co-tenants therefore had constructive notice thereof. (**Pellow v. Arctic Iron Co.**, *supra*). The \$100, which was paid on the execution and delivery of the fishing agreement, was deposited together with the other income from the farms, in a bank account for the mutual benefit of all of the tenants in common. This bank account stands in the names of George A. Pursel and Frank A. Pursel, who is also one of the tenants in common, as administrators. All of the tenants in

common knew that the money received from Green was deposited in this bank account. By mutual agreement the net balance of this bank account is to be divided among the six tenants in common after all of the farms have been sold, and, in the meantime, all of them have had the privilege of drawing upon the balance as they desired, **and they have actually drawn upon the same from time to time.** (State of Case, pp. 12-14.) Moreover, the five co-tenants of George A. Pursel, also knew that Andrew J. Green was exercising the fishing privilege in the Pequest Creek, and they acquiesced therein. These facts show a ratification of the fishing agreement by George A. Pursel's five co-tenants. 10

Still assuming that the fishing agreement is a lease, there is another reason why it is not invalid. The learned Vice-Chancellor decided, that as there was no grant in writing signed by the parties or their agent thereunto lawfully authorized by writing, the fishing agreement has the force and effect of a lease at will only. But tenancies at will can be terminated only by a three months' notice. 20

Den v. Drake, 14 N. J. L. 523.

Moore v. Moore, 41 N. J. L. 515.

3 C. S. p. 3077, sec. 29.

This section reads as follows:

“29. That in all cases where any tenant is, or may be entitled by law to notice to quit the premises by him holden, in order to determine his tenancy, three months' notice to quit as aforesaid shall be deemed and taken to be sufficient.” 30

In other words, according to the learned Vice-Chancellor's decision, the fishing agreement became a parol demise for a longer period than three years, which would operate as a demise from year to year.

Georgetti v. Steuber, 80 N. J. L. 482.

And three months' notice is necessary to terminate a tenancy from year to year.

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Pfeiffer v. Peters, 80 N. J. L. 661.

As the third year of the fishing agreement began on April 1, 1925, and the agreement of sale was dated April 3, 1925, and was to be consummated on June 1, 1925, it was manifestly impossible to give any such notice, and no notice was given. The appellee may say that his attorney did not state to the appellants that they would not have to give notice to terminate the fishing agreement. But if his attorney knew that such a notice was necessary, and did not so inform the appellants, his conduct was inequitable. His statement to the appellants that the fishing agreement was invalid was intended to make them believe, and did make them believe that the fishing agreement was absolutely void, and that they had a right to make an agreement of sale and a conveyance without giving any notice and without taking any proceedings whatsoever. In **Pomeroy's Equity Jurisprudence, sec. 847**, which was cited by the learned Vice-Chancellor, the author says:

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“Whatever be the effect of a mistake pure and simple, there is no doubt that equitable relief, affirmative or defensive, will be granted when the ignorance or misapprehension of a party concerning

the legal effect of a transaction in which he engages, or concerning his own legal rights which are to be affected, is induced, procured, aided, or accompanied by inequitable conduct of the other parties. It is not necessary that such inequitable conduct should be intentionally misleading, much less that it should be actual fraud; it is enough that the misconception of the law was the result of, or even aided or accompanied by, incorrect or misleading statements, or acts of the other party.”

10

Hence, if the fishing agreement be assumed to be a lease, it was not and is not invalid.

This brings us to the question of the actual character of the fishing agreement. In Bouvier's Law Dictionary (Rawle's 3rd Ed.) Vol. II, p. 1888, the case of **Commonwealth v. Weatherhead**, 110 Mass. 175 was cited as a case in which a lease was made of the right of fishing. An examination of that case shows that a large pond, known as Mendon Pond, was leased. An examination of the reported cases shows that usually the so-called fishing leases are actually leases of either a tract of land containing a body or stream of water, or are leases of a body of water or stream itself, with the privilege of fishing therein. Thus in **Beach v. Morgan**, *supra*, the plaintiff was the lessee of a strip of land 250 feet in width, the center line of which was coincident with the center line of a stream passing through it.

20

30

In the instant case the so-called lease is of the exclusive right or privilege of fishing in the stream known as the Pequest Creek. (State of Case, p. 28.) The learned Vice-Chancellor states that in **Cobb v. Davenport**, 33 N. J. L. 223, and **Albright v. Cort-**

right, 64 N. J. L. 330, it was decided that the only mode of acquiring a right of taking a profit on another's soil is by grant or prescription, which implies a grant. (State of Case, p. 44.) But that does not decide the question as to whether such a grant may not be made by a contract concerning land, which would come under the fifth section of the Statute of Frauds. 2 C. S. p. 2612, sec. 5. The pertinent parts of said section read as follows:

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"5. That no action shall be brought (4) upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; unless the agreement, upon which action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized."

20

The right to take fish from a stream is a profit a prendre and can be acquired in gross.

Mitchell v. D'Olier, 68 N. J. L. 375.

The following contracts concerning lands have been held to be governed by the fifth section of the Statute of Frauds:

The right to take sand out of a pit. (*O'Donnell v. Brehen*, 36 N. J. L. 257.)

A sale of standing timber. (*Sarson v. Mueller*, 3 A. R. 1781.) (Not reported.)

An agreement to make a lease for one year and to give an option for two years. (*Cooper v. Aiello*, 93 N. J. L. 336.)

In *Clement v. Young-McShea Amusement Company*, *supra*, the late Justice Dixon, who wrote the opinion for this court, in speaking of the lease in question in that case, says, on page 681:

“But the instrument contains, beside the implied covenant for quiet enjoyment, presumed from the word “demise” (1 Washb. Real Prop. 325) an express covenant of like character, and it may be that such a covenant should be held to be covered by the fifth section of the statute of frauds as a contract concerning lands which an agent may lawfully sign without written authority. Assuming this to be so, the covenant would of itself be sufficient evidence of Young’s contract, the authority of Shackelford to sign for him being unquestioned, but it would be inadequate against the company, under the decisions in this state, because it nowhere points out the company as one of the parties. *Schenck v. Spring Lake Beach Improvement Co.*, 20 47 N. J. Eq. (2 Dick.) 44; *Bowers v. Glucksman*, 68 N. J. Law (39 Vr.) 146.”

In the instant case the fishing agreement contains the word “demise”, and also expressly states the parties who are to be bound thereby, to wit, “George A. Pursel, individually and for the heirs-at-law of Emma J. Pursell, late of Warren County, in the State of New Jersey, deceased.” If the memorandum required by the fifth section of the Statute of Frauds states the names of the parties to be bound thereby, the signature of the agent to the memorandum is sufficient.

Weyl-Zuckerman v. Schnell, 96 N. J. L. 558.

The appellants contend that the fishing agreement

is a contract concerning lands, and is controlled by the fifth section of the Statute of Frauds. There can be no question but that the allegations of the answer show that George A. Pursel had parol authority to make the fishing agreement. (State of Case, pp. 12-14.) His authority as agent to make such an agreement could be created by parol.

Lindley v. Keim, 54 N. J. Eq. 418.

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Neither the taking of the acknowledgments of the four heirs-at-law who were married women, nor the certification thereof, were essential to the validity of the fishing agreement as their contract.

Wolff v. Meyer, 75 N. J. L. 181; aff. 76 N. J. L. 574.

20 Whether, therefore, the fishing agreement be con-
sidered as a lease or as a contract concerning lands,
it was not and is not invalid, and the agreement of
sale was executed by the appellants and the appellee
under a mutual mistake of law, which was caused by
the representation of the latter's attorney, and the
appellee is seeking to take advantage of the mistake in
his suit. By reason thereof the appellants have been
placed in a position of jeopardy, because, if they
should be compelled to give a warranty deed to the
appellee, with a covenant against encumbrances, and
30 if the validity of the fishing agreement should be sub-
sequently established, the appellee could bring suit for
damages for breach of the covenant. In such suit,
the fact that appellee knew of the existence of
the fishing agreement would not affect his right of
action.

Demars v. Koehler, 62 N. J. L. 203.

Smith v. Smith, 90 N. J. L. 282.

The appellants ask to be saved from this dangerous position in which they have been placed by relying upon the representation of appellee's attorney. This relief can be given to them without substantial injustice to the appellee, who is seeking to take advantage of the mistake. A court of equity only can grant the relief needed, and it should be accorded them. 10

2. The allegations of the answer show that the agreement of sale was consummated on Sunday.

An agreement which is consummated on Sunday is void, and is incapable of ratification.

Reeves v. Butcher, 31 N. J. L. 224.

Burr v. Nevison, 74 N. J. Eq. 320; aff. 75 N. J. Eq. 241. 20

County Engineering Co. v. West, 88 N. J. Eq. 109.

These decisions are based upon the statute forbidding worldly employment or business on Sunday, (4 C. S. p. 5712, sec. 1). The pertinent part of said statute rests as follows:

"1. That no traveling, worldly employment or business, ordinary or servile labor or work either upon land or water (works of necessity and charity excepted), nor shooting, fishing (not including fishing with a seine or net, which is hereafter provided for), sporting, hunting, gunning, racing, or frequenting of tippling-houses, or any interludes, or plays, dancing, singing, fiddling or other music for the sake of merriment, nor any playing at foot- 30

ball, fives, nine-pins, bowls, long bullets or quoits, nor any other kind of playing, sports, pastimes, or diversions, shall be done, performed, used or practiced, by any person or persons within this state, on the Christian Sabbath, or first day of the week, commonly called Sunday; ”

The question is, therefore, **when, according to the intention of the parties, was the agreement of sale in**
10 the instant case consummated?

As there was no evidence adduced in the case, the intention of the parties must be gathered from the instrument itself. The agreement of sale provides that of the purchase price of \$6,000, the sum of \$600 was to be paid by the appellee on the **signing** of the agreement, and it contains the following significant sentence: “Said Party of the Second Part, his heirs and assigns, to have the immediate and exclusive
20 possession of said lands and premises from the date of **signing** this agreement, and said party of the Second Part is hereby given the right and authority to exclude all other person or persons therefrom, except said Arthur Gardner.” (State of Case, p. 33.)

Manifestly, it was the intention of the parties that the agreement of sale should take effect on the **date of signing**. If it was not effective until delivery, then it could not take effect according to its terms.
30

The agreement of sale is an executory contract, and it takes effect according to the intention of the parties. The fact that it operates as an equitable conveyance does not change its nature as an executory contract. There is a clear distinction between an executory contract and an instrument in the nature of a

conveyance, or a promissory note, or a bond. A conveyance requires delivery in order to render it effective as a conveyance, and a promissory note and a bond require delivery in order to make them effective as contracts. This distinction is well brought out by Vice-Chancellor Leaming in *County Engineering Co. v. West*, supra, on page 111 of the opinion.

Nor does the fifth section of the Statute of Frauds require that an agreement of this kind must be delivered in order to make it effective. 10

Charlton v. Columbia Real Estate Co., 67 N. J. Eq. 629, 634.

In the last-mentioned case this court declined to accept *Brown v. Brown*, 33 N. J. Eq. 650, as authority for the proposition that an undelivered executed instrument cannot be a sufficient memorandum to satisfy the Statute of Frauds. In *Brown v. Brown*, the bill was filed for a specific performance of a parol agreement to make an assignment in trust of the appellant's interest under a will. An assignment was executed but never delivered. As an assignment is a conveyance, it naturally would require delivery to make it effective. 20

The learned Vice-Chancellor says in his opinion:

"In ordinary negotiations of this kind the contract is prepared and executed simultaneously by all the parties, in which event each one receives his copy thereof and departs about his business. Under those circumstances, delivery is contemporaneous with the signing and the contract is complete. But in a case like the present one, where an understand-

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10 ing is arrived at and one of the parties is to prepare the formal evidence thereof at a distant place and transmit the same to the other for execution, it is only fair that the former should not be bound by the action of the latter until he is properly apprised thereof by delivery back to him of an executed copy. Otherwise he would be in ignorance as to his rights or obligations thereunder. He would not know that the other had completed the bargain and bound himself, or whether he had altered it. He would be left in darkness as to all the conditions he would have to meet at the time fixed for passing title. Every dictate of fairness would seem to require delivery of such a contract."

(State of Case, pp. 42, 43.)

20 But how could the appellee be in ignorance as to his rights or obligations under the agreement, or how could he be left in darkness as to the conditions he would have to meet at the time fixed for passing title, when his attorney had drawn the agreement, and had submitted it to him and he had signed and acknowledged it? If the appellants had altered the agreement in any material respect, the appellee would not have been bound thereby unless he subsequently assented thereto.

Burr v. Nevison, supra.

30 He was apprised of the execution of the agreement by the appellants by the fact that a copy thereof was given to him next day by George A. Pursel. (State of Case, p. 17.) There were no changes or alterations whatsoever made in the agreement after the appellee signed it. If no copy of the agreement

had been given to him, the appellee could easily have learned of the execution of the agreement of sale by inquiring.

Let us assume, for the sake of argument, that after the agreement of sale was executed by the appellee, the appellants, finding the terms satisfactory, had executed it on a secular day, and that there was no other question raised respecting the validity of the agreement of sale. Suppose that, under such circumstances, George A. Pursel neglected for a month to give the appellee his copy of the agreement of sale. Then, according to the reasoning of the learned Vice-Chancellor, the agreement could not become effective until a month after it was signed, although by its terms the appellee was to have immediate and exclusive possession of the premises from the date of signing. Let us go a step farther and suppose that George A. Pursel lost the appellee's copy of the agreement of sale, then, if we follow the same reasoning, we come to the anomalous situation that the agreement of sale, which by its terms was to become effective on the date of signing, **never** could take effect. If, therefore, the learned Vice-Chancellor's view that delivery was essential to the consummation of the agreement of sale, we are brought to the unavoidable conclusion that when the appellee's attorney sent both copies of the agreement to George A. Pursel, after they had been executed by the appellee, with instructions for the execution thereof by the appellants, the appellee made George A. Pursel his agent for the purpose of receiving delivery of the former's copy of the agreement, and the delivery thereof to George A. Pursel on Sunday, when both copies were executed by the appellants, was delivery to the appellee. Otherwise, the agreement could never take effect according to its terms.

The provision that the appellee should have the immediate and exclusive possession from the date of signing the agreement was a material portion of the agreement, and the agreement must therefore have become effective on the date of its signing, or else it could never take effect.

10 If the appellee had desired to have an agreement of sale that took effect upon delivery, he should have had his attorney so write it. Instead of that, he had it drawn in such manner that he was to obtain immediate and exclusive possession on the signing thereof, which was surely a very unusual privilege to be given to a vendee when he makes an initial payment of only one-tenth of the purchase price. When we bear in mind that the open season for trout began on April 15th following the date of the agreement of sale, which was April 3, 1925, it may throw some light upon the reason for the appellee's great haste
20 and eagerness.

(P. L. 1925, p. 15.)

The pertinent part of this statute reads as follows:

30 "29. It shall be unlawful to catch, kill, take or have in possession any trout or landlocked salmon, except only from the fifteenth day of April to the thirty-first day of July, both dates inclusive, in each year, under a penalty of twenty dollars for each fish so caught, killed, taken or had in possession;"

He certainly cannot now complain of the agreement being drawn in this manner, when it was prepared by his own attorney, and when he approved of its terms himself by signing and acknowledging it.

The case of **Gibbs & Sterrett Mfg. Co. v. Brucker**, 111 U. S. 597; 28 L. Ed. 534, which is cited in **Burr v. Nevison**, *supra*, is not parallel with the instant case. In **Gibbs & Sterrett Mfg. Co. v. Brucker**, the plaintiff was engaged in the manufacture of agricultural implements, and had made Hoag & Conklin its agents in Wisconsin for the purpose of making sales of its implements, through sub-agents. Hoag & Conklin had no authority to close any contract, but were required to forward to the plaintiff its printed form of contract, with the signature of the sub-agent and his sureties, who were required to sign a guaranty for the fulfillment of the contract on the part of the sub-agent. The contract was not to become binding until it had been **approved and signed** by the plaintiff. One Matteson, an employee and agent of Hoag & Conklin, obtained the signatures of three parties as sub-agents to the contract in question, and also the signatures of three parties, including the defendants, to the guaranty. This was done on Sunday by Brucker and Steffes, but the contract, with the guaranty annexed, was sent to plaintiff, who **approved and signed** it on a secular day. The United States Supreme Court held that, as the contract was **completed** on a secular day, the contract of guaranty was good, notwithstanding the fact that the defendant Brucker had signed the guaranty on Sunday.

The appellants contend that, in the instant case, no delivery was necessary and that the agreement of sale was completed and consummated on Sunday, April 5, 1925, when it was executed by the appellants and was therefore void **ab initio**, and was incapable of ratification.

3. The allegations of the answer show that the

appellants Alice P. Skinner, Catherine Schmidt, Elizabeth P. Armstrong and Vida E. Cook were all married women at the time they executed the agreement of sale, and that their acknowledgments thereto were taken on Sunday.

(State of Case, p. 12.)

10 These married women are four of the six tenants in common of the farm. A married woman cannot be compelled to specifically perform a contract unless the same was acknowledged by her and the acknowledgment thereof duly certified according to law.

Corby v. Drew, 55 N. J. Eq. 387.

Ten Eyck v. Saville, 64 N. J. Eq. 611.

Chassman v. Wiese, 90 N. J. Eq. 108.

Schwabinger v. Saxon, 92 N. J. Eq. 461.

Kotok v. Rossi, 94 N. J. Eq. 327.

20

As the acknowledgments of these four married women were taken on Sunday, they are void.

30 If the taking of the acknowledgments be considered a judicial act, as was held by Chancellor Runyon in *Homeopathic Mutual Life Ins. Co. vs. Marshall*, 32 N. J. Eq. 103, then they are void by virtue of the common law rule that a judicial act performed on Sunday is void, because Sunday is *dies non*. *Atlantic City. vs. Ferretti*, 70 N. J. L. 489. If, on the other hand, the taking of the acknowledgments be considered a ministerial act, as was intimated by Vice-Chancellor Stevens in *Morrow v. Cole*, 58 N. J. Eq. 203, then the acknowledgments are void by reason of the above-mentioned statute forbidding the transaction of private business on Sunday.

Consequently the agreement of sale cannot, for that reason also, be specifically enforced against these four appellants.

The answer, therefore, discloses these three good grounds of defense, and should not have been struck out.

II.

THE COUNTER-CLAIM DISCLOSES GOOD CAUSE OF ACTION AGAINST THE APPELLEE.

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1. The allegations of the counter-claim show that the agreement of sale was executed under a mutual mistake of law, that said mistake was caused by the representation of the appellee's attorney, and that the appellee is seeking to take advantage thereof.

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The counter-claim alleges substantially the same facts as are set forth in the answer, regarding the execution of the agreement of sale under a mutual mistake of law.

(State of Case, pp. 19-27.)

That the agreement of sale was executed under a mutual mistake of law, is good ground for a suit in equity to have the agreement declared null and void.

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Hummer v. Buerk, 90 N. J. Eq. 97.

In the latter case an agreement of sale of lands had been made, and two supplementary agreements were also executed between the parties, and the complainant.

prayed to have the two supplementary agreements declared null and void on the ground that they were executed under a mutual mistake of law, and also prayed for a specific performance of the original agreement of sale. Vice Chancellor Backes held that the supplementary agreements were executed under a mutual mistake of law, and were null and void, and directed specific performance of the original agreement.

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(2) The allegations of the counter-claims show that the agreement of sale was consummated on Sunday.

The allegations of the counter-claim, regarding the consummation of the agreement of sale on Sunday, are the same as those in the answer. (State of Case, p. 23.)

20

Burr v. Nevison, *supra*, was a suit brought for the cancellation of an agreement alleged to have been made on Sunday, and Vice-Chancellor Howell heard the testimony and decided the case. On the appeal of the case to this court, the opinion states that no view is expressed on the question whether the court will intervene at the instance of one of the contracting parties to cancel a contract made on Sunday.

30

This court, nevertheless, considered the whole case and decided that the contract was consummated on a secular day. In the instant case one of the prayers of the counter-claim is to have the agreement of sale declared null and void, since a contract consummated on Sunday is void *ab initio*.

Rule 29 of Chancery Act (1915) (P. L. 1915,

p. 191), contains the following provisions regarding a counter-claim:

“29. Counter-claim. Subject to the provisions of other rules herein contained, a defendant may counter-claim or set-off any cause of action against the complainant. He may, and when required by the Court, shall, issue subpoena against any third party necessary to be brought in; but, in the discretion of the court, separate hearings may be ordered; or if the counter-claim cannot be conveniently disposed of in the pending action, the court may strike it out.” 10

In the instant case the appellants pray in the counter-claim to have the agreement of sale declared null and void, both upon the ground that it was executed under a mutual mistake of law, and also upon the ground that it was consummated on Sunday. They are entitled to affirmative relief, since the dismissal of the appellee's bill would afford them merely negative relief. 20

The appellants also pray in their counter-claim for an accounting from the appellee for the rents, issues and profits of the farm from the time that he took possession thereof, which, as the counter-claim alleges, was shortly after the making of the agreement of sale.

(State of Case, p. 27.)

30

Therefore the counter-claim discloses good cause of action, and should not have been stricken out.

III.

SAID ANDREW J. GREEN IS A PROPER PARTY DEFENDANT IN THE SUIT UNDER THE COUNTER-CLAIM, AND HIS PRESENCE IN THE SUIT IS NECESSARY TO PROTECT THE APPELLANTS.

10 The appellee sets up, as one of the grounds of his motion to strike out, that Andrew J. Green is not a proper party defendant to this suit, and that the appellants cannot litigate in this suit the validity of the alleged fishing agreement.

(State of Case, pp. 39, 40.)

20 It has been held that in a common bill for the specific performance of a contract of sale, the parties to the contract or their privies are the only proper parties.

Bacot v. Wetmore, 17 N. J. Eq. 250.
Brisbane v. Sullivan, 93 N. J. Eq. 578.

30 In the instant case, however, the appellants are asking to have the agreement of sale declared null and void on the ground of mutual mistake of law, which involves an adjudication as to the validity of the fishing agreement, and to have Green added as a party defendant, not in the appellee's suit for specific performance, **but upon the cross action of the appellants under their counter-claim.** In this counter-claim Green is not only a proper party defendant, but his presence in the suit is necessary for the protection of the appellants.

Green is a proper party defendant because, as has already been shown, the effect of the learned Vice-Chancellor's decision that the fishing agreement was invalid, practically deprives him of his rights without giving him an opportunity to be heard. On the other hand, if Green be admitted as a party in this suit under the counter-claim and if he be allowed to plead, he would thus be given an opportunity to protect his interests.

Green is a necessary party in the suit under the counter-claim in order to protect the rights of the appellants. If he were made a party to the suit under the counter-claim and brought into court, the final decree would be binding upon him. This would both protect the appellants, and would also settle all the matters in controversy, and thus prevent a multiplicity of suits.

Then, too, with Green as a party to the suit, there could be a determination of the question regarding the construction of the fishing agreement, and a declaration of the rights of the persons interested, under section 7 of The Chancery Act (1915), (P. L. 1915, p. 185, sec. 7), which reads as follows:

"7. Decree to Declare Rights. Subject to rules, any person claiming a right cognizable in a court of equity, under a deed, will, or other written instrument, may apply for the determination of any question of construction thereof, in so far as the same affects such right, and for a declaration of the rights of the persons interested."

The objection in the notice of motion that the appellants cannot litigate in this suit the validity of the

fishing agreement, is entirely without merit. The Court of Chancery is continually called upon to pass upon the validity of alleged encumbrances and defects in title. The learned Vice-Chancellor did not hesitate in the instant case to decide upon the validity of the fishing agreement, even upon the motion to strike out. The case of **Mackey v. Cain**, 92 N. J. Eq. 631, did not in any way disturb the power of the Court of Chancery to decide such questions. In the

10 last-mentioned case a bill to quiet title was filed in the Court of Chancery, seeking to have a decree declaring certain tax sales under the Martin Act null and void. This court held that the Court of Chancery had no jurisdiction to pass upon such tax sales, because it had always been one of the exclusive prerogatives of the Supreme Court to consider and adjudicate upon alleged errors of municipal bodies committed in the exercise of legal or quasi-legal functions in matters which were of a purely legal nature.

20

And with Green as a party defendant in the suit, there could be no question that the Court of Chancery could adjudicate upon the validity of the fishing agreement, and make a decree that would be binding upon him, and thus protect the appellants.

IV.

30 THE COURT OF CHANCERY SHOULD HAVE DENIED APPELLEE'S MOTION, WITH COSTS, AND SHOULD NOT HAVE ALLOWED COSTS TO APPELLEE, BUT SHOULD HAVE PERMITTED THE CAUSE TO BE BROUGHT TO FULL HEARING.

For the reasons above given the Court of Chancery should have denied the appellee's motion to strike out the answer and counter-claim, and should not have allowed costs to him, including a counsel fee of \$250. This counsel fee is unreasonable and excessive, since there was no hearing in the case, and the only services that were performed on behalf of the appellee were the filing of the bill, the notice of the motion to strike out and the argument thereof.

10

The Court of Chancery should have allowed the cause to go on to hearing. Then the Court, after hearing the testimony of all the parties, could have made such a decree as would be in accordance with the evidence produced and the law applicable thereto and as would be binding upon all the parties interested. By reason of said Court's not following that course, the appellants were improperly and erroneously deprived of an opportunity to defend the suit, and also of an opportunity to obtain the remedies to which they were and are entitled by virtue of their said counter-claim.

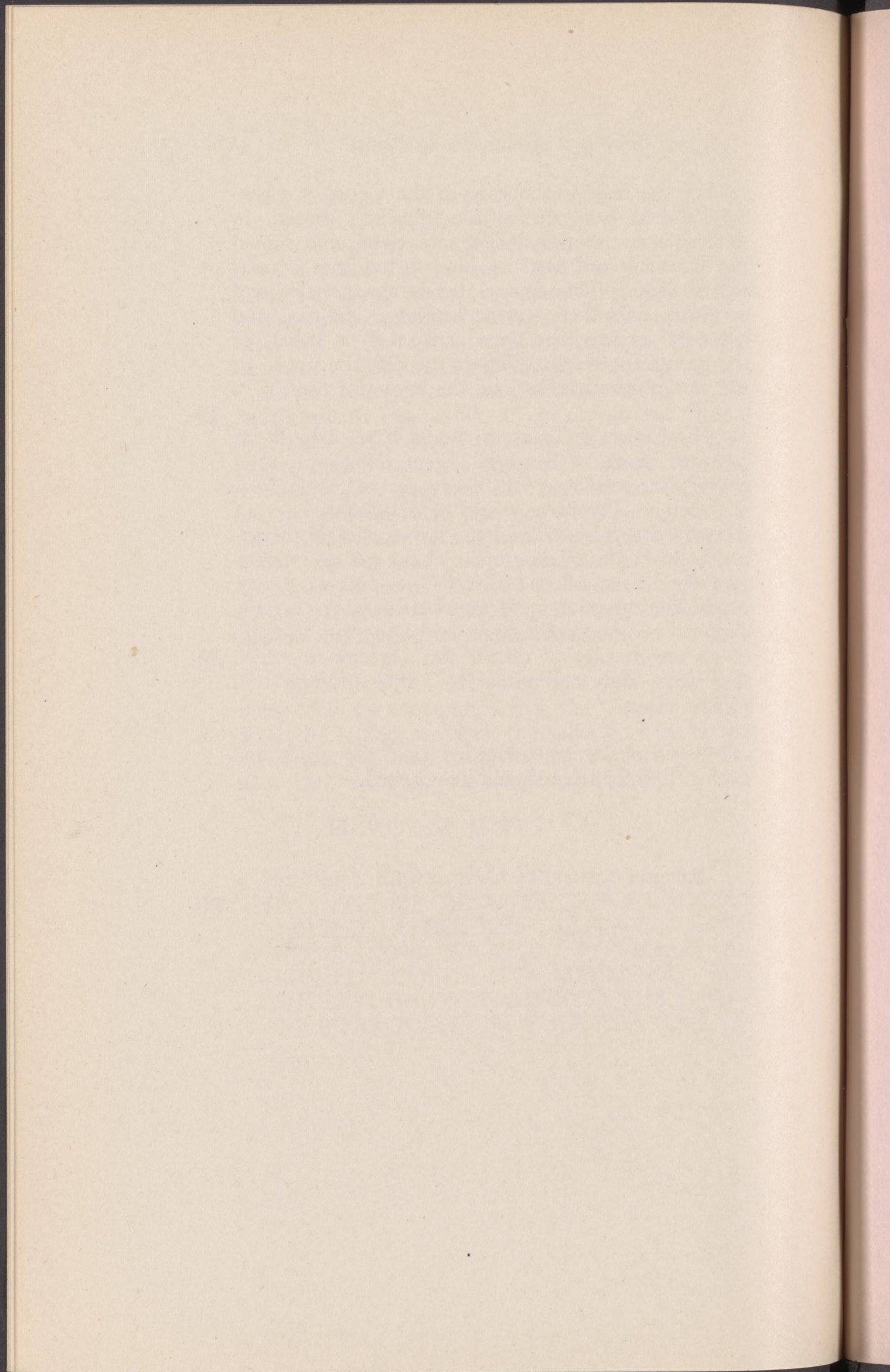
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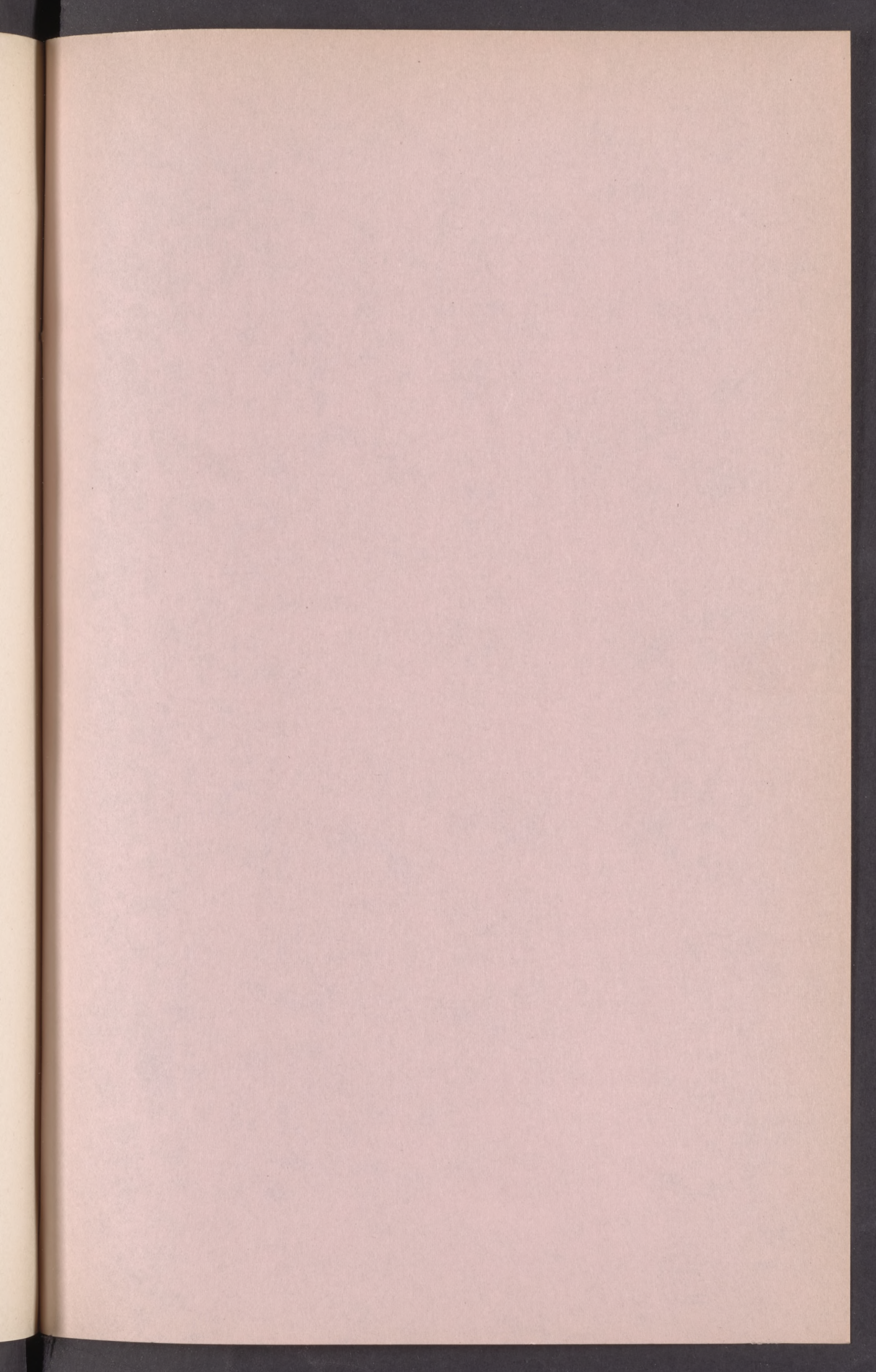
It is respectfully submitted that the order and decree appealed from should be reversed.

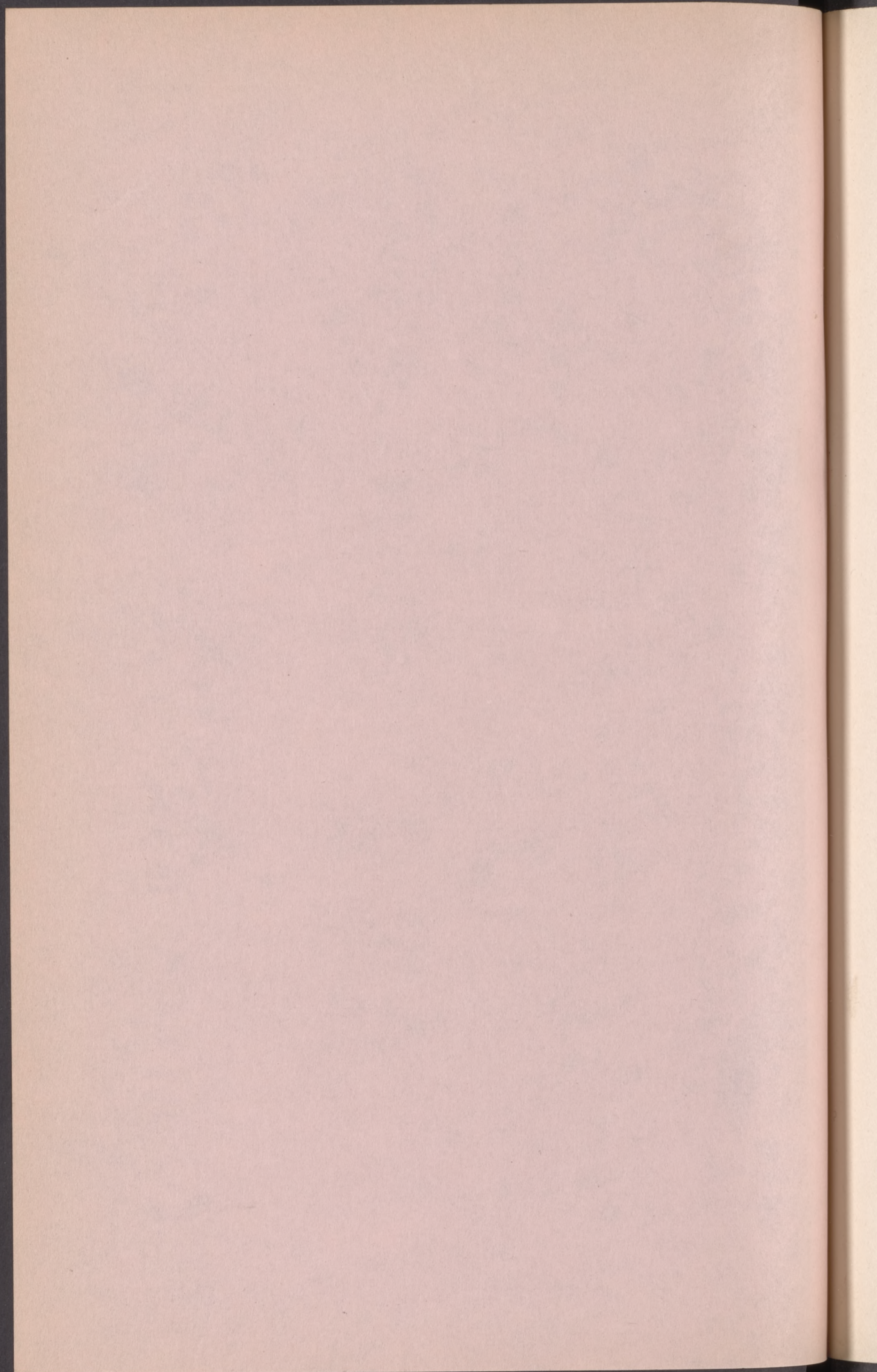
O. D. McCONNEL,

Solicitor for and of Counsel with Appellants.

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BILL.

(Filed July 1, 1925.)

IN CHANCERY OF NEW JERSEY

To the Honorable EDWIN ROBERT WALKER,
Chancellor of the State of New Jersey:

Complainant, JAMES BOWEN, of the City of
Jersey City, in the County of Hudson and State of
New Jersey, respectfully shows that:

10

1. George A. Pursel, single; Frank A. Pursel, single,
Alice P. Skinner and Arthur M. Skinner, her hus-
band, Catherine Schmidt and John Schmidt, her
husband, Elizabeth P. Armstrong and Martin V.
Armstrong, her husband, and Vida E. Cook and Carl
Cook, her husband, entered into a certain Agreement
in writing with Complainant, dated April 3rd 1925, a
true copy of which is hereto annexed and made a
part hereof, marked "Schedule A", wherein and
whereby they agreed to convey to Complainant for
the sum of \$6,000 by Deed of Warranty on or before
June 1st, 1925:

20

A L L those certain lots, tracts or parcels of land
and premises, situate, lying and being in the
Township of Oxford, in the County of Warren
and State of New Jersey, and more particularly
described as follows:

30

The first thereof begins in the middle of the Pe-
quest Creek in the old Axford line and running
thence south fifty chains to a white oak stump,

comes to John A. Axford, thence (2) north seventy degrees and a half, east twenty-nine chains and eighty-five links to a corner, being a corner to the County Poor House Farm, thence (3) running along the Poor House Farm north sixteen degrees and a half west fourteen chains and sixty links to a stake and stone corner, (4) north seventy-three degrees east fourteen chains and ninety-five links to a corner (5) north thirty-seven and a half degrees west four chains and seventy-five links to the corner of Vansyckle's land, thence (6) along Van Syckle's land south sixty-two and a half degrees west five chains and twenty-five links to a stake, (7) north thirty-four degrees and three quarters west fourteen chains and sixty-five links to a stake, thence (8) north five degrees west six chains and thirty-three links to a stake at the road (9) north sixty-two and a half degrees east sixty-five links to a stone corner on the side of the road, (10) north forty degrees, east two chains to a corner, thence (11) north seventy-two degrees, east six chains and sixty links to a corner, thence (12) north forty degrees, west two chains to a corner at the road, thence (13) running up the road north seventy-two degrees, east fifteen chains and thirty-five links to a corner in the road, being a corner to Vansyckle's land, thence (14) north twenty-nine degrees, west eighteen chains and fifteen links to the middle of the Pequest Creek, thence down the middle of the Pequest, the several courses thereof to the beginning, containing one hundred and fifty-five acres and forty-five hundredths of an acre of land, be the same more or less.

Lot No. 2

begins at a stake and stone corner, being a corner to the Poor House Farm, and running thence north seventy-five degrees, east ten chains and fifty links to another corner of the Poor House Farm, (2) south eighteen degrees, east nine chains and thirty-eight links to another corner, thence (3) south twenty-nine chains and fifty links to a corner, thence south about seventy-five degrees, west sixteen chains and sixty-five links to a stake, 10
thence (4) north five degrees, east supposed to be about forty chains more or less to the beginning, containing fifty-four acres and fifty hundredths of an acre of land, be the same more or less.

Lot No. 3

begins at a heap of stones by the road near a white oak, thence (1) south sixty degrees, west sixty-five links (2) south eight degrees, east six 20
chains and thirty-three links to a post, (3) south thirty-seven degrees, east fourteen chains and sixty-five links to a heap of stones, (4) north sixty degrees, east five chains, and eight links to line of lands belonging to the County of Warren, thence (5) along said line of the county of Warren, north thirty-five degrees west nineteen chains and ninety-two links to the place of beginning, containing eight acres and one hundredth of an acre of land, strict measure. 30

EXCEPTING THEREFROM about half an acre which has been conveyed for school purposes, where the school-house now stands.

in fee simple, free from all encumbrance, and free of

and from all right, title, interest or claim in law or in equity of any person or persons whatsoever, SUBJECT ONLY to the right or interest of Arthur Gardner, the farmer, tenant and occupant of said lands and premises, in and to the same, whose term as such began April 1st, 1925, and ends April 1st, 1926.

10 2. The said Agreement, duly executed and acknowledged by said vendors, was by them delivered to Complainant at Jersey City aforesaid on April 6th, 1925.

20 3. In and by said Agreement, Complainant agreed to pay to said vendors said purchase price of \$6,000 by the payment of \$600.00 on the signing of said Agreement and by the payment of \$5400.00, the remainder of said purchase price, upon delivery by said vendors to Complainant of said Deed; said Deed to be delivered at the office of Edward P. Stout, 15 Exchange Place, Jersey City, New Jersey, or such other place as should thereafter be agreed upon, on or before June 1st, 1925, at the hour of two o'clock in the afternoon of said day.

30 3. Complainant paid to said vendors said sum of \$600.00, the receipt whereof was acknowledged by said vendors in and by said Agreement, and Complainant was ready and willing to pay the remainder of said purchase price at the time and place aforesaid, but said vendors were not ready and willing to perform their part of said Agreement.

4. Said vendors have refused and still refuse to execute and deliver to Complainant, a Deed of conveyance for the premises in question in accordance with said Agreement, and although often requested

so to do, still so refuse.

5. Complainant tenders himself ready and willing to pay the remainder of said purchase price, upon delivery to him of a duly executed Deed of conveyance for the lands and premises hereinbefore described, in accordance with said Agreement.

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

10

(1) That George A. Pursel, single, Frank A. Pursel, single, Alice P. Skinner and Arthur M. Skinner, her husband, Catherine Schmidt and John Schmidt, her husband, Elizabeth P. Armstrong and Martin V. Armstrong, her husband, and Vida E. Cook and Carl Cook, her husband, who are the Defendants to this suit, may answer this Bill of Complaint and each statement therein made;

(2) That said Defendants may be decreed specifically to perform said Agreement hereinbefore set forth:

20

(3) That said Defendants may also be decreed to account for and pay to Complainant the rents, issues and profits of said lands and premises from June 1st, 1925:

(4) That a writ of subpoena may issue commanding said Defendants to answer this Bill of Complaint and to abide by such decree as this Court may make in the premises.

30

EDWARD P. STOUT,
Solicitor for and of Counsel with Complainant.

AGREEMENT OF SALE

"Schedule A"

ARTICLES OF AGREEMENT, made and entered into the Third day of April, in the year one thousand nine hundred and twenty-five, Between George A. Pursel, single, of Reading, Pennsylvania; Frank A. Pursel, single, Alice P. Skinner and Arthur M. Skinner, her husband, of Stewartsville, Franklin Township, Warren County, New Jersey; Catherine Schmidt and John Schmidt, her husband, of Ringwood Borough, Passaic County, New Jersey; Elizabeth P. Armstrong and Martin V. Armstrong, her husband, of Hackettstown, Warren County, New Jersey; and Vida E. Cook and Carl Cook, her husband, of Broadway, Franklin Township, Warren County, New Jersey, Parties of the First Part, and James Bowen, of Jersey City, Hudson County, New Jersey, Party of the

10
20

Second Part.

The Parties of the First Part, for and in consideration of the sum of Six Hundred Dollars (\$600.00) to them duly paid by the said Party of the Second Part, hereby agree to sell unto the said Party of the Second Part:

30

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

(Here follows the same description of the premises as appears in the Bill.)

For the sum of Six Thousand (6,000) Dollars, which the said Party of the Second Part hereby agrees to pay to the said Parties of the First Part, as follows: The sum of Six Hundred (600) Dollars on the signing of this Agreement, the receipt whereof is hereby acknowledged, and the sum of Fifty-Four Hundred (5400) Dollars, on or before the 1st day of June, Nineteen Hundred Twenty-Five.

AND THE SAID Parties of the First Part, on receiving such payment at the time and in the manner above mentioned, shall at their own proper cost and expense execute, acknowledge and deliver to the said Party of the Second Part, or to his heirs or assigns, a proper Deed for the conveying and assuring to him or them, the fee simple of the said premises, FREE FROM ALL ENCUMBRANCE, and free of and from all right, title, interest or claim in law or in equity of any person or persons whatsoever, SUBJECT ONLY to the right or interest of ARTHUR GARDNER, the farmer, tenant and occupant of said lands and premises, in and to the same, whose term as such began April 1st, 1925, and ends April 1st, 1926; Said Party of the Second Part, his heirs and assigns, to have the immediate and exclusive possession of said lands and premises from the date of signing this Agreement, and said Party of the Second Part is hereby given the right and authority to exclude all other person or persons therefrom, except said Arthur Gardner.

10

20

30

Taxes, Insurance, &c., to be apportioned as of the date of passing title.

The balance of said purchase price to be paid, and the Deed therefor to be given at the office of ED-

WARD P. STOUT, 15 Exchange Place, Jersey City, New Jersey (or such other place as shall hereafter be agreed upon) on or before the First day of June, Nineteen Hundred Twenty-Five, at the hour of Two O'clock in the Afternoon of said day, which Deed shall contain a general warranty and the usual full covenants.

- 10 AND IT IS UNDERSTOOD that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of their respective parties.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals the day and year first above written.

SEALED AND DELIV-
ERED IN THE PRES-
ENCE OF

- | | | | |
|----|--|---|------------------------------|
| 20 | <u>Paul S. Kinney</u> | <u>George A. Pursel</u> | L.S. |
| | <u>As to George A. Pursel,
Frank A. Pursel, Alice P.
Skinner and Arthur M.
Skinner</u> | <u>Frank A. Pursel</u>

<u>Alice P. Skinner</u>

<u>Arthur M. Skinner</u> | L.S.

L.S.

L.S. |
| | <u>Paul S. Kinney</u> | | |
| 30 | <u>As to Elizabeth P. Arm-
strong and Martin V.
Armstrong</u> | <u>Elizabeth P. Armstrong</u>

<u>Martin V. Armstrong</u> | L.S.

L.S. |
| | <u>Paul S. Kinney</u> | <u>Vida E. Cook</u> | L.S. |
| | <u>As to Vida E. Cook and</u> | <u>Carl Cook</u> | L.S. |

Carl Cook _____

Oliver H. Rvoine	Catherine Schmidt	L.S.
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As to Catherine Schmidt and John Schmidt	John Schmidt	L.S.
---	---------------------	-------------

Helen E. Rector	James Bowen	L.S.
------------------------	--------------------	-------------

As to James Bowen

(Duly Acknowledged by the Party of the Second Part, **10**
 April 3rd 1925, and
 by the Parties of the First Part,
 April 6th 1925.)

20

30

ANSWER AND COUNTER-CLAIM

(Filed August 1, 1925)

IN CHANCERY OF NEW JERSEY

	Between	}	On Bill, etc.
10	James Bowen, Complainant,		
	and	}	Answer and Counter-claim
	George A. Pursel, et al, Defendants.		

20 The answer of the defendants George A. Pursel, Frank A. Pursel, Alice P. Skinner and Arthur M. Skinner, her husband, Catherine Schmidt and John Schmidt, her husband, Elizabeth P. Armstrong and Martin V. Armstrong, her husband, and Vida E. Cook and Carl Cook, her husband.

These defendants, answering the bill of complaint, say that:

30 1. They admit that on April 5, 1925, they signed the agreement in writing of complainant, dated April 3, 1925, a copy of which, but without the certificates of the acknowledgments thereto attached, is annexed to the complainant's bill and marked "Schedule A", wherein and whereby they agreed to convey to complainant for the sum of Six Thousand Dollars by a proper deed containing a general warranty and the usual full covenants, on or before June 1, 1925, the land and premises described in the complainant's bill,

in fee simple, free from all encumbrances, and free of and from all right, title, interest or claim in law or in equity of any person or persons whatsoever, subject only to the right or interest of Arthur Gardner, the farmer, tenant and occupant of said land and premises, in and to the same, whose term as such began April 1st, 1925, and ends April 1st, 1926, but they deny all other allegations in said paragraph 1, including the allegation at the end of "Schedule A" that the same was duly acknowledged by the parties of the first part April 6, 1925, and they also deny the validity of said agreement. 10

2. Paragraph 2 is denied.

3. The two paragraphs of complainant's bill marked 3 are admitted.

4. Paragraph 4 is admitted.

5. These defendants have no knowledge or information sufficient to form a belief as to the statements in paragraph 5. 20

6. These defendants signed and acknowledged said alleged agreement, dated April 3, 1925, a copy of which, without the certificates of the acknowledgments, is attached to said bill and marked "Schedule A", and which agreement will be hereinafter referred to as the "agreement of sale," on the 5th day of April, 1925, which day was the Christian Sabbath, or the first day of the week, commonly called Sunday, but the certificates of the acknowledgments of these defendants were dated on the 6th day of April, 1925, by the officers taking the same, notwithstanding that these defendants did not acknowledge said agreement 30

of sale on the day last mentioned, of all of which the complainant had due notice on April 6, 1925.

7. The defendants Alice P. Skinner, Catherine Schmidt, Elizabeth P. Armstrong and Vida E. Cook were married women on said 5th day of April, 1925, when they signed and acknowledged said agreement of sale, and, by reason of the same having been acknowledged on the Christian Sabbath, the same was
10 not acknowledged by them according to law and is not binding upon them, of all of which the complainant had due notice on April 6, 1925.

8. The complainant signed and acknowledged said agreement of sale in duplicate on April 3, 1925, and, on April 4, 1925, paid said sum of \$600.00, which was to be paid on the signing of said agreement of sale, to the defendant George A. Pursel, who had said sum, on his own behalf and on behalf of the rest of
20 these defendants, when said agreement of sale was signed and acknowledged by the said defendants on said 5th day of April, 1925, being the Christian Sabbath, or the first day of the week, commonly called Sunday, as aforesaid, and said agreement of sale was executed in violation of law, and is therefore null and void.

9. The land and premises described in the agreement of sale and in complainant's bill, descended to the defendants George A. Pursel, Frank A. Pursel,
30 Alice P. Skinner, Catherine Schmidt, Elizabeth P. Armstrong and Vida E. Cook, the children and only heirs-at-law of Emma Pursel as tenants in common, upon the death of the latter, intestate, in January, 1905, subject to the estate by the courtesy therein of David F. Pursel, the husband of the said Emma Pursel,

and the father of the said defendants George A. Pursel, Frank A. Pursel, Alice P. Skinner, Catherine Schmidt, Elizabeth P. Armstrong and Vida E. Cook.

10. The said land and premises consist of a farm, which will be hereinafter referred to as the "Emma Pursel farm," one of the boundaries whereof is a stream known as the Pequest Creek, which borders on said farm for about a mile, and the center of said creek is the boundary of said farm on that side. 10

11. Said David F. Pursel died on or about June 8, 1914, and, from the time of his death, the defendant George A. Pursel, with the acquiescence of the defendants Frank A. Pursel, Alice P. Skinner, Catherine Schmidt, Elizabeth P. Armstrong and Vida E. Cook, the other tenants in common of said Emma Pursel farm, took the entire charge and management of said Emma Pursel farm, as well as two other farms which descended to said six defendants as tenants in common on the death of their said father, and made leases and agreements respecting the same. 20

12. After the death of the said David F. Pursel, the defendant George A. Pursel made agreements at divers times with one Andrew J. Green, of the Township of Hope, in the County of Warren and State of New Jersey, whereby he granted to said Andrew J. Green the right or privilege of fishing in that portion of the Pequest Creek which belongs to the Emma Pursel farm, and, the defendant George A. Pursel, individually and for the heirs-at-law of said Emma Pursel, whose full name was Emma J. Pursel, executed and acknowledged an agreement with said Andrew J. Green, bearing date June 12, 1922, wherein the exclusive fishing right or privilege of the stream known 30

as the Pequest Creek on said Emma Pursel farm was granted to said Andrew J. Green, his heirs, executors, administrators and assigns, for the term of ten years, commencing April 1, 1923, and ending April 1, 1933, at the rental of Two Hundred Dollars for said term, payable One Hundred Dollars on the execution and delivery of said agreement, and the remaining One Hundred Dollars to become due and payable April 1, 1928. Said agreement was duly recorded in the Warren County Clerk's office on July 3, 1922, in Book 226 of Deeds, pages 398, etc., which agreement is hereinafter referred to as the "fishing agreement". A true copy of said fishing agreement is hereto annexed and made a part hereof and marked "Schedule B".

13. Said Green duly paid said sum of One Hundred Dollars mentioned in said fishing agreement, to the defendant George A. Pursel, and the latter deposited said sum in a bank account standing in the names of said defendants George A. Pursel and Frank A. Pursel, as administrators of said David F. Pursel, deceased, and, in said bank account, have also been deposited the income from said three farms since the death of the said David F. Pursel, and out of the same have been paid the taxes and other expenses incident to the management of said farms, and, by agreement between said defendants George A. Pursel, Frank A. Pursel, Alice P. Skinner, Catherine Schmidt, Elizabeth P. Armstrong and Vida E. Cook, the net balance of money remaining in said bank account is to be divided among said last six defendants after all of said farms have been sold, and said six defendants have had the privilege of drawing upon said balance as they desired, and they have drawn upon the same from time to time.

14. In March, 1925, the complainant and his attorney, Edward P. Stout, who was at that time and still is an attorney and counselor at law of this State, and who is hereinafter referred to as "complainant's attorney", met the defendant George A. Pursel at the home of Enos B. Hoagland, in White Township, Warren County, in this State, and the complainant told said George A. Pursel that he desired to buy the Emma Pursel farm. Said George A. Pursel thereupon presented to complainant's attorney, in the presence of complainant, said fishing agreement and also the deed for said farm made by Aaron Keyser and others, executors of George Keyser, deceased, to Emma Pursel, bearing date January 3, 1898, and recorded in the Warren County Clerk's office in Book 162 of Deeds, pages 536, etc. Complainant's attorney examined said fishing agreement and deed, and said that he did not think that the fishing agreement was valid; that he would examine his law books; that, if he found that said fishing agreement was valid, the complainant would not want the farm, as he desired the fishing privilege in the Pequest Creek; that, if he, complainant's attorney, after such examination of his law books, found that said fishing agreement was invalid, he would send to said George A. Pursel an agreement for the sale of said farm, for the sum of \$6000.00, to the complainant, together with instructions regarding the execution thereof by these defendants, and would also send a check for the \$600.00 which was to be paid by the complainant on the signing of said agreement of sale. Complainant's attorney took away with him said fishing agreement and deed.

15. On or about April 4, 1925, said George A. Pursel received a letter from complainant's attorney, bearing date April 3, 1925, enclosing the agreement

of sale in duplicate, which had been signed and acknowledged by the complainant on April 3, 1925, and also complainant's check for \$600.00 for the deposit under the agreement of sale, and complainant's attorney, in the said letter, requested these defendants to execute the agreement of sale, and gave instructions for the signing and acknowledging thereof by these defendants, before a Notary Public or Commissioner of Deeds, to which letter, for greater
10 certainty, these defendants beg leave to refer.

16. These defendants signed and acknowledged said agreement of sale, in duplicate, on April 5, 1925.

17. The defendant George A. Pursel informed the rest of these defendants, before the agreement of sale was signed and acknowledged by them, that complainant's attorney had told him that he did not think that the fishing agreement was valid; that he, complainant's attorney, would examine his law books;
20 that, if he found that said fishing agreement was valid, the complainant would not want the farm, as complainant desired the fishing privilege in the Pequest Creek; that if complainant's attorney, after such examination, found that said fishing agreement was invalid, he would send the agreement of sale to said George A. Pursel, together with a check for the \$600.00 which the complainant was to pay down on the signing of the agreement, and instructions for the
30 execution of said agreement of sale.

18. In view of the said statements made by complainant's attorney to said George A. Pursel, and repeated by the latter to the rest of these defendants, respecting the validity of said fishing agreement, the sending by complainant's attorney to said George A.

Pursel of the said letter of April 3, 1925, together with complainant's said check for \$600.00 and the said agreement of sale in duplicate, with said request for the execution of the same by these defendants, and said instructions regarding the signing and acknowledging thereof by these defendants, were a representation by complainant's attorney to these defendants that he had, after examination of his law books, found the said fishing agreement was invalid as a matter of law, and these defendants did not seek any other legal advice, but relied upon said representation of complainant's attorney and believed that said fishing agreement was invalid, and therefore signed and acknowledged said agreement of sale. 10

19. The complainant, when he executed said agreement of sale, believed and relied upon said representation of complainant's attorney that said fishing agreement was invalid. 20

20. On April 6, 1925, the defendant George A. Pursel gave a duplicate copy of said agreement of sale to the complainant's attorney, in the presence of the complainant, and at the same time informed both of them that said agreement of sale had been signed and acknowledged by these defendants on the preceding day, notwithstanding that the certificates of the acknowledgments thereof had been dated on said 6th day of April, 1925. 30

21. At the time when the said defendant George A. Pursel gave the duplicate copy of said agreement of sale to complainant's attorney, in the presence of complainant as aforesaid, complainant's attorney again told the defendant George A. Pursel, in the presence of complainant, that said fishing agreement was invalid.

22. Shortly after April 6, 1925, complainant took possession of said Emma Pursel farm, and has had possession thereof ever since, which possession is and always has been unlawful.

23. In the first part of June, 1925, these defendants, for the first time, sought independent legal advice respecting the validity of said fishing agreement, and consulted their solicitor in this cause, an attorney and
10 counselor at law of this State, and were advised by him that said fishing agreement is not invalid.

24. Said agreement of sale was executed by the complainant and by these defendants under a mutual mistake of law, in that both the complainant and these defendants relied upon the representation of complainant's attorney that said fishing agreement was invalid as a matter of law, and whereas, the same is not invalid.

20

25. These defendants therefore refused to execute and deliver to the complainant a deed conveying said farm to the complainant free from all encumbrance, and free of and from all right, title, interest or claim in law or in equity, of any person or persons whatsoever, subject only to the aforesaid right or interest of Arthur Gardner, the farmer, tenant and occupant of said farm, in and to the same, whose term as such began April 1, 1925, and ends April 1, 1926,
30 as specified in said agreement of sale.

26. On June 27, 1925, before this action was commenced, at Jersey City, New Jersey, these defendants tendered to complainant said \$600.00, which he paid on the signing of said agreement of sale, but he refused to accept the same.

27. These defendants have ever since been, and still are, ready and willing to pay complainant said sum, but complainant has hitherto refused to accept the same.

28. These defendants now bring said sum into court here.

By way of counter-claim against the complainant, 10
James Bowen, and third party, Andrew J. Green,
these defendants say that:

COUNTER-CLAIM

1. In January, 1905, Emma Pursel, the mother of the defendants George A. Pursel, Frank A. Pursel, Alice P. Skinner, Catherine Schmidt, Elizabeth P. Armstrong and Vida E. Cook, died intestate, leaving her surviving her said six children and her husband, 20
David F. Pursel, who was the father of George A. Pursel, Frank A. Pursel, Alice P. Skinner, Catherine Schmidt, Elizabeth P. Armstrong and Vida E. Cook.

2. The said Emma Pursel, whose full name was Emma J. Pursel, died seized of three tracts of land situated in the Township of Oxford, in the County of Warren and State of New Jersey, which had been conveyed to her by Aaron Keyser and others, executors of George Keyser, deceased, by deed bearing date 30
January 3, 1898, and recorded in the Warren County Clerk's office in Book 162 of Deeds, pages 536, etc., and at her death the said three tracts of land descended to the said defendants George A. Pursel, Frank A. Pursel, Alice P. Skinner, Catherine Schmidt, Elizabeth P. Armstrong and Vida E. Cook, her chil-

dren and only heirs at law, as tenants in common, subject to the estate by the courtesy therein of her said husband, David F. Pursel. Said tracts of land are more particularly described in a certain alleged agreement, bearing date April 3, 1925, wherein James Bowen is the party of the first part, and these defendants are the party of the second part, which alleged agreement will be hereinafter referred to as the "agreement of sale," and a true copy thereof is
10 hereto annexed and made a part hereof and marked "Schedule C."

3. The said land and premises consist of a farm, which will be hereinafter referred to as the "Emma Pursel farm", one of the boundaries whereof is a stream known as the Pequest Creek, which borders on said farm for about a mile, and the center of said creek is the boundary of said farm on that side.

20 4. Said David F. Pursel died on or about June 8, 1914, and, from the time of his death, the defendant George A. Pursel, with the acquiescence of the defendants Frank A. Pursel, Alice P. Skinner, Catherine Schmidt, Elizabeth P. Armstrong and Vida E. Cook, the other tenants in common of said Emma Pursel farm, took the entire charge and management of said Emma Pursel farm, as well as two other farms which descended to said six defendants as tenants in common on the death of their said father, and made leases and
30 agreements respecting the same.

5. After the death of the said David F. Pursel, the defendant George A. Pursel made agreements at divers times with one Andrew J. Green, of the Township of Hope, in the County of Warren and State of New Jersey, whereby he granted to said

Andrew J. Green the right or privilege of fishing in that portion of the Pequest Creek which belongs to the Emma Pursel farm, and, the defendant George A. Pursel, individually and for the heirs-at-law of said Emma Pursel, whose full name was Emma J. Pursel executed and acknowledged an agreement with said Andrew J. Green, bearing date June 12, 1922, wherein the exclusive fishing right or privilege of the stream known as the Pequest Creek on said Emma Pursel farm was granted to said Andrew J. Green, his heirs, executors, administrators and assigns, for the term of ten years, commencing April 1, 1923, and ending April 1, 1933, at the rental of \$200.00 for said term, payable \$100.00 on the execution and delivery of said agreement, and the remaining \$100.00 to become due and payable April 1, 1928. Said agreement was duly recorded in the Warren County Clerk's office on July 3, 1922, in Book 226 of Deeds, pages 398, etc., which agreement is hereinafter referred to as the "fishing agreement". A true copy of said fishing agreement is hereto annexed and made a part hereof and marked "Schedule B."

6. Said Green duly paid said sum of \$100.00, mentioned in said fishing agreement, to the defendant George A. Pursel, and the latter deposited said sum in a bank account standing in the names of said defendants George A. Pursel and Frank A. Pursel, as administrators of said David F. Pursel, deceased, and, in said bank account have also been deposited the income from said three farms since the death of the said David F. Pursel, and out of the same have been paid the taxes and other expenses incident to the management of said farms, and, by agreement between said defendants George A. Pursel, Frank A. Pursel, Alice P. Skinner, Catherine Schmidt, Elizabeth P. Arm-

strong and Vida E. Cook, the net balance of money remaining in said bank account is to be divided among said last six defendants after all of said farms have been sold, and said six defendants have had the privilege of drawing upon said balance as they desired, and they have drawn upon the same from time to time.

7. In March, 1925, the complainant and his attorney, Edward P. Stout, who was at that time and still is an attorney and counselor at law of this State, and who is hereinafter referred to as "complainant's attorney", met the defendant George A. Pursel at the home of Enos B. Hoagland, in White Township, Warren County, in this State, and the complainant told said George A. Pursel that he desired to buy the Emma Pursel farm. Said George A. Pursel thereupon presented to complainant's attorney, in the presence of complainant, said fishing agreement and also the deed for said farm made by Aaron Keyser and others, executors of George Keyser, deceased, to Emma Pursel, bearing date January 3, 1898, and recorded in the Warren County Clerk's office in Book 162 of Deeds, pages 536, etc. Complainant's attorney examined said fishing agreement and deed, and said that he did not think that the fishing agreement was valid; that he would examine his law books; that, if he found that said fishing agreement was valid, the complainant would not want the farm, as he desired the fishing privilege in the Pequest Creek; that, if he, complainant's attorney, after such examination of his law books, found that said fishing agreement was invalid, he would send to said George A. Pursel an agreement, for the sale of said farm, for the sum of \$6000.00, to the complainant, together with instructions regarding the execution thereof by these defendants, and would

also send a check for the \$600.00 which was to be paid by the complainant on the signing of said agreement of sale. Complainant's attorney took away with him said fishing agreement and deed.

8. On or about April 4, 1925, said George A. Pursel received a letter from complainant's attorney, bearing date April 3, 1925, enclosing the agreement of sale in duplicate, which had been signed and acknowledged by the complainant on April 3, 1925, 10 and also complainant's check for \$600.00 for the deposit under the agreement of sale, and complainant's attorney, in the said letter, requested these defendants to execute the agreement of sale, and gave instructions for the signing and acknowledging thereof by these defendants before a Notary Public or Commissioner of Deeds, to which letter, for greater certainty, these defendants beg leave to refer.

9. These defendants signed and acknowledged said 20 agreement of sale, in duplicate, on April 5, 1925, being the Christian Sabbath, or the first day of the week, commonly called Sunday, but the certificates of the acknowledgments of these defendants were dated on the 6th of April, 1925, by the officers taking the same, notwithstanding that these defendants did not acknowledge said agreement of sale on the day last mentioned, and said agreement of sale was executed in violation of law.

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10. The defendants Alice P. Skinner, Catherine Schmidt, Elizabeth P. Armstrong and Vida E. Cook were married women on said 5th day of April, 1925, when they signed and acknowledged said agreement of sale, and their said acknowledgment is void, and the said agreement of sale was not acknowledged by

them according to law.

11. The defendant George A. Pursel informed the rest of these defendants, before the agreement of sale was signed and acknowledged by them, that complainant's attorney had told him that he did not think that the fishing agreement was valid; that he, complainant's attorney, would examine his law books; that, if he found that said fishing agreement was valid, the complainant would not want the farm, as complainant desired the fishing privilege in the Pequest Creek; that if complainant's attorney, after such examination, found that said fishing agreement was invalid, he would send the agreement of sale to said George A Pursel, together with a check for the \$600.00 which the complainant was to pay down on the signing of the agreement, and instructions for the execution of said agreement of sale.
- 10
12. In view of the said statements made by complainant's attorney to said George A. Pursel, and repeated by the latter to the rest of these defendants, respecting the validity of said fishing agreement, the sending by complainant's attorney to said George A. Pursel of the said letter of April 3, 1925, together with complainant's said check for \$600.00 and the said agreement of sale in duplicate, with said request for the execution of the same by these defendants, and said instructions regarding the signing and acknowledging thereof by these defendants, were a representation by complainant's attorney to these defendants that he had, after examination of his law books, found the said fishing agreement was invalid as a matter of law, and these defendants did not seek any other legal advice, but relied upon said representation of complainant's attorney and believed that said fishing
- 20
- 30

agreement was invalid, and therefore signed and acknowledged said agreement of sale.

13. The complainant, when he executed said agreement of sale, believed and relied upon said representation of complainant's attorney that said fishing agreement was invalid.

14. On April 6, 1925, the defendant George A. Pursel gave a duplicate copy of said agreement of sale to the complainant's attorney, in the presence of the complainant, and at the same time informed both of them that said agreement of sale had been signed and acknowledged by these defendants on April 5, 1925, which day was the Christian Sabbath, or the first day of the week, commonly called Sunday, notwithstanding that the certificates of the acknowledgments thereof had been dated, by the officers taking the same, on the 6th day of April, 1925.

15. At the time when the said defendant George A. Pursel gave the duplicate copy of said agreement of sale to complainant's attorney, in the presence of complainant as aforesaid, complainant's attorney again told the defendant George A. Pursel, in the presence of complainant, that said fishing agreement was invalid.

16. Shortly after April 6, 1925, complainant took possession of said Emma Pursel farm, and has had possession thereof ever since, and his said possession thereof is and always has been unlawful.

17. In the first part of June, 1925, these defendants, for the first time, sought independent legal advice respecting the validity of said fishing agreement, and consulted their solicitor in this cause, an attorney and

counselor at law of this State, and were advised by him that said fishing agreement is not invalid.

18. Said agreement of sale was executed by the complainant and by these defendants under a mutual mistake of law, in that both the complainant and these defendants relied upon the representation of complainant's attorney that said fishing agreement was invalid as a matter of law, and whereas, the same is not
10 invalid.

19. These defendants therefore refused to execute and deliver to the complainant a deed conveying said farm to the complainant free from all encumbrance, and free of and from all right, title, interest or claim in law or in equity, of any person or persons whatsoever, subject only to the aforesaid right or interest of Arthur Gardner, the farmer, tenant and occupant of said farm, in and to the same, whose term as such
20 began April 1, 1925, and ends April 1, 1926, as specified in said agreement of sale.

20. On June 27, 1925, before this action was commenced, at Jersey City, New Jersey, these defendants tendered to complainant said \$600.00, which he paid on the signing of said agreement of sale, but he refused to accept the same.

21. These defendants have ever since been, and
30 still are, ready and willing to pay complainant said sum, but complainant has hitherto refused to accept the same.

22. These defendants now bring said sum into court here.

23. Said Andrew J. Green claims that said fishing agreement is valid.

24. As an adjudication of the matters set up by these defendants in this cause may require the determination by this honorable court of the question of the validity of said fishing agreement, said Andrew J. Green is a proper and necessary party hereto.

These defendants, therefore pray:

10

1. That said complainant, James Bowen, and said third party, Andrew J. Green, may answer this counter-claim and each statement herein made.

2. That said agreement of sale may be decreed to be null and void.

3. That said complainant may be decreed to account for the rents, issues and profits of said Emma Pursel farm from the time that he took possession thereof, as aforesaid. 20

4. That complainant may be decreed to pay to these defendants the amount found due them on said accounting.

5. That a writ of subpoena may issue commanding said Andrew J. Green to answer this counter-claim and to abide by such decree as this court may make in the premises.

O. D. McCONNEL,

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Solicitor of defendants George A. Pursel,
Frank A. Pursel, Alice P. Skinner, Ar-
thur M. Skinner, Catherine Schmidt,
John Schmidt, Elizabeth P. Armstrong,
Martin V. Armstrong, Vida E. Cook
and Carl Cook.

FISHING AGREEMENT

SCHEDULE B.

LEASE

THIS INDENTURE OF LEASE, Made this 12th day of June, in the year Nineteen Hundred and
10 Twenty-two, BETWEEN GEORGE A. PURSELL, individually and for the heirs at law of Emma J. Pursell, late of Warren County, in the State of New Jersey, deceased, and ANDREW J. GREEN, of the township of Hope, in the County of Warren and State of New Jersey, WITNESSETH, that the said party of the first part has agreed to let, and hereby does demise and let, and the said party of the second part has agreed to take and hereby does take for himself, his heirs, administrators, executors and assigns,
20 the exclusive right or privilege Fishing right or privilege of the stream known as the Pequest Creek on the farm known as the Pursell Farm in the County of Warren, and State of New Jersey, for a term of ten years, commencing on the first day of April, nineteen hundred and twenty-three, and ending on the first day of April, nineteen hundred and thirty-three; that the rental for said Fishing right and privilege as hereinabove stated, for the said term is two hundred dollars; and is to become due and payable as follows: One
30 Hundred Dollars thereof shall become due and payable upon the execution and delivery of this lease, and the remaining one hundred dollars to become due and payable on the first day of April, nineteen hundred and twenty-eight.

IN WITNESS WHEREOF, the said parties have

hereto set their hands and seals the day and year first above written.

Signed, sealed and delivered George A. Pursell (Seal)
in the presence of Andrew J. Green (Seal)

As to George A. Pursell,
S. Florence Biehl
As to Andrew J. Green,
Geo. A. Angle.

10

State of Pennsylvania, }
 } ss.
County of Berks }

Be it remembered, that on this 28th day of June, nineteen hundred and nineteen hundred and twenty-two, before me a Notary Public in and for the County and State aforesaid, personally appeared George A. Pursell, who I am satisfied is the grantor in the above release named, and in having first made known to him the contents thereof, he did then acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed. 20

In Witness Whereof, I have hereto set my hand and affixed my Notarial Seal, the day and year last above written.

Lillie M. Fry (Notary Seal)
Notary Public.

My Commission expires Mar. 25, 1925.

30

State of Pennsylvania, }
 } ss.
County of Berks }

I, CHARLES R. LUDWIG, PROTHONOTARY

of the County of Berks, and Clerk of the Court of Common Pleas of said County, which as a Court of Record, having a seal, do hereby certify that Lillie M. Fry before whom the annexed was made, was at the time of so doing a Notary Public, in and for the County and State aforesaid, duly commissioned, sworn and qualified, and authorized to take acknowledgments of deeds or conveyances for lands, tenements and hereditaments in said State of Pennsylvania, and to administer oaths and affirmations. And further, that I am well acquainted with the handwriting of said Notary Public and verily believe that the signature thereto is genuine, and that said oath or affirmation purports to be taken in all respects as required by the laws of the State of Pennsylvania.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, at Reading, this 28 day of June A. D. 1922.

20

(S E A L)

Chas. R. Ludwig,
Prothonotary.

A. F. Schnable,
Deputy Prothonotary.

State of New Jersey, }
County of Warren. } ss.

30 Be it remembered, that on this 12th day of June, nineteen hundred and twenty-two, before me a Master in Chancery of New Jersey, personally appeared Andrew J. Green, who I am satisfied is the grantee in the foregoing Indenture of Lease named, and I having first made known to him the contents thereof he did then acknowledge that he signed, sealed and delivered

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

Geo. A. Angle,
Master in Chancery of N. J.

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AGREEMENT OF SALE

SCHEDULE C.

ARTICLES OF AGREEMENT, made and entered into the Third day of April in the year one thousand nine hundred and Twenty-five Between GEORGE A. PURSEL, single, of Reading, Pennsylvania; FRANK A. PURSEL, single, ALICE P. SKINNER and ARTHUR M. SKINNER, her husband, of Stewartsville, Franklin Township, Warren County, New Jersey; CATHERINE SCHMIDT and JOHN SCHMIDT, her husband, of Ringwood Borough, Passaic County, New Jersey; ELIZABETH P. ARMSTRONG and MARTIN V. ARMSTRONG, her husband, of Hackettstown, Warren Co., N. J., and VIDA E. COOK and CARL COOK, her husband, of Broadway, Franklin Township, Warren Co., New Jersey, Parties of the First Part, and JAMES BOWEN, of Jersey City, Hudson County, New Jersey, Party of the Second Part, The Parties of the First Part, for and in consideration of the sum of Six Hundred Dollars (\$600.00) to them duly paid by the said party of the second part, hereby agree to sell unto the said party of the second part. All those certain lots, tracts or parcels of land and premises, situate, lying and being in the Township of Oxford, in the County of Warren and State of New Jersey, and more particularly described as follows:

30 (Then follows the same description of the premises as appears in the Bill.)

For the sum of Six Thousand (6,000) dollars which the said party of the second part hereby agrees to pay to the said parties of the first part, as follows:

The sum of Six Hundred (600) Dollars, on the signing of this agreement, the receipt whereof is hereby acknowledged, and the sum of Fifty-Four Hundred (5400) Dollars on or before the 1st day of June, nineteen hundred and Twenty-five.

AND THE SAID parties of the first part, on receiving such payment at the time and in the manner above mentioned, shall at their own proper cost and expense execute, acknowledge and deliver to the said party of the second part, or to his heirs or assigns, a proper deed for the conveying and assuring to him or them, the fee simple of the said premises, free from all encumbrance and free of and from all right, title, interest or claim in law or in equity of any person or persons whatsoever, SUBJECT ONLY to the right or interest of ARTHUR GARDNER, the farmer, tenant and occupant of said lands and premises, in and to the same, whose term as such began April 1st 1925 and ends April 1st 1926; Said Party of the Second Part, his heirs and assigns, to have the immediate and exclusive possession of said lands and premises from the date of signing this Agreement, and said Party of the Second Part is hereby given the right and authority to exclude all other person or persons therefrom, except said Arthur Gardner.

Taxes, insurance, &c. to be apportioned as of the date of passing title.

The balance of said purchase price to be paid, and the deed therefore to be given at the office of EDWARD P. STOUT, 15 Exchange Place, Jersey City, New Jersey (or such other place as shall hereafter be agreed upon) on or before the First day of June, nineteen hundred and Twenty-five, at the hour of two

o'clock in the afternoon of said day, which deed shall contain a general warranty and the usual full covenants.

AND IT IS UNDERSTOOD that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators and assigns of the respective parties.

IN WITNESS WHEREOF, the parties to these presents have hereunto set their hands and seals the day and year first above written.

10 Sealed and delivered in the presence of

Paul S. Kinney

George A. Pursel (Seal)

As to George A. Pursel,
Frank A. Pursel, Alice P.
Skinner and Arthur M.
Skinner

Frank A. Pursel (Seal)

Alice P. Skinner (Seal)

Arthur M. Skinner (Seal)

20

Paul S. Kinney

Elizabeth P. Armstrong
(Seal)

As to Elizabeth P. Arm-
strong and Martin V.
Armstrong

Martin V. Armstrong (Seal)

Paul S. Kinney

Vida E. Cook (Seal)

As to Vida E. Cook and
Carl Cook

Carl Cook (Seal)

30

Oliver H. Roome

Catherine Schmidt (Seal)

As to Catherine Schmidt
and John Schmidt

John Schmidt (Seal)

Helen E. Rector

James Bowen (Seal)

As to James Bowen

AGREEMENT OF SALE

STATE OF NEW JERSEY }
 COUNTY OF HUDSON. } ss.

BE IT REMEMBERED, That on this 3rd day of April, in the year one thousand nine hundred and Twenty-five before me, the subscriber, A NOTARY PUBLIC OF NEW JERSEY personally appeared **10** JAMES BOWEN who, I am satisfied is the grantee in the within Indenture named, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed for the uses and purposes therein expressed:

HELEN E. RECTOR
 NOTARY PUBLIC OF NEW JERSEY.

STATE OF NEW JERSEY } **20**
 COUNTY OF WARREN } ss.

Be IT REMEMBERED, that on this 6th day of April, 1925, before me, the subscriber, a Notary Public of New Jersey, personally appeared GEORGE A. PURSEL, FRANK A. PURSEL, and ALICE P. SKINNER AND ARTHUR M. SKINNER, her husband, who, I am satisfied, are four of the Grantors in the within Indenture named, and I having first made known to them the contents thereof, they did each **30** acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

PAUL S. KINNEY
 NOTARY PUBLIC OF NEW JERSEY.
 (SEAL)

STATE OF NEW JERSEY }
 COUNTY OF WARREN } ss.

BE IT REMEMBERED, that on this 6th day of April, 1925, before me, the subscriber, a Notary Public of New Jersey, personally appeared
 10 ELIZABETH P. ARMSTRONG and MARTIN V. ARMSTRONG, her husband, who, I am satisfied, are two of the Grantors in the within Indenture named, and I having first made known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed.

20 PAUL S. KINNEY
 NOTARY PUBLIC OF NEW JERSEY.
 (SEAL)

STATE OF NEW JERSEY }
 COUNTY OF WARREN } ss.

BE IT REMEMBERED, that on this 6th day of April, 1925, before me, the subscriber, a Notary Public of New Jersey, personally appeared
 30 VIDA E. COOK and CARL COOK, her husband, who, I am satisfied, are two of the Grantors in the within Indenture named, and I having first made known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses

and purposes therein expressed.

PAUL S. KINNEY
NOTARY PUBLIC OF NEW JERSEY.
(SEAL)

STATE OF NEW JERSEY }
COUNTY OF PASSAIC } ss.

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BE IT REMEMBERED, that on this Sixth day of April, 1925, before me, the subscriber, a Commissioner of Deeds of New Jersey, personally appeared CATHERINE SCHMIDT and JOHN SCHMIDT, her husband, who, I am satisfied, are two of the Grantors in the within Indenture named, and I having first made known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed. 20

OLIVER H. ROOME

Commissioner of Deeds of New Jersey.
(SEAL)

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NOTICE OF MOTION

(Filed Aug. 26, 1925)

IN CHANCERY OF NEW JERSEY

10	JAMES BOWEN, Complainant,	}	On Bill, &c.,
vs.		}	
20	GEORGE A. PURSEL, et al, Defendants.	}	NOTICE OF MOTION TO STRIKE OUT AN- SWER & COUNTER- CLAIM

To the Defendants: GEORGE A. PURSEL, Single; FRANK A. PURSEL, Single; ALICE P. SKINNER and ARTHUR M. SKINNER, her husband; CATHERINE SCHMIDT and JOHN SCHMIDT, her husband; ELIZABETH P. ARMSTRONG and MARTIN V. ARMSTRONG, her husband; and VIDA E. COOK and CARL COOK, her husband:

TAKE NOTICE that on Monday, August 17th 1925, at the hour of ten o'clock in the forenoon (Daylight Saving Time), or as soon thereafter as counsel can be heard, at the Chancery Chambers, No. 1 Exchange Place, Jersey City, New Jersey, I shall apply to the Chancellor for an Order striking out the answer and counter-claim filed by you in the above-entitled suit, for the following reasons:

1. The allegations of the answer disclose that:

(a) The alleged "fishing agreement" referred to therein was not authorized in writing or

ratified by the heirs of Emma Pursel, and is therefore invalid;

- (b) The "agreement of sale" in suit was not executed by Complainant and Defendants under a mutual mistake of law;
- (c) The "agreement of sale" in suit was delivered by Defendants to Complainant on a secular day and, therefore, is not null and void because the Defendants signed and acknowledged it on Sunday; 10
- (d) The Defendants have no defense to the Complainant's bill of complaint

2. The allegations of the counter-claim disclose that:

- (a) The alleged "fishing agreement" referred to therein was not authorized in writing or ratified by the heirs of Emma Pursel, and is therefore invalid; 20
- (b) The "agreement of sale" in suit was not executed by Complainant and Defendants under a mutual mistake of law;
- (c) The "agreement of sale" in suit was delivered by Defendants to Complainant on a secular day and, therefore, is not null and void because the Defendants signed and acknowledged it on Sunday; 30
- (d) Andrew J. Green is not a proper party Defendant to this suit;

(e) The Defendants have no cause of action or counter-claim against the Complainant.

3. The Defendants cannot litigate in this suit, the validity of the alleged "fishing agreement".

4. The alleged "mistake of law" set forth in the answer and counter-claim is neither a defense to Complainant's bill of complaint nor a ground for re-
 10 scission of the "agreement of sale" in suit.

EDWARD P. STOUT,
 Solicitor for Complainant.

Dated: August 10th, 1925.

[Endorsed]

Service of the within notice is hereby acknowledged
 this 11th day of August, 1925.

20

O. D. McCONNEL,

Solicitor for defendants George A. Pursel, single; Frank A. Pursel, single; Alice P. Skinner and Arthur M. Skinner, her husband; Catherine Schmidt and John Schmidt, her husband; Elizabeth P. Armstrong and Martin V. Armstrong, her husband, and Vida E. Cook and Carl
 30 Cook, her husband.

O P I N I O N

(Filed Nov. 24, 1925)

IN CHANCERY OF NEW JERSEY.

Between

JAMES BOWEN,
Complainant,

and

GEORGE A. PURSELL,
et al.,
Defendants.

OPINION

10

ON BILL, &c.

Submitted October 6, 1925.

Decided October 16, 1925.

EDWARD P. STOUT, Esq.,
For the Complainant,

20

OSIRIS D. McCONNEL, Esq.,
For the Defendants.

O P I N I O N

BENTLEY, V.C.:

ON MOTION TO STRIKE OUT AN ANSWER
AND COUNTER-CLAIM.

30

On April 3d, 1925, the defendants were the owners, as tenants in common, of a farm threaded by a trout brook and entered into an agreement to convey

the same to the complainant for the sum of \$6,000. On that date the complainant executed and acknowledged a contract for that purpose and remitted the same to the defendants, with his check for the amount of deposit agreed upon. On April 5th, which was Sunday, the defendants executed and acknowledged the contract and on the following day delivered one of the duplicate copies to the complainant's attorney. The contract, by its terms, was in all respects
10 valid and enforceable except for the effect to be given to the execution of the same upon the Sabbath.

It is argued by the defendants' counsel that the contract stood complete immediately upon the defendants signing it and the acknowledgment by those of them who were married women. With this reasoning I am unable to agree. It would seem to me that until they had completed the transaction by delivering back to the complainant a properly-executed copy of the
20 agreement that they were in no sense bound. The defendants concede that, ordinarily, a contract required to be in writing is not complete until the writing is delivered, but they say that where there is a mutual intention to the contrary the contract is effected immediately upon execution by all the parties and rely upon *Fitzgerald v. Metropolitan Life Insurance Company* (Supreme Court of Vermont), 98 Atl. 498. The contract under consideration which, of
30 course, was required to be in writing, provided that the complainant should have possession upon the signing of the contract, and upon this slim foundation is built the argument that the parties intended the signing to complete the transaction. In ordinary negotiations of this kind the contract is prepared and executed simultaneously by all the parties, in which event each one receives his copy thereof and departs

about his business. Under those circumstances, delivery is contemporaneous with the signing and the contract is complete. But in a case like the present one, where an understanding is arrived at and one of the parties is to prepare the formal evidence thereof at a distant place and transmit the same to the other for execution, it is only fair that the former should not be bound by the action of the latter until he is properly apprised thereof by delivery back to him of an executed copy. Otherwise he would be in ignorance as to his rights or obligations thereunder. He would not know that the other had completed the bargain and bound himself, or whether he had altered it. He would be left in darkness as to all the conditions he would have to meet at the time fixed for passing title. Every dictate of fairness would seem to require delivery of such a contract. 10

The second point presented arises out of the following facts and circumstances: At the time the negotiations were had for the sale of the farm, one of the defendants informed the complainant that one, Green, had been granted a right by one of the tenants in common to fish the trout brook for a period of ten years from April 1st, 1923. Thereupon, complainant's counsel, in effect, advised the defendants that the agreement granting such fishing rights was invalid, and thereupon the defendants, relying upon the advice of complainant's counsel, consented to enter into the contract which is the basis of this suit. 20 30

I am unable to agree with counsel for complainant that a mutual mistake of law is not sufficient ground upon which to annul a contract. The subject is an intricate one and, for reasons which will become apparent, there is no reason to enter upon a discussion

- of the doctrine which is accurately set forth in Pomeroy's Equity Jurisprudence, sections 841 et seq. But the doctrine of mistake is not involved, for the reason that no mistake is made to appear. It is elementary that one tenant in common cannot bind the others by such an agreement as the one under consideration, either oral or written, except when he acts as the duly authorized agent of the others. (Boston Franklinite Co. v. Condit & Torrey, 19 N. J. Eq. 394). The
- 10 first section of the statute of frauds and perjuries (2 C. S., 2610) requires that "any uncertain interest of, in, to, or out of any messuages, lands, tenements, or hereditaments" shall be in writing "and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing". In Cobb v. Davenport (33 N. J. Law, 223) and Albright v. Cortright (64 N. J. Law 330) it has been
- 20 decided that the only mode of acquiring a right of taking a profit on another's soil is by grant or prescription, which, of course, implies a grant. Therefore the attempted fishing agreement of Green's falls by reason of the fact that no grant in writing, signed by the parties "or their agents thereunto lawfully authorized by writing" (2 C. S. 2610) is pleaded in the answer or counter-claim.

- To meet this situation, defendants' counsel then takes the position that if there was no authorization in accordance with the statute for the execution of
- 30 the fishing agreement with Green, there was a sufficient ratification by the other tenants in common to take the matter out of the statute. The difficulty with this was dealt with by the Court of Errors and Appeals in Clement v. Young-McShea Amusement Company (70 N. J. Eq. 677). The statute of frauds converts any interests in land, not put in writing and

signed by the parties or their agents authorized in writing, into leases or estates "at will only". Therefore, when the co-tenants accepted the benefits of the fishing agreement with Green they had a right to suppose that his interest did not exceed the quantity circumscribed by the statute and that he had what he now has, namely, a right, terminable at the will of the grantor or his successor. In *Clement v. Young-McShea* (supra) a lease was signed for a period of 10 years by an agent who was not authorized so to do in writing. The lessees filed a bill to enjoin the agent's principal from the proecution of an action of ejectment, and pleaded therein the aforementioned lease. Upon an application of the statute of frauds, the lessees contended that the principal was barred, in the eyes of this court, under the doctrine of notice. The Court of Errors and Appeals, at page 683, say:

The company must undoubtedly be charged with notice that the complainants were in possession of the premises occupied by them and were paying rent therefor to Young. But this was all consistent with the idea that they had become tenants under the authority actually vested in Young.

So in the case at bar, it must be assumed that the defendants knew that Green was exercising the right of *profit a prendre*. But this, in the language of Mr. Justice Dixon in the opinion just mentioned, was entirely consistent with the belief that the managing tenant had invested Green with no greater right than he was legally authorized to do.

For these reasons, it is inconceivable that the defendants could prevail if this matter should go to final

hearing and they were able to prove every allegation of the answer. The counter-claim being based upon a like set of facts, it is equally clear that, as counter-claimants, they could not obtain the relief sought under the completest proofs of the allegation of that instrument. Consequently, the provisions of section 4 of The Chancery Act (1915) P. L. 1915, p. 185, should be enforced. This, of course, disposes of the subsidiary argument as to the right of the defendants

10 to implead Green as a party. So far as Green's rights are concerned, this decision will not bind him.

I will advise an order striking out the answer and counter-claim.

20

30

ORDER AND DECREE

(Filed Nov. 24, 1925)

IN CHANCERY OF NEW JERSEY

JAMES BOWEN, Complainant,	}	ON BILL, &c. Order Striking Out Answer and Counter-Claim, and Decree for Specific Performance.	10
vs.			
GEORGE A. PURSEL, et al, Defendants.	}		

This matter coming on to be heard in the presence of EDWARD P. STOUT, solicitor for complainant James Bowen, and of OSIRIS D. McCONNEL, solicitor for defendants George A. Pursel, single, Frank A. Pursel, single, Alice P. Skinner and Arthur M. Skinner, her husband, Catherine Schmidt and John Schmidt, her husband, Elizabeth P. Armstrong and Martin V. Armstrong, her husband, and Vida E. Cook and Carl Cook, her husband; and it appearing that due notice has been given said defendants of said complainant's motion to strike out the answer and counter-claim of said defendants filed herein on the ground that said answer disclosed no defense to said complainant's bill of complaint and that said counter-claim disclosed no cause of action against said complaint; and the court having heard the arguments of said solicitors on said motion, and being of the opinion that the objections taken by said complainant to said answer and counter-claim are well founded, and that said answer and counter-claim should be stricken out; and it further appearing to the satisfaction of the court that by agreement in writing dated April 3rd, 1925, said defendants agreed to convey to said complainant, for

the sum of \$6,000.00, by deed of warranty on or before the 1st day of June, 1925,

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

- 10 (Here follows the same description of the premises as appears in the Bill.)

and that \$600.00 was duly paid by said complainant to said defendants on account of said sum, upon the execution and delivery of said agreement; and it further appearing that said defendants have refused and still refuse to deliver to said complainant a deed for said lands and premises in accordance with said agreement; and the court being of the opinion that said

20 complainant is entitled to the specific performance of said agreement as prayed for in his said bill of complaint;

It is, therefore, on this 24th day of November, 1925, ORDERED, ADJUDGED AND DECREED, that the motion aforesaid to strike out said answer and counter-claim be and the same is hereby granted, and said answer and counter-claim be and the same are hereby stricken out for the reason aforesaid; and

- 30 It is, FURTHER ORDERED, ADJUDGED AND DECREED that the agreement aforesaid be specifically performed by said defendants George A. Pursel, single, Frank A. Pursel, single, Alice P. Skinner and Arthur M. Skinner, her husband, Catherine Schmidt and John Schmidt, her husband, Elizabeth P. Armstrong and Martin V. Armstrong, her husband, and

Vida E. Cook and Carl Cook, her husband; and that said defendants make and acknowledge in due form of law, and deliver to said complainant, within 25 days after service upon said defendants or their solicitor, Osiris D. McConnel, of a true but uncertified copy of this decree, a good and sufficient warranty deed of conveyance, in accordance with said agreement, for

ALL those certain lots, tracts or parcels of land 10
and premises, situate, lying and being in the
Township of Oxford, in the County of Warren
and State of New Jersey, and more particularly
described as follows:

(Here follows the same description of the premises
as appears in the Bill.)

and that said defendants deliver at the same time to
said complainant, the possession of said lands and 20
premises, and that they also account for and pay to
said complainant the rents, issues and profits of said
lands and premises since the 1st day of June 1925, and
that the taxes levied against said lands and premises
for the year 1925 and the unearned premiums paid
for fire insurance, insuring the improvements on said
lands and premises, be apportioned as of June 1st
1925, between said complainant and said defendants,
as provided in said agreement; and

It is FURTHER ORDERED, ADJUDGED AND 30
DECREED, that said defendants pay to said com-
plainant the costs of this suit to be taxed, including a
counsel fee of Two Hundred Fifty Dollars (\$250.00)
which is hereby allowed to said complainant; and

It is FURTHER ORDERED, ADJUDGED AND

• DECREED, that said complainant, upon delivery of said deed to him as aforesaid, after deducting the amount due him as aforesaid, pay to said defendants or their solicitor, Osiris D. McConnel, the amount remaining of the sum of \$5400.00, being the amount specified to be paid by said complainant to said defendants on passing title to said lands and premises in accordance with the terms of said agreement.

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E. R. WALKER, C.

Respectfully advised:

JOHN BENTLEY, V. C.

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NOTICE OF APPEAL

(Filed Dec. 16, 1925)

IN CHANCERY OF NEW JERSEY

Between James Bowen, Complainant, and George A. Pursel, et al, Defendants.	}	On Bill, Etc. Notice of Appeal.	10
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The defendants, George A. Pursel, Frank A. Pursel, Alice P. Skinner and Arthur M. Skinner, her husband, Catherine Schmidt and John Schmidt, her husband, Elizabeth P. Armstrong and Martin V. Armstrong, her husband, and Vida E. Cook and Carl Cook, her husband, hereby appeal from the order striking out answer and counter-claim and decree for specific performance made in the above-entitled cause on November 24, 1925, and from the whole and every part thereof, to the Court of Errors and Appeals in the Last Resort in all Causes. 20

Dated December 10, 1925.

O. D. McConnel,
 Solicitor for and of counsel with defendants,
 George A. Pursel, Frank A. Pursel, Alice P. Skinner, and Arthur M. Skinner, her husband, Catherine Schmidt and John Schmidt, her husband, Elizabeth P. Armstrong and Martin V. Armstrong, her husband, and Vida E. Cook and Carl Cook, her husband. 30

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

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O. D. McConnel,
Of counsel with defendants,
George A. Pursel, Frank A. Pursel, Alice
P. Skinner, and Arthur M. Skinner, her
husband, Catherine Schmidt and John
Schmidt, her husband, Elizabeth P. Arm-
strong and Martin V. Armstrong, her
husband, and Vida E. Cook and Carl
Cook, her husband.

[ENDORSED]

Service of the within notice of appeal is hereby ac-
knowledged this 12th day of December, 1925.

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EDWARD P. STOUT,
Solicitor and Counsel for Complainant.

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PETITION OF APPEAL

(Filed Dec. 29, 1925)

NEW JERSEY COURT OF ERRORS AND
APPEALS

Between James Bowen, Complainant-Appellee, and George A. Pursel, et al, Defendants-Appellants.	}	On Appeal from the Court of Chancery. Petition of Appeal.	10
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To the Honorable the Court of Errors and Appeals
in the last Resort in all Causes:

The petition of George A. Pursel, Frank A. Pursel, Alice P. Skinner and Arthur M. Skinner, her husband, Catherine Schmidt and John Schmidt, her husband, Elizabeth P. Armstrong and Martin V. Armstrong, her husband, and Vida E. Cook and Carl Cook, her husband, the appellants in the above-stated cause, respectfully shows: 20

That your petitioners find themselves aggrieved by an order and decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the twenty-fourth day of November, nineteen hundred and twenty-five, in a certain cause in said Court of Chancery wherein the said James Bowen was complainant and the said George A. Pursel, Frank A. Pursel, Alice P. Skinner and Arthur M. Skinner, her husband, Catherine Schmidt and John Schmidt, her husband, Elizabeth P. Armstrong and Martin V. Armstrong, her 30

husband, and Vida E. Cook and Carl Cook, her husband, were defendants, in this respect, to wit: That the said order and decree adjudges that the objections taken by said complainant, James Bowen, by motion to strike out the answer and counter-claim filed by your petitioners, as such defendants, in said cause, on the ground that said answer disclosed no defense to said complainant's bill of complaint, and that said counter-claim disclosed no cause of action against

10 said complainant, were well founded, and that said answer and counter-claim should be stricken out, and that said complainant was entitled to the specific performance of the agreement prayed for in said bill of complaint, being an agreement for the sale of certain lands and premises described in said bill of complaint and in said order and decree, situated in the Township of Oxford, in the County of Warren and State of New Jersey, and containing 217.46 acres, more or less, of land, which agreement of sale is alleged to be dated April 3,

20 1925, and to have been executed between your petitioners, as the party of the first part, and said complainant, as the party of the second part, and said order and decree adjudges and decrees that the said motion of the complainant to strike out said answer and counter-claim be granted and that said answer and counter-claim be stricken out for the reason aforesaid, and that said agreement of sale be specifically performed by your petitioners, and that your petitioners make and acknowledge in due form of law, and deliver to

30 said complainant, within twenty-five days after service of a true but uncertified copy of said decree, a good and sufficient warranty deed of conveyance, in accordance with said agreement, for said lands and premises, and that your petitioners deliver at the same time to said complainant the possession of said lands and premises and that they account for and pay to

said complainant the rents, issues and profits of said lands and premises since June 1, 1925, and that the taxes levied against said lands and premises for the year 1925, and the unearned premiums paid for fire insurance, insuring the improvements on said lands and premises, be apportioned as of June 1, 1925, between the said complainant and your petitioners, and that your petitioners pay to said complainant the costs of said suit to be taxed, including a counsel fee of \$250.00, which was thereby allowed to said complainant, and that said complainant, upon delivery of said deed to him as aforesaid, after deducting the amount due him as aforesaid, pay to your petitioners, or their solicitor, the amount remaining of the sum of \$5400.00, being the amount specified to be paid by said complainant on passing title to said lands and premises in accordance with the terms of said agreement of sale. 10

And your petitioners appeal from the order and decree of the Chancellor, which adjudges and decrees as aforesaid, upon the ground that the same is erroneous, in that the said order and decree adjudges that the said objections taken by said complainant to said answer and counter-claim, upon the ground that said answer disclosed no defense to said complainant's bill of complaint, and that said counter-claim disclosed no cause of action against said complainant, were well founded, and that said answer and counter-claim should be stricken out, and adjudges and decrees that said motion be granted and that said answer and counter-claim be stricken out for the reason aforesaid, with the costs as aforesaid, whereas, the Chancellor should have adjudged that said answer discloses good grounds of defense to said complainant's bill of complaint and that said counter-claim dis- 20 30

closes good cause of action against said complainant, and should have adjudged and decreed that the said motion of the complainant to strike out said answer and counter-claim should be denied, with costs to your petitioners, and the Chancellor should have adjudged that said Andrew J. Green, who was made by your petitioners a third party defendant in said counter-claim, is a proper party to the action set up by virtue of said counter-claim, and the Chancellor should

10 have permitted said Andrew J. Green to plead in the action under said counter-claim, and the Chancellor should have allowed said cause to be brought on for a hearing according to the usual practice of said Court of Chancery, and should have made an order or decree in accordance with the evidence adduced at said hearing and the law applicable thereto; and also in that said order and decree adjudges and decrees that your petitioners specifically perform said agreement of sale, and deliver to said complainant a deed for said lands

20 and premises, and deliver possession of said lands and premises to said complainant, and account for and pay to said complainant the rents, issues and profits of said lands and premises, since June 1, 1925, and that the taxes and unearned insurance premiums be apportioned as of June 1, 1925, and that your petitioners pay to said complainant the costs of said suit, including an excessive and unreasonable counsel fee of \$250.00, as aforesaid, whereas said order and decree was made without a decree being previously made directing that

30 the complainant's bill be taken as confessed against your petitioners, and without any proofs or evidence being presented or taken in said cause; and also in that said order and decree adjudges and decrees a specific performance of said agreement of sale, and the delivery to said complainant of a deed for and the possession of said lands and premises, and the ac-

counting to said complainant for the rents, issues and profits of said lands and premises since June 1, 1925, and the apportionment of the said taxes and unearned insurance premiums and the payment by your petitioners to said complainant of costs, including said excessive and unreasonable counsel fee, as aforesaid, whereas, the Chancellor should not have adjudged and decreed as aforesaid, but should have, before making a decree in said cause, heard the proofs and evidence of your petitioners in support of their said answer and counter-claim, and should have, after a full hearing as aforesaid, made such decree as the facts and the law in the case warranted; and also in that the Chancellor, by making said order and decree in the form and manner aforesaid, improperly and erroneously deprived your petitioners of an opportunity to defend said complainant's suit and also of an opportunity to obtain the remedies to which they were and are entitled by virtue of their said counter-claim.

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Your petitioners therefore pray that the said order and decree of the said Chancellor may be wholly reversed, set aside and for nothing holden, and that your petitioners may have such relief in the premises as to this honorable court shall seem meet.

O. D. McCONNEL,

Solicitor for and of Counsel with Appellants.

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ACKNOWLEDGMENT OF SERVICE.

(Filed Jan. 7, 1926)

 NEW JERSEY COURT OF ERRORS AND
 APPEALS.

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Between James Bowen, Complainant-Appellee, and George A. Pursel, et al, Defendants-Appellants.	}	On Appeal from Court of Chancery. Acknowledgment of Service.
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20 Due and legal service is hereby acknowledged this 30th day of December, 1925, of a copy of the petition of appeal filed in the above-stated cause.

EDWARD P. STOUT,

Solicitor of James Bowen, Complainant-Appellee.

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ANSWER TO PETITION OF APPEAL.

(Filed Jan. 11, 1926)

NEW JERSEY COURT OF ERRORS AND
APPEALS.

JAMES BOWEN,
Complainant-Respondent,

vs.

GEORGE A. PURSEL, single,
FRANK A. PURSEL, single,
ALICE P. SKINNER and AR-
THUR M. SKINNER, her hus-
band, CATHERINE SCHMIDT
and JOHN SCHMIDT, her hus-
band, ELIZABETH P. ARM-
STRONG and MARTIN V.
ARMSTRONG, her husband,
and VIDA E. COOK and CARL
COOK, her husband,
Defendants-Appellants.

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On Appeal from
the Court of
Chancery.

ANSWER TO
PETITION OF
APPEAL

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The answer of James Bowen, the above-named
respondent. to the petition of appeal of George A. Pur-
sel, single, Frank A. Pursel, single, Alice P. Skinner
and Arthur M. Skinner, her husband, Catherine
Schmidt and John Schmidt, her husband, Elizabeth P.
Armstrong and Martin V. Armstrong, her husband,

30

and Vida E. Cook and Carl Cook, her husband, the above-named appellants.

The respondent, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that an order and decree were, on November 24th 1925, 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 the substance and form of said order and decree, this respondent begs leave to refer thereto when the same shall be produced.

This respondent is advised and believes that the said order and decree are agreeable to equity; and he prays that same may be affirmed with costs to be taxed in favor of this respondent.

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EDWARD P. STOUT,
Solicitor for and of Counsel with Respondent.

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New Jersey Court of Errors and Appeals

JAMES BOWEN,
Complainant-Respondent,

vs.

GEORGE A. PURSEL, et al,
Defendants-Appellants.

On Appeal
from the
Court of
Chancery.

BRIEF FOR RESPONDENT

This is an appeal from an order and decree of the Court of Chancery, striking out, on complainant's motion, defendants' answer and counterclaim to complainant's bill, and directing defendants, as vendors, to specifically perform in accordance with the prayer of the bill, an agreement for the sale of certain lands.

Statement of the Case

The essential allegations of the bill of complaint are, that defendants by an agreement in writing dated April 3rd, 1925, agreed to sell to complainant a certain farm located in Warren County in this State, known as the "Emma Pursel Farm," a copy of which agreement is annexed to the bill (Case, pp. 1-9); that by the agreement defendants were to convey this farm

" in fee simple, free from all encumbrances and free of and from all right, title or interest in law or in equity of any person or persons whatsoever, subject only to

the right or interest of Arthur Gardner, the farmer, tenant and occupant of said lands and premises in and to the same, whose term as such began April 1st, 1925, and ends April 1st, 1926;”

that complainant was to have the immediate and exclusive possession of these lands and premises from the date of signing the agreement; that the agreement, duly executed and acknowledged by defendants, was by them delivered to complainant at Jersey City on April 6th, 1925 (Case, pp. 8-11); that complainant agreed to pay defendants \$6,000 as the purchase price for this farm, \$600 of which was paid at the time of the signing of the agreement and the remainder was to be paid upon delivery of a Deed on or before June 1st, 1925, at the office of complainant's attorney, Jersey City; that complainant was ready and willing to pay the remainder of the purchase price at the time and place aforesaid, but the defendants were not ready and willing to perform the agreement on their part, but refused and still refuse to execute and deliver to complainant a deed in accordance with the agreement.

The bill prays for specific performance of the agreement, and that defendants account for and pay to complainant the rents, issues and profits of the farm from June 1st, 1925.

The pertinent allegations of the answer and counterclaim are (Case, pp. 10-37): that complainant signed and acknowledged the agreement in duplicate on April 3rd, 1925, and that his attorney sent same by mail to defendant, George A. Pursel, enclosing complainant's check for \$600 as a deposit under the agreement, together with

a letter of instructions as to the manner in which the defendants should sign and acknowledge the agreement; that defendant, George A. Pursel, received the agreement in duplicate, the check and the letter, on April 4th, 1925; that defendants, as tenants in common of the "Emma Pursel Farm," signed and acknowledged the agreement in duplicate on Sunday, April 5th, 1925; that four of the vendors were married women at the time they signed and acknowledged the agreement; that defendant, George A. Pursel, delivered a copy of the agreement to complainant's attorney in the presence of complainant on Monday, April 6th, 1925; that the agreement when so delivered bore certificates of acknowledgment that the defendants had each signed, sealed and delivered the agreement on April 6th, 1925, but that the defendant, George A. Pursel, informed complainant and his attorney that notwithstanding the date of the certificates of acknowledgments that the defendants had signed and acknowledged the agreement on Sunday. Defendants further allege that prior to defendants signing and acknowledging the agreement, complainant's attorney had stated to defendant, George A. Pursel, that an alleged lease made by George A. Pursel individually and for the heirs at law of Emma J. Pursel to Andrew J. Green, dated June 12th, 1922, whereby Green, his heirs, administrators, executors and assigns were granted the exclusive right and fishing privilege of the stream known as the Pequest Creek on the farm in question for a term of ten years, was invalid; that defendant, George A. Pursel, had informed the other defendants of this statement prior to their signing and acknowledging the agreement of sale, and that complainant's

attorney again stated to defendant, George A. Pursel, on April 6th, 1925, when he delivered a copy of the agreement of sale to complainant, that the lease to Green was invalid; that the defendants are now advised by their attorney that this lease is valid and, therefore, the defendants and complainant executed the agreement in suit under a mutual mistake of law.

Complainant moved to strike out the answer and counter-claim on the grounds that the allegations thereof disclosed (Case, pp. 38-40): (1) that the alleged lease was invalid and, therefore, the agreement in suit was not executed under a mutual mistake of law; (2) that the agreement in suit was delivered by defendants to complainant on a secular day and, therefore, not null and void if signed and acknowledged by them on a Sunday; and (3) that Green was not a proper party defendant to the suit.

On this motion, the court below held that the agreement of sale was not fully executed by defendants until they had delivered a copy thereof to complainant, and that no mistake was made to appear in the execution of same; and ordered that the answer and counter-claim be stricken out because the answer disclosed no defense to the bill, and the counter-claim no cause of action against complainant, and decreed specific performance of the agreement.

Questions Involved

1. Whether the alleged lease of Pursel to Green is valid;
2. Whether the agreement of sale was consummated by the Pursels on Sunday.

BRIEF OF THE ARGUMENT

Point I

The answer discloses no defense to the bill.

The answer sets up as defenses for non-performance of the agreement of sale in suit: (1) that the agreement was executed under a mutual mistake of law, in that complainant's attorney said to complainant and defendant, George A. Pursel, prior to the execution thereof, that he thought that an alleged lease made by George A. Pursel to Andrew J. Green, for a term of ten years, of the exclusive fishing rights in the Pequest Creek of the farm in question, was invalid, whereas same is valid; and (2) that the agreement was signed and acknowledged by defendants on a Sunday and, therefore, is unenforceable against them.

As to the first defense, complainant contends that:

(1) *The alleged lease is invalid and, therefore, the agreement of sale was not executed under a mutual mistake of law.*

The alleged lease was attempted to be made by George A. Pursel, on behalf of himself and the heirs at law of Emma J. Pursel, to Andrew J. Green, and is signed by George A. Pursel and Andrew J. Green. It is dated June 12th, 1922, and is to run for a period of ten years. It is designated an "Indenture of Lease" (Case, p. 28), and the granting clause is in the following language:

“ that the said party of the first part has agreed to let, and hereby does demise and let, and the said party of the second part has agreed to take and does hereby take, for himself, his heirs, administrators, executors and assigns, the exclusive right or privilege, fishing right or privilege, of the stream known as the Pequest Creek on the farm known as the Pursel Farm, in the County of Warren and State of New Jersey, for a term of ten years * * * .”
(Case, p. 28).

Appellants, in their Brief raise the question as to whether this indenture is a lease, and say “that the word ‘lease’ which appears at the beginning of the fishing agreement was erroneously copied from the record in the Warren County Clerk’s Office.” (Brief, p. 13).

There is no allegation in the Answer to that effect, and therefore appellants are now attempting to read into the record something that does not appear in the case.

The court below did not characterize this indenture as a lease, but said that “the attempted fishing agreement of Green’s fails by reason of the fact that no grant in writing, signed by the parties ‘or their agents thereunto lawfully authorized by writing’ (2 C. S., p. 2610) is pleaded in the answer or counter-claim.” (Case, p. 44).

It is submitted that this indenture is a lease; that it was so designated by the parties thereto as a lease; and that the granting clause indicates that it is a lease. It being a lease, its validity must be determined by the first section of the statute of frauds, supra, which provides:

“1. That all leases, estates, interests of freehold or term of years, or any uncertain interests of, in, to, or out of any messuages, lands, tenements, or hereditaments, made or created, or hereafter to be made or created, by livery or seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or in equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates notwithstanding; except nevertheless all leases not exceeding the term of three years from the making thereof.”

As to the validity of the lease it is necessary to consider the allegations of the answer to determine whether defendant, George A. Pursel, was authorized in writing by the other defendants to make such a lease or whether they had knowledge of the making thereof and ratified same.

The gist of the allegations of the answer as to the authority of George A. Pursel to make this lease is, that for about eight years prior to the making thereof he, with the acquiescence of his co-tenants the other defendants, had entire charge and management of the Pursel Farm, and that he had made other leases and agreements respecting same, and that prior to the making of the instant lease he had made agreements at divers times with Green whereby he granted to him the right or privilege of fishing in the Pequest Creek, and

that the rent from the Pursel Farm and other farms of defendants had been deposited by him in a bank account standing in his name and his co-tenant Frank A. Pursel, and that out of the income from these farms he had paid the taxes and other expenses and, by agreement between the defendants, they had the right to and did draw upon the moneys remaining in the bank account, and after all the farms were sold they were to divide up the fund among themselves. (Case, pp. 13, 14).

There is no allegation, however, that the co-tenants of George A. Pursel had authorized him in writing to make a lease to Green of the exclusive fishing rights in the Pequest Creek for a period of ten years, nor is there any allegation that the co-tenants of George A. Pursel knew that he had made such an agreement or that they had ratified same.

Obviously, under the first section of the statute of frauds, *Supra*, these allegations are not sufficient to spell out an authorization in writing to defendant, George A. Pursel, to make such a lease or that they amount to a ratification thereof, by the other defendants.

In *Clement vs. Young-McShea Amusement Company*, 70 N. J. Eq., 677, it was held that a lease for more than three years made by an agent was invalid, because his authority to make same was not in writing.

In that case the agent had for a long time had control of the affairs of his principal and had unwritten authority to lease its property. He made a lease of a portion of his principal's property to run for a period of ten years. The lessee took possession of the demised premises and spent more than \$6,000 in fitting it up for business. The

lessee regularly paid the rent, and the agent deposited it to his credit in bank and annually included it as so much rent collected in his reports to his principal. In deciding that the lease was invalid, this court said:

“The transaction between Young as agent, and the complainants, was the delivery and acceptance of a lease for ten years, with the ancillary and incidental covenants. *To render that transaction valid*, either in law or in equity, against Young’s principal, his authority must have been in writing, and where a written authority is required, by the very nature of the transaction, it is the duty of the persons dealing with the agent to make inquiries as to the nature and extent of the authority and to examine it. Story Ag. Sec. 73. This, of course, implies that third parties have no right to assume the existence of such authority when none is produced. It would be unreasonable to hold that an agent whose agency must, under a legislative rule of public policy, like the statute of frauds, be created by writing, might be dealt with as if such writing existed without any effort to ascertain its existence. Equally unreasonable would it be to hold that an agent appearing to have merely *unwritten authority to make leases*, which under such a rule cannot, either at law or in equity, bind his principal for more than three years, may yet make a contract incidental or ancillary to a lease, which in equity will bind the principal for a longer period, in the discretion of the agent. These

considerations prevent us from adjudging that the complainants had a right to assume that Young had the authority necessary to maintain their contract against the company." (Our italics).

The court below relied upon the Clement Case, *Supra*, in holding that the lease in the instant case was invalid. (Case, pp. 44, 45).

On the question of ratification, this court in the Clement Case said:

"The company (principal) must, undoubtedly, be charged with notice that the complainants, (tenants) were in possession of the premises occupied by them and were paying rent therefor to Young (agent). But this was all consistent with the idea that they had become tenants under the authority actually vested in Young." (Words in parentheses ours.)

In the instant case, the court below cited this authority, and said:

"So, in the case at bar it must be assumed that the defendants knew that Green was exercising the right of profit *a prendre*, but this, in the language of Mr. Justice Dixon in the case just mentioned, was entirely consistent with the belief that the managing tenant had invested Green with no greater right than he was legally authorized to do."

It is submitted that the facts in the Clement Case clearly show that the authority of the agent to make the lease, and the knowledge of the prin-

principal in respect thereto, are analagous to the pertinent allegations of the answer in the case at bar; and that in neither case did the agent have written authority to make a lease for a period of ten years, nor was the act of the agent in attempting to make a ten-year lease known to or ratified by the principal. Therefore, the statement of appellants (Brief, pp. 26, 27) that:

“ the fishing agreement was ratified by the five co-tenants of George A. Pursel”

is based on a false assumption. There is not an allegation in the answer which supports such a statement.

Furthermore, their statement (Brief, p. 26) that:

“ after the present fishing agreement was executed with Green, it was duly recorded. The other co-tenants, therefore, had constructive notice thereof.”

is of no effect on the question of ratification, because constructive notice only applies to such person or parties who, by the nature or circumstance of the transaction are put upon inquiry or when certain acts have been done which the party interested is presumed to have knowledge of on grounds of public policy.

Bates vs. Norcross, 14 Pick (Mass) 224.

Pritchard vs. Brown, 4 N.H., 397.

Wise vs. Wilmer, 23 Mo., 237.

Gale vs. Morris, 30 N.J., Eq. 285

Ogden vs. Del. Riv. & A. R. Co., 80 N.J., Eq. 191.

In the instant case, there was no duty imposed upon the co-tenants of George A. Pursel to make

inquiry as to whether he had transcended his authority in making the lease in question, nor should these co-tenants be presumed to have knowledge of his illegal and unauthorized act.

Manifestly, the allegations of the answer do not show that the co-tenants of George A. Pursel had knowledge of the making of the lease or that they ratified it; and, under the Clement Case, *Supra*, both as to authority to make and ratification thereof, the lease is invalid.

Appellants, however, in the court below and here contend (Brief, pp. 29, 30), that the "Indenture of Lease" is controlled by the 5th, instead of the 1st, section of the statute of frauds (2 C. S., p. 2612) which provides as follows:

"5. That no action shall be brought
* * * upon any contract or sale of lands,
tenements or hereditaments, or any inter-
est in or concerning them; * * * un-
less the agreement, upon which action shall
be brought, or some memorandum or note
thereof, shall be in writing and signed by
the party to be charged therewith, or some
other person thereunto by him or her law-
fully authorized."

Their contention is based upon the assumption that the "Indenture of Lease" is not a lease but a contract concerning lands, under this section of the statute of frauds, and argue that the right to take fish from a stream is not the proper subject matter of a lease.

Bouvier, in his Law Dictionary (Rawle's 3rd Ed.) Vol. II., p. 1888, says:

"Anything corporeal or incorporeal lying in livery or in grant may be the subject matter of a lease."

“Among the rights springing from or connected with lands other than ordinary forms of real estate which have been held to be subject matter of a tenancy are:

(1) the use of a public wharf, *Board of Commissioners of Pilots vs. Clarke*, 33 N.Y. 251;

(2) the right to flow lands, *Morrill vs. Mackman*, 24 Mich. 279;

(3) *the right of fishing, Commonwealth vs. Weatherhead*, 110 Mass. 175,” etc. (our italics.)

The right to take fish from a stream is a profit *a prendre* and is, in its nature, an incorporeal hereditament and, therefore, is the proper subject matter of a lease.

Blackstone’s definition of a lease is:

“A lease is properly a conveyance of any lands or tenements (usually in consideration of rent or other annual recompense) made for life, years, or at will, but always for a less time than the lessor had in the premises; for if it be for the whole interest, it is more properly an assignment than a lease. * * * By this conveyance, an estate for life, for years or at will may be created, either in corporeal or *incorporeal hereditaments*; though livery of seisin is indeed incident and necessary to one species of leases, viz., leases for life of corporeal hereditaments; but to no others.” (Our italics.)

The principle is laid down in 19 Cyc., 989, that:

“The right of hunting or fishing on another’s lands or waters may be acquired by

a grant or lease from the owner, either with or without the soil, and with such restrictions or limitations as the owner may see fit to impose. This right of profit in the land passes by grant or lease of the land, unless expressly reserved.”

In *Cobb vs. Davenport*, 33 N.J.L., 223, 225, 226, the court said:

“The right to fish and take fish is not an easement; it is a right of profit in lands
* * * ,”

“The only mode of acquiring a right of taking a profit in another’s soil is by grant or prescription, and it must be so pleaded.
* * * ,”

In *Cobb vs. Davenport*, 32 N.J. L. 369, 384, it was held:

“While the right of fishing is prima facie, exclusive in the owner of the soil, as part of the inheritance, yet it is not inseparable from the soil, but may be acquired, distinct from ownership of the soil, by *grant* or prescription; * * * ”
(Our italics.)

See also *Albright vs. Cortright*, 64 N.J., L. 330.

The cases cited by appellants (Brief, p. 30), of *O'Donnell vs. Brehem*, 36 N.J. L. 257, and *Sarson vs. Mueller*, 3 A.R., 1781, and *Cooper vs. Aiello*, 93 N.J. L. 336, are not in point because the latter case had to do with an agreement to make a lease, and the former cases had to do with a conveyance of an interest in land such as the physical taking of water from a well or standing timber

from a forest, which belonged to the owner of the lands and were of themselves a part of the land; while, in the instant case, the fish are *ferae naturae* and do not belong to the owner of the lands, and only belong to the person who captures them, and the "Indenture of Lease" did not attempt to convey an interest in fish, but an exclusive right to catch them.

It is submitted from the foregoing that the exclusive right to take fish from a stream is the proper subject matter of a lease; that, as pointed out above, the indenture by which this right was attempted to be given in the instant case was designated a lease; and that the indenture itself shows that it was a lease instead of a contract concerning lands and, therefore, its validity is determined by the first and not the fifth section of the statute of frauds.

Appellants also contend (Brief, pp. 14-20) that if the lease is invalid as to the co-tenants of George A. Pursel that it is valid as to him. The allegation of the answer is that complainant's attorney stated to the parties to the agreement of sale, before its execution, that he thought the lease was invalid. Complainant's contention is that if the lease is invalid as to one co-tenant, it is invalid as to all because one of the co-tenants could not grant or lease an exclusive fishing right in the Pequest Creek, without authority of the others.

The court below said (Case, p. 44):

"It is elementary that one tenant in common cannot bind the others by such an agreement as the one under consideration, either oral or written, except when he acts as the duly authorized agent of the others (*Boston Franklinite Co. vs. Condict & Torrey*, 19 N.J. Eq. 394)."

Assuming, in the instant case, that the lease demised to Green the undivided one-sixth exclusive fishing right of George A. Pursel in and to the Pequest Creek of the Emma Pursel Farm, and applying the rule of law laid down in the Boston Franklinites Case, *Supra*,—such a demise would be absolutely void as to his co-tenants, if they did not consent thereto. It being absolutely void as to them, Green would not be a co-tenant of theirs in the *exclusive* fishing rights.

The cases cited in appellants' Brief as to the right of a co-tenant to sell and convey his interest in an estate in common, are not in point because in the instant case, as pointed out herein, we are not considering a contract concerning lands or an interest therein, but the leasing of an incorporeal hereditament—the exclusive right to fish and not the sale or conveyance of a corporeal interest. An exclusive right is not subject to division or partition.

Appellants admit (Brief, p. 23), that:

“In the instant case there could be no tenancy in common in the fish in the Pequest Creek, for the reason that fish are *fera naturae*, and cannot be the subject of private property. They belong to anyone who catches them.”

This being so, how could one co-tenant lease an *exclusive right* to catch them, without authority from the others?

In *Holcomb vs. Coryell*, 11 N.J. Eq. 548, the Court speaking of a deed made by one tenant in common said:

“Such a deed cannot give to the grantee the *exclusive title* to the portion conveyed

any more than the co-tenant, who is the grantor, can select any particular part of the land and appropriate it as his *exclusive moiety*." (Our italics.)

Manifestly it was necessary for all of the co-tenants in the instant case to join in a lease in order to grant an *exclusive fishing* right in the Pequest Creek.

It is, therefore, insisted that the lease in question is not even a valid lease as to George A. Pursel. Furthermore, there is no allegation in the answer that George A. Pursel was informed by complainant's attorney that Green did not acquire the rights of George A. Pursel to fish in the Pequest Creek. The allegation is that complainant's attorney told complainant and George A. Pursel that:

" he did not think that the fishing agreement was valid." (Case, p. 22, 11. 25, 26).

Appellants further contend (Brief, p. 27) that if the lease is invalid under the statute of frauds and perjuries, it is valid as a lease at will or from year to year, requiring three months notice to terminate it.

It is submitted that there is no merit in this contention. The question here is, whether the *written lease* of George A. Pursel to Green is valid or invalid under the statute of frauds. The nature of Green's tenancy resulting from the invalidity of the lease, or what notice was required to terminate it, is not in the case; the allegation of the answer being that complainant's attorney misstated the law when he expressed his opinion that the *written lease* was invalid.

The lease in question being invalid, there was no misstatement of the law by complainant's attorney respecting same; and, therefore, the parties to the agreement of sale did not execute it under a mutual mistake of law.

Appellants, in order to place complainant in an unethical light before this court, say (Brief, p. 21) that:

“Every dictate of fairness should have influenced the appellee to respect the rights of Green under this fishing agreement. The fishing agreement had been made in good faith and for valuable consideration.”

Such a remark and the other uncomplimentary ones in appellants' brief come with poor grace from the Pursels. If they thought they were morally bound by the lease or had any regard for Green, why did they repudiate the lease when told by complainant's attorney that he thought it was invalid in law? The answer is that they were so eager to sell their farm, which had been in the market for years, that they had no regard whatsoever for their moral obligation; what they wanted to know was whether they were legally bound by the lease for, if they were not, they were anxious to sell the farm. It is fair to assume that they are not now actuated by any lofty motive or tender consideration for Green that they seek to be relieved of their agreement for sale; but, on the contrary, their motive is to sell the farm to someone interested in the fishing rights, for a great deal more money than they are to receive from complainant.

Furthermore, there is no allegation in the answer that complainant or his attorney persuaded, induced or requested the Pursels to disregard

their moral obligations, if any, under the lease in question. The full import of the allegations on this phase of the case is (Case, p. 15) that:

“Complainant’s attorney examined said fishing agreement and deed, and said that he did not think that the fishing agreement was valid * * * ”

that (Case, p. 17):

“These defendants did not seek any other legal advice, but relied upon said representation of complainant’s attorney, and believed that said fishing agreement was invalid, and therefore signed and acknowledged said agreement of sale.”

that (Case, p. 17):

“At the time when the said defendant, George A. Pursel, gave the duplicate copy of said agreement of sale to complainant’s attorney, in the presence of complainant as aforesaid, complainant’s attorney again told the defendant, George A. Pursel, in the presence of complainant, that said fishing agreement was invalid.”

Manifestly, these allegations do not warrant an attack upon complainant’s conduct in the transaction.

However, it might well be asked, is the attitude of appellants above reproach? They were eager to sell the farm; they wanted to repudiate the lease in question in order to do so; they asked complainant’s attorney if the lease were valid and were told by him that he thought it was not; relying upon this opinion they made the agreement

of sale; they now refuse to perform because they say that they have been advised by their attorney that the lease is valid; and they also desire to take advantage of their own disregard for the Sabbath Day, to be relieved of the agreement.

Surely, they are not entitled, by reason of their conduct, to any special consideration in a court of conscience and equity, and should be compelled to perform the decree of the court below.

As to the other defense for non-performance of the agreement of sale, complainant contends that:

(2) *The agreement of sale was consummated by defendants on a secular day and is, therefore, enforceable against them, even though they may have signed and acknowledged it on a Sunday.*

The gist of the allegations of the answer on this defense is, that the agreement of sale was signed and acknowledged by complainant in duplicate on April 3rd, 1925, a secular day; that the agreement provides that complainant was to have immediate and exclusive possession of the farm in question from and after the date of signing thereof; that complainant's attorney sent the agreement, in duplicate, to defendant, George A. Pursel, by mail with a letter of instructions as to the manner in which defendants should sign and acknowledge the agreement; that defendants signed and acknowledged same in duplicate on April 5th, 1925, a Sunday; that defendants, Alice P. Skinner, Catherine Schmidt, Elizabeth P. Armstrong, and Vida E. Cook, were all married women at the time they signed and acknowledged the agreement on Sunday, and that, therefore, it is not binding upon them; that defendant, George A. Pursel, delivered a copy of the agreement to complainant

on the following day, April 6th, 1925, and informed complainant that it had been so signed and acknowledged by defendants on Sunday, even though the certificates of acknowledgments bore date of April 6th, 1925, a secular day (Case, pp. 11, 12).

Appellants contend (Brief, p. 33) that these allegations of the answer show that the agreement was consummated on Sunday, and further (Brief, p. 39) that it was not necessary for defendants to deliver to complainant a copy thereof in order to complete it.

Respondent's reply to these contentions is that the defendants' execution of the agreement was not complete until a copy thereof was delivered to complainant on Monday, April 6th, 1925, and therefore the agreement was consummated on a secular day.

Williston in his work on Contracts, Vol. III., Sec. 1701, p. 2984, says:

“A formal instrument, as a bond or deed or negotiable instrument, though signed on Sunday is valid if delivered on a secular day, since until delivery the transaction is incomplete.”

In *County Engineering Co. vs. West*, 88 N.J., Eq. 109, the court said:

“I am unable to regard the executed ratification as an instrument in the *nature of a conveyance* or a promissory note or a bond, the first of *which requires delivery to render it effective* as a conveyance, and the others to render them effective as contracts; accordingly, such authorities as hold that a conveyance or obligation which requires delivery as an essential element to render it effective, is not to be deemed executed

on Sunday if delivered on a secular day, are without application.” (Italics ours.)

The agreement in suit is a formal instrument and is, in effect, a conveyance by the vendors to the vendee of their equitable title to the Pursel Farm. It is upon this theory that specific performance is decreed to pass the legal title, the purchaser being the equitable owner of the land.

Huffman vs. Hummer, 17 N.J. Eq. 263.
Haighwout and Pomery vs. Murphy, 22 N.J. Eq. 531.

Complainant in the instant case contends, therefore, that it was necessary for the defendants to sign and deliver the agreement in order to bind them.

Furthermore, under the statute of frauds, it is necessary to *deliver* a memorandum for sale of lands, to bind the parties to be charged.

In *Brown vs. Brown*, 33 N.J. Eq. 650, this court, in a suit for the specific performance of a contract for the sale of real property, said:

“The assignment in this case cannot be regarded as the written memorandum required by the statute of frauds, *because it was not delivered.*” (Our italics.)

thereby enunciating the principle that a memorandum, under the statute of frauds, must not only be signed but delivered in order to hold the parties to be charged.

In *Callanan vs. Chapin*, 158 Mass., 113, 32 N.E. 941, the court said:

“Although the agreement was signed by the parties, yet as there was no delivery, it never took effect and cannot be considered

a sufficient memorandum within the statute of frauds.”

See also *Parker vs. Parker*, 67 Mass., 409.
Morrow vs. Moore, 98 Me., 373.

In *Cagger vs. Lansing*, 43 N.Y., 550, 553, the Court of Appeals said:

“No one will contend that a contract for the sale of land, executed by the vendor, is binding upon the purchaser unless the contract is delivered to and accepted by the purchaser as a valid subsisting contract.”

In *Burr vs. Nivison*, 74 N.J. Eq. 320, V. C. Howell, in determining the validity of an agreement for the sale of lands executed by the vendor on Sunday, said:

“I, therefore, conclude that the agreement was not delivered to the real vendee until Monday, July 22nd, and that it is a valid instrument.”

Applying the reasoning of the learned Vice Chancellor in the Burr Case to the instant case, the agreement of sale alleged to have been executed by the Pursels, vendors, on Sunday, April 5th, 1925, but delivered to Bowen, vendee, on Monday, April 6th, 1925, is valid.

This court, on appeal, in affirming the decree advised in *Burr vs. Nivison*, *Supra*, said, 75 N.J. Eq. 241, 244, that the case of *Gibbs & Sterrett Mfg. Co. vs. Brucker*, 111 U.S., 597, was quite in point and quoted from the opinion in that case as follows:

“In order to make good the defense set up in the answer, it is necessary to prove not only that the defendant signed his name

on Sunday, but that he delivered it on Sunday. The mere signing of a contract on Sunday, which is not delivered on that day, does not avoid the contract."

The agreement of sale in the instant case was delivered by the defendants on a secular day, therefore the allegation of their answer that they signed it on Sunday is no defense under the authority of *Gibbs vs. Brucker*, *Supra*.

In *Berry vs. O'Neill*, 92 N.J. L. 63, 64, Mr. Justice Trenchard said:

"The mere carrying on of negotiations on Sunday will not invalidate a contract *completed on a secular day*. The final consummation of a contract on Sunday is necessary to bring it within the prohibition of the Sunday statutes. *Burr vs. Nivison*, 75 N.J. Eq. 241." (Our italics.)

In *Diamond Glass Co. vs. Gould*, 61 Atl. (N.J.) 12, it was held that where a guaranty sued on was dated and signed on a Sunday, and delivered to plaintiff on a secular day, plaintiff not being a party to the signing thereof on Sunday, the fact that it was so signed was no defense to an action thereon. The court saying:

"This case is within the principle determined in *Gibbs vs. Brucker*, 111 U.S., 597."

Appellants, in an effort to escape the conclusive and defensive effect of these authorities that an agreement for the sale of lands executed on Sunday but delivered on a secular day is valid, contend (Brief, p. 34) that:

“It was the intention of the parties that the agreement of sale should take effect on the date of signing.”

There is no such allegation in their answer, but they rely upon the provision of the agreement (Case, p. 7) that:

“Said party of the second part (Bowen) his heirs and assigns, to have the immediate and exclusive possession of said lands and premises from the date of signing this agreement, and the said party of the second part is hereby given the right and authority to exclude all other person or persons therefrom, except said Arthur Gardner.”

It is to be noted that the agreement does not provide that it shall go into effect upon the signing thereof by the vendors, but that the vendee is to have possession on the signing of the agreement. Obviously, signing as used in the agreement at bar meant the delivery of a duly signed agreement. To hold otherwise would be to give equitable cognizance of a fraud practiced by defendants on complainant, by their executing the agreement on Sunday to make it void.

Surely, the agreement in suit did not go into effect until the defendants had met the requirements of the statute of frauds, viz., *delivery*. There was no intention of the parties to the agreement to waive this requirement of the statute of frauds as to delivery by fixing a time when the vendee was entitled to take possession. The vendee signed the agreement on April 3rd, 1925 (a secular day), and the vendors allege that they signed it on April 5th, 1925 (a Sunday). Which signing should determine the vendee's right to

possession? And how would the vendee know that the agreement had been signed by the defendants until a copy thereof were delivered to him or his agent? It is insisted that the only reasonable interpretation that can be put upon this provision of the agreement is that the vendee was entitled to possession of the Pursel Farm upon the due execution of the agreement in accordance with the statute of frauds. The statute of frauds requires the memorandum for sale of lands to be in writing, and signed by the party to be charged therewith. (Comp. Stat., Vol. 2, p. 2612); but, under the authorities above cited, the signing is not effective until delivery of the memorandum.

It is to be observed on the question of intention of the parties that defendants allege in their answer (Case, p. 18) that complainant did not take possession of the Pursel Farm until after delivery by defendants to him of the agreement, thereby signifying that complainant believed he was not entitled to possession until he received the agreement.

The court below said (Case, pp. 42, 43):

“It is argued by the defendants’ counsel that the contract stood complete immediately upon the defendants signing it and the acknowledgment by those of them who were married women. With this reasoning I am unable to agree. It would seem to me that until they had completed the transaction by delivering back to the complainant a properly executed copy of the agreement that they were in no sense bound. The defendants concede that, ordinarily, a contract required to be in writing is not complete until that writing is delivered, but they say that where there is a mutual intention to

the contrary, the contract is effected immediately upon execution by all the parties and rely upon *Fitzgerald vs. Metropolitan Life Ins. Co.* (Supreme Court of Vermont), 98 Atl. 498. The contract under consideration which, of course, was required to be in writing, provided that complainant should have possession upon the signing of the contract, and upon this slim foundation is built the argument that the parties intended the signing to complete the transaction. In ordinary negotiations of this kind the contract is prepared and executed simultaneously by all the parties, in which event each one receives his copy thereof and departs about his business. Under the circumstances, delivery is contemporaneous with the signing and the contract is complete. But in a case like the present one, where an understanding is arrived at and one of the parties is to prepare the formal evidence thereof, at a distant place, and transmit the same to the other for execution, it is only fair that the former should not be bound by the action of the latter until he is properly apprised thereof by delivery back to him of an executed copy. Otherwise he would be in ignorance as to his rights or obligations thereunder. He would not know that the other had completed the bargain and bound himself, or whether he had altered it. He would be left in darkness as to all the conditions he would have to meet at the time fixed for passing title. Every dictate of fairness would seem to require delivery of such a contract."

As to the alleged defense that the agreement is void and unenforcible against the married women defendants, because they acknowledged it on Sunday, complainant contends that the acknowledgments did not take effect until delivery of the agreement by them. If, under the above authorities, their signing on Sunday did not avoid the agreement, their acknowledgments also on Sunday did not invalidate it, because it was delivered on a secular day.

Acknowledged instruments, such as a deed, must go into the hands of the grantee with the consent of the grantor to be valid.

Black vs. Shreve, 13 N.J. Eq. 455.

Rennebaum vs. Rennebaum, 78 N.J. Eq. 427.

Beckett vs. Heston, 49 N.J. Eq. 510.

In *Ten Eyck vs. Saville*, 64 N.J. Eq. 611, it was held that a deed executed and acknowledged by a married woman, while it remained undelivered in the hands of her attorney, was not an acknowledged agreement within the meaning of the Act of 1898 respecting conveyances.

In *Love vs. Wells*, 25 Ind., 502, the court said that:

“A deed takes effect from the time of its delivery and not from the time it may be signed and *acknowledged*. It may be drawn up, signed and *even acknowledged on Sunday*, but if not delivered until a subsequent day it is a valid deed.” (Our italics.)

In *Duggan vs. Champlin*, 23 So. (Miss.) 179, it was held that a deed takes effect from its delivery and, if delivered on a secular day, it is valid.

It is, therefore, insisted that the acknowledgments by the married women defendants on Sunday, of the agreement in the instant case, is immaterial because it was delivered on a secular day. Furthermore, it is unimportant whether the taking of the acknowledgments were judicial or ministerial acts; for, if it were lawful for the defendants to sign on Sunday, the agreement delivered on Monday, it was also lawful for them to acknowledge it.

Obviously, the signing and acknowledging of the agreement by the married women defendants were only steps toward the due execution thereof by them. Their signing and acknowledging were not effective or complete in law until the agreement so signed and acknowledged by them was delivered to complainant.

The case of *Atlantic City vs. Ferretti*, 70 N.J. L. 489, cited by appellants (Brief, p. 40) is not in point. What the court said in that case, in respect to the Holiday Act of 1895, was:

“It does not make holidays *dies non*, as are Sundays, except as regards the transaction of business in the public offices of the State or a County.”

Sunday, under the statute forbidding the transaction of business on that day, is just as much of a *dies non* as to signing an agreement such as the one in suit as it is to acknowledge the execution of it. However, under the authorities herein cited, the signing or acknowledging is not complete until delivery of the agreement so executed, and the Sunday statute only makes void those transactions which are completed on Sunday.

As to appellants' contention that the defendant, George A. Pursel, was the agent of the complain-

ant to accept delivery of the agreement for him (Brief, p. 37), there is no allegation in the answer that he was to act as complainant's agent in obtaining the signing, acknowledging and delivery of the agreement by himself and the other defendants. The agreement was sent to George A. Pursel to be executed by all of the defendants in accordance with the letter of instructions and then a copy so executed was to be delivered by him to complainant. Manifestly, George A. Pursel was not the agent of complainant in delivering the agreement to him. George A. Pursel was one of the parties of the first part to the agreement, and complainant was the party of the second part. He and the other defendants were principals, and when he delivered the agreement to complainant on Monday, April 6th, 1925, he did it on behalf of himself and the other defendants.

In closing the argument under this Point, which has been entirely too lengthy because complainant has attempted to answer many of the extraneous issues injected into the case by appellants' Brief, complainant submits that there are only two real questions involved, viz., (1) Whether the alleged lease is valid; and (2) Whether the agreement of sale was consummated by the Pursels on Sunday.

As to these questions, it is insisted that the authorities cited in this Brief conclusively uphold complainant's contention that the alleged lease is invalid, and that the agreement of sale was not consummated on Sunday and, therefore, the answer discloses no defense to the bill of complaint.

Point II

The counter-claim discloses no cause of action against Complainant.

The allegations of the counter-claim are substantially the same as those of the answer. The contentions, therefore, made and the authorities cited under Point I that the alleged lease is invalid, and that the agreement of sale was not consummated by the defendants on Sunday, apply here. Consequently, the counter-claim discloses no cause of action against complainant.

Point III

Andrew J. Green is not a proper party to this litigation.

The allegation of the counter-claim is (Case, p. 27):

“Said Andrew J. Green claims that said fishing agreement is valid.”

This allegation is unwarranted. There is no averment in either the answer or counter-claim that Andrew J. Green has manifest in any way that he maintains that the alleged lease is valid, or that he has taken any action whatsoever, or asserted any dominion over the fishing right of the Pequest Creek since the making of the agreement in suit. If he claims or did claim that the alleged lease is valid, why did he not take some action between April 15th, 1925, the opening of the trout season, and August 1st, 1925, the date of filing the answer and counter-claim (Case, p. 10). The fact is, that he did nothing during the

trout season of 1925, which was closed before the filing of the answer and counter-claim (nor to date). If he had, it is safe to assume that defendants would have made some allegations in their counter-claim to that effect.

What right have defendants to allege that "Andrew J. Green claims that said fishing agreement is valid." He is not a party to the agreement of sale nor a party to the suit, nor has he petitioned the court to be admitted as a party and have his rights under the alleged lease determined. He has not in any way exhibited that he desires to be brought into the controversy or that he is concerned about the specific performance of the agreement of sale.

In *Brisbane vs. Sullivan*, 117 Atl. (N.J.) 37, it was held that persons who are not parties or privies to a contract cannot be made parties defendant in a suit for specific performance thereof, the Court saying:

"My conclusion is that the added parties being strangers to the contract were improperly brought into the suit."

Since only parties and privies to a contract are the proper parties to a suit for specific performance, the rights of Andrew J. Green under the alleged "fishing agreement" cannot be litigated in this suit because Green is not a party to the "agreement of sale" in suit, and therefore is not a proper party defendant to the counter-claim.

See also *Bacot vs. Wetmore*, 17 N.J. Eq. 250.

The court below said (Case, p. 46):

"So far as Green's rights are concerned, this decision will not bind him."

It is submitted that Green is not a proper party to this litigation and the specific enforcement of the agreement of sale in accordance with its terms is no concern of his.

Point IV

The allowance of costs and a counsel fee to Complainant was in the discretion of the Court below and the amount allowed was very reasonable and proper.

The statute on counsel fees and costs in the Court of Chancery provides, (1 Comp. St., p. 445) :

“In any cause, matter or proceeding in the court of chancery, the chancellor may make such allowance by way of counsel fee to the party or parties obtaining the order or decree as shall seem to him to be reasonable and proper, and shall direct which of the parties shall pay such allowance
* * * the Chancellor may provide for the inclusion of such allowance in the taxable costs * * * .”

The order and decree of the court below provided (Case, p. 49) :

“It is further ordered, adjudged and decreed, that said defendants pay to said complainant the costs of this suit to be taxed, including a counsel fee of two hundred and fifty dollars (\$250.00) which is hereby allowed to said complainant.”

The many questions raised by appellants in this court, is one indication of the great amount of work which devolved upon complainant's counsel to answer them in the court below. Complainant insists that defendants' contribution, as fixed by the court below, toward his expenses for Counsel in this litigation is very small, considering the value of the services rendered by him.

Since the allowance of counsel fee in the court below was a matter of discretion, it should not be disturbed in this court unless it be made to appear that the court below abused its discretion. No proof is present to that effect, therefore the allowance should stand.

Respondent respectfully submits that the order and decree of the Court below should be affirmed.

EDWARD P. STOUT,
Counsel for Respondent.

