

342

LUCILE LEAVINS,

Complainant,

VS.

OROLEAN WILSON AND
THOMAS WILSON, JR.,

Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
IN EQUITY. NO. 342.

APPEAL.

Now come Orolean Wilson and Thomas Wilson, Jr., the Respondents in the above entitled cause, by their Attorney, and appeal to the Supreme Court of the State of Alabama from the Final Decree of the Circuit Court of Baldwin County, Alabama rendered on November 2, 1938.

J. T. Blackburn
Solicitor for Respondents.

LUCILE LEAVINS,

Complainant,

VS.

OROLEAN WILSON AND
THOMAS WILSON, JR.,

Respondents.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA.

IN EQUITY. NO. 342.

SECURITY FOR COSTS ON APPEAL.

We, Orolean Wilson and Thomas Wilson, Jr., as Principals, and the undersigned as Sureties, do hereby acknowledge ourselves security for all costs on the appeal taken to the Supreme Court by the said Orolean Wilson and Thomas Wilson, Jr., from the Final Decree rendered in said cause on November 2, 1938,

Dated this 28th day of November, 1938.

Orolean Wilson

Thomas Wilson Jr

Melvin B. Klumpff

J. A. Klumpff Jr.

Taken and approved on this the 1st
day of ~~November~~, 1938.

December

R. S. Dush,

Register in Chancery, Baldwin County,
Alabama.

By - Sanlice Thompson,
Deputy - Register

LUCILE LEAVINS,)	
Complainant,	(IN THE CIRCUIT COURT OF
)	
vs.	(BALDWIN COUNTY, ALABAMA.
)	
OROLEAN WILSON and	(IN EQUITY. NO. 342.
THOMAS WILSON, JR.,)	
Respondents.	(

NOTICE OF APPEAL.

WHEREAS, at a Term of the Circuit Court of Baldwin County, Alabama, held on the 2nd day of November, 1938, in a certain cause in said Court, wherein LUCILE LEAVINS, Complainant, and OROLEAN WILSON and THOMAS WILSON, JR., Respondents, a judgment was rendered against said OROLEAN WILSON and THOMAS WILSON, JR., to reverse which Decree, the said OROLEAN WILSON and THOMAS WILSON, JR., have this day applied for and obtained from this office an APPEAL, returnable to the Spring Term, 1939, of our Supreme Court of the State of Alabama, to be held at Montgomery, on the _____ day of April, 1939, next; and the necessary bond having been given by the said OROLEAN WILSON and THOMAS WILSON, JR., with Melvin B. Klumpp and J. A. Klumpp, Jr., sureties.

NOW, You Are Hereby Commanded, without delay, to cite the said LUCILE LEAVINS, or BEEBE, HALL & BEEBE, attorneys, to appear at the Spring Term of our said Supreme Court, to defend against said appeal, if they think proper.

WITNESS, R. S. DUCK, Register of the Circuit Court of Baldwin County, Alabama, in Equity, this 1st day of December, 1938.



Register.

The State of Alabama, }
Baldwin County } Circuit Court of Baldwin County, In Equity

To Any Sheriff of the State of Alabama—GREETING:

WE COMMAND YOU, That you summon

OROLEAN WILSON and THOMAS WILSON, JR.

of **BALDWIN** County, to be and appear before the Judge of the Circuit Court of Baldwin County, exercising Chancery jurisdiction, within thirty days after the service of Summons, and there to answer, plead or demur, without oath, to a Bill of Complaint lately exhibited by

LEWIS LEAVINS,

against said **OROLEAN WILSON and THOMAS WILSON, JR.**

and further to do and perform what said Judge shall order and direct in that behalf. And this the said Defendant shall in no wise omit, under penalty, etc. And we further command that you return this writ with your endorsement thereon, to our said Court immediately upon the execution thereof.

WITNESS, Robert S. Duck, Register of said Circuit Court, this **19th** day

of **JUNE** 193**7**



Register

N. B.—Any party defendant is entitled to a copy of the bill upon application to the Register.

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1938-39

I Div. 33

Coleen Wilson, et al.,

v.

Lucile Leavins.

Appeal from Baldwin Circuit Court,
In Equity.

BROWN, JUSTICE:

Bill filed by appellee against appellants to enforce specific performance of a contract to convey certain specifically described real estate, consisting of a store building and two acres of land on which the same is situated.

2.

The bill alleges that the complainant contracted to purchase said property and that defendants contracted to sell the same to her for a consideration of Fifteen Hundred Dollars, all of which has been paid except \$171.30, which the complainant is ready, able and willing to pay, and which she has offered to pay, but the defendants have refused and continue to refuse to make complainant a deed in accordance with the contract.

That complainant went into possession at the time the contract was made, in April, 1934, and has continued in possession of the property.

The defendants demurres taking the point that averments of the bill are vague and indefinite, and do not sufficiently inform the defendants of the issues which they are called on to meet were properly overruled.- Shelley V. Murphy, 234 Ala. 311, 174 So. 508.

There is no dispute in the evidence that the defendants contracted to sell and convey to complainant the store building and the ground on which it was situated for a consideration of \$1500.00, of which \$1328.70 has been paid, in fact this is expressly admitted in the answer filed to the bill. They contend, however, that is all they agreed to sell, not the building and two acres.

The evidence is in conflict on this phase of the case, and after full consideration thereof we are of opinion that it fully sustains the conclusion of the trial court embodied in the decree.

The decree is therefore affirmed.

Affirmed.

Anderson, C. J., Thomas and Knight, J.J., concur.

THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

1 Div., No. 53,

Orelean Wilson, et al., Appellant,s

vs.

Lucile Leavins, Appellee,

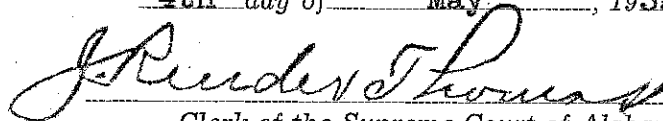
From Baldwin, (In Equity) Circuit Court.

The State of Alabama, }
City and County of Montgomery. }

I, J. Render Thomas, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing pages, numbered from one to two inclusive, contain a full, true and correct copy of the opinion of said Supreme Court in the above stated cause, as the same appears and remains of record and on file in this office.

Witness, J. Render Thomas, Clerk of the Supreme
Court of Alabama, at the Capitol, this the

4th day of May, 1939


Clerk of the Supreme Court of Alabama.

LUCILE LEAVINS,
Complainant,

VS.

OROLEAN WILSON and
THOMAS WILSON, JR.,
Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
IN EQUITY. NO. 342.

DEMURRER TO BILL OF COMPLAINT.

Comes the Respondents in the above entitled cause and for demurrer to the Bill of Complaint in said cause, and to each and every paragraph thereof, separately and severally, assigns the following separate and several grounds, to-wit:

1. Because there is no equity in the Bill of Complaint.
2. For aught that appears from said Bill of Complaint, Complainant has not fully performed said contract.
3. Because the contract mentioned in said Bill of Complaint is not set out therein, nor any of the terms thereof, with any degree of certainty.
4. Because the contract set out in said Bill of Complaint is the foundation of the action and is not described with sufficient certainty to apprise Respondents or the Court with knowledge of its contents.
5. For aught that appears from said Bill of Complaint, the contract mentioned therein contains other duties to be performed by the Complainant.
6. For aught that appears from said Bill of Complaint the Respondents are not, or were not at the time of filing said Complaint, the owners of the real estate described therein.
7. For aught that appears from said Bill of Complaint has not fully and fairly performed all the conditions precedent on his part to the obligation of the Respondents.
8. Because said Bill of Complaint does not allege that Complaint was not in default at the time of filing said Bill

of Complaint.

9. Because said Bill of Complaint does not state whether said contract was oral or written.


10. The allegations of said Bill are fatally vague and indefinite.

11. The allegations are too general and do not sufficiently inform these respondents of the issues which they are called upon to meet.

12. The Bill fails to allege or set out by whom or when the Complainant was put into possession of said property.

13. No valid contract of sale is set out in said Bill.

14. Because the said Bill of Complaint does not show a legal tender to the Respondents by the Complainant.


Solicitor for Respondents, Orolean
Wilson and Thomas Wilson, Jr.

LUCILE LEAVINS,

Complainant,

VS.

OROLEAN WILSON and
THOMAS WILSON, JR.,

Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

IN EQUITY. NUMBER 342.

NOTE OF TESTIMONY.

This cause is submitted on behalf of the Respondents on the following:

1. Decree on Demurrer.
2. Amended Answer.
3. Written agreement between the Solicitors of record for the Complainant and the Respondents with reference to the taking of the testimony, which is not dated.
4. Stipulation dated July 27, 1938 relative to certain testimony of Harry H. Parker and Respondents' Exhibits "E" and "F".
5. Testimony of the witnesses, Orolean Wilson and Thomas Wilson, Jr., and Respondents' Exhibits "A", "B", "C", "D", "E" and "F".

R. S. Duck

Register.

LUCILE LEAVINS,

Complainant,

VS.

OROLEAN WILSON and
THOMAS WILSON, JR.,

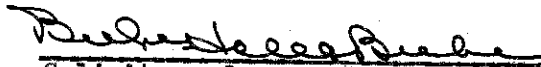
Respondents.

)
IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA,

IN EQUITY,

NUMBER 342.

IT IS EXPRESSLY AGREED between the parties hereto, acting by
and through their respective solicitors of record, that this cause be forth-
with submitted for final decree.


Solicitors for Complainant.


Solicitor for Respondents.

LUCILE LEAVINS,
Complainant,

VS.

OROLEAN WILSON and
THOMAS WILSON, JR.,
Respondents.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA,

IN EQUITY.

TO HONORABLE F. W. HARE, JUDGE OF THE CIRCUIT COURT OF BALDWIN COUNTY,
ALABAMA, IN EQUITY:

Your Complainant, LUCILE LEAVINS, respectfully represents and shows unto your Honor and this Honorable Court as follows:

1. That your Complainant is a bona fide resident of Baldwin County, Alabama, and over twenty-one years of age; that the Respondents, Orolean Wilson and Thomas Wilson, Jr., are both bona fide residents of Baldwin County, Alabama, and over twenty-one years of age.

2. That your Complainant and the Respondents, on to-wit, August 27th, 1934, entered into a contract whereby the Respondents were to sell and the Complainant to purchase the following described lands in Baldwin County, Alabama, to-wit:

From the $\frac{1}{8}$ section post on the West line of Fractional Section 19, Township 6 South, Range 2 East, run South 398 feet, and East 147 feet, for a point of beginning; thence East 237 feet along the North margin of a 50 foot road; thence N 5° 00' E, 132 feet; thence S 87° 00' E 163 feet; thence N 5° 00' E, 250 feet; thence N 87° 00' W 163 feet; thence S 16° 30' W 158 feet; thence West 150 feet; thence S 7° 00' W 82 feet; thence S 23° 15' W 164 feet, more or less, to the point of beginning. Contains 2 acres.

3. That the purchase price to be paid by the Complainant to the Respondents was Fifteen Hundred (\$1500.00) Dollars; that a part of the purchase price was paid and the Complainant put in possession of the said property; that the Complainant has now paid to the Respondent on the purchase price of said property the sum of Thirteen Hundred Twenty-eight and $\frac{70}{100}$ (\$1328.70) Dollars; that there still remains due on said contract the sum of One Hundred Seventy-one and $\frac{30}{100}$ (\$171.30) Dollars.

by the Respondents under the Contract
That Respondents were to deliver conveyance and title to Complainant upon payment of purchase price

4. That the Complainant has diligently, fully and faithfully complied with the terms of the contract of purchase and has tendered to the Respondents the balance due on said contract and demanded delivery of necessary conveyance of title, but the Respondents refused and continue to refuse

to make conveyance, in accordance with the contract.

5. That the Complainant has at all times and now stands ready, able and willing to comply with her part of the contract and to pay over to the Respondents the balance due upon said contract upon the execution and delivery of proper conveyance.

6. The Complainant submits herself to the jurisdiction of the Court and agrees to abide by any orders, judgments or decrees of the Court and to pay the balance of the purchase price, to-wit, One Hundred Seventy-one and 30/100 (\$171.50) Dollars into Court^{or} to the Respondents upon the execution and delivery of proper conveyance.

WHEREFORE, the premises considered, Complainant prays that your Honor will, by proper process, make the said Orolean Wilson and Thomas Wilson, Jr. party respondents to this Bill of Complaint, requiring them to plead, answer or demur to the same within the time and under the penalties proscribed by law and the practice of this Honorable Court.

Complainant further prays that upon a final hearing of this cause, your Honor will enter an order and decree requiring the Respondents, Orolean Wilson and Thomas Wilson, Jr., upon the payment of the balance due, to-wit, One Hundred and Seventy-one and 30/100 (\$171.30) Dollars to convey the said property to the Complainant, in accordance with the terms and conditions of the original contract, or, in the event the Respondents fail to promptly comply with the orders and decrees of the Court, that a decree be made and entered authorizing, directing and empowering the Register of this Court to convey to the Complainant any and all right, title and interest that the Respondents have in and to said property.

Complainant further prays for such other, further, different, or general relief as she may be in equity and good conscience entitled to receive and as in duty bound she will ever pray.

Robert Lee & Bebe

Solicitors for the Complainant.

FOOT NOTE:

The Respondents, Orolean Wilson and Thomas Wilson, Jr., and each of them, are required to answer each and every allegation contained in the foregoing Bill of Complaint, in paragraphs 1 to 6, inclusive, but not under oath, oath being hereby expressly waived.

Robert Lee & Bebe

Solicitors for the Complainant.

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7-18

BILL OF COMPLAINT

JUDITH LEAVIS,

Complainant,

vs.

ORCEMAN WILSON and
THOMAS WILSON, JR.,

Respondents.

IN THE CIRCUIT COURT OF

HALDWIN COUNTY, ALABAMA,

IN EQUITY.

Filed June 12th 1937
R.S. Duchs. Register

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2 - 401

NOTE OF TESTIMONY

LUCILE LEAVINS,
Complainant,

VS.

OROLEAN WILSON and THOMAS
WILSON, JR.,
Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA,
IN EQUITY,
NUMBER 342.

Filed this 30 day July 1935
R. S. Buck
Clerk-Registrar

RECORDED

AGREEMENT OF COUNSEL FOR SUB-
MISSION FOR FINAL DECREE:

LUCILE LEAVINS,
Complainant,

VS.

ORLEAN WILSON and
THOMAS WILSON, JR.,

Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA,
IN EQUITY,
NUMBER 342.

Filed this 20 day July 1935
R. S. Decker
Clerk-Register

THE SUPREME COURT OF ALABAMA

October Term, 1938-39

1 Div., No. 53

Orelean Wilson, et al.

Appellants

vs.

Lucile Leavins

Appellee.

From Baldwin Circuit Court.
(In Eq It Y)

COPY OF OPINION

Fairly

Serve on _____

Circuit Court of Baldwin County
IN EQUITY

No. _____

SUMMONS

JUSTICE LEAVINS,

VS.

OROLEAN WILSON and
THOMAS WILSON, JR.

BEETLE, SEAMER & COMPANY
Attorneys for Complainant

Recorded in Vol. _____ Page _____

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2-189
Dues

THE STATE OF ALABAMA,
BALDWIN COUNTY

Received in office this _____

day of _____, 193_____

SHERIFF

Executed this *24* day of

Jan 193*7*

leaving a copy of the within Summons with

Orlean Wilson

Thomas Wilson Jr
Defendant

W. H. McAllister
Sheriff

By *E. W. Anderson*
Deputy Sheriff

592

*SIVARI SIGN

ONS HOLLIS MARKER

*M. HOLLIS MARKER

*HOLLIS MARKER

Executed this 25th
day of Dec 1938 by
deputy secretary of
within about on
D. M. Hall

M. D. Albano
Sherry

By B. J. Shivers
D. M.

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5-46

NOTICE OF APPEAL.

LUCILLE LEAVINS,
COMPLAINANT,

VS.

ORLEAN WILSON and
THOMAS WILSON, JR.,
RESPONDENTS.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

IN EQUITY.

NO. 342.

LUCILE LEAVINS,

Complainant,

VS.

OROLEAN WILSON and
THOMAS WILSON, JR.,

Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

IN EQUITY. NUMBER 342.

AMENDED ANSWER.

Now come the Respondents in the above entitled cause and amend the Answer heretofore filed by them so that the same will read as follows:

1. The Respondents admit the allegations of paragraph Numbered 1 of the Bill of Complaint.

2. The Respondents deny the allegations of paragraph Numbered 2 of the Bill of Complaint.

3. The Respondents deny the allegations of paragraph Numbered 3 of the Bill of Complaint.

4. The Respondents deny the allegations of paragraph Numbered 4 of the Bill of Complaint.

5. The Respondents deny the allegations of paragraph Numbered 5 of the Bill of Complaint.

6. The Respondents deny each and all of the other allegations of the said Bill of Complaint which have not been specifically answered herein.

7. The Respondents, for further answer to the Bill of Complaint and to paragraphs numbered 2, 3, 4, 5 and 6 thereof, allege that on or about January 1, 1934, they verbally agreed to sell to the Complainant all of their right, title and interest in and to a stucco building approximately thirty-by-forty feet in size with an asphalt composition roof, together with the land on which the building was located and also the land between the said building and the road. In addition to the said building and land the

Respondents agreed to sell the Complainant all of their right, title and interest in and to the stock, fixtures and equipment located in the said store consisting of a large Hussman refrigerated counter, nine-by-ten feet in length; Frigidaire cooling machines; one pair of Hamilton Computing Scales; one ice box approximately six-by-ten feet in size; other scales and also tables, counters, shelves, meat market equipment consisting of tools, pans, meat blocks and stock of goods. At the time the said agreement was made, no description of the real property to be conveyed was made out and there was no understanding between the said parties except that it was to be the land on which the said store was located and the land between the said store and the road.

The price to be paid by the Complainant to the Respondents for the said property was the sum of Fifteen Hundred Dollars (\$1500.00). The Respondents admit that Thirteen Hundred Twenty-eight and 70/100/^{Dollars}(\$1328.70) of this amount has been paid to them by the Complainant, leaving a balance due on the principal of One Hundred Seventy-one and 30/100 Dollars (\$171.30), together with interest thereon from January 1, 1934 at the rate of five per cent (5%) per annum, which said sum is still due and unpaid.

At the time the said verbal agreement was made and on or about January 1, 1934, the respondents placed the Complainant in possession of the said store building, the land on which it was situated, the land between it and the road and the personal property located in the store; the Complainant took possession of the said property and nothing else.

All of the other property described in the Bill of Complaint in said cause was then, and is now in cultivation, and was then, is now and has been during all of the intervening period of time, in the possession of the Respondents who have continuously farmed it. Complainant has never been in possession of it or any part thereof and it is separated from the property sold by the Respondents to the Complainant by a fence.

The Respondents did not on August 27th, 1934, or at any

other time, sell or agree to sell the Complainant the property described in the Bill of Complaint filed by the Complainant in this cause. The only contract between the said parties was the verbal contract described above. This said agreement or contract or any note or memorandum thereof was not in writing subscribed by the Respondents or either of them, or by any other person by the Respondents or either of them duly authorized in writing.

When the said agreement or contract was made by and between the Complainant and the Respondents in January, 1934, no correct and accurate description of the land which was sold and to be conveyed was worked out and the description of the land to be conveyed was not in any way reduced to writing. Since the commencement of this suit the Respondents have had the land which they agreed to sell the Complainant and which the Complainant agreed to buy from them surveyed and allege and admit that a correct and proper description of the said property which was sold by the Respondents to the Complainant in January, 1934, is as follows, to-wit:

From the one-half mile post on the West line of the Fractional Section 19, Township 6 South Range 2 East, run East 219.12 feet; thence South 12 degrees 30' West 198 feet; thence East 48 feet; thence South 7 degrees West 30 feet for a point of beginning; thence run South 7 degrees West 32 feet; thence East 72 feet; thence North 32 feet; thence West 68 feet to the point of beginning, lying in Government Subdivision 4 according to Map of Township 6 South Range 2 East, Baldwin County, Alabama approved by Act of Congress June 1, 1858 for the relief of Laurent Millaudon.

Long after the said verbal contract hereinabove described was made in January, 1934, and sometime during the summer of 1934 the Complainant went to her mother, the Respondent, Orolean Wilson, and her brother, Thomas Wilson, Jr., and told them that she desired to enlarge the store building which she had purchased from them and requested that they allow her to use additional land for this purpose. The Respondents complied with her request, moved their field fence and allowed her to use some additional land adjoining that

which she had agreed to purchase from them. The Respondents have, since the commencement of this suit, had this additional tract of land surveyed and admit and allege that the land which the Respondents agreed to sell to the Complainant in January, 1934, and the land which they allowed her to use thereafter, when described together, make up and form the following described tract of land, to-wit:

From the one-half mile post on the West line of the Fractional Section 19, Township 6 South Range 2 East, run East 219.12 feet; thence South 12 degrees 30 minutes West 198 feet; thence East 48 feet for a point of beginning; thence South 7 degrees West 76 feet; thence East 80 feet; thence North 75 feet; thence West 67 feet to the point of beginning, lying in Government Subdivision 4 according to map of Township 6 South Range 2 East, Baldwin County, Alabama, approved by Act of Congress June 1, 1858 for the relief of Laurent Millaudon.

The Respondents are willing that the Complainant have the entire tract of land last above described, provided they are paid the balance due them on the contract which they made with the Complainant in January, 1934, the interest thereon and some reasonable compensation for the additional land which they allowed the Complainant to use, which amount they allege to be Fifty Dollars (\$50.00) for all of which amounts the Respondents claim and assert a vendor's lien on the said property.

The Respondents deny that the Complainant has diligently, fully and faithfully complied with the terms of the oral contract made between the parties to this suit in January, 1934, and deny that the Complainant has tendered to the Respondents the balance due on the said contract and further allege that the Complainant has not offered to pay the interest due by her on the said contract and expressly deny that they have refused and continue to refuse to make a conveyance to the Complainant in accordance with the said contract.

8. During the month of August, 1934, and before August 27th, 1934, Orolean Wilson, who is the mother of the other parties to this suit, was confined to her home with illness and while she was so confined with illness the Complainant came to her and talked

with her about giving her a deed to a piece or parcel of land adjoining the store. This transaction was not in any way connected with the oral contract made between the said parties in January, 1934, and if and when this new transaction was completed, it was to be a gift by the Respondents to the Complainant. After this conversation was had the Respondents agreed to make the Complainant a deed to certain lands but told her before the deed was made and executed that she could not have the said deed, the property described thereon, or the possession thereof as long as the Respondent, Thomas Wilson, Jr., was able to farm the said property, because the Respondents made their living by their farming operations. After this conversation, the Complainant employed a surveyor, namely, Harry Parker, to survey off two acres of land and she paid him for his services. The said surveyor surveyed off two acres of land and in so doing surveyed a very irregular shaped piece of property which cuts into Respondents' field in an irregular manner and which is the property described in the Bill of Complaint filed by the Complainant in this cause. The Complainant had a deed prepared describing the said property in the same way and manner as it is described in the Bill of Complaint filed in this cause which deed was executed by the Respondents as they had told the Complainant that she could not have the deed to the property or the property as long as the Respondent, Thomas Wilson, Jr., could use it. This deed was never delivered by the respondents to the Complainant for this reason. The making of this deed as before stated had no connection whatsoever with the contract made between the parties in January, 1934. When the said deed was made no money was paid by the Complainant to the Respondents and the Complainant was not placed in possession of any property at that time.

The contract alleged by the Complainant and the alleged contract which she attempted to enforce is not as to the Respondents just and reasonable because the tract of land described in the Complainant's Bill of Complaint was surveyed out by Complainant's surveyor in an irregular shape without any regard whatever to the

effect on the remainder of the Respondents' land and if such alleged contract was specifically enforced the Court would in effect, be making a contract for the parties that they themselves did not make and a contract that would work a hardship and injustice on Respondents.

9. The Complainant, by her Bill of Complaint, is attempting to establish a parol trust in lands; is attempting to enforce an alleged agreement made in violation of the statute of frauds and an alleged agreement which is not mutually enforceable.

Having fully answered the Bill of Complaint, Respondents pray that the relief prayed for by the Complainant in her Bill of Complaint be denied to her and further pray that the Complainant be required to do equity as a condition to a decree in her favor against the Respondents based on the facts alleged by them in this answer.

J. B. Blackburn
Solicitor for Respondents.

LUCILE LEAVINS,
Complainant,

vs.

OROLEAN WILSON ET AL.,
Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

IN EQUITY.

NO. 342.

This cause coming on to be heard, is submitted upon the demurrers to the original bill of complaint, and after due consideration the court is of the opinion that the demurrers are not well taken.

It is therefore ORDERED, ADJUDGED and DECREED that the demurrers of the respondents to the original bill of complaint be and the same are hereby overruled.

It is further ORDERED that the respondents be and they are hereby given thirty (30) days in which to file answer.

Done this the 18th day of August, 1937.

J. W. Hare

Judge.

LUCILE LEVINS,

Complainant,

VS.

OROLEAN WILSON and
THOMAS WILSON, JR.,

Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

IN EQUITY. NO. 342.

ANSWER.

Now come the Respondents in the above entitled cause and for answer to the Bill of Complaint in said cause say:

1. Respondents admit the allegations of paragraph numbered 1 of the Bill of Complaint.
2. Respondents deny the allegations of paragraph numbered 2 of the Bill of Complaint.
3. Respondents deny the allegations of paragraph numbered 3 of the Bill of Complaint.
4. Respondents deny the allegations of paragraph numbered 4 of the Bill of Complaint.
5. Respondents, for further answer to the Bill of Complaint, allege that on or about August 27, 1934, they agreed to sell to the Complainant a store building, together with the land on which the building was located and the land between it and the road, but no additional land, and the stock of goods and fixtures in said store for the sum of \$1500.00, of which said sum the sum of \$1328.70 has been paid by the Complainant to the Respondents, leaving a balance due on the principal amounting to \$171.30 and interest on the deferred payments from the date of the contract at the rate of 5% per annum.
6. Respondents deny each and all other allegations of the Bill of Complaint which have not been specifically answered herein.

WHEREFORE, these Respondents having fully answered the Bill of Complaint in this cause, pray that the same be dismissed and that they may go hence with their reasonable costs in this behalf expended.

J. T. T. Slackman
Solicitor for Respondents.

342

and

RECORDED

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LUCILE LEAVINS,
Complainant,

vs.

CROLEEN WILSON ET AL.,
Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
IN EQUITY.
NO. 342.

DECREE

Filed

Aug 19 1937
R. S. [Signature]
Register

RECORDED

Book 8-

AMENDED ANSWER,

LUCILLE LEAVINS,

Complainant,

VS.

OROLEAN WILSON and
THOMAS WILSON, JR.,

Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
IN EQUITY. NUMBER 342.

Filed this 22 day July 1935

R. S. Quicke
Clerk-Register

CHANCERY EXECUTION

BILL OF COSTS

No. 342

Levins

VS. Wilson et als

PLAINTIFF

DEFENDANT

FEES OF REGISTER	Dollars	Cents	Brought Forward	\$ 8 20
Filing each bill and other papers	\$ 10	1 30	For Receiving, keeping and paying out or distributing money, etc.: 1st \$1,000, 1%, all over \$1,000, and not over \$5,000, 3-4 of 1%; all over \$5,000 and not exceeding \$10,000, 1-2 of 1%, all over \$10,000 1-4 of 1%.	
Issuing each subpoena	50	50	Receiving, keeping and paying out money paid into court, etc., 1-2 of 1% of amount received.	
Issuing each copy thereof	40	80	Each notice sent by mail to creditor	15
Entering each return thereof	15	15	Filing receipting for and docketing each claim, etc.	25
For each order of publication	1 00	15	For all entries on subpoena docket, etc.	50
Issuing Writ of injunction	1 50	15	For all entries on commission docket, etc.	50
For each copy thereof	50	1 00	Making final record, per 100 words	15
Entering each return thereof	15	1 00	Certified copy of decree	1 00
Issuing Writ of Attachment	1 00	1 00	Report of divorce to State Health Office	50
Entering each return thereof	15	1 00	<i>Transcript</i>	
Docketing each case	1 00	1 00	TOTAL FEES OF REGISTER..	57 20
Entering each appearance	25	1 50	FEES OF SHERIFF	
Issuing each decree pro confesso on per ser. 1 00	1 00	1 50	Serving and returning subpoena on deft. \$1 50	3 00
Issuing each decree pro confesso on publica 1 00	1 00	1 50	Serving and returning subpoena for witness	65
Each order appointing guardian	1 00	1 50	Levying attachment	3 00
Any other order by Register	50	1 50	Entering and returning same	25
Issuing Commission to take testimony	50	1 50	Selling property attached	
Receiving and filing	10	1 50	Impaneling Jury	75
Endorsing each package	10	1 50	Executing Writ of possession	2 50
Entering order submitting cause	50	1 50	Collecting execution for costs	1 50
Entering any other order of court	25	1 50	Serving and returning sci. fa., each	65
Noting all testimony	50	1 50	Serving and returning notice	65
Abstract of cause, etc.	1 00	1 50	Serving and returning writ of injunction 1 50	3 00
Entering each decree	75	1 50	Serving and returning writ of exeat.	1 50
For every 100 words over 500	15	1 50	Taking and approving bonds, each	75
Taking account, etc.	3 00	1 50	Collecting money on execution	
Taking testimony, etc.	15	1 50	Making Deed	2 50
Each report, 500 words or less	2 50	1 50	Serving and returning application, etc.	1 00
For every 100 words over 500	15	1 50	Serving attachment, contempt of court.	1 50
Amount claimed less than \$500, etc.	2 00	1 50	TOTAL FEES OF SHERIFF..	6 00
Issuing each subpoena	25	1 50	RECAPITULATION	
Witness certificate, each	25	1 50	Register's Fees	51 20
Issuing execution, each	75	1 50	Sheriff's Fees	6 00
Entering each return	15	1 50	Commissioner's Fees. <i>Chas Jones</i>	35 00
Taking and approving bond, each	1 00	1 50	Solicitor's Fees	
Making copy of bill, etc.	15	1 50	Witness Fees	
Each notice not otherwise provided for ..	50	1 50	Guardian Ad Litem	
Each certificate or affidavit, with seal ..	50	1 50	Printer's Fees	
Each certificate or affidavit, no seal	25	1 50	Trial Tax	3 00
Hearing and passing on application, etc. 3 00	3 00	1 50	Recording Decree in Probate Court	17 25
Each settlement with Receiver, etc.	3 00	1 50	<i>Supreme Court Cost</i>	
Examining each voucher of Receiver, etc. 10	10	1 50	TOTAL	112 45
Examining each answer, etc.	3 00	1 50		
Recording resignation, etc.	75	1 50		
Entering each certificate to Supreme Court 50	50	1 50		
Taking questions and answers, etc.	25	1 50		
For all other ser relating to such proceedings 1 00	1 00	1 50		
For services in proceeding to relieve minors, etc., same fee as in similar cases.		1 50		
Commission on sales, etc: 1st \$100, 2 per cent: all over \$100 and not exceeding \$1,000, 1 1-2 per cent; all over \$1,000, and not exceeding \$20,000, 1 per ct; all over 20,000, 1-4 of 1 per cent		1 50		
Sub Total Carried Forward		8 20		

The State of Alabama,
Baldwin County

No. _____
Circuit Court, In Equity _____ Term, 193 _____

To any Sheriff of the State of Alabama—GREETING:

You are hereby commanded, That of the goods and chattels, lands and tenements of _____

Defendant _____

you cause to be made the sum of _____ Dollars,

which _____ Plaintiff _____

recovered of _____ on the _____ day of _____ 193 _____

by the judgment of our Circuit Court, held for the county of Baldwin, besides the sum of _____

Dollars,

costs of suit, and have the same to render to the said _____ and make return of this Writ and the execution thereof, according to law.

Interest from _____ 193 _____ to date of collection.

Witness my hand, this _____ day of _____ 193 _____

Register

R. S. DUCK
Register and Clerk Of The
Circuit Court, Baldwin County
Bay Minette, Ala.

Route #1.

6/17/39.

Dear Alice

Please settle with
me on this basis
I will explain when
I see you

Transport	3500
Record	800
Comm Fee	3500
Admitted	600
Lat	300
Sup. Court	1725
<hr/>	<hr/>
Gas Court	10425
Bank	820
<hr/>	<hr/>
Total	11275

R. S. Duck,
Bay Minette, Ala.

R. S. Duck

164,25
17,25

181,50



THE STATE OF ALABAMA--JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

October Term, 19 38-39

To the Register of the Circuit Court, Baldwin County—Greeting:

Whereas, the Record and Proceedings of the Circuit Court In Equity of said county, in a certain cause lately pending in said Court between

Orolean Wilson et al., Appellant, s,

and

Lucile Leavins, Appellee,

wherein by said Court, at the Term, 19, it was considered adversely to said appellant s, were brought before our Supreme Court, by appeal taken, pursuant to law, on behalf of said appellant s:

NOW, IT IS HEREBY CERTIFIED, That it was thereupon considered by our Supreme Court, on the 4th day of May, 19 39, that said Decree

of said Circuit Court be in all things affirmed, and that it was further considered that the appellant s, and Orolean Wilson and Thomas Wilson, Jr., and Melvin B. Klumpp and J. A. Klumpp, Jr., sureties on the appeal bond, pay

the costs accruing on said appeal in this Court and in the Court below

Witness, J. Render Thomas, Clerk of the Supreme Court of Alabama, at the Capitol, this the

4th day of May, 19 39. J. Render Thomas

Clerk of the Supreme Court of Alabama.

LUCILE LEAVINS,

Complainant,

VS.

OROLEAN WILSON AND
THOMAS WILSON, JR.,

Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

In Equity.

o-o-o-o-o-o-o

The Bill seeks specific performance of a contract alleged in the bill to have been entered into between the parties in August, 1934.

It appears from the pleading and proof that the Complainant is the daughter of Respondent, Orolean Wilson, and sister of the Respondent, Thomas Wilson, Jr., who jointly owned the land. It further appears that the agreed purchase price was \$1500.00, practically all of which Complainant has paid to Respondents. It seems that the contract had its inception in January, 1934, and the Complainant then placed in possession of the store house, though, to quote from Respondents' answer, "no correct and accurate description of the land which was sold and to be conveyed was worked out."

Complainant testifies that in January, 1934, the agreement was reached that she should purchase the store house and two acres adjoining, which were pointed out to her but no accurate description made at that time, the two acres being a part of a larger tract. At that time the Respondents were using the land surrounding the store for a farm. Respondents do not deny the contract of sale and receipt of the purchase money, but contend that they only contracted to sell the store house with certain goods and fixtures, and insist that they bargained to sell only the land upon which the store was situated and the strip between the front of the store and the highway. This contention is not easily reconciled with the fact that they permitted Complainant to build considerable additions to the

store building after the January, 1934, agreement, or with the testimony of Mrs. Wilson that she never agreed to sell an inch of land - not even that between the store door and the highway.

Complainant contends that, while the contract was entered into in January and the amount of land agreed upon and pointed out to her at that time, the contract was never perfected, or completed, until August following when the survey was made and the description of the land reduced to writing, and any uncertainty or indefiniteness removed; she, in the meantime, having been placed in possession of such part of the premises as she then required, and having paid the major part of the purchase price.

In August, 1934, Respondents executed a deed to Complainant conveying the land in suit, and the mother testifies that this deed was delivered to Complainant. It is not made clear how Respondents repossessed the deed. Both Respondents admit executing the deed, and it appears from the testimony of the witness Parker -- as well as their own -- that they knew what they were signing and the contents of the deed. Neither Respondent gives any clear, coherent, or satisfactory reason for executing the deed. At the time Thomas Wilson, Jr., acknowledged the deed before the officer, Perkins, he told the officer that they "were making a deed to Mrs. Leavins for some land and they were going to hold it until it was paid for." Mrs. Leavins did owe them a balance on the purchase price at that time. Now, Respondents claim differently. They now claim that the execution of the deed had no relation to the contract of sale; that the deed was a gift pure and simple. The Respondent, Thomas Wilson, Jr., is most hazy in his testimony concerning his purpose in executing the deed. He admits that, "I don't know how it was." In reply to insistent questioning by his Solicitor he testified that they executed the deed "and put it away for herx" so she would have it if anything happened to him or his mother. The

attempted explanation by the Respondents of the execution of the deed is incoherent and unconvincing; is contrary to statements made at the time the deed was executed, and contrary to the general trend of the testimony of the disinterested witnesses.

I am convinced that the deed was executed for the purpose of completing and consummating the contract, and that it was then intended that the deed should be delivered when the balance of the purchase price was paid, as one of the Respondents then told the witness, Perkins. In the meantime, extreme bitterness and ill feeling have arisen between the parties and they appear to have become blinded to the right.

The principal question in the case is whether or not the contract was sufficiently certain and definite in all its terms to justify specific performance. The uncertainty is with respect to the description of the land contracted to be conveyed. Whether or not the execution of the deed in August can be looked upon as a part of the original agreement entered up in January, it certainly can be looked to to supply any deficiency in description of lands to be conveyed, and to remove the contract from the statute of frauds. It has been uniformly held that the statute of frauds "does not defeat a parcel contract which is afterwards evidenced by a writing^v signed by the party sought to be charged with it."

If the deed signed in August, 1934, was a separate and distinct transaction from the contract of January, 1934, and not intended as a consummation and final execution of the January contract, why was the store house building included in the deed? There is no dispute as to any of the terms of the contract except as to the amount of land to be conveyed. The contract is patently without the statute of frauds because the purchase price was paid, or nearly all paid, and the purchaser placed in possession.

It is contended that the contract is unenforceable because of the uncertainty as to the land. Whatever of uncertainty

er ambiguity there may have been in the contract of January was cleared and rendered certain by the deed in August. I am convinced that the deed was a part of the res gestae of the sale, and intended by the parties as a consumation thereof, though not delivered as a conveyance of title, and probably not intended to be delivered till the balance of the agreed purchase price was paid. This balance the Complainant offers to pay, and she is entitled to the relief prayed.

The Register will enroll the following

DECREE

This cause coming on to be heard is submitted for decree upon the pleading and proof as noted by the Register, and upon a consideration thereof I am of the opinion that Complainant is entitled to the relief prayed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the Respondents, Orelean Wilson and Thomas Wilson, Jr., be, and they are hereby ordered and directed to execute and deliver to the Complainant, Lucile Leavins, within thirty (30) days from the date hereof, a deed of conveyance conveying to her the following described real property situated in the County of Baldwin, State of Alabama, to-wit:

From the half section post on the west line of Fractional Section 19, Township 6 South, Range 2 East, run South 398 feet, and East 147 feet, for a point of beginning; thence East 237 feet along the North margin of a fifty-foot road; thence N 5° 00' E. 132 feet; thence S 87° 00' E 163 feet; thence N 5° 00' E. 250 feet; thence N 87° 00' W 163 feet; thence S 16° 30' W 158 feet; thence West 150 feet; thence S 7° 00' W 82 feet; thence S 28° 15' W 164 feet, more or less, to the point of beginning, containing 2 acres,

upon the Complainant paying to them the sum of \$171.30, together with interest thereon from January 1st, 1934, to date, namely, the total sum of \$212.66.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that if the said Respondents shall fail and refuse to execute the said conveyance within said time, the Register of this Court be, and he is hereby authorized and directed to execute a deed

of conveyance conveying to the Complainant. Lucile Leavins, all the right, title and interest of the said Orolean Wilson and Thomas Wilson, Jr., in and to the aforesaid property, and to deliver the same to the said Lucile Leavins upon her paying into court the said sum, namely, #212.66.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT the Respondents pay the costs of this proceeding, for which let execution issue.

Done this the 2nd day of November, 1938.



Judge.

of conveyances... to the...
all the right, title and interest of the said...
Thomas... in and to the...
deliver the same to the said...
into court the said sum, namely, \$...

It is further...
payments by the...
execution...
Done this... day of... 1938.

Filed November 4, 1938
R. S. DUCK
clerk, - register
By *[Signature]*
Deputy

Done Received

RECORDED
Duck
2-401

IN THE
CIRCUIT COURT OF BALDWIN
COUNTY, ALABAMA

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LUCILE LEAVINS,
Complainant,

VS.

OROLEAN WILSON and
THOMAS WILSON, JR.,
Respondents.

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BRIEF AND ARGUMENT OF COMPLAINANT

oooooooooooooooooooooooooooooooooooo

By
BEEBE, HALL & BEEBE,
Solicitors for Complainant,
Bay Minette, Alabama.

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This proceeding was begun by the Complainant, Lucile Leavins, filing complaint in the Circuit Court of Baldwin County, Alabama, Equity Side, against the Respondents, Orolean Wilson and Thomas Wilson, Jr., alleging, among other things, that the Complainant and the Respondents entered into a contract whereby the Respondents were to sell and the Complainant to purchase certain lands in Baldwin County, Alabama, described in the original Bill of Complaint, and hereinafter described, for and at the price of Fifteen Hundred (\$1500.00) Dollars, of which amount Thirteen Hundred Twenty-eight and 70/100 (\$1328.70) Dollars has been paid, and a balance due of One Hundred Seventy-one and 30/100 (\$171.30) Dollars; that the Complainant had diligently, fully, and faithfully complied with all the terms and conditions of said contract and was ready, upon the delivery of deed, to pay the balance due, in accordance with the terms of the contract, and submitted herself to the jurisdiction of the Court and agreed to abide by all orders, judgments and decrees of the Court, and prayed that a proper decree be made and entered requiring the Respondents to convey the property, in accordance with the terms of the contract, and, in the event of a failure by them, to authorize, direct and empower the Register of the Court to convey to the Complainant any and all right, title and interest that the Respondents had in and to said property.

The Respondents filed their answer, admitting, in effect, that they had entered into a contract to convey a certain specific piece of property forming a part of that described in the Bill of Complaint, and that the Complainant had made the payments, as set out in her Bill of Complaint, and that there remained a balance due under said contract of One

Hundred Seventy-one and 30/100 (\$171.30) Dollars, as alleged by the Complainant, but claimed interest at the rate of 5% per annum from the date of the original oral contract of January 1st, 1934. The Respondents also admitted that the Complainant took possession of a certain part of the property under the alleged contract, but denied that the property described in the Bill of Complaint was included in the contract, nor was possession taken of it.

The facts, as we construe them, are very simple, and the only question, as we see it, is as to the property which the Complainant intended to purchase and the Respondents sold to her.

The Complainant is the daughter and sister of the Respondents.

The testimony is identified as pages 1 to 71, inclusive, and all references are made as to page numbers.

The Respondents were the owners of a tract of land about half way between Fairhope and Battles Wharf, in Baldwin County, Alabama, on which was located a small store building and butcher shop. There was certain equipment in the building and also a stock of goods.

The business had apparently gone from bad to worse, until it had gotten to the point where it was no longer profitable and the Complainant was approached with the idea of taking it and the following statement was made by Mrs. Wilson (21) " - - she just as well to sell it or they would have to close it. They couldn't run it any longer." An agreement was entered into by and between the Complainant and the Respondents for the purchase of said property, and, on January 1st, 1934, the Complainant was placed in possession and has remained in such possession until this time. It was understood at that time that the Complainant was to get the store building, equipment, and such land as she wanted not to exceed two acres, for Fifteen Hundred (\$1500.00) Dollars, however, the land was not definitely pointed out,

but was referred to in a general way by the Respondents. The stock of goods in the store was inventoried and cash paid by the Complainant to the Respondents.

The Complainant, after going into possession of the property, in accordance with the contract, made certain payments to the Respondents and the Respondents also received from the Complainant groceries and other articles and the price thereof was credited on the contract. This is agreed to by all parties.

At the time the property was delivered by the Respondents to the Complainant, the store building formed a part of the field fence and completed the enclosure of the property upon which the store building was located and also the other property described in the Bill of Complaint.

The Complainant remained in the possession of the property and made payments until in August, 1934, when the question again came up as to just what property the Complainant was to get under her contract of purchase. The property was again pointed out by the Respondents, or at least one of them, and Harry H. Parker, a surveyor, employed to make a survey thereof. There is some dispute as to who employed Mr. Parker, however, there is no conflict that he did make a survey and that he drafted a deed, including a description of the two acres now in question. The Respondents were either present at the time that the survey was being made or after the survey was made, the deed drafted and before it was executed by them, the land, according to the surveyor, Mr. Parker, was pointed out to them (29), and that they, after having had the land pointed out to them by Mr. Parker, and in his presence, executed the deed and requested him to witness it (32). A carbon copy of the deed is in evidence, having been offered by the Complainant as Exhibit "A".

After the definite establishment of the lines of the tract of

land, and the execution of the deed, the Complainant remained in the possession of the said land and continued to make payments, in accordance with the terms of the contract. Everything went along fine until something suddenly happened, in the earlier part of 1937, when the Complainant offered to pay the balance due on the contract and demanded her deed. The Respondents refused to convey any property to her and stated that they were only willing to give her a bill of sale.

There is no question but that a contract was entered into between the parties and that the Complainant entered into the possession and made certain payments, which were accepted by the Respondents. The question of whether or not the Complainant made certain payments before being put into possession or made such other payments after having been put into possession is immaterial. If she was put into possession and subsequently paid the purchase money or a part thereof, or if she paid the purchase money or if she had paid some of the purchase money and later put into possession, it would have put the transaction beyond the influence of the statute of fraud. (*City Loan & Banking Co. vs. Poole*, 43 So., 13; 149 Ala., 164; See also *Penny vs. Norton*, 81 So., 666; 202 Ala., 690).

It is also true that the terms of the contract were very indefinite as to when the payments should have been made, however, this is immaterial: If a contract to convey land can be specifically enforced though no certain or definite time is fixed as to when the purchase price should be paid, if the time can be made certain by an offer to deliver the deed or the tender of the purchase price, but, of course, an offer of the deed or a tender of the purchase price, must be made within a reasonable time. (*Penny vs. Norton*, 81 So., 666; 202 Ala., 690). Then

too, there is no question raised by the pleadings that the Respondents are claiming a breach on the part of the Complainant as to a part of the land at least.

Then too, if we are to take the statements of the witnesses, the Complainant was placed in possession of the property and made payments under an indefinite oral agreement, until in August, 1934, when the terms of the contract were made more definite by a survey of the property and the further acceptance by the Respondents of payments on the purchase price.

It is undisputed that the Complainant was placed in possession of some property which formed a part of that described in the Bill of Complaint. This being the case, it was sufficient to take the matter from within the statute of fraud.

The testimony of Mrs. Orolcan Wilson, one of the Respondents, is very indefinite to say the least, even as to the payments made by the Complainant, however, after a due consideration of all she has said, it can be clearly seen that she is now trying to shift away from her conduct in the definite location of the property to be conveyed under the contract and the execution of the deed. However, she does admit the execution of the deed by her and the other Respondent and the delivery of the deed to the Complainant. (41). Then too, we must take the statement of the Respondent, Thomas Wilson, Jr., at the time he asked Mr. Perkins, a Notary, to acknowledge the deed: "Mr. Wilson said at the time he asked me to notarize the deed, that they were making the deed to Mrs. Leavins for some land and they were going to hold it until it was paid for" (34). Isn't this enough to off-set the statement of Mr. Wilson that it was their intention to give it to Mrs.

Leavins when he got to the point that he was unable to work it any longer? Then again, let us take the statement of Mr. Thomas Wilson, Jr., with reference to the land described in the deed, and also in the Bill of Complaint:

"Q: That deed was presented to you and you were told that it was the land she, Mrs. Leavins, wanted?

A: Yes, that was.

Q: You and your mother signed that deed?

A: Yes.

Q: At that time Mrs. Leavins had paid you quite a bit of the purchase price on some property?

A: Which she was supposed to do all along.

Q: You knew the land went out in the field. You knew that it included more land than just the little plot the store was on?

A: I knew that.

Q: You knew what you were signing?

A: I certainly did.

(49)

Then too, if the Respondents intended to give the Complainant some property after they were unable to longer use it, if it was to be separate and apart from that the Complainant had already purchased, then why did they include the store and the property on which it was located as a part of the conveyance?

The Respondents, in their answer, raised a certain question as to the interest. The Complainant is most positive that the item of interest was never mentioned. We are unable to see how the Respondents arrived at the interest at 5%. In this connection, it must be borne in mind the relationship of the parties and also the apparent anxiety of the Respondents

to get rid of an unprofitable business.

The Respondents also attempt to off-set delivery of possession on the part of the Respondents to the Complainant of the property that she claims was included in the Complaint. However, again bearing in mind the relationship of the parties, isn't it clearly to be seen, and the reasonableness of it understood, that the Respondents were, as members of the same family, to have the use of the property until such time as the Complainant needed it. It was a mere family transaction.

The Respondents have also injected into the evidence as to the value of the property transferred in an effort to influence the Court to the fact that the Complainant, in the building and equipment, got much more than she paid for, however, the testimony of disinterested witnesses clearly shows that the Complainant paid at least, if not much more than the market value of the property. If we are to take the maximum amount, as fixed by disinterested witnesses, then we have the value of the land, two acres, at One Hundred (\$100.00) Dollars per acre, or Two Hundred (\$200.00) Dollars; the building at Four Hundred (\$400.00) Dollars, and the equipment at Five Hundred (\$500.00) Dollars, making a total valuation, as fixed by disinterested appraisers, at Eleven Hundred (\$1100.00) Dollars. We do not consider the value as material or germane to the issues involved.

Frankly, we are unable to understand why the Respondents should have gone to all the trouble of executing a deed, which was, no doubt, known to them to include property additional to that on which the store was located, and then receive and accept payments on the purchase price thereof over a period of two years and more and say nothing until the Complainant tendered the balance due under the contract and demanded her deed.

We, therefore, respectfully submit, in conclusion, that the Complainant purchased from the Respondents, under an oral agreement, the building, equipment and such land as they needed not to exceed two acres; that they went into the actual possession of the said land, paid a part of the purchase price under the indefinite description; that the description was later made definite by a survey, the drafting of a deed and the execution thereof by the Respondents, which definitely determined the boundary of the land to be conveyed, and the subsequent acceptance of payments thereon; that the land on which the store building is located was a part of the two acre tract now claimed by the Respondents, and a delivery of a part of the two acre tract by the Respondents to the Complainant, and the pointing out by the Respondents to the Complainant of the land intended to be included was sufficient; that the Complainant is now entitled to a decree ordering and directing the Respondents to convey to the Complainant the property included in the contract, or, in the event of their failure, then an order and decree directing, ordering and authorizing the Register of this Court to make conveyance, in accordance with the prayer of the Bill, of the following described lands in Baldwin County, Alabama, to-wit:

From the $\frac{1}{2}$ section post on the West line of Fractional Section 19, Township 6 South, Range 2 East, run South 398 feet, and East 147 feet, for a point of beginning; thence East 237 feet along the North margin of a 50 foot road; thence N 5° 00' E, 132 feet; thence S 87° 00' E 163 feet; thence N 5° 00' E, 250 feet; thence N 87° 00' W 163 feet; thence S 16° 30' W 158 feet; thence West 150 feet; thence S 7° 00' W 82 feet; thence S 28° 15' W 164 feet, more or less, to the point of beginning. Contains 2 acres.

There may be some question as to when the contract was entered into, however, we again respectfully submit that although there was an original

contract, verbally, as of January 1st, 1934, the indefiniteness of it as to the property was cured and, in effect, the real contract describing the property was entered into as of the date the Respondents executed a deed to the Complainant, on August 27th, 1934 - at any rate the Complainant is entitled to the relief prayed for.

Respectfully submitted,

Reuben Doolittle Reel
Solicitors for Complainant.

We hereby certify that we have this day delivered a copy of the above brief to Hon. J. B. Blackburn, Solicitor for the Respondents.

Dated this 30th day of July, 1938.

Reuben Doolittle Reel
Solicitors for Complainant.

LUCILE LEAVINS,

Complainant,

VS.

OROLEAN WILSON and
THOMAS WILSON, JR.,

Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
IN EQUITY. NO. ____.

RESPONDENTS' BRIEF AND ARGUMENT

By

J. B. BLACKBURN,

Solicitor for Respondents,

Bay Minette, Alabama.

STATEMENT OF THE CASE.

This is an action commenced by Lucile Leavins against her mother, Orolean Wilson, and her brother, Thomas Wilson, Jr., for specific performance of an oral contract to sell certain real property which the Complainant alleges was made and entered into between the said parties on August 27, 1934. The Complainant also alleges that she was placed in possession of all of the said property which she claimed that she purchased under the contract at the time the said contract was made. She also alleges that she agreed to pay the Respondents \$1500.00 for the property; that she has paid them \$1328.70, leaving a balance due of \$171.30, and also alleges that she has diligently, fully and faithfully complied with her contract, tendered to the Respondents the balance due.

The Respondents strenuously deny that they made any contract with the Complainant on August 27, 1934, but allege that they did make a contract with the Complainant in January, 1934, to sell to her the tract of land that is first described in the Respondents' Amended Answer which they filed in this cause, and that the Complainant was placed in possession of this property and nothing else, and further that she has never had possession of any of the other property.

POINTS AND AUTHORITIES.

1. A court in chancery cannot decree specific performance of an agreement to convey property to which the defendant has no title. *Enslin v. Allen*, 49 So. 430, 160 Ala. 529.

2. That in cases of specific performance complainant must establish his case by such proof as to produce clear conviction in the judicial mind. Courts in such cases will not grope their way on inconclusive probabilities. *Wilder v. Reed*, 112 So. 312, 216 Ala. 29. *Burt v. Moses*, 99 So. 106, 211 Ala. 47.

3. In suits for specific performance great accuracy of averment and strict corresponding proof are required. Loose and inaccurate pleading and variant or merely persuasive testimony is alike fatal to the relief prayer. The complainant's case must be clearly made out in harmonious pleading and proof to entitle him to a decree. *Jones v. Jones*, 47 So. 80, 155 Ala. 644.

4. In the following cases, every agreement is void, unless such agreement, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party to be charged therewith, or some other person by him thereunto lawfully authorized in writing: Every contract for the sale of lands, tenements or hereditaments, or of any interest therein, except leases for a term not longer than one year, unless the purchase money, or a portion thereof be paid, and the purchaser be put in possession of the land by the seller. Section 8034 of the 1923 Code of Alabama, Sub-section (5).

that the Court will readily see that the allegations of the complainant's bill of complaint and the proof offered by her to support it, both wholly fail to meet the strict requirements of 1923 8034, subdivision 5) must be notorious and exclusive. Jones v. Jones, 121 So. page 78.

performance. The Complainant does not allege and she has not proved

ARGUMENT.

that the Respondents own the lands which are made the basis of

FIRST PROPOSITION: When the Complainant filed her original bill in this cause Respondents demurred to it and one of the grounds of demurrer raised the question that the complainant did not allege that the Respondents owned the lands in question. This demurrer was overruled by the Court but the pleadings at this time do not show, nor has the complainant proved that the respondents own the lands that are made the basis of this suit, consequently we contend that for this reason alone the complainant has not made out a case that will entitle her to relief.

SECOND AND THIRD PROPOSITION: As the second and third proposition are somewhat similar, we shall, with the court's permission, attempt to discuss them together. In suits for specific performance of oral contracts to convey lands

"great accuracy of averment and strict corresponding proof are required. Loose and inaccurate pleadings or variant or merely persuasive testimony is alike fatal to the relief prayer. The complainant's case must be clearly made out in harmonious pleading or proof to entitle him to a decree." Jones v. Jones supra.

"In cases of specific performance complainant must establish a case by such proof as to produce clear conviction in the judicial mind. Courts in such cases will not grope their way on inconclusive probabilities." Wilder v. Reed, Burt v. Moses, supra.

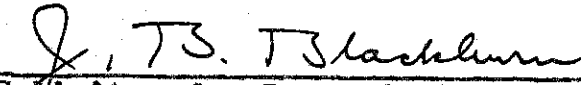
When these rules are applied to the present case we feel

The mere description of the land is such that this alone should convince the Court that the Respondents did not at any time agree to sell such a irregular shaped piece of property. This is the tract of land described in the Bill of Complaint.

CONCLUSION.

For the reasons above stated, we respectfully submit that the Complainant has wholly failed to make out a case entitling her to specific performance of the alleged contract. The Respondents in their answer admit that they are willing to make a conveyance of either one of two pieces of land and we again respectfully submit that the Court may, under Complainant's offer to do equity, so mold a decree that the Complainant will get either one of the two tracts described in the Amended Answer upon paying the balance due the Respondents. She is entitled to nothing else.

Respectfully submitted,


Solicitor for Respondents.

I hereby certify that I delivered a copy of the foregoing Brief to Messrs. Beebe, Hall and Beebe, Solicitors for the Complainant in this cause, on August 31, 1938.

Dated this August 31, 1938.


Solicitor for Respondents.

Not only did complainant, Lucile Leavins fail to prove that the alleged contract was made on August 27, 1934, but she made a positive statement and positively testified that they went into possession of the store "about four years ago on the 1st day of January." She was then asked: "Did you bargain to buy it before you went in?" Answer: "Sure, we bargained to buy it." "That was when the contract was made?" Answer: "sure". This testimony will be found on page six of the testimony in this cause. See also testimony pages 9 and 10. The Complainant has also failed to prove that she was placed in possession of the property which she claims to have purchased at the time the contract was made, namely, on or about August 27, 1934. She did state, however, that on or about January 1, 1934, she was placed in possession of the store. Testimony, page 9.

If the parties themselves do not fix a description of the property to be sold, the court cannot fix a description for them. If the Court can do anything in this matter, it must enforce or refuse to enforce the alleged contract. It cannot make a contract for the parties.

"In order for a complainant to procure the specific performance of a contract through a court of equity, he must show a contract that is specific, certain and complete. He cannot set up one contract and then procure the performance of another. If he contends for a certain contract as having been made between the parties, but which was not complied with by the respondent, he cannot procure the court to make a new or different contract from the one contended for by him, in order to get a specific performance of some contract, regardless of whether or not it was the one contended for by him as the real contract." Citronelle Turpentine Co. v. Buhlig, 63 So. 951.

In this connection we desire to call the Court's attention

to the testimony shown by page 10 of the evidence where the complainant was asked: "You had never fixed a description?" To which she answered: "No". "You never had it surveyed?" Answer: "No". When the Complainant himself admits that there was no description of the land which she claims to have purchased, can the court fix a description for the parties?

Up to this time we have referred to the testimony of the Complainant, Lucile Leavins. We will now call the court's attention briefly to the testimony of her husband, Hollis Leavins. First, on page 22 of the evidence, he stated that the trading was done by his wife, Mrs. Leavins. He further stated that they took possession of the property on January 1, 1934, and that the contract was made before they took possession. He made two statements about this, both of which are shown on page 22 and in both places he stated that the contract was made when they went there on January 1, 1934.

On page 25 of the evidence he also stated when being examined relative to the land that they were to get with the store as follows: "No amount was set out. Whatever we wanted." In the case of Thompson v. Gordon, 72 Ala. 455, a bill was filed for specific performance of a written agreement whereby Gordon agreed to sell Thompson "forty acres of land at three dollars per acre and give him three years to pay for it without interest", the Court held that the agreement was void for uncertainty in the description of the land. As we construe the present case the facts are exactly the same. There is no definite description of

the property which Complainant claims to have purchased, consequently the agreement is void because of this uncertainty and cannot be specifically enforced.

All of the testimony in the cause shows conclusively that the Complainant was not placed in possession of any property in January, 1934, except the store and that a fence separated the store from the other property. She was not placed in possession of any property in August, 1934. No payment was made by her to the Respondents in August, 1934. All of the other property described in the Bill of Complaint, according to all of the testimony in this case, has at all times been in the possession of the Respondents and is still in their possession.

The possession referred to in the statute of fraud (Code 1923, Section 8034, Subdivision 5) must be notorious and exclusive. *Jones v. Jones, supra.*

There is absolutely no evidence before the Court to show that the Complainant has ever been in possession of any property except that described in the Respondents' Amended Answer.

The Complainant, in her brief, has stated that this was a mere family transaction. In this connection we desire to call the Court's attention to the following statement made in the case of *Jones v. Jones, supra*:

"If the possession could be accounted for just as well by some other right or title actually existing in the vendee's favor, or by some relation between him and the vendor other than the alleged contract, it is not such possession as the doctrine requires."

The Complainant has had something to say about a deed

which the Respondents executed on or about August 27, 1934, a copy of which was introduced in evidence as an exhibit to the testimony of the Complainant's witness, Harry Parker. As we understand the law this copy of a deed is not legal evidence for the reason that the original is the best evidence. Complainant had two proper ways of making the proof. She could have, by a subpoena duces tecum compelled the production of the original, or she could have given the Respondents notice to produce it and on their failure so to do she could have then introduced a copy.

All of the evidence in this case shows that the deed referred to was never delivered. The Respondents testified that this deed was made by them at the request of the Complainant and was to be a gift of the property described therein and not a sale.

In the case of Smith v. East Alabama National Bank, 128 So. page 600, it was held that the only exception that will withdraw a parol contract of sale from the operation of the statute of frauds is when a portion of the purchase price is paid and the purchaser put in possession by the seller. In this case a deed was executed by never delivered. The court did not hold that the execution of the deed which was not delivered was sufficient to take the case out of the statute of frauds.

We request that the court carefully examine the two plats which have been introduced in evidence in this case which show the location of the store building and how the piece of land which the complainant claims to have purchased runs into the field that is occupied by the Respondents in an irregular shaped manner.

IN THE
CIRCUIT COURT OF BALDWIN
COUNTY, ALABAMA

LUCILE LEAVINS,

Complainant,

VS.

OROLEAN WILSON and
THOMAS WILSON, JR.,

Respondents.

REPLY BRIEF OF THE COMPLAINANT

By

BEEBE, HALL & BEEBE,

Solicitors for Complainant,

Bay Minette, Alabama.

The Respondents, in their brief, have raised five points or propositions, and argue that either one or all are sufficient to defeat the rights of the Complainant.

This matter was discussed with the Court on last Friday, and we understood at that time that the only propositions of doubt were, whether or not the matter came within, and was controlled, by the Statute of Fraud. We are, therefore, addressing this brief only to the question of whether or not the statute of fraud has been complied with.

The statute of fraud has been fully complied with:

There can be no question but that there was a writing executed to evidence the intention of the parties. The carbon copy of deed offered in evidence by the Complainant was not offered as a muniment of title, but for the purpose of corroborating the testimony of the witnesses and to further prove the fact that there was a writing executed. Mr. Tommy Wilson, one of the Respondents, in his testimony (Pages 51 and 52) testified as follows:

Q: Mr. Wilson, this carbon copy of Warranty Deed, which we offered in evidence as Exhibit "A" for the Complainant, is that an exact copy of the deed which you and Mrs. Wilson signed?

A: Yes.

Q: The original deed of the carbon copy which we have offered in evidence as Exhibit "A" of the Complainant, was signed "Orolean Wilson, Thos. Wilson, Jr." and as witnesses the names "Harry H. Parker and Harold W. Graham" appear?

A: Yes.

An examination of this carbon copy, and too, the testimony of Mr. Wilson in admitting its execution, sufficiently identifies the two acres that the Complainant claims that the Respondents contracted to convey to her.

There can be no question but that payments were made on the contract after the boundaries of the property to be conveyed were definitely established and the written memorandum, in the form of a deed, evidencing the intention of the Respondents as to what they were to convey and of the Complainant as to what she was to receive.

Mrs. Wilson, one of the Respondents, (Page 40), testified as follows:

Q: When did you stop getting groceries down there?

A: About a year this month.

Q: Were you paying for your groceries?

A: They were put down on the book.

Q: You were telling her to charge you on the book and give herself credit up until March, 1937?

A: Yes.

Q: All those groceries and all that money that was delivered over to you was to go against the payments on the property?

A: That was it.

The Respondent, Mrs. Wilson, at some points in her evidence, attempts to say that all the purchase money was paid before the survey and the execution of the deed. However, her testimony, as above referred to, and also the fact that it was so improbably that the Complainant would have paid the full amount of the Thirteen Hundred and some odd dollars over a period beginning January and ending August of the same year, or

that the Respondents could have possibly used that many groceries over such a short period of time.

There is, as we have stated above, no question but that a deed or memorandum was duly executed by the Respondents, or at least they admit so much, both of them, in their evidence. Then too, Mrs. Wilson, in her testimony (Page 41) stated as follows:

Q: Did you say Mr. Thomas Wilson, Jr. signed this deed?

A: Yes, he did.

Q: And you did sign it?

A: I did.

Q: You then delivered it over to Mr. Tommy Wilson to bring up to -

A: She took it herself and brought it up here to get Earl and Harry Parker and the rest to sign it.

Q: Did you deliver this deed over to Mrs. Leavins?

A: I did.

If we are to take the testimony of the Respondents alone, then we find that they contracted to sell to the Complainant some property; that the metes and bounds of the property were not definitely located or pointed out; that they received money on the contract from time to time; that subsequently there was a survey made and the property definitely pointed out and located by metes and bounds and that the evidence of the location of the property was reduced to writing in the form of a Warranty Deed and duly executed by the Respondents, conveying the property to the Complainant, and that the said deed was delivered over to the Complainant; that a part of the consideration had been paid prior to this time, and that after the due execution of the written instrument and the delivery

to the Complainant, the Complainant continued to pay and the Respondents to receive money or the equivalent on the purchase price of the property, and the Complainant continued to use the property, in accordance with their agreement.

The deed was delivered, however, if the position is taken that it was not delivered, bearing in mind that the Respondents themselves admit the due execution thereof, then the undelivered deed, we submit, is a sufficient memorandum to satisfy the conditions of the statute of fraud. 27 R.C.L., page 300; Also Jenkins vs. Harrison, 66 Ala., page 345.

The execution and delivery of a deed carries out the delivery of possession.

It must also be borne in mind that the Complainant had absolutely nothing to do with the pointing out to the surveyor of the lands surveyed by him and included in the Warranty Deed executed by the Respondents. The Respondents were about when the land was surveyed and knew, in a general way at least, the land that the surveyor was surveying and also knew the land that was described in the instrument which they executed.

There was also an ^{actual} ~~additional~~ delivery of the possession by the Respondents to the Complainant.

There can be no question, in fact it is admitted by all the parties of the cause, that there was originally a contract entered into whereby the Complainant was to buy from the Respondents certain property. The testimony of the Complainant is unequivocal that she was to receive two acres with the building (Page 3), and that one of the Respondents pointed to the property ~~that~~ ^{to} the Complainant, and that the other Respondent was there present (Page 3); that at the time that possession was delivered,

the property on which the store building was located was a part and parcel of the two acre tract described in the bill of complaint; that the Complainant, following out her rights under the contract, and with the permission of the Respondents, built additions to the original building and therefore necessarily exercised complete dominion and control over additional lands. This was permitted by the Respondents with actual knowledge thereof and that they received payments on the purchase price subsequent to that time; that thereafter additional property was pointed out by one of the Respondents and the Complainant exercised possession thereover; that this additional property was a part of the two acres described in the bill of complaint.

We wish to refer the Court to Exhibit "B" of the Respondents, which is a map of the property involved. The testimony is to the effect that when the property was delivered by the Respondents to the Complainant, there was a fence around the West and South sides and a part of the East side and that the balance extended out into an enclosed field; that the fence on the West was attached to the Southwest corner of the store building and that the building formed a part of the fence and that the fence then took up with the Northeast corner of the store building and continued on Northwardly. This clearly shows that there was an actual delivery of a part, at least, of the two acre tract, and we respectfully submit that when this was done and the balance of the two acre tract pointed out by the Respondents to the Complainant, that it constituted an actual delivery of the entire two acre parcel.

It will be noted that the shape of the property in dispute is rather irregular. However, an examination of said plat shows that it was

that time, with full knowledge of the property described in the written memorandum, the Complainant continued to make payments and the Respondents to receive them on the contract; that the Complainant was permitted to make improvements on the property, and with this in mind, the Respondents continued to receive payments on the contract, and that now the Complainant has paid practically all of the purchase price and has tendered the balance and demanded her deed, the Respondents suddenly wake up to the fact that they have the Complainant in more or less of a hole and attempt to void their contract and set up that the claim of the Respondents is void by the reason of the statute of fraud. Is this equity?

If we are to examine the plat, as exhibited by the Respondents, then we find that the Complainant has paid out her good money and that the Respondents are now, in effect, wishing to confine her to the immediate building and the property on which it is located. This would, we submit, so completely shut in the Complainant as to make her property practically valueless for any business purpose.

We, therefore, respectfully submit that the evidence in the case has clearly shown, and is convincing, that the law has been fully complied with and that in addition thereto, that the equities are materially on the side of the Complainant and that she is now entitled to the relief she prays for in having a conveyance of the property she purchased - the property for which the Respondents executed a written memorandum, in the form of a Warranty Deed, and the property for which she has paid her money and the Respondents have received her money in payment

of. The fact that the property is somewhat irregular in shape, or may inconvenience the Respondents somewhat, is not to be taken seriously in view of the fact that they have for a period of four years, with knowledge of the execution of the written instrument, permitted the Complainant to remain in possession of said property and have received her money or the equivalent thereof and applied it to their own use.

We, therefore, submit that the Complainant is entitled to the relief prayed for.

Respectfully submitted,

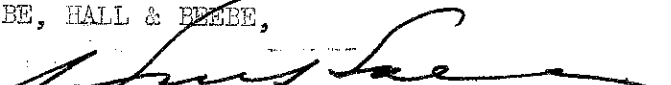
BEEBE, HALL & BEEBE,

By: 
Solicitors for Complainant.

We hereby certify that we have this day delivered a copy of the above brief to Hon. J. B. Blackburn, Solicitor for the Respondents.

Dated this 3 day of September, 1938.

BEEBE, HALL & BEEBE,

By: 
Solicitors for Complainant.