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**BILL OF COMPLAINT.**

Filed March 25, 1930.

**In Chancery of New Jersey**

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

The complainant, William B. Kunz, of the City  
of Maplewood, in the County of Essex and State  
of New Jersey, respectfully shows that:

1. The Barnegat Pines Realty Co., Inc. is a  
corporation organized and existing under and by  
virtue of the laws of the State of Delaware, duly  
authorized to do business in the State of New  
Jersey, having a principal place of business at 20  
No. 17 Academy street, in the City of Newark,  
County of Essex and State of New Jersey.

2. On February 24, 1928 the said Barnegat  
Pines Realty Co., Inc. entered into a certain  
contract in writing with complainant, a true copy  
of which is hereunto annexed and made a part  
hereof, whereby it agreed to convey to com-  
plainant for the sum of Six Hundred Dollars  
(\$600.00), by Deed of Warranty, on or before 30  
the first day of September, 1929, all those cer-  
tain lands and premises hereinafter particularly  
described, situate, lying and being in the Town-  
ship of Lacey, in the County of Ocean and State  
of New Jersey, namely:

Lots thirty-one (31), thirty-two (32), thirty-  
three (33), thirty-four (34), thirty-five (35) and  
thirty-six (36), in Block 144 on Map No. 12 of  
property belonging to the Barnegat Pines Realty  
Co., and filed with the Township Committee of 40

*Bill of Complaint.*

Lacey, Ocean County; also the County Clerk of Ocean County, at the Court House, Toms River, Ocean County, New Jersey.

3. An accurate description of the above-mentioned lots, by meads and bounds, is as follows:

10

Beginning in the easterly line of Alpine Street at a point therein distant southerly one hundred feet (100) from the southerly line of Holmes Avenue; thence easterly parallel with Holmes Avenue one hundred feet (100); thence southerly parallel with Alpine Street one hundred and twenty feet (120); thence westerly parallel with Holmes Avenue one hundred feet (100) to the easterly line of Alpine Street; thence along the same northerly one hundred and twenty feet (120) to the place of Beginning.

20

4. By the terms of the said contract the said sum of Six Hundred Dollars (\$600.00), which was the purchase price for the lots, was to be paid Fifty Dollars (\$50.00) in cash upon the signing of order and One Hundred Dollars (\$100.00) on March 17, 1928, and the balance of Four Hundred and Fifty Dollars (\$450.00) to be paid at the rate of Twenty-five Dollars (\$25.00) monthly for eighteen (18) consecutive months, which was to be paid at the said Newark office of the Barnegat Pines Realty Co., Inc.

30

5. The lands mentioned and described in said contract of sale consist of six unimproved building lots on Alpine street, in the Township of Lacey, each being twenty feet in front and rear, and one hundred feet in depth.

6. After the above-mentioned contract was entered into and after the complainant had com-

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*Bill of Complaint.*

menced to make his payments thereunder, the said Barnegat Pines Realty Co., Inc., through its agents and servants, without the knowledge or consent of complainant, entered in and upon said premises and wilfully, wrongfully and unlawfully removed hundreds of wagon loads of valuable red gravel from said premises, which it used in connection with building roads through other property belonging to said Barnegat Pines Realty Co., Inc. in the neighborhood, leaving an immensely large hole on said premises from which the gravel was taken, thus changing the character and appearance of said property and decreasing the value of the same materially. 10

7. The said Barnegat Pines Realty Co., Inc., in digging and removing the said gravel as aforementioned, destroyed and removed scores of beautiful trees and shrubbery, which were on said premises at the time the contract was made, and which was one of the inducing causes for the complainant purchasing said lots. 20

8. Complainant not knowing of the above-mentioned trespass, waste and wrongful acts continued to pay his monthly installments to the Barnegat Pines Realty Co., Inc., until the entire amount of the purchase price had been paid as called for by said contract, the last installment having been paid on or about the eleventh day of September, 1929. 30

9. The said Barnegat Pines Realty Co., Inc., after receiving the last installment due it from complainant, delivered to the complainant on or about the twentieth day of September, 1929, a warranty deed, dated September 20, 1929, acknowledged September 20, 1929, covering the lands and property mentioned in said contract, 40

*Bill of Complaint.*

which complainant received in good faith, not knowing of the above-mentioned trespass, waste and wrongful acts committed by said Barnegat Pines Realty Co., Inc.

10 10. Before recording the deed above mentioned, and on or about October 26, 1929, the complainant inspected the said premises covered by said contract and deed, and discovered, for the first time, that the Barnegat Pines Realty Co., Inc., after it entered into said contract with complainant, entered in and upon said premises and dug a gravel pit upon said premises and removed therefrom hundreds of wagon loads of valuable red gravel without the knowledge or consent of complainant, and destroyed numerous  
20 beautiful trees and shrubbery which were on said lots and leaving an immensely large hole on said premises from which the gravel was taken, thus changing the character and appearance of said property and decreasing the value of the same materially.

30 11. Upon complainant discovering the excavation on said premises, he immediately went to the office of the Barnegat Pines Realty Co., Inc. and tendered back the said deed, which had not been recorded, as yet, and which is not recorded up to the present time, and demanded the return of the purchase price paid for said premises under the terms of said contract.

40 12. The said Barnegat Pines Realty Co., Inc. refused to take back the deed and to repay to the complainant the purchase price, but offered to give complainant six other lots on said map, upon condition, however, that he pay a larger sum of money for said six lots than the original contract price, which complainant refused to do,

*Bill of Complaint.*

insisting upon his right to have the property which he contracted for, without any change made in the same.

13. Complainant is desirous of having the above-mentioned deed declared null and void and of no effect, and having the purchase money paid under the contract decreed to be returned to him, with interest, together with such other damages as he is lawfully entitled to for the defendant's breach of contract, and is desirous of having the amount found due him impressed upon the said premises as a lien. 10

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

1. That Barnegat Pines Realty Co., Inc., a corporation, which is the defendant to this suit, may answer this bill of complaint and each statement therein made. 20

2. That it be ordered, adjudged and decreed that the above-mentioned deed, dated September 20, 1929, and acknowledged September 20, 1929, covering the above-mentioned premises, wherein the Barnegat Pines Realty Co., Inc., a corporation, appears as grantor, and the complainant herein appears as grantee, be declared null and void and of no effect, and that the complainant be permitted to return and surrender the said deed to the Barnegat Pines Realty Co., Inc., for cancellation. 30

3. That it be ordered, adjudged and decreed that the defendant pay to the complainant the purchase price received by it under the said contract, with interest.

*Bill of Complaint.*

4. That the defendant be decreed to pay to the complainant such other damages as he has suffered by reason of the breach of contract on behalf of the Barnegat Pines Realty Co., Inc.

10 5. That it be ordered, adjudged and decreed that the amount found to be due to the complainant from the defendant be impressed upon the above-mentioned premises as a lien.

6. And for such other relief as the nature of the case may require.

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

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AQUILA N. VENINO,  
Solicitor for and of Counsel  
with Complainant.

30

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*Bill of Complaint.*

Telephone: Mulberry 4820

—  
TRENTON OFFICE  
BROAD ST. BANK BUILDING

—  
BARNEGAT PINES REALTY CO.  
INCORPORATED 10  
17 ACADEMY STREET  
SUITE 1103-4  
PETRONE

PATERSON OFFICE  
COLT BUILDING NEWARK, N. J.  
810

ARTICLES OF AGREEMENT, Made the 24th  
day of February in the year of Our Lord One  
Thousand Nine Hundred and Twenty-eight BE- 20  
TWEEN the BARNEGAT PINES REALTY  
CO., INC., a corporation organized and existing  
under the laws of the State of Delaware, duly  
authorized to do business in the State of New  
Jersey, party of the First Part:

AND WILLIAM B. KUNZ,  
509 Richmond Avenue,  
of the City of Maplewood in the County of  
Essex and State of New Jersey, party of the  
Second Part

30  
That the said party of the first part, for and  
in consideration of the sum of  
SIX HUNDRED & 00/100 (\$600.00) . . DOLLARS  
to be paid and satisfied as hereinafter men-  
tioned, and also in consideration of the covenants  
and agreements herein after mentioned, made  
and entered into by the said party of the second  
part, doth agree to and with the said party of  
the second part, that they, the said party of the  
first part, will well and sufficiently convey to

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*Bill of Complaint.*

the said party of the second part, his heirs and assigns, by Warranty Deed on or before the first day of Sept. 1929 ensuing the date hereof, all the lots, tracts, or parcels, of land and premises, hereinafter particularly described, situate, lying and being in the Township of Lacey, in the County of Ocean and State of New Jersey, and further described as Map No. 12 Block 144 Lots 31, 32, 33, 34, 35 and 36. of Property belonging to the Barnegat Pines Realty Co., and filed with the Township Committee of Lacey, Ocean County, also the County Clerk of Ocean County at the Court House, Toms River, Ocean County, New Jersey,

AND the said WILLIAM B. KUNZ, for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that he the said party of the second part, will pay and satisfy or cause to be paid and satisfied unto the said party of the first part the sum of SIX HUNDRED & 00/100 (\$600.00) . . . DOLLARS as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

30 CASH upon the signing of order in the amount of \$50.00 and \$100.00 on March 17, 1928

The balance of \$450.00 to be paid at the rate of \$25.00 monthly for 18 consecutive months and \$. . . . for the next ensuing month with interest of 6% on unpaid balance, at the Newark office of the company, the first monthly payment to be due and payable on the first of the next month following date of this agreement, and should the party of the second part fail to make any and all payments as herein agreed and at the time and place agreed upon, then the party of the

*Bill of Complaint.*

first part shall and will retain all moneys paid under this contract as liquidated damages for abrogation of contract by party of the second part.

AND IT IS FURTHER AGREED by the parties hereto, that the said Deed shall be delivered and received at 509 Richmond Avenue, Maplewood, N. J. between the hours of 11 in the forenoon and 8 o'clock in the afternoon on the said first day of Sept. 1929 ensuing the date hereof. 10

AND IT IS FURTHER AGREED by the parties hereto that no representations other than that contained in the printed literature of the Company is binding on the Company, and the party of the second part in signing this contract does so with full knowledge of all the facts and statements contained therein. 20

AND for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of SIX HUNDRED & 00/100 (\$600.00) .....DOLLARS which they hereby fix and settle as liquidated damages therefor. 30

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

BARNEGAT PINES REALTY CO.

509 Richmond Ave.,	NORMAN A. GRAHAM	
Street Address	Vice President	
Maplewood,	RUSSELL T. GRAHAM	
City	Ass't. Secretary	
N. J.	WILLIAM B. KUNZ (SEAL)	40
State	Party of the Second Part	

**ANSWER.**

Filed April 26, 1930.

IN CHANCERY OF NEW JERSEY.

10	<i>Between</i> WILLIAM B. KUNZ, <i>Complainant,</i> <i>and</i> BARNEGAT PINES REALTY CO., INC., a corporation, <i>Defendant.</i>	<i>On Bill, &amp;c.</i> <i>Answer.</i>
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20 The answer of the defendant, Barnegat Pines Realty Co. Inc., a corporation organized under the laws of the State of Delaware and duly authorized to do business under the laws of the State of New Jersey.

The defendant, Barnegat Pines Realty Co. Inc., answering the bill of complaint, says:

1. Paragraphs 1 and 2 are admitted.
2. As to paragraph 3, the defendant has no knowledge or information sufficient to form a belief.
- 30 3. Paragraphs 4 and 5 are admitted.
4. Paragraphs 6 and 7 are denied.
5. As to paragraph 8, the defendant admits that the purchase price has been paid. All other allegations in said paragraph are denied.
6. Paragraph 9 is denied, with the exception that the defendant delivered to the complainant a warranty deed in accordance with the contract.
- 40

*Answer.*

7. Paragraph 10 is denied.

8. Defendant neither admits nor denies the allegations in paragraphs 11 and 12, but puts the complainant to his proof.

9. Answering paragraph 13, defendant says that the complainant is not entitled to have the said deed declared void and of no effect, nor is he entitled to have the purchase money returned to him, nor is he entitled to any damages, nor to a lien upon the said premises. 10

10. The defendant further answering the bill of complaint says that the complainant viewed the premises and purchased said lots subsequently thereto; that the said land consists of six unimproved lots, and that this defendant has not changed or altered in any manner whatsoever the character or appearances of the lots purchased by the complainant. 20

Defendant prays to be hence dismissed with his costs and charges in this behalf most wrongfully sustained.

EGNER and BEATTY,  
Solicitors of Defendant.

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**REPLICATION.**

Filed May 2, 1930.

IN CHANCERY OF NEW JERSEY.

#77-648.

10

WILLIAM B. KUNZ,

*Complainant,*

*vs.*

BARNEGAT PINES REALTY Co.,

INC., a corporation,

*Defendant.*

*On Bill.*

*Replication.*

20

The complainant joins issue on the answer of the defendant.

AQUILA N. VENINO,  
Solicitor of Complainant.

Dated, May 1, 1930.

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**CONSENT ORDER OF REFERENCE.**

Filed May 29, 1930.

IN CHANCERY OF NEW JERSEY.

#77-648.

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WILLIAM B. KUNZ, <i>Complainant,</i>  vs. BARNEGAT PINES REALTY Co., INC., a corporation, <i>Defendant.</i>	}	On Bill.  Consent Order of Reference.
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This matter being opened to the Court by 20  
 Aquila N. Venino, solicitor of the complainant,  
 and it appearing that Egner & Beatty, solicitors  
 for the defendant, have consented hereto; it is,  
 on this 29th day of May, nineteen hundred and  
 thirty, on motion of Aquila N. Venino, solicitor  
 of the complainant,

ORDERED that the above-entitled cause be re-  
 ferred to Hon. Alonzo Church one of the Vice-  
 Chancellors of this court, to hear the same for  
 the Chancellor, and to report thereon to him 30  
 and to advise what order or decree should be  
 made therein.

E. R. WALKER,

C.

I hereby consent to the entry of the foregoing  
 order.

EGNER & BEATTY,  
 By HENRY W. EGNER, JR., 40  
 Solicitors of Defendant.

**NOTICE OF MOTION TO FIX DAY FOR  
HEARING.**

Filed September 17, 1930.

IN CHANCERY OF NEW JERSEY.

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#77-648.

WILLIAM B. KUNZ,

*Complainant,*

*vs.*

BARNEGAT PINES REALTY Co.,  
INC., a corporation,

*Defendant.*

*Notice of  
Motion  
to Fix Day  
for Hearing.*

20

To Egner & Beatty, Esqs., solicitors for defendant, 17 Academy street, Newark, New Jersey:

TAKE NOTICE that on Monday, June 16, 1930, at the hour of four o'clock in the afternoon (Daylight Savings Time), or as soon thereafter as counsel can be heard, I shall apply to the Honorable Alonzo Church, the Vice-Chancellor of this court to whom this cause has been referred, at his private chambers, Room 638, on the sixth floor of the Prudential Building, 763 Broad street, in the City of Newark, for an order fixing the time and place for the hearing of the said cause.

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AQUILA N. VENINO,  
Solicitor for Complainant.

40

**ORDER FIXING DAY FOR HEARING.**

Filed September 17, 1930.

IN CHANCERY OF NEW JERSEY.

#77-648.

10

WILLIAM B. KUNZ, <i>Complainant,</i> <i>vs.</i> BARNEGAT PINES REALTY Co., INC., a corporation, <i>Defendant.</i>	} <i>Order Fixing Day for Hearing.</i>
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This matter being opened to the Court by 20  
Aquila N. Venino, solicitor of the complainant,  
and it appearing that due notice of this applica-  
tion has been given to Egner & Beatty, solicitors  
of the defendant; it is, on this 21st day of June,  
1930,

ORDERED, that the 17th day of September, 1930,  
at the hour of 10 o'clock in the forenoon, at the  
Chancery Chambers, in the City of Newark, be  
designated as the time and place for the hearing  
of the above-entitled cause. 30

E. R. WALKER,  
C.

Respectfully advised,

ALONZO CHURCH,  
V.-C.

**NOTICE OF HEARING.**

Filed December 10, 1930.

IN CHANCERY OF NEW JERSEY.

#77-648.

10

WILLIAM B. KUNZ, <i>Complainant,</i>  <i>vs.</i> BARNEGAT PINES REALTY Co., INC., a corporation, <i>Defendant.</i>	}	<i>Notice of Hearing.</i>
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20 To Egner & Beatty, Esqs., solicitors for defendant, 17 Academy street, Newark, New Jersey:

30 TAKE NOTICE of the hearing of this cause before the Honorable Alonzo Church, the Vice-Chancellor of this court to whom the said cause has been referred, on the seventeenth day of September, 1930, at the hour of ten o'clock in the forenoon, at the Chancery Chambers in the City of Newark, the time and place designated by the order of said Vice-Chancellor on the 21st day of June, 1930.

Dated, June 23, 1930.

AQUILA N. VENINO,  
Solicitor for Complainant.

Service of a copy of the within Notice of Hearing, is hereby acknowledged this 27th day of June, 1930.

40

EGNER & BEATTY,  
By M. M. TRUBE,  
Solicitors for Defendant.

**ORDER DISMISSING BILL OF  
COMPLAINT.**

Filed October 31, 1930.

IN CHANCERY OF NEW JERSEY.

#77-648.

10

*Between*

WILLIAM B. KUNZ,  
*Complainant,*  
  
*and*  
  
BARNEGAT PINES REALTY Co.,  
INC., a corporation,  
*Defendant.*

*On Bill, &c.*  
*Order*  
*Dismissing*  
*Bill of*  
*Complaint.*

20

This cause coming on to be heard in the presence of Aquila N. Venino, solicitor of the complainant, William B. Kunz, and Lloyd G. Beatty, of Egner and Beatty, solicitors of the defendant, Barnegat Pines Realty Co. Inc., a corporation, and the Court having examined the pleadings, taken proofs orally and in open court, and having heard and considered the argument of counsel thereon;

30

And it appearing to the satisfaction of the Court that the complainant failed to prove any misrepresentation or fraud on the part of the defendant, but on the contrary, the complainant having inspected the property prior to entering into the contract to purchase, and four times while he was paying his installments, had knowledge and notice that there were or had been sand pits in the immediate vicinity of the property purchased by the complainant, and it further

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*Order Dismissing Bill of Complaint.*

appearing to the Court that notwithstanding such notice or knowledge, the complainant continued to make payments in accordance with the terms of his contract, and on final payment accepted the deed when delivered by the defendant:

10 It is, on this 31st day of October, nineteen hundred and thirty, ORDERED, ADJUDGED AND DECREED that the bill of complaint filed herein be, and the same is hereby dismissed.

And it is further ordered that the said complainant pay to the defendant herein the costs of this suit to be taxed.

20 And it is further ordered that a true but uncertified copy of this decree be served upon the said complainant or his solicitor, within five days from the date hereof.

E. R. WALKER,

C.

Respectfully advised,

ALONZO CHURCH,  
V.-C.

Approved as to form,

30 AQUILA N. VENINO,  
Solicitor of Complainant.

**NOTICE OF APPEAL.**

Filed November 8, 1930.

IN CHANCERY OF NEW JERSEY.

#77-648.

10

*Between*

---

WILLIAM B. KUNZ,  
*Complainant,*  
*and*  
 BARNEGAT PINES REALTY CO.,  
 INC., a corporation,  
*Defendant.*

---

*On Bill, &c.*  
*Notice of*  
*Appeal.*

20

The complainant, William B. Kunz, hereby appeals from the order dismissing the bill of complaint, made by the Chancellor and advised by Vice-Chancellor Alonzo Church, in the above-entitled cause on the thirty-first day of October, 1930, which order is in effect the final decree in said cause, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

30

Dated November 7, 1930.

AQUILA N. VENINO,  
 Solicitor for and of Counsel with  
 Complainant, William B. Kunz.

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

AQUILA N. VENINO,  
 Of Counsel with Complainant,  
 William B. Kunz.

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*Notice of Appeal.*

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

MARION L. GRANT, of full age, being duly sworn according to law on her oath, deposes and says:

10 That on the 7th day of November, 1930, at about 2:15 in the afternoon, she served the within notice of appeal upon the defendant, Barnegat Pines Realty Co. Inc., a corporation, by leaving a true copy thereof at the office of Egner & Beatty, the solicitors of said defendant, 17 Academy street, Newark, N. J., that being their office address in this State as endorsed on the first paper filed by them in this cause, by leaving the same with Myrtle Trube, she being the stenographer in charge of said office, no member of the said firm being in at the time.

20

MARION L. GRANT.

Sworn and subscribed to before  
 me this 7th day of November,  
 1930.

FREDERICK J. FISCHER,  
 Notary Public of N. J.

30

40

**PETITION OF APPEAL.**

Filed November 15, 1930.

**NEW JERSEY COURT OF ERRORS  
AND APPEALS.**

<p>WILLIAM B. KUNZ, Complainant-Appellant,  vs.  BARNEGAT PINES REALTY Co., INC., a corporation, Defendant-Appellee.</p>	}	<p><i>On Appeal from the Court of Chancery.  Petition of Appeal.</i></p>	<p>10</p>
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To the Honorable the Court of Errors and Appeals in the last resort in all causes: 20

The petition of William B. Kunz, the appellant in the above-entitled cause, respectfully shows that:

1. Petitioner finds himself aggrieved by an order dismissing the bill of complaint, which order is in effect the final decree in said cause, made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the thirty-first day of October, 1930, in a certain cause in said Court of Chancery wherein the said William B. Kunz was complainant and the said Barnegat Pines Realty Co. Inc., a corporation, was defendant, in this respect, to wit, 30

That the said order recites and adjudges that the complainant failed to prove any misrepresentation or fraud on the part of the defendant, but on the contrary, the complainant having inspected the property prior to entering into the 40

*Petition of Appeal.*

contract to purchase, and four times while he was paying his installments, had knowledge and notice that there were or had been gravel pits in the immediate vicinity of the property purchased by the complainant, and that notwithstanding such notice or knowledge, the complainant continued to make payments in accordance with the terms of his contract, and on final payment accepted the deed when delivered by the defendant; and doth

Further order, adjudge and decree that the bill of complaint filed by the complainant therein be and the same is hereby dismissed; and that the complainant pay to the said defendant the costs of this suit to be taxed.

And your petitioner appeals from the said order of the Chancellor which decrees as aforesaid, upon the ground that the same is erroneous for the following reasons:

1. Because the order recites and adjudges that the complainant failed to prove any misrepresentation or fraud on the part of the defendant, whereas his Honor the Chancellor should have found that the case does not involve any fraudulent misrepresentation and was not based upon any misrepresentation or fraud, but that the same was based upon the defendant's wilful, wrongful and unlawful act in entering upon the premises after it entered into a contract to sell the same to the complainant, and unlawfully removing one hundred and forty-six (146) cubic yards of gravel and numerous beautiful trees and shrubbery, leaving an excavation and hole upon said premises some eight or twelve feet deep and that this unlawful act gave the complainant the right to rescind the contract upon discovering

*Petition of Appeal.*

this condition, which entailed the cancellation of the deed and the return of the purchase price paid under the contract.

2. Because the said order recites and adjudges that the complainant inspected the property prior to entering into the contract to purchase and four times while he was paying his installments and had knowledge and notice that there were or had been gravel pits in the immediate vicinity of the property purchased by the complainant and that notwithstanding such notice or knowledge complainant continued to make payments in accordance with the terms of his contract and on final payment accepted the deed when delivered by the defendant, whereas his Honor the Chancellor should have found that the complainant prior to entering into the contract to purchase, inspected with Mr. Petrone, the defendant's sales agent, the tract out of which the six lots which he purchased came and that he and Mr. Petrone, the defendant's sales agent, were unable to locate said lots because the streets laid out upon the map from which the complainant selected his lots, had not been staked out or opened, nor had any of the lots which he purchased or which were shown on the map, been staked out or in any way marked so they could be identified by an inspection, but that he had been informed by Mr. Petrone, the said sales agent of the defendant, that his lots were near a gravel pit on Lacey Road, which gravel pit was about one hundred and fifty (150) feet wide on the westerly side of Lacey Road and ran back in a westerly direction between sixty-five (65) and one hundred (100) feet from Lacey Road, and that the lots purchased by the complainant were on Alpine street, an unopened

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*Petition of Appeal.*

street two hundred (200) feet west of Lacey Road, and that said lots were only one hundred (100) feet deep running in an easterly direction, and that on February 24, 1928 the complainant entered into a written contract with the defendant to purchase six lots from a map, the purchase price of which was to be paid Fifty Dollars (\$50.00) upon the signing of the order, One Hundred Dollars (\$100.00) on March 17, 1928, and the balance at the rate of Twenty-five Dollars (\$25.00) per month for eighteen consecutive months, to be paid at the Newark office of the Barnegat Pines Realty Co. Inc., a corporation, and that the premises purchased were located in the Township of Lacey, County of Ocean and State of New Jersey, and that after the signing of the contract the complainant made three or four trips to the Barnegat Pines property to ascertain whether the tract had been improved to such an extent that he would be able to locate and identify his lots and that on none of these occasions was he able to locate his lots as no streets had been laid out or staked out, nor any lots staked out, and that on one or two of these occasions the complainant noticed that the defendant was enlarging the gravel pit on Lacey Road and using the said gravel to improve a part of the tract distantly removed from the property in question and that at the time the complainant saw the gravel pit enlarged he did not know where his lots were and could not identify his lots from inspection as there were no streets staked out or laid out, or any of the lots marked. That on these occasions the complainant roamed around the neighborhood of the gravel pit on Lacey Road and saw that there were no other

*Petition of Appeal.*

gravel pits in or near this section of the property of the Barnegat Pines Realty Co. Inc., and that the complainant fulfilled his part of the contract by making his monthly payments, which were made by mailing the same to the defendant, and that the last payment under the contract was made on September 11, 1929, some eighteen months after the contract was entered into, and that at the time these payments were made the complainant did not know where his lots were located and could not identify them on account of no streets having been laid out or staked out or no lots staked out. That the complainant received his deed on October 12, 1929 and that on October 27th or 28th, 1929, which was the first opportunity the complainant had to inspect the premises after he got the deed, he discovered that Lake View Road had been cut through, which gave the complainant his first opportunity to locate his lots by measuring a certain distance from this road. That he measured the required number of feet from Lake View Road and that, for the first time, he discovered that the gravel pit on Lacey Road had been enlarged by the defendant to such an extent that it took in part of lots thirty-five (35) and thirty-six (36), which was part of the property covered by the contract and the deed, and that the pit was so enlarged after the contract was entered into. That the gravel pit took the form of an excavation on the complainant's property, from which one hundred and forty-six (146) cubic yards of gravel had been removed, leaving a large hole eight to twelve feet deep. That the excavation was of recent origin as the color of the soil was fresh and the photograph shows this same condition. That

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*Petition of Appeal.*

the complainant upon learning of this condition promptly went to the defendant and tendered back the deed and demanded the return of his purchase price, thus electing to rescind the contract on the ground that the defendant, after entering into the contract with the complainant

10 wilfully, wrongfully and unlawfully removed one hundred and forty-six (146) cubic yards of gravel from the premises mentioned in said contract, and also destroyed and removed scores of beautiful trees and shrubbery, which were upon the premises at the time the contract was made, leaving a large hole or excavation, changing the character and appearance of said property and decreasing the value of the same materially. That the complainant did not record

20 the deed and that the defendant, at the time it delivered the deed to the complainant, did not disclose to the complainant the changed conditions which it wrongfully created. That the defendant wrongfully refused to take back the deed and wrongfully refused to repay the purchase price, but offered to give complainant six other lots in another location, provided the complainant would pay an additional sum of money, which the complainant refused to do, and that

30 the above-mentioned deed is null and void and of no effect, and that the complainant be permitted to return the deed to the defendant for cancellation and that the defendant repay to the complainant the purchase price received by it under said contract; that the defendant pay to the complainant such other damages as he suffered by reason of the breach of contract on behalf of the defendant, and that the amount found to be due from the defendant to the complainant be imposed upon the above-mentioned

40 premises as a lien.

*Petition of Appeal.*

3. Because the testimony, evidence and proofs do not warrant the conclusions of his Honor the Chancellor nor the order made by him.

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

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AQUILA N. VENINO,  
Solicitor for and of Counsel  
with Appellant.

Service of a copy of the within Petition of Appeal is hereby acknowledged this 14th day of November, 1930.

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EGNER & BEATTY,

By HENRY W. EGNER, JR.,  
Solicitors for Defendant.

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## ANSWER TO PETITION OF APPEAL.

Filed December 6, 1930.

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

10

WILLIAM B. KUNZ,  
Complainant-Appellant,  
vs.

*On Appeal  
from Court  
of Chancery.*

BARNEGAT PINES REALTY CO.,  
INC., a corporation,  
Defendant-Appellee.

*Answer to  
Petition of  
Appeal.*

20 The answer of Barnegat Pines Realty Co. Inc., a corporation, the above-named appellee, to the petition of William B. Kunz, the above-named appellant.

30 This appellee, 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 was, on the thirty-first day of October, 1930, 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, this appellee begs leave to refer thereto when the same shall be produced.

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

EGNER & BEATTY,  
Solicitors for and of Counsel  
with Appellee.

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*William B. Kunz, direct.*

**TESTIMONY.**

IN CHANCERY OF NEW JERSEY.

October 22, 1930.

<p><i>Between</i></p> <p>WILLIAM B. KUNZ, <i>Complainant,</i></p> <p style="text-align: center;"><i>and</i></p> <p>BARNEGAT PINES REALTY COM- PANY, INC., <i>Defendant.</i></p>	}	10
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Transcript of shorthand notes of testimony taken in the above-entitled cause before his Honor, Alonzo Church, Vice-Chancellor, at the Chancery Chambers, Newark, New Jersey, in the presence of Aquila N. Venino, for complainant; Egner & Beatty (By Mr. Beatty) for defendant.

(Complainant's and defendant's counsel open.)

WILLIAM B. KUNZ, complainant.

*Direct examination* by Mr. Venino. 30

Q Mr. Kunz, are you the complainant in this action? A I am.

Q Where do you live? A 509 Richmond avenue, Maplewood.

Q Did you have any business dealings with the Barnegat Pines Realty Company, Inc., the defendant in this action, on or about February 23, 1928? A I did.

Q What was the nature of those transactions? A I entered into a contract to purchase six lots. 40

*William B. Kunz, direct.*

Q And is this the contract you entered into (handing witness paper)? A Why, yes.

Mr. Venino: I offer the contract in evidence.

10 The Court: How much is the purchase price?

Mr. Venino: \$600.

(Contract marked Exhibit C. 1.)

Q Who sold you these lots mentioned in this contract? On behalf of the Barnegat Pines Realty Company? A Mr. Tony Petrone, their salesman.

20 Q How did you come to buy these lots, and did you buy them after a personal inspection or by map or how?

Mr. Beatty: I think that is leading, your Honor.

The Court: Yes.

Mr. Beatty: Ask the question, "How did you come to buy it?"

The Court: How did you come to buy it?

Mr. Venino: All right, I will reframe it.

30 Q How did you come to buy these lots? A Why, my father had purchased two lots, previous, and a friend of his, too, and there were six lots left on this block, and my father says it was—(interrupted).

Mr. Beatty: I object.

40 Q Never mind what your father said. A Father told me about these six lots and enticed me to buy them.

*William B. Kunz, direct.*

The Court: Your father enticed you to buy them?

The Witness: That is how, yes; he told me about the investment.

The Court: All right.

The Witness: And he introduced me to Mr. Petrone, that came to sell them to me, and we went down—Mr. Petrone made an appointment with me and went down with the Barnegat Pines Realty Company bus down to the tract. As we went down, why, Mr. Petrone explained the different points of interest and advantages, and, as we went through a road—Lacey Road—which is on the west—which starts the tract, that is, adjoins to the tract, goes through the tract, why, we stopped at a sand, gravel pit, and at this gravel pit Mr. Petrone explained to me how at this gravel pit there was red gravel that they were going to develop the property the same as Pinewald, and that they didn't have to go ahead and purchase it the same as what they did—the other companies had to do, that they had it right on the ground; so we went on over there up the road and in toward the lakes, around along the lakes and out to the main highway to a hotel where Mr. Petrone brought out a map and showed me these six lots and explained that it was in the neighborhood of where we had stopped at this gravel pit and features that I had seen it, the neighborhood, and saw the nice location, the trees, and so forth, shrubberies, pine trees, so I entered a contract with him to purchase these six lots.

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*William B. Kunz, direct.*

Q Now, Mr. Kunz, when you stopped at this gravel pit, you say it was on Lacey Road? A The westerly side of Lacey Road.

Q I see. A That is, it entered—it was at the—dimensions of about 150 foot wide, facing Lacey Road and extending, I should judge, about  
10 65 foot in from Lacey Road, westerly from Lacey Road.

Q And when you saw the lots that you were purchasing on this map, later on at the hotel, how far in from Lacey Road were those lots?

A Why, 200 feet from Lacey Road.

Mr. Venino: Have you got the map here?

Mr. Beatty: Do you want a map or photograph?

20 Mr. Venino: Map.

Mr. Beatty: Does he know the location of those lots?

Mr. Venino: Yes.

Mr. Beatty: I mean, does he know?

Mr. Venino: Have you any objection to introducing that?

Mr. Beatty: No, I will offer it, anyway.

30 Mr. Venino: We might as well offer it now. It might enlighten your Honor a little.

Mr. Beatty: You might understand, see here, that the red are the lots sold, and the yellow, the larger yellow is lots and the other yellow is the father's land.

Mr. Venino: I see. By consent, then, this map is introduced in evidence.

The Court: Well—

40 Mr. Beatty: I think we can stipulate in regard to the explanation of that map, your Honor, if you wish—

*William B. Kunz, direct.*

The Court: What do you mean "explanation"?

Mr. Beatty: Well, the explanation of the diagram in color here, so as to bring out the points we want. The red, the entire plot, the entire tract has been plotted and staked out—the red are the lots that are sold and the larger yellow section is the lots in question consisting of six, while the other yellow section is the father's lots.

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Mr. Venino: Well, I cannot stipulate as to what the yellow on there indicates, you see, I have my surveyor here.

Mr. Beatty: Well, you can tell by the numbers, if you look at the numbers.

Mr. Venino: Yes, check it up.

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Mr. Beatty: Well, it won't be necessary then to—I don't know whether those numbers are—well, we will try to check it up. You said he could identify it. Don't let the map go in unless it has something to do with the case.

Mr. Venino: 39 and 40 are not his lots.

Mr. Beatty: No.

Mr. Venino: They are in yellow.

Mr. Beatty: Those are his father's. I said the larger yellow section is his father's lots.

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Mr. Venino: It doesn't make any difference.

Mr. Beatty: It makes a difference. We want to look at the lots before we squabble about them.

Q Is this the kind of a map which was shown to you by Mr. Petrone? A Yes.

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*William B. Kunz, direct.*

Q And how far were your lots in from Lacey Road, about how many feet? A Why, about 200 foot.

Q 200 feet? A Yes.

10 Q Now, Mr. Kunz, when you inspected the property of the Barnegat Pines Company on February 23, 1928, were any of the streets shown on this map opened up or laid out or staked out? A No, sir.

Q Were any of the lots on this map, shown on this map staked out or laid out? A None.

Q Was it possible for you or Mr. Petrone to definitely locate the lots which you were buying at this time, except outside of the map? A No.

20 Q So, when you purchased your lots, did the Barnegat Pines Realty Company furnish any means whereby you could definitely identify them? A None.

Q Now, after you signed the contract, did you ever visit the tract again? A Yes; about three or four times thereafter.

Q On what days did you make these visits? A Well, I haven't kept track of that, I couldn't tell you just exactly the dates.

30 Q All right. Why did you make these visits? A Why, I was interested in—that is, in the surroundings and at the same time seeing how they were developing and how it was getting along, and I went down there and roamed around, looking around for my lots, whether I could locate them, whether there was any streets around in through there, and tried to find my location.

40 Q Well, on these three or four occasions, were you able to locate your lots? A Why, not, I was not able to—there wasn't any—

*William B. Kunz, direct.*

Q Now, on these occasions when you went down there, when you say you roamed around this section where you thought your lots were, did you discover whether there were any other gravel pits or excavations on the property outside of the ones that you have mentioned on Lacey Road? A None that I know.

10

Q Can you tell us on any of these visits that you made, whether the gravel pit that you had stopped at with Mr. Petrone before purchasing the lots had in any way changed? A Why, yes, I—that is, on the occasion that I was down there, why, roaming around in through that section and also going down in the lower section, why, where they had been developing the property, had been cutting out streets, that is, not in this here block at all, that is in the lower section towards, nearer to town.

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Q I see. A What they call the lower lake, they had started to develop the streets and if it had been sidewalks, and so forth, and I took notice that they were getting the gravel—that is, by truck loads they were taking it from where this little gravel pit had been, they had started to dig through there with a driveway and go around, I should judge, well, about 200 foot deeper, that is, in there and dug in through there with a—and took out the gravel and took it down to the other section where they were developing it, and that is, using it down there.

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Q Then, on these visits, you found that they were enlarging that pit? A They were enlarging it; yes, sir; that is it.

Q Did you fulfill your part of the contract and make monthly payments as called for by the contract? A I did.

Q How did you make these payments?

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*William B. Kunz, direct.*

Mr. Beatty: We admit they were made.

A By check, through the mail.

Q I see.

10 The Court: Now, did you make these payments after you found that they were enlarging the pit?

The Witness: Why, I was continuing on through, that is, from the time I signed my contract right on through.

The Court: Even after you saw that they were enlarging the pits?

The Witness: Yes, sir.

20 Q And, Mr. Kunz, at that time did you know when you saw them enlarge the pit, did you know where your lots were up to that time? A No, I didn't know where the exact location of my lots were; I couldn't tell; there was nothing developed or no streets around through.

Q No lots laid out? A No lots laid out or any streets cut into it.

30 Q I see. A That is, only that they had that sand pit there, and that they kept on cutting in through there.

Q When did you make your last payment under the contract? A September the 11th, 1929.

Q And did you receive your deed for this property on the day that you made your last payment? A Why, no.

Q When did you receive your deed? A October the 12th, 1929.

40 Q And is this the deed you received (showing witness paper)? A Yes.

*William B. Kunz, direct.*

Mr. Venino: I offer it in evidence.  
(Deed marked Exhibit C. 3.)

Q How did you receive this deed? A Why, a salesman by the name of Bruen had delivered it to me, at my house on a Saturday morning.

Q And did you have any conversation with reference to the property mentioned in this deed? A Why, yes, Mr. Bruen asked—that is, when he handed the deed to me he told me, he asked me whether I— 10

Mr. Beatty: I think Mr. Bruen should be produced, too. I object to conversations he had there.

Mr. Venino: All right; we will withdraw it if they don't want it in. 20

The Court: In the first place you will have to connect Mr. Bruen up with the company more definitely than you have.

Mr. Venino: Well, he is the one that delivered the deed.

The Court: That doesn't make any difference.

Mr. Venino: And I will—

The Court: You might have sent your office boy to deliver a deed. 30

Mr. Venino: All right.

The Court: That doesn't amount to anything.

Mr. Venino: All right; I will withdraw the question.

Q After you received this deed, Mr. Kunz, what did you do, if anything? A Why, a week or so after—two weeks after, or so, I went down 40

*William B. Kunz, direct.*

to the Barnegat Pines Realty Company to look over how far—that is, how the development was, because Mr. Bruen had tried to get me—(interrupted).

Mr. Beatty: I object.

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Q No, leave the permit transaction out. A I know, but I got to tell—

The Court: You have to leave Mr. Bruen out of the picture.

Mr. Venino: Yes.

Q You went down there two weeks later, after you got the deed? A Yes, I went down.

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Q All right. Now, what did you find when you got there? A Why, when I—it was around October the 27th or 28th that I—of 1929 that I went down on the property and with my car and looked around and at that time I found that Central Lake Drive had been cut through and I knew—that is, through Mr. Petrone, that my lots were a certain distance in from Central Lake Drive on Alpine street, so I went down and happened to discover that Central Lake

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Drive was finished and the clearance made a certain distance in on Alpine street, so I went and I took a rule that I had in my car, and I measured in 100 foot and then I measured a couple of hundred, that is, one hundred and some-odd foot back from that to find out—that is, from my father's lots, because I knew that he was in there, and I discovered that my lots were in—that is, that my lots were cut out, that is, that this sand pit had been enlarged upon my property, this gravel pit, so I went

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*William B. Kunz, direct.*

over along the property and met Mr. Jacobus, who is their property manager, and he was on the premises there and I said—

The Court: Well, is that objected to?

Mr. Beatty: I don't object to it. I was wondering whether he was going to quote him or not. 10

The Witness: So I said to him—I told him—

Mr. Beatty: I object to conversations with parties that have not been produced. I—

The Court: I will sustain the objection.

Mr. Venino: I think this man can testify to what he told Mr. Jacobus; he is not quoting Mr. Jacobus. 20

The Court: Who is Mr. Jacobus?

Mr. Venino: He just testified he was the property manager there on the property.

The Court: Well, just his statement that he was the property manager would not do unless you can back it up and prove that he was. Of course, if the other side will admit he was, that is all right.

Mr. Venino: I think he has a right to testify to what he said, not to what Mr. Jacobus said. 30

The Court: Why, no; he might have told me the story; it wouldn't amount to anything. You cannot bind the defendant that way.

Mr. Venino: All right.

Q You had a talk with Mr. Jacobus, did you?

A Yes. 40

*William B. Kunz, direct.*

Q Now, you say that the gravel pit had been enlarged on your property? A On my property, either—

Q Is that the gravel pit that you originally referred to as being on Lacey street? A That is enlarged, yes, that is the same.

10 Q Yes. Now, could you tell from the appearance of this excavation or gravel pit whether it was of recent origin? A Why, yes, I could.

Q How could you tell that? A Why, because you could see there had been just recently done—that is, cut through; the ground was in the clear—that is, clear, and you could tell that it had been cut in there, and also that I had seen them do it previous to that, when they were taking the sand out of there to develop the entry through.

20 Q At the time you saw them enlarging it, you didn't know where your lots were? A No, I didn't know.

Q And this road that you refer to—at the time you saw them enlarging, was not through the property at that time? A What is that?

Q This is Central Lake Drive that had not been broken through at the time you saw them enlarge the pit? A No, no streets were cut through.

30 Q Now, after you discovered this excavation on your property, what did you do about it, besides speaking to Mr. Jacobus? A Why, I sent a letter to Barnegat Pines Realty Company of my discovery and—

Q One minute now.

Mr. Venino: I have a notice to produce, which I served. I asked them to produce letter under date of October 29, 1929.

40 (Letter produced by Mr. Beatty.)

*William B. Kunz, direct.*

Q Is this the letter you sent? A Yes, sir.

Mr. Venino: I introduce this letter, the original letter which was produced under my notice to produce.

(Letter marked Exhibit C. 4.)

The Court: You want it marked in evidence? 10

Mr. Venino: Yes.

The Court: Read it in the record, then.

(Exhibit C. 4 read.)

Q Now, did you receive a reply to this letter from the Barnegat Pines? A I did.

Q Is this the letter you received in answer to it? A Yes, sir. 20

Mr. Venino: Any objection?

Mr. Beatty: Is that November the 6th?

Mr. Venino: I offer letter in evidence.

(Letter marked Exhibit C. 5.)

(Exhibit C. 5 read.)

Q Now, after you received this letter of November the 6th, 1929, from the Barnegat Pines Realty Company, did you arrange to see Mr. Dillon, the writer of that letter? A Why, yes, sir; we made an appointment over the phone to meet him down at his office at the Barnegat Pines Realty Company office. 30

Q Do you know when that was, about? A November or December.

Q Well, when you saw Mr. Dillon and had this conference, just what was said, what took place? A Why, after explaining to Mr. Dillon what I had found down there, about the location, 40

*William B. Kunz, direct.*

and I explained to him what Mr. Jacobus had told me.

Q What had Mr. Jacobus told you? Tell me just what he said to Mr. Dillon. A I told him that Mr. Dillon had admitted that—

10 Mr. Beatty: I object to the Jacobus feature.

The Court: Yes.

Mr. Beatty: Or conversation. This is a— (interrupted).

Mr. Venino: Now, the conversation, your Honor please— All right, I am going to make my exception if it is not admitted. Now, this is a conversation now with the president of the concern and I contend he has a perfect right—

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Mr. Beatty: He is not president of the concern, to begin with.

Mr. Venino: There is no objection that can be made to rule out part of a conversation and allow part of it. We are either going to allow none or all of it. Now, that is the point there. You have no right to object to just part of the conversation. This man is now testifying as to what he said to Mr. Jacobus and what Mr. Jacobus said to him pursuant to a conference called by this letter, and I contend we are entitled to put the entire conversation in.

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Mr. Beatty: Well, I note my objection. I object to the man quoting someone else. You can—he can talk about what he said, and what Mr. Dillon said, but when he quotes what Mr. Jacobus said, it is a subterfuge to get in something that has already been ruled on.

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*William B. Kunz, direct.*

Mr. Venino: There is no subterfuge.

The Court: He can say what he said to Mr. Dillon, but the value of what he said to Mr. Jacobus is a matter for the Court to determine. I think it is of very little value. He can say everything that he thinks he said to Mr. Dillon.

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Q Just tell us what you said to Mr. Dillon and what Mr. Dillon said to you? A I told Mr. Dillon that I had been down on the property and discovered that this gravel pit had been enlarged upon my property, and I had met Mr. Jacobus down there and Mr. Jacobus had admitted that this gravel pit was on my property, and, first of all, he argued with me that it was not, and he said, "If it was on your property, why, we will go ahead and take care of that for you. You don't have to worry. We will go and put it in A-1 shape for you, before you go ahead and build on there," he said, "Sorry that it had to happen, but," he says, "we can probably fix that up for you." I said, "Mr. Dillon," just as I am saying to Mr. Jacobus, I says, "he can't fulfill his promise because he can't put the trees back and put it in the condition the way it was." It was impossible after taking and cutting down the trees and excavating into my property the way they did, they could never go ahead and put in—that is, make the location the way it was originally, so Mr. Dillon says, "Why," he says, "I don't think it is on your property." "Well," I says, "Mr. Jacobus will vouch upon that." I went over to Mr. Jacobus' and he says, "Well," he says, "if it is," he says, "Why we can come to a reasonable agreement," he says, "we have got some other lots

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*William B. Kunz, direct.*

in different locations where they are valued at a little more, with an additional payment, why, we can transfer you to these—to a finished location.” “Well,” I said, “Gee, that is no way of doing business.” I said, “Here I bought these lots and here you are trying to get me  
10 into and doing the same as Mr. Bruen had enticed me to do when he handed me the deed to hand over this other property.” So I says, “That is—I won’t stand for that at all, and, furthermore,” I says, “I bought these lots on account of my father buying two lots in the same location and I wanted to be located where he was, and also Mr. Schroeder, and therefore I bought these lots and I don’t want to be separated from them, and I don’t think it is  
20 fair and square that they should go ahead and ask me an additional payment for developed lots at the present time, which I bought, that is, bought lots before at an unfinished price—that is, at a smaller—shorter—lower price,” so I says to him, “The way it looks to me, why, I can’t do business with you people right, and you are trying to do unjustable things to me, so,” I says, “here is the deed. I would sooner clear my hands from it.” And I tendered the deed  
30 back to him and he said, “Well, I will have to take it up with the executive board, and I will let you know what we can do about it,” and also a remark of Mr. Dillon, why, he actually accused me of being out to—for money, that is, trying to make money on this after what as a man I went to them personally and spoke to them about this property and wanted them to take it back, I was in a clinch or in trouble there and they refused to accept the deed.

*William B. Kunz, direct.*

Q Did you demand the return of your money from Mr. Dillon? A I demanded a return of the deed, that is, with the money that I had actually paid into it, that is, that is what I was satisfied to do.

Q And did he refuse to do it? A And he refused—that is, he refused—refused and said he would take it up with the executive board which meant— 10

Q Now, this offer to switch you over to some other lot, was that an offer without additional money being paid on your part? A With additional money.

Q That was additional; they wanted additional money? A That was the understanding. That is, they were the higher priced lots and with an additional payment, why— 20

Q I see. Now, did you hear from Mr. Dillon after that? A Yes. It was quite a while after, that is, I forget—quite a time had passed through that time and when I had heard from them because the executive board only met at certain times.

Q Did you hear from them in writing? A Why, yes.

Q Is this the letter you received (handing witness paper)? A Yes. 30

Mr. Beatty: What is the date of that?

Mr. Venino: December 26th. I offer that.

(Letter marked Exhibit C. 6.)

(Exhibit C. 6 read.)

Q Now, Mr. Kunz, in this letter which I just read, Mr. Dillon stated, "Your contention was that owing to the fact that your property was located adjacent to a red gravel pit you were 40

*William B. Kunz, direct.*

fully justified in asking for the return of your money." Did Mr. Dillon correctly state your contention in that letter? A No, he did not.

Q What was your contention that you told Mr. Dillon? A I told Mr. Dillon that the gravel pit was on my property.

10 Q All right. A And not—

Q And you claim that Mr. Dillon misstated your contention in this letter? A I do.

Q Did you answer this letter? A Why, no, I didn't answer it. I handed it to my attorney who took care of it.

Mr. Venino: I ask for the production of a registered letter sent by me under date of January 6, 1930.

20 (Letter produced by Mr. Beatty.)

Mr. Venino: Any objection.

Mr. Beatty: Not a bit. I offer letter in answer to last letter I read by A. N. Venino, attorney for Mr. Kunz.

(Letter marked Exhibit C. 7.)

(Exhibit C. 7 read.)

Mr. Beatty: Do you want to read our reply?

30 Mr. Venino: Not at this time of my case.

Q Now, have you recorded the deed, Mr. Kunz? A No, I have not.

Q Why not? A Why, I don't want to accept it.

Q Are you willing to again tender this back to the Barnegat Pines Realty Company? A I do.

40 Q And are ready to take the money here in court? A Yes.

*William B. Kunz, direct.*

Mr. Venino: On behalf of Mr. Kunz, I hereby tender the deed here again in court and demand the return of our money.

Q Did you take any photographs of the excavation you found in your property? A I did.

Q You made it personally? A Personally.

10

Q When was that? A Why, around in December or later. That is December, 1929, or a little later. It was around in that neighborhood, between 1929 and 1930.

Q I see. A That is, around December there.

Q And at the time you took these pictures, did they show the condition that you found when you first found the excavation? A Yes, sir.

Q Are those the pictures you have there that you took? A Yes.

20

Q Now, where were you standing at the time that you snapped those pictures? A Why, on the excavation that is—

Q No. I mean, where were you standing? Were you standing on the street or lot or where?

A No, on the street. Where the excavation is.

Mr. Beatty: Alpine street.

Q Alpine street? A Alpine street.

30

Q That is the street running in front of the lots? A There was a clearance made for this street; it was not finished.

Q What point were you standing on that Alpine street? That is, in relation to the lots? A Why—

Q The lot numbers. Maybe if you use the lot numbers we would know better where you were standing. A Well, say about in front of the adjoining—that is, Lot 38, which is the second—Mr. Schroeder's lot.

40

*William B. Kunz, cross.*

Q I see. A That is, and looking into the—  
(Witness stops of his own accord.)

Q You were standing a little south of Lot 36  
which is your last lot? A Yes, that is south  
of that.

Q Do these pictures show the excavation? A  
10 Yes, right here; that is my lots.

Q I see.

Mr. Venino: I offer these in evidence.

(Two photographs marked Exhibits C. 8  
and C. 9.)

Mr. Venino: Does your Honor want to  
see them?

The Court: I will look at them, yes.

Mr. Venino: Take the witness.

20

*Cross examination by Mr. Beatty.*

Q Mr. Kunz, you said at the opening, that  
you purchased this property on account of your  
father? A What is that?

Q On account of your father having pur-  
chased property there? A Well, my father had  
purchased, yes.

Q That was some time before your purchase,  
30 was it not? A Why, a week previous, maybe.

Q And a neighbor of your father's, too, Mr.  
Schroeder, purchased, too? A Mr. Schroeder,  
yes, positively.

Q And did you actually make any inspection  
of that property at all? A What do you mean?

Q Prior to the purchase? A Why, only that  
day, that is, that Mr. Petrone went down; that  
is the day that I signed the agreement.

Q You went down and drove all through there,  
40 didn't you? A Well, down through Lacey Road

*William B. Kunz, cross.*

and—that is, to this gravel pit, as I have explained, and then on down a little further through a small wood road, farm road, I guess it was, into the lake, and then around the side of the lakes and out into the highway there, that is where the hotel is.

Q You practically made this entire circuit around there, did you not? A Yes. 10

Q Wasn't this an entire tour of inspection? Was it not? A What did you say?

Q Wasn't it a tour of inspection? A Yes.

Q Conducted by the Barnegat Pines Realty Company? A Yes.

Q And on this tour they pointed out and designated, as you progressed through there, it was part of the property from which you purchased these lots, was it not? A Yes. 20

Q Now, when you say that you saw some gravel pits from Lacey Road— A Yes.

Q —do you know or do you not know that Lacey Road is a county road? A Well, that was explained to us that it was going to be accepted.

Q I mean, it was made known to you, then? A What is that?

Q Was it made known to you then that that road leads on into Philadelphia? A Yes, Mr. Petrone had told me that it was going to be accepted as a county road. He didn't say it was a county road, but they expected it to be accepted for a county road. 30

Q Did they say at any time it was going to be a State Highway? A No, nothing.

Q And, in your tour of inspection, you say you saw gravel pits there?

*William B. Kunz, cross.*

Mr. Venino: I object. There is no testimony he saw gravel pits. He saw a gravel pit, not pits.

Q You said you saw them working in gravel pits there?

10

Mr. Venino: I object to the question. I object to referring to gravel pits. There is no evidence in there there were gravel pits. It was a gravel pit.

Q You say there was only one gravel pit that you saw during this tour? A That gravel pit that we had stopped at.

Q And that is the only gravel pit that you saw? A That is the only—

20

Q (Continuing.) What later turned out to be a gravel pit on your property? A Yes.

Q You are positive of that? A Why, yes, I am positive now.

Q In your travels and visit to the property down there since, have you ever seen any others? A Why, no, not that I—that is, I didn't see that, any other pits.

Q Where does Alpine street lead to as it goes down past your property? A What is that?

30

Q Where does Alpine street lead to? A Alpine street lead?

Q As it goes away from Central Lake Drive?

Mr. Venino: I object to the question unless the time is stated. This street was not run through at the time.

Mr. Beatty: At any time that he has been down there.

40

*William B. Kunz, cross.*

Q You said you have been down there three or four times? A Yes, sir.

Q All right. Where does Alpine street as it leaves Central Lake Drive and goes past your property—where does it lead to, or where does it terminate? A Why, it stops practically—

Q What is that? A That is, it was not completed; this street was not completed and did not extend—it was only just a clearance made, that is all. 10

Q All right. Where does the clearance lead to? A The clearance led on down—that is, on into—that is, it continued on until it stopped, that is all.

Q All right. And where did it stop? A Why, it is—that is, the following street across this, that is, the later part of it that I discovered. 20

Q Well, did you make any observation or do you know? A Why, yes, I know that it led down into Homes street, I think it is—Home avenue.

Q And isn't that where the gravel pit is? A No, sir.

Q It is not? A No, sir.

Q All right. You are concentrating on the gravel pit in your lot, aren't you? A Yes.

Q Are there any other in the same neighborhood that you saw on any of your visits? A The gravel pit that we are talking about— 30

Q I am not interested in the gravel, Mr. Kunz, you are talking about, I am interested did you see any others? A Yes. There is, the later part, after this case had been taken up with Mr. Dillon, that is that—

Q All right. You said, if I recall correctly, on your direct, that when you were on this tour you saw gravel pits? A It is a continuation of 40

*William B. Kunz, cross.*

the gravel pit, yes, that they had dug, clearance that they had dug.

Q Now, can you locate any of the gravel pits in reference to your lots, either on them or how near you were to them or any other way? A Well, they were a continuation, it was the continuation of the gravel pit that they had continued, that is, later on.

Q Do you know whether there are any gravel pits down at the end of Alpine street? A Why, that is the one gravel pit, yes.

Q And you say that that is the same gravel pit that touches your lot? A That is the continuation of the same gravel pit which they had started from the back of my—that is, from Lacey Road, that little one, and continued around in front of my property, and continued on back into the clearance of Homes avenue.

Q This is Alpine street, indicating on the thing? A That is Alpine, yes.

Q Your last lots are here, are they not? A Yes.

Q Now, can you, on your lot, locate where the gravel pit touches? A The gravel pit was here in back here and through here (indicating) around into my property and around here (indicating).

Q Wait a minute. I am showing you where it is. A You are looking—

Q That is all right. You follow it. Use the numbers, such and such lots, call your numbers. A They came through from Lacey Road, that is where the original—the old gravel pit had been on facing on Lacey Road and had been dug through Mr. Schroeder's two lots and taking in part of mine, that is, taking two of my lots in and my father's two, and continued and made

*William B. Kunz, cross.*

a big gully all around here, along Alpine street—Alpine street, all in through here (indicating) and then came, continued on through here and cleared out in here and then out into Lacey Road.

Q Sure of that? A Positively.

Q You have had a surveyor mark out these lots? A Yes, sir. 10

Q And also where the pit is? A Yes, sir.

Q All right. Have you that in court? A Yes, sir.

Mr. Beatty: Do you wish to offer that map?

Mr. Venino: No.

Q Can you say that this pit touches your lot or enters upon it? A On these two— 20

Q Now, use your numbers. A Lots 35 and 36.

Q All right. Now, which is that, on the side or not? A What do you—the property on the side of what?

Q Consider Alpine the front. A On the front, that is facing Alpine street.

Q Your lots face on Alpine street? A On Alpine street. 30

Q Don't they? A Yes, sir.

Q Well, let us consider that the front of the lots. A Yes.

Q Did the pit touch any of the lots in front? A They touched the side, that is, the side of 36 and 38 in towards the front.

Q 38. You haven't got any 38? A I mean, 36 and 35. Pardon me. My mistake.

Q Yes, so that Lots 34, 33, 32 and 31 are not touched at all? A No, sir. 40

*William B. Kunz, cross.*

Q Do you know whether or not 35 is touched anywhere in the front? A Why, according to the—

Q I am talking from your knowledge. Your attorney doesn't want to put in the survey yet. A Probably a little corner of 35.

10 Q Touches in the front? A That is the gravel probably, I am not sure. It dents in there somewhere. It is quite a funny shape affair.

Q Yes. Now, you have put in some photographs showing the property. Have you those, Mr. Venino?

The Court: Here they are.

20 Q Pardon me. Calling your attention to Exhibit C. 8, can you tell us where you stood when you took that picture? A Right here (indicating on map). That is, in front of Mr. Schroeder's lot looking into the—that is, into my two lots, 36 and 35.

Q So, were you really on the side of the lot when you looked in? A No.

30 Q You were taking a view at the side of the lot? A That is, it was the front corner, that is the corner of it here, see, looking towards it that way, see, that is going looking in that way (indicating).

Q Where is Alpine street? A Right along here (indicating).

Q It looks as if you are looking down that way (indicating). A Why, no, it is taken that way (indicating).

40 Q You take a road that way that turns out on the photograph to go the other way? A This is not in Alpine street.

*William B. Kunz, cross.*

Q That is what you said it was. A I said in front of here; that is the road.

Q That is not Alpine street, is it? A No, that is the road that leads in from Lacey Road, that is the dig-out, the continuation of the same pit from Lacey Road on in.

Q So that that really is running at right angles to Alpine street, is it, that road that you say— A That is Alpine. 10

Q —crossing, yes. At right angles? A Cuts in, yes.

Q Why, you are not taking—your camera was pointed towards Lacey Road? A No—well, yes, to the corner of the property.

Q So your camera was headed towards Lacey Road, wasn't it? A Why, yes, to a certain extent, yes. 20

Q So that is not—it does not show any portion of Alpine? A It is—no, that is outside of the—this section here, you see, that is this road here, this road here that way that we have got here is a continuation of the road that leads into, that is, the road that they had dug in from Lacey Road and that is taken—in other words, you are looking right at the corner of this—it is looking in the direction of northwest—well, I don't know, looking north from the— 30

Q You are really looking towards Lacey Road as you face that way? A Yes, you are looking up that way (indicating).

Q Up that way, because that road goes right through Lacey Road? A Yes.

Q So that Lacey Road runs parallel with Alpine street? A Yes.

Q Now, can you state where you were when you took that? A Down in front of my lot, looking in towards Lacey Road. 40

*William B. Kunz, cross.*

Q Yes, looking—practically the same view, is it not? A Right square towards Lacey Road.

Q That would be practically the same view only running it more at right angles **that way**, instead of this way, that went on 45 degrees?

A 45 degrees.

10 Q And this at 90. A And this that way. And that is looking at the property.

Q When were those taken, after the excavation? A Yes, sir.

Q I call your attention to a photograph. Do you notice the shrubbery in your excavation? A There is not any shrubbery in the excavation.

Q You wouldn't say that was shrubbery in the excavation? A No, that is kind of cloudy on account of its developing.

20 Q I guess that would be up to an expert whether it is cloudiness or shrubbery. **You say** it is cloudiness? A I should judge—that is, there is not any shrubbery there.

Q All right isn't that cloudiness or shrubbery right there? A That is **shrubbery—that is cloudy—**

Q Is that cloudy? A There is no shrubbery there. Let's see.

30 Q All right. What is that below the line? A That is sand.

Q That is sand? A That is just—

Q What is that (indicating)? A Well, probably shrubbery, a little shrubbery.

Q So that you have shrubbery growing where they are excavating, is that it? A No, not where the excavation—the stuff that dropped down.

40 Q It is not cloudiness, it is dropped down shrubbery? A It is shrubbery.

*William B. Kunz, cross.*

Q That is up there. Now, with this picture in mind, would that practically be the same view?

Mr. Venino: I object to the question. Not cross examination.

The Court: I will sustain the objection. 10

Mr. Beatty: Your Honor, may I have an exception and may it be agreed on that the photograph he offered is being used? And then asking the question whether that was the first view taken.

The Court: You have not even introduced your photograph and you haven't proved it.

Mr. Beatty: I will do that on my case.

The Court: Certainly the direct examination did not concern your photograph. They examined his own. 20

Mr. Beatty: He can be asked whether he recognizes them or not. All right. I will have an exception.

Q Now, did you make any personal inspection of this property prior to the purchase or the signing of the contract? 30

The Court: He says he went down there with Mr. Parello, or whatever his name was, and looked all over the place.

Q Did you make any—when did you first discover that the pit that you refer to and lay stress on affected your property? A Why, when I took—that is, when I went down there on October the 29th—28th, that is when—after the deed was handed to me—that is, after— 40

*William B. Kunz, cross.*

Q So that you made all your payments— A Yes.

Q —and made no inspection other than the original inspection on the property? A That is, I told you that I made. That is, that I went down there occasionally, three or four times during the—

10 Q All right. A —at the time that I was making my picture.

Q All right. A But I didn't know the location of my lot—I couldn't indicate the location.

The Court: But you saw gravel pits down there?

The Witness: Yes, sir.

20 The Court: While you were making your pictures? That is what you said in your direct.

Q And you—

The Court: Isn't that so?

The Witness: That is, I saw gravel—

The Court: Yes?

The Witness: —pits that they—

30 The Court: Yes.

Q And didn't you on those three or four trips down there—did you have—did you attempt to locate them? A Why, I could not.

Q Why not? You knew them, you knew what lots you purchased? A Well, there were no streets cut.

40 Q Lacey Road was there? A Lacey Road, yes, but Alpine street or no other street was cut in there.

*William B. Kunz, cross.*

Q They were staked out, were they not? A No, sir.

Q Not even staked or monumented? A No, sir.

Q Or monumented? A No, sir; not that I know.

Q Did you make any effort to locate them at all? A Why, I roamed around there; I can't say anything—

10

Q You knew from the lots you had, by Lots 31, 32, 33, 34, 35 and 36, did you not? A I know that.

Q And you could have measured them off from Lacey Road, couldn't you? A That is, I couldn't measure them off from Lacey Road.

Q Why not? A Because I don't know the facing of them.

20

Q The map shows you the distance from Lacey Road? A Yes.

Q Couldn't you have paced it off? A Why, it is 200 foot, that is all.

Q All right. Then you knew it was 200 feet from Lacey Road? A 200 foot from Lacey Road, yes.

Q All right. And you made no attempt to pace it off or locate them, did you? A Why, no.

30

Q You did not? A I didn't know the location of them.

The Court: Did it occur to you to get an engineer to get where the location was?

The Witness: That is afterward.

The Court: I mean, while you were making the payment.

The Witness: No, I did not.

40

*William B. Kunz, cross.*

The Court: But it did occur to you to get an engineer after you refused to accept the deed, did it?

The Witness: Yes.

The Court: Yes.

10 Q And after you had been down there three or four times, was each visit with the same result, still you didn't know where your property was?

A I didn't know, no.

Q All right. Now, you say that Central Lake Drive was completed in October? A Yes, that is—

Q Yes? A Yes.

Q And that you got your deed in September?

20 A No, I got my deed in October.

Q You got your deed in October? A Oc-  
tober.

Q That is, you were down there in September? A I was not down there in September.

Q All right. Then, at any of your previous visits down there, before this, before, did you see any preparation for Central Lake Drive going through? A No.

30 Q You were not down, didn't see any preparations? A No.

Q Did you know where your father's or Schroeder's lots were? A That they were adjoining mine, that is, continuation of mine, that is, from mine on out, that is all.

Q How did you actually know you were near them? A How I knew I was near them?

Q Yes. A That is how I come to buy them, that is, to get near them.

40 Q Well, how did you know the lots you bought were near them? A Because they had

*William B. Kunz, cross.*

the continuation of the numbers, that is, 37, 38, 39 and 40, of block 12, or map 12, 144, block—

Q So you relied entirely on that map? A That is, on the little slip that we got—not on the map—we didn't have a map.

Q Now, you said in your testimony that you saw them taking sand and gravel? A Yes, sir. 10

Q I presume you referred to workmen there? A Yes.

Q Now, did you notice their method? A Well, with trucks, that is, digging in there.

Q All right. Did you notice a steam shovel? A Steam shovel, yes, steam shovel.

Q Yes. And weren't they removing any gravel with it whatever? A Steam shovel, steam shovel, yes. 20

Q And wouldn't the steam shovel leave entirely a different gravel scar than is shown by your photograph? A Why, that is in further it does, yes; that is, as the gravel pit is dug further, that is, developed, it shows—

Q I am talking about the pit affecting your lots. A Well, now—

Q From your observation would you say that a steam shovel had been used on the pits on your lot? A No, not on my lots, no, I wouldn't say that. 30

Q Now, in your inspection of the pit and in connection with your lots, did you notice any shrubbery there at all? A We—will you explain that again?

Q (Question read as follows: "Now in your inspection of the pit and in connection with your lots, did you notice any shrubbery there at all?")

A No, that is not in the pit.

Q No shrubbery along the pit? A No. 40

*William B. Kunz, cross.*

Q In the section? A Only on the top of this.

Q Included in your lots? A That is the upper part of it, not where it was dug out, that is only the upper part where it had not fallen down for shrubbery was still standing up.

10 Q You testified that you actually saw them working in this pit? A Yes.

Q Was the steam shovel used there? A That is, yes, the steam shovel further back in.

Q Now, then, did you really see them working on the part of the pit that is adjacent or touching your property? A Why, yes.

Q You saw them working on your pit? A That is the adjacent property, yes.

Q But not on your property? A Well, dug in there, not up—

20 Q Well, did you see them remove or working on your property? A Why, yes, in the beginning, yes, but not with the steam shovel.

Q Well, now, did you or did you not see them working on the pit on your property? A Yes, sir.

Q All right. What was their method? A Why, shoveling, and, that is, pick axe.

30 Q All right. When did you see that? A Why, probably the beginning, the first times I went down there, that they were enlarging that there sand pit, that is, that sand pit to make a road in there and to get around on Alpine street.

Q Now, you are positive that they were working on your property now? A That is, now, I am, yes.

Q Yes. A I was not positive at that time.

Q But you now know it affected it? A Yes.

40 Q All right. In your tour around this particular section did you notice whether or not

*William B. Kunz, cross.*

this property was developed or undeveloped? A Undeveloped.

Q All right. Can you describe it with regard to whether or not it was flat or had rolls, rolling territory or not? Just tell us what the terrain was. A Well, I knew that certain—that is, that certain ground was higher than others, that is, it was like a regular, open field, that is, an open forest, it is.

10

Q And did you notice that the so-called pits are really the lowering of the level or do they actually dig them down below street levels? A In the later—that is, in the development of the pit, why, they are actually making a level, yes, they are level, sure, they wouldn't go down below their cut streets down, that is about the idea of it.

20

Q But in the common sense of a pit, it is not lowering below the street level? A No, it is not below the street level.

Q And these pits you refer to being further away from the lots, but as you have described it, being part of this— A Yes.

Q —this same gravel pit, is really the removal of a gravel ridge, isn't it? A Yes, that is, you mean the higher parts of it.

Q The higher parts breaking down? A Yes, it is a—Homes avenue, the later part, Homes avenue is being cut through, and, of course, that is where what you are indicating, that is what you are trying to tell me the highest part, and they are cutting through there in order to get the level in there.

30

Q So that in the removal of any of this gravel, isn't it a preliminary step of the development of it as you observed? A Oh, yes, it is developing the street.

40

*William B. Kunz, cross.*

Q So, in reality, it is not detrimental to that section at all, is it? A I don't get you on that.

Q In reality, it is not diminishing the value of the property, but part of their plan and scheme of development? A Cut through there  
10 sure.

Q Now, on your last visit, did you notice or did you not notice whether Alpine street was developed within 80 feet of your property? A That is—no, that is, not developed—not finished. I haven't seen it, that is, it has not been finished, it was only just cleared about 80 foot in from—

Q Have you been down since October? That October you were talking about is 1929? A Yes.

Q Do you know the present conditions down there? A Why, I was down there when I took the payment. That is, around in, say, December, 1929, or January, around in that, that is I did that month.  
20

Q So you have not really been interested in—  
A When I took that picture.

Q You have not been interested in the development of the property since then? A Why, no, because I had—

Q You don't know whether your property has been improved or not? A No, I have not been down since.  
30

Q You have not been down there? A No, because I am letting it here.

Q Do you know whether streets have been cut through your property? A No, outside of what you told me.

Q Do you know whether sidewalks are down there now? A Only I saw sidewalks in that other section, not in my section.  
40

*William B. Kunz, cross.*

Q You have not been in your own section?

A No.

Q So you couldn't give us any information regarding—as that development progressed and included your property, what effect that had on it, you couldn't give us any information? A No, I have not been down there since, as I say—

10

Q You don't know whether the sidewalks cross your property? A No, I have not seen any.

Q Now, you spoke of several letters that you wrote. Now, you said in this letter of October the 9th, which is Exhibit C. 4, you said, "Having bought same for the appearance of same and surroundings, have been much disappointed when I rode down to see whether there was a chance to build." Now, that is October the 29th. Is that the October you went down there? A Yes, yes.

20

Q What change did you find then? A Why, here is—that is the only—that is only the enlarging of that sand pit, that gravel pit.

Q The enlarging of it? A The enlarging of it.

Q Wasn't that in the development of the street and sidewalk there? A No, sir.

Q It was not? A No, not at the time.

Q Now, was any of this pit below your street level?

30

The Court: He has said, No, several times.

Q Now, at the interview that you had with Mr. Dillon didn't you tell him that you were ready to build, but couldn't use the property at that time? A No.

Q In that condition, rather? A What is that?

40

*William B. Kunz, cross.*

Q Didn't you say you were ready to build, but that you couldn't use the property in that condition? A I did not.

Q You did not? A No, sir.

Q What? A That is, can I tell you about it? Conversation regarding it?

10 Q Yes. You can tell anything that took place between you and Mr. Dillon. A I told them I wasn't in a financial position at the present time to—to build there, and—well—that is, I told Mr. Dillon I was not in a position at that time to build on it, but if the improvements were—would only take six months, that is, that was passed between Mr. Dillon and also between Mr. Jacobus and I; I have said the same thing to Mr. Jacobus, that is, the same as I had told  
20 Mr. Dillon, that I was not in a financial position to build right away, but as long as the ground was going to be developed and put in condition in six months' time, why, that would be sufficient for me in order to get—that is, to get started for the following—for the following spring.

Q Spring? A Yes.

30 Q Now, Mr. Kunz, just how far was the development reached with regard to your location? How close was it to your location? A Well, the only improvement—that is, the only improved section that I saw was up around the—what they call the Lower Lake, that is, I can't exactly tell you what streets.

Q When— A That was around in the lake section, that is, it was not over anywheres near Lacey Road.

40 Q Well— A About the lake, over around the lakes.

*William B. Kunz, cross.*

Q Well, Lacey Road was already in. A Yes.  
Lacey Road—

Q Lacey Road was already in. A Yes, that  
is—

Q Wasn't it developed up to what is now  
known as the Central Lake Drive? A No.

10

Q It was not developed? A It was not—  
that is Central Lake Drive was—that is, you  
mean on the—when I went over and discovered  
that it was from—that is, our—after October 29th  
you are talking about?

Q Well, you discovered it sometime; I don't  
know when you said. A Well, yes, after October  
the 29th, that is, the section in towards the lakes  
from Central Lake Drive on back.

Q So, around October when you got your deed  
the development was right up to Central Lake  
Drive, wasn't it? A Yes, that is Central Lake  
Drive passes into the developed section, what I  
mean, it connected into the development, but it  
was not developed on either side of Central  
Lake Drive from Lacey Road on, say, in the  
distance—say, four or five blocks from over  
there.

20

Q Well, do you make a difference between  
completely developed and partially developed?  
A Well, that is completely—yes, that is part—  
of course, the streets were cleared, if that is  
what you mean, that is, developed; it was  
cleared but it was not—it was not now—it was  
not finished; what I mean to say, you could go  
ahead and drive through it.

30

Q You could drive through it, couldn't you?  
A No, there were stumps, trees, and like that.

Q Not on Central Lake Drive. A Central  
Lake Drive, that was finished.

40

*William B. Kunz, cross.*

Q Do you know whether that work was finished in August? Were you down there then?

A I don't know.

Q You were not down there in August? A That is, I don't know the time—that is, when I was down there I didn't see it, outside of the  
10 last time I was there.

Q Were you down in August at all? A No. That is, I can't tell you what dates they were.

The Court: He said he was down there three or four times while he was making the payments.

The Witness: Yes, but I couldn't—

Q And his deed was received in October, 1929,  
20 I understand and now he says, "During that period." I want to see if he can place it.

Q Were you down in August? A No, not that I know of.

Q Were you down in December? A I couldn't tell you the dates.

Q But you do know that in October the road there was completed? A That is right—yes, that is the Central Lake Drive.

Q Yes. Now, to get back to the interview  
30 you had with Mr. Dillon, when you went in and told him about this gravel pit, Mr. Kunz, did Mr. Dillon go over the general scheme of development there with you? Didn't he say anything that would be taken care of in the development? A That is, that he said the same as Mr. Jacobus said, that "I will fix that up for you all right; it will be in perfect condition." I explained to him it was impossible to put the cedar trees and the small, what I would call cedar trees, of course, you can call it shrubberies,  
40

*William B. Kunz, cross.*

but they were small ones, around four and five feet, that is, the long needle cedars, small cedars.

Q Your property is what is known as scrub pines and scrub ash, isn't it? A Well, yes, small pines.

Q Yes. It is sort of second or third growth. 10  
A Yes, small pines.

Q All small trees had been removed long ago?  
A No, there were a number of them that were big trees, there were pines all around.

Q In regard to height, how much higher? A Well, some of them ran into 15, 16 foot high.

Q You are sure of that? A Yes, in sections.

Q Yes. In your lots, I am talking about?  
A Well, an average, say 12 foot in height, sometimes a little longer. 20

Q You referred to a transfer, wasn't that transfer suggested by Mr. Dillon, that if you would build they would transfer you to the improved section, that is, if you were in a hurry to build? A No.

Q All right. You don't recall that? A No.

Q You are positive nothing was said about that? A I had given Mr. Dillon to understand that I was not in any hurry to build as long as my section was going to take six months, that is, I even took that up with Mr. Jacobus and Mr. Bruen, their salesmen. 30

The Court: Now, gentlemen, I don't think this exchange property business is important at all.

Mr. Beatty: Oh, I think it is, your Honor.

The Court: Well, I disagree with you. You cannot make this man exchange this property if he doesn't want to. 40

*William B. Kunz, cross.*

Mr. Beatty: No. We are not trying it, your Honor, but we are—they are trying to allege that we are trying to get them to exchange in the hopes of getting more money.

The Court: That does not interest me at all.

10

Mr. Beatty: We are not doing that. What we are trying to do, if anybody down there that owns lots in undeveloped property will move into the developed, so as to put additional homes down there, that is an advantage to us.

The Court: I am not interested in that at all.

20

Mr. Beatty: Well, I think—of course, we are governed by your suggestions in that, but, under Mr. Venino's attitude and particularly in view of what the witness said that, "You are not playing fair with us, you are trying to get more money out of us," I think we should be justified to show the situation. Of course, I can bring it out with my own witnesses, the fact that we are not working any game like that, but we are anxious to get homes and buildings up there.

30

The Court: I don't think that has anything to do with the case.

Mr. Beatty: Well, if we don't stand charged with this attempt that we are enveigling money out of them—

The Court: No, you won't be charged with anything like that.

40

Mr. Beatty: Well, then I won't have to go further on that. Well, then, your Honor will take the same view in regard to that letter which was read to us, which said that

*William B. Kunz, cross.*

he bought after a personal inspection and that their suspicions were aroused when we tried to get more money.

The Court: No, I don't think that has anything to do with the case.

Have you finished with this witness?

10

Mr. Beatty: No, not yet.

The Court: Oh.

Q Did Mr. Dillon give you a choice of other locations? A What is that?

Q Did Mr. Dillon give you a choice of other locations? A A better location?

Q A choice of other locations? A Why, no, that is, he didn't say any definite—

Q And didn't you tell him that you were going down to look at the other locations? A That is— No.

20

Q You didn't tell him that? A No.

Q Then your proposition was you wanted your money back and nothing else? A Why, yes, that is, after I seen that they took the attitude towards me what they did.

Q What was the attitude they took? Didn't they try to do everything they could for you? Didn't they offer to fix up the property? A Why, no, he told me that I had—(interrupted).

30

Q To get your money back. That is exactly what he told you. A He told me—he didn't explain that—he said, "I am out to make whatever I can make out of it. In other words, all I can get out of it."

Q That is, you were trying to get all you could out of it? A That is, I voluntarily asked for just the return of my money on myself, but Mr. Dillon explained it a different way, in other

40

*William B. Kunz, cross.*

words, he as much as told me I was a Jew trying to get all I could out of the thing. That is what he told me.

Q That is, he said, and so did Mr. Jacobus, according to your testimony that they would take care of this matter? A Yes, sir.

10 Q And then they said that they would give you another location—did they not? A At additional, yes.

Q And did they make any inducements to have you take another location and build within thirty or sixty days, that there would be no extra charge? A No.

Q You don't recall that? A He didn't say that.

Q But you steadfastly wanted your money back? A That is, yes, and handed in my deed.

20 Q That is all you wanted. You didn't want the lot, you didn't want it fixed up, you didn't want it developed, you wanted your money? A I was discouraged.

Q What were you discouraged about? They were willing to put that in condition? A How can they put that in the condition?

Q They said they would develop it or give you other lots? A They can't put it in the conditions of the lots that I had bought of them with the pine trees as I had bought it and my intention of having it that way.

30 Q You would have to remove the pine trees and excavate and buy the lumber, wouldn't you? A Yes, some of them, but not all of them, the way they moved; they were not able to plant it over there.

Q It all sums down, you wanted your money back, did you not? A Yes, the return of the deed.

40

*William B. Kunz, re-direct—re-cross.*

Q And you remember telling him that you needed your money in your business? A No, I didn't say that.

Q You didn't say that? A No, I didn't say that. I told them—

Q That is all. A —I was in a financial position—

10

The Court: Is that all of this witness?

Mr. Beatty: That is all.

The Court: That is all.

*Re-direct examination by Mr. Venino.*

Q Mr. Kunz, you were asked whether what the Barnegat Pines were doing in connection with that sand pit was development work. Just what did you mean by that? A Well, they took the sand out of where my—that is, on my lots, took them out, the sand, and took them down to a section where they had—where they were developing it, that is, putting the red gravel sidewalks and the yellow gravel.

20

Q You don't mean they were developing your property? A No, they were taking it out of there and developing—

Mr. Venino: That is all.

30

*Re-cross examination by Mr. Beatty.*

Q You said they were taking out red gravel? A Red gravel.

Q Is there red gravel on your property? A Exactly, that is, there was red gravel on that property.

Q You are sure of that? A Yes. That is Mr. Petrone had even—we had seen it there at the time.

40

*William B. Kunz, re-cross.*

Q And didn't you at the time you testified directly say that Mr. Petrone stated that this property—not yours, but the general run of it—had red gravel and not like Pinewald, they had to go elsewhere to get it? A He explained to me—

10 Q Not that. I am asking you what you said on your direct testimony. A I said that Mr. Petrone had showed us this here gravel pit with the red gravel in, that was the same as Pinewald was using for their development, and that they didn't have to go off the premises to buy it the same as Pinewald, it was a saving to them because they had it right on their premises.

Q All right. Now, that is a general statement. A That is—

20 Q Now, was any statement made by Mr. Petrone that there was red gravel on your lots? A Why, there was the gravel, the continuation—that is—that gravel pit that was there, that we had stopped when he had explained it to us.

Q And this was a continuation. Now, do you say, from your knowledge of you and your father looking, that there was red gravel on there? A Yes, sir.

30 Q This letter that Mr. Dillon wrote about red gravel does refer to something that you said to Mr. Dillon and not, as your attorney said that there was a misstatement of the fact.

Mr. Venino: There is no such thing there. I object to that. The record will refer to what the letter states, that the gravel pit was adjacent to his property and what I corrected is, it is not adjacent, it is on our property. That is the only question there about the red gravel.

*William B. Kunz, re-cross.*

Mr. Beatty: All right.

Q Now, you make the contention of red gravel or removal of trees, or what is your contention?

A The contentions are just disfiguring the surroundings, taking red gravel away from there and damaging the trees. 10

Q You have examined these pits, have you?

A That is, that one.

Q The one particularly with regard to your property? A Yes.

Q Now, is that the gravel pit you call the red gravel?

Mr. Venino: I object to it. Not cross examination.

The Court: I will sustain the objection. 20

Mr. Beatty: Well, he has made reference here and I think—

Mr. Venino: Under cross examination—

Mr. Beatty: I think he has made reference to red gravel and laid stress on it, that red gravel appears in the letter, and that red gravel is not adjacent, but on another property, I think we are entitled to get this man to testify whether or not from his own inspection he knows red gravel or yellow gravel. 30

The Court: I will sustain the objection.

Mr. Beatty: All right; I will ask an exception.

The Court: You don't have to have any in Chancery.

Mr. Beatty: No. I see.

The Court: That is all.

Mr. Venino: Mr. Petrone. 40

*Antonio Petrone, direct.*

ANTONIO PETRONE, sworn for complainant.

*Direct examination by Mr. Venino.*

Q Mr. Petrone, were you employed by the  
Barnegat Pines Realty Company on February  
10 23, 1928? A I was.

Q In what capacity? A As a salesman.

Q Did you sell the lots mentioned in contract  
Exhibit C. 1 to the complainant on behalf of  
the Barnegat Pines Realty Company? A I did.

Q When you sold these lots to the complain-  
ant, was the street on which these lots run,  
namely, Alpine street, laid out? A It was not.

Q Was it staked out? A No, sir.

Q Were any of the streets shown on the map  
20 from which these lots were sold staked out or  
laid out, that is Map 12? A The only work  
done on Map 12 at the time was the monu-  
menting, but no staking.

Q I see. Was it possible to definitely identify  
the lots or their location at the time? A Not  
without a survey.

Q Did you have a general idea of where the  
lots were? A I did.

Q Were you on the bus with Mr. Kunz on  
30 February 23rd on the way to the Barnegat Pines  
from Newark? A I was not only on the bus,  
but I had charge of the bus. I was the bus  
captain.

Q I see. Now, did the bus stop at a gravel  
pit on Lacey Road on the way down? A Yes,  
sir.

Q What were the dimensions of the gravel pit  
on that day when you stopped there, Mr. Petrone?  
A It was the old gravel pit, as we found it  
there when the property was purchased by the  
40 Barnegat Pines Realty Company.

*Antonio Petrone, direct.*

Q I see. A Yes.

Q And what dimensions was it along Lacey Road, that is, how wide was it along Lacey Road? A Well, I couldn't say exactly. I would say 150 feet or so.

Q How deep was it, that is, how far had it been dug in towards Alpine street at that time? 10  
A Oh, about 100 feet or so.

Q Now, was there any other gravel pit or excavation on this property shown on Map 12 at that time? A Not to my knowledge.

Q Was there any gravel pit or excavation on these lots that you sold Mr. Kunz at that time? A Not to my knowledge; no, sir.

Q Now, do you know whether this gravel pit on Lacey Road was enlarged from time to time? 20  
A I have reason to believe that it was enlarged.

The Court: No.

Mr. Beatty: No, I object to that.

The Court: Do you know it?

The Witness: Yes, sir.

The Court: How do you know it?

The Witness: Because we saw the machinery there on the job and we were instructed to tell the people that they were fortunate in having the gravel right on the property, they wouldn't have to purchase it. 30

Q Have you seen the gravel pit recently? A I have seen it this past summer, twice.

Q And is it enlarged? A I didn't go up far enough to notice that, I simply went up Lacey Road, westward and turned left on the so-called Central Lake Drive.

Q I see. A Yes. 40

*Antonio Petrone, cross.*

Q Have you seen the lots which you sold to Mr. Kunz after the contract was entered into?

A No, sir.

Q Can you tell us whether or not any excavation is on those lots at the present time? A No, sir.

10

Mr. Venino: Take the witness.

The Court: Any questions?

Mr. Beatty: Yes.

*Cross examination by Mr. Beatty.*

Q Mr. Petrone, you say that it was monumented, wasn't it?

20

The Court: He has already said that.

Q This property? A All the maps were monumented.

Mr. Beatty: And then, in answer to counsel's question, he said, could he give a general idea of where the lots were and he said No.

The Court: He said Yes.

30

The Witness: No; I said Yes.

Mr. Beatty: I thought he said No.

Mr. Venino: I asked him whether he has a general idea—Petrone—he said, Yes, he had a general idea.

Q Did you have a general idea with regard to that? A Yes.

Q And do you not know that this particular section was bought after the other sections were bought? You know that? A You mean Lot 12?

40

*George Gardner, direct.*

Q Yes. A Yes.

Q And did it not have other gravel pits there? A Why, there was what I thought one general pit.

Q Well, wasn't there, also, at the end of Alpine street, that gravel ridge, which is referred to as a gravel pit? A Yes, there was an elevation there of some kind. 10

Q And at which they were removing gradually? A They were removing gravel, yes.

Q And this pit, do you know from your own knowledge whether this pit that is described as facing on Lacey Road continues back as far as the Kunz property? A It cut close to it, yes.

Q Close to it? A I thought that the lots I sold Mr. Kunz were quite—right adjacent to the old gravel pit. 20

Q Were adjacent to it? A Yes.

Mr. Beatty: That is all.

Mr. Venino: That is all.

The Court: That is all.

Mr. Venino: Mr. Gardner.

---

GEORGE GARDNER, sworn for complainant. 30

*Direct examination by Mr. Venino.*

Mr. Venino: Are Mr. Gardner's qualifications admitted?

The Court: Yes, I have known Mr. Gardner for years.

Q Mr. Gardner, did you make a survey of Lots 31, 32, 33, 34, 35 and 36, on Map 12, of 40

*George Gardner, direct.*

property belonging to Barnegat Realty Pines Company, Incorporated, mentioned in Exhibit C. 1 and C. 3? A No, this is Block 144.

Q 144. Block 144, that is right, Map 12? A Yes.

10 Q When did you make the survey, Mr. Gardner? A February the 19th, 1930.

Q And have you the original figures and tracing here? A Yes.

Q Is this the tracing? A Yes.

Q That shows accurately what you found on that day there? A Yes.

Q By making the survey? A Yes.

Mr. Venino: I offer this in evidence.

(Tracing marked Exhibit C. 10.)

20

Q Now, Mr. Gardner, this survey has some dotted lines running in on Lots 35 and 36. Will you explain just what those dotted lines indicate? A Indicate the edge of a cut, of an excavation.

Q Will you tell us just what the dimensions of that excavation are? A Well, that excavation, so far as this property was concerned, contained 146 cubic yards, but the excavation—  
30 (interrupted).

Q That is, 146 cubic yards of— A Gravel.

Q —removed? A Yes, sir.

Q I see. And what is the elevation of that property? Is it low or high? A That property is high.

Q I see. And this was dug right into a sort of an embankment? A Yes.

Q I see. And was this excavation that you found there a part of a larger excavation? A It extended beyond the property about, probably  
40 two or three lots.

*George Gardner, cross.*

Q I see. A That is to the south.

Q And did that excavation run out to any street? A It ran out as far as Alpine; it may have gone into it a few feet, but not much.

Q Did it have any course towards Lacey Road that you discovered? A Well, it was in between Lacey Road and Alpine street. 10

Q I see. A You see, Alpine street was only—was cut down, trees were cut down and it was not graded.

Mr. Venino: I see. Take the witness.

*Cross examination by Mr. Beatty.*

Q Mr. Gardner, when you were down there, they had part of Alpine coming in towards the Kunz lot developed in sidewalks? A No. 20

Q When you were down there, February 19th? A I was down there February 19th the first and only time. All that was there was just a clearance for to start in for a development.

Q Yes. Did you in regard to this—do you know whether or not there was any shrubbery on it? A There was no shrubbery. The only shrubbery was just knocked down.

Q Could you tell from the examination whether or not it had been worked recently? A Well, I couldn't say it had—it had been—it was not long enough excavated for shrubbery to grow into it, that portion. 30

Q Well, we don't want to get into the botany of it, how long shrubbery grows, but I mean, could you tell from either scars or the condition whether it had been worked recently? A It looked to me as though it had been worked somewhere around about a year, but I wouldn't say positively, but I wouldn't say positively. 40

*Conclusions of Vice-Chancellor.*

Q About a year before, you mean? A Yes.

Q It looked to you as if it was in part of an excavation that a steam shovel had worked upon? A No steam shovel had ever worked in there.

Q No steam shovel had ever worked there.  
10 Did you know whether it was red or yellow gravel, did you notice? A That was yellow gravel.

Q That was yellow gravel? A Partly, but it may have been red on the top, but I couldn't see; that was not there.

Q You couldn't see, but from what you thought it was yellow gravel? A Yes.

Mr. Beatty: That is all.

20 Mr. Venino: That is all.

The Court: Anything further?

I am ready to decide this case now. I do not think it is necessary to put in any defense. The sole question is whether this man bought this property in good faith—whether there was any misrepresentation or fraud in the matter.

30 Now, he says himself that it was his father that persuaded him to buy this property, and, acting on his father's suggestion, in a very natural desire to be next to his father and his friends, he went down there. He got an agent from the company to show him over the property in general, then he got a map and he selected these lots from this map. He stopped in front of a sand pit of some kind, old or new, and he must have known—or, it was his duty to have known that there were sand pits or had been sand pits in that immediate vicinity.

*Conclusions of Vice-Chancellor.*

His own witness testified that, at the time this property was pointed out to him, the street, or proposed street, was monumented. He went down there four times, while he was paying his installments, he knew that there were sand pits there. He made absolutely no effort to find out whether the sand pits were on his property or not. The monuments were there. If he could not accurately determine by his own measurement, he should have gotten an engineer—which, after the beginning of this case, he appears to have done—to locate his lots. He was clearly in laches in paying his money. He made no effort—he says himself he didn't know where his lots were, excepting in a general way. He knew, however, as he testified, that there were sand pits there and he saw them working, and it was up to him to find out whether they were working on his lots.

10

20

I will therefore advise a decree dismissing the bill.

30

40

*Exhibit C. 1.*

**EXHIBIT C. 1.**

Telephone: Mulberry 4820

10 **BARNEGAT PINES REALTY CO.**  
**INCORPORATED**  
**17 ACADEMY STREET**  
**SUITE 1103-4**  
**NEWARK, N. J.**

TRENTON OFFICE  
 BROAD ST. BANK BUILDING

PETRONE

PATERSON OFFICE  
 COLT BUILDING  
 810

20 *ARTICLES OF AGREEMENT*, Made the 24th day of February in the year of Our Lord One Thousand Nine Hundred and Twenty-eight BETWEEN the BARNEGAT PINES REALTY CO., INC., a corporation organized and existing under the laws of the State of Delaware, duly authorized to do business in the State of New Jersey, party of the First Part:

AND WILLIAM B. KUNZ,  
 509 Richmond Avenue,  
 30 of the City of Maplewood in the County of Essex and State of New Jersey, party of the Second Part

That the said party of the first part, for and in consideration of the sum of SIX HUNDRED & 00/100 (\$600.00) . . . *DOLLARS* to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements herein after mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of 40 the second part, that they, the said party of the

*Exhibit C. 1.*

first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Warranty Deed on or before the first day of Sept. 1929 ensuing the date hereof, all the lots, tracts, or parcels, of land and premises, hereinafter particularly described, situate, lying and being in the Township of Lacey, in the County of Ocean and State of New Jersey, and further described as Map No. 12 Block 144 Lots 31, 32, 33, 34, 35 and 36. of Property belonging to the Barnegat Pines Realty Co., and filed with the Township Committee of Lacey, Ocean County, also the County Clerk of Ocean County at the Court House, Toms River, Ocean County, New Jersey,

10

AND the said WILLIAM B. KUNZ, for himself, his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, their heirs, executors, administrators and assigns, that he the said party of the second part, will pay and satisfy or cause to be paid and satisfied unto the said party of the first part the sum of SIX HUNDRED & 00/100 (\$600.00)..DOLLARS as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

20

30

CASH upon the signing of order in the amount of \$50.00 and \$100.00 on March 17, 1928

The balance of \$450.00 to be paid at the rate of \$25.00 monthly for 18 consecutive months and \$... for the next ensuing month with interest of 6% on unpaid balance, at the Newark office of the company, the first monthly payment to be due and payable on the first of the next month following date of this agreement, and should the party of the second part fail to make any and

40

*Exhibit C. 1.*

all payments as herein agreed and at the time and place agreed upon, then the party of the first part shall and will retain all moneys paid under this contract as liquidated damages for abrogation of contract by party of the second part.

- 10 *AND IT IS FURTHER AGREED* by the parties to these presents, that the said party of the second part, his heirs and assigns, may enter into and upon the said land and premises on the first day of Sept. 1929 ensuing the date hereof, and from thence take the rents, issues, and profits to his and their use.

- 20 *AND IT IS FURTHER AGREED* by the parties hereto, that the said Deed shall be delivered and received at 509 Richmond Avenue, Maplewood, N. J. between the hours of 11 in the forenoon and 8 o'clock in the afternoon on the said first day of Sept. 1929 ensuing the date hereof.

- 30 *AND IT IS FURTHER AGREED* by the parties hereto that no representations other than that contained in the printed literature of the Company is binding on the Company, and the party of the second part in signing this contract does so with full knowledge of all the facts and statements contained therein.

*AND* for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of SIX HUNDRED & 00/100 (\$600.00) ..... *DOLLARS* which they hereby fix and settle as liquidated damages therefor.

*Exhibit C. 1.*

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

*BARNEGAT PINES REALTY CO.*

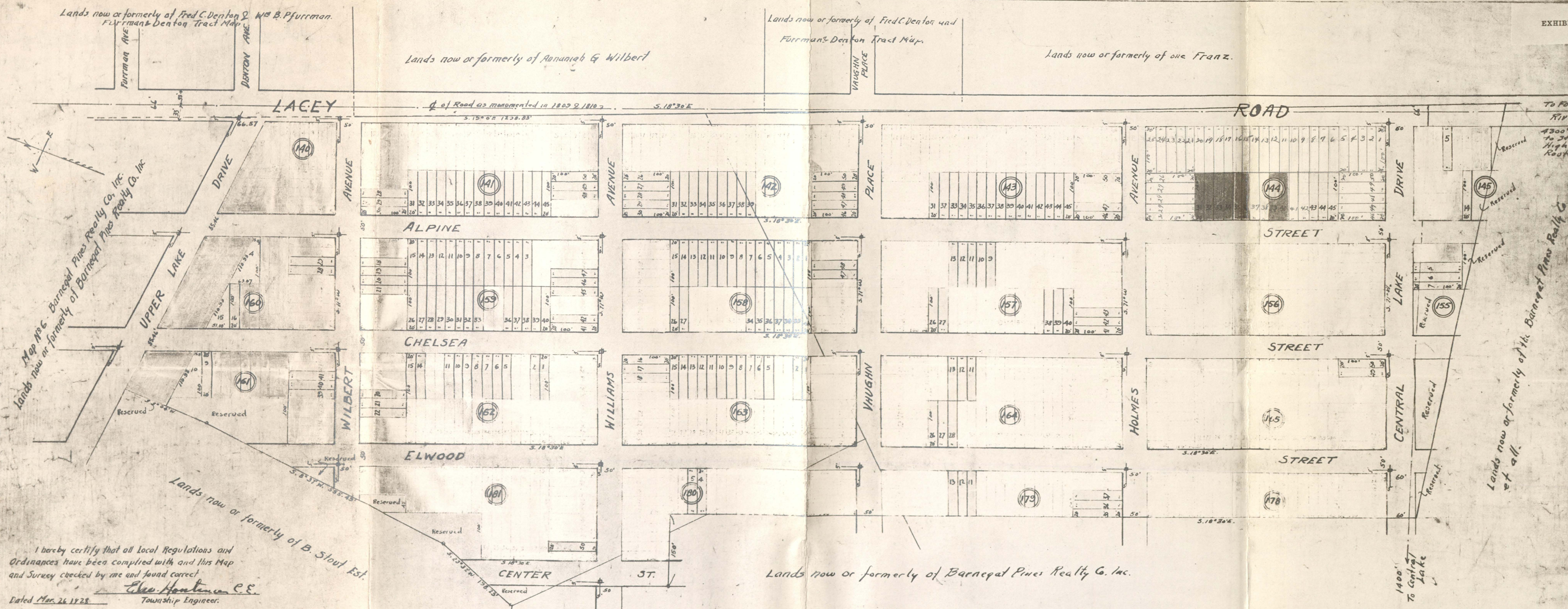
509 Richmond Ave., Street Address	NORMAN A. GRAHAM Vice President	10
Maplewood, City	RUSSELL T. GRAHAM Ass't. Secretary	
N. J. State	WILLIAM B. KUNZ (SEAL) Party of the Second Part	

20

30

40

*Exhibit C. 2.*



I hereby certify that all Local Regulations and Ordinances have been complied with and this Map and Survey checked by me and found correct  
 Dated Mar. 24 1928  
 Township Engineer.

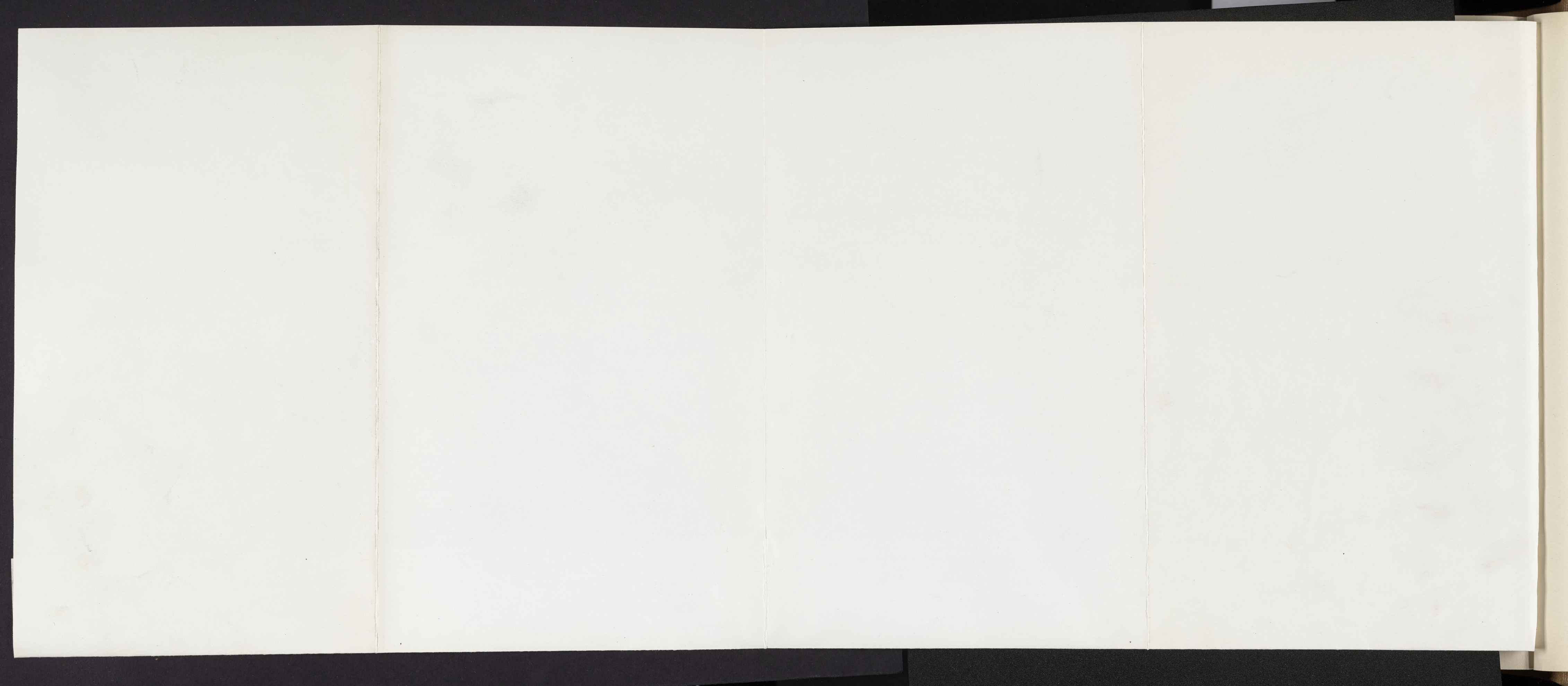
This map is approved for filing with the Clerk of the County of Ocean, State of New Jersey.  
 By Resolution of the Township Committee of the Township of Lacey.  
 Adopted March 27, 1928

Attest  
 Chairman Township Committee  
 Clerk of the Township of Lacey.

MAP No 12  
 OF  
 Property belonging to  
**BARNEGAT PINES REALTY CO., INC.**  
 Situated in the TOWNSHIP OF LACEY,  
 OCEAN COUNTY,  
 NEW JERSEY.  
 1928

Scale - One inch equals One hundred feet

Approved in accordance with Chapter 224  
 P.L. 1921 as amended.  
 Engineer and Land Surveyor - LICENSE No 1  
 Dated - Mar. 24, 1928 Forked River, N.J.



*Exhibit C. 3.***EXHIBIT C. 3.**

810

D5043  
Petron

THIS INDENTURE Made the 20th day of September  
in the year of our Lord One Thousand Nine Hun-  
dred and Twenty-nine

10

BETWEEN BARNEGAT PINES REALTY CO.,  
INC., a corporation organized and existing under  
the laws of the State of Delaware, duly authorized  
to transact business in the State of New Jersey,  
party of the first part;

AND WILLIAM B. KUNZ, 509 Richmond Ave-  
nue, of the City of Maplewood in the County  
of Essex and State of New Jersey party of the  
second part:

20

WITNESSETH That the said party of the first part,  
for and in consideration of One Dollar, lawful  
money of the United States of America, and  
other good and valuable considerations, to him  
in hand well and truly paid by the said party  
of the second part, at or before the sealing and  
delivery of these presents, the receipt whereof  
is hereby acknowledged, and the said party of  
the first part being therewith fully satisfied,  
contented and paid, has given, granted, bar-  
gained, sold, aliened, released, enfeoffed, con-  
veyed and confirmed, and by these presents does  
give, grant, bargain, sell, alien, release, enfeoff,  
convey and confirm unto the said party of the  
second part, and to his heirs and assigns forever  
ALL those certain lots, tracts or parcels of land  
and premises, hereinafter particularly described,  
situate, lying and being in the Township of  
Lacey, in the County of Ocean and State of New  
Jersey.

30

40

*Exhibit C. 3.*

and more particularly shown on map filed in office of County Clerk of Ocean County, and designated as follows:

Map No. 12 of Property belonging to the Bar-Block 144 negat Pines Realty Co., Inc.

10      Lots Nos. 31-32-33-34-35-36

As a condition to this deed the purchaser agrees for himself, his heirs and assigns forever to the following, viz.:

- (A) The lots herewith deeded cannot be sold to or purchased by anyone other than of white blood.
- (B) That there shall be no assessment on the herewith described property for any improvements now in process or that may be undertaken by the party of the first part.
- 20      (C) That no other building other than a dwelling house and out-buildings appertaining thereto shall be built or maintained upon said premises or any part thereof, it being understood, however, that the lots facing Lacey Road may be used for business purposes. Lots in all other locations on the tract are restricted to residences only. Further, that no building of any description shall at
- 30      any time be erected thereon within twenty-five feet of the line of any street, avenue or boulevard upon which it faces; further. Nor within fifteen feet of the side line of any corner lot, further, that no building of any description, shall at any time be erected on a lot or on lots less than forty feet in frontage, further, that no house shall be built on any corner at a less cost than \$2,000.00, nor on any inside lot at a cost less than \$1,500.00, and all houses shall be
- 40

*Exhibit C. 3.*

artistic in design and substantial in construction; further, that all plans for building must be submitted to the Company and permit for erection obtained; further, that all plumbing and sewer disposal systems must conform with the local board of health regulations and must be approved by the Company before installation; further, that there shall be no limitation as to the time in which to build, the object of these covenants being to secure uniformity of improvements and the health, beauty and value of the locality; further, that the right to lay and operate telegraph, sewer, trolley, gas, electric and gas systems on the boulevards, streets, roads and avenues adjoining the above lots is reserved by and to the party of the first part and to its assigns. 10  
20

TOGETHER with all and singular the houses, buildings, trees, ways, waters, profits, privileges, and advantages, with the appurtenances to the same belonging or in anywise appertaining:

ALSO all the estate, right, title, interest, property, claim and demand whatsoever, of the said party of the first part, of, in and to the same, and of, in and to every part and parcel thereof, To HAVE AND TO HOLD all and singular the above described land and premises, with the appurtenances, unto the said party of the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns forever: 30

And the said party of the first part does for itself and its successors covenant and grant to and with the said party of the second part, heirs and assigns that if the said party of the 40

*Exhibit C. 3.*

first part is the true, lawful and right owner of all and singular the above described land and premises, and of every part and parcel thereof, with the appurtenances thereto belonging; and that the said land and premises or any part thereof, at the time of the sealing and delivery  
 10 of these presents, are not encumbered by any mortgage, judgment, or limitation, or by any encumbrance whatsoever, by which the title of the said party of the second part, hereby made or intended to be made, for the above described land and premises, can or may be changed, charged, altered or defeated in any way whatsoever:

AND ALSO, that the said party of the first part now has good right, full power and lawful authority to grant, bargain, sell and convey the  
 20 said land and premises in manner aforesaid.

AND ALSO, that the said party of the first part will WARRANT, secure, and forever defend the said land and premises unto the said party of the second part, his heirs and assigns, forever, against the lawful claims and demands of all and every person or persons, freely and clearly freed and discharged of and from all manner of encumbrance whatsoever.

30 IN WITNESS WHEREOF, the said party of the first part has caused these presents to be signed by its President and attested by its Secretary, and its corporate seal to be hereto affixed, the day and year first above written.

BARNEGAT PINES REALTY CO., INC.

THOMAS T. GRAHAM  
 President.

ATTEST:

40 RUSSELL F. GRAHAM  
 (SEAL) Secretary.

*Exhibit C. 3.*

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

BE IT REMEMBERED, That on this 20th day of September in the year of our Lord One Thousand Nine Hundred Twenty-nine, before me, the subscriber, a Notary Public of New Jersey, personally appeared Russell F. Graham, Secretary of the Barnegat Pines Realty Co., Inc., a corporation, who being by me duly sworn, doth depose and make proof to my satisfaction, that he well knows the corporate seal of the Barnegat Pines Realty Co., Inc., a corporation, the grantor mentioned in the within Indenture; that the seal thereto affixed is the proper corporate seal of the said company; that the same was so affixed thereto and the said deed signed and delivered by Thomas T. Graham, who was at the date and execution thereof, the President of said company, in the presence of the said deponent, as the voluntary act and deed of the said company, and that the said deponent thereupon signed the same as subscribing witness.

RUSSELL F. GRAHAM.

Sworn and subscribed before me  
 on the day and year afore-  
 said.

*Exhibit C. 3.*

DEED.

BARNEGAT PINES REALTY CO., Inc.

TO

10 WILLIAM B. KUNZ,  
509 Richmond Avenue,  
Maplewood, N. J.

Dated, September 20, 1929

RECEIVED in the Office of the  
County of Ocean on the day of  
A. D., 19 , at o'clock,  
in the noon, and Recorded in Book  
of DEEDS for said County, on  
20 page

BARNEGAT PINES REALTY CO., Inc.  
17 Academy Street  
Suite 1208  
NEWARK, N. J.

30

40

*Exhibit C. 4.***EXHIBIT C. 4.**

Phone So. Orange 969 M

WILLIAM B. KUNZ  
 Carpenter and Builder  
 509 Richmond Ave.  
 MAPLEWOOD. N. J.

10

Oct 29, 1929

Mr Norman. A. Graham  
 Barnegat Pines Realty Co. Inc

Dear Sir—,

As Owner of Lots Nos. 31-32-33-34-35-36, Block  
 144, Map No 12. Haveing bought same for the  
 appearance of same and its surrounding have  
 been very much disappointed when *i* rode down  
 to see *weather* there was a change to build so  
 we could enjoy next summer at Barnegat Pines

20

Have taken the matter up with Mr Jacobus  
 and he said the *propety* would be in good condi-  
 tion by next summer which to my minde can not  
 be without the trees.

Hopeing to hear from you in near fuature.

Yours Very Truly

William B. Kunz.

30

40

*Exhibit C. 5.***EXHIBIT C. 5.**

BARNEGAT PINES REALTY CO., INC.

THE DEVELOPMENT DIFFERENT

17 Academy Street, Newark, New Jersey

Telephone Mulberry 4820

10

Suite 1208

Post Office Building  
Forked River, N. J.Harrison Building  
Philadelphia, Pa.

November 6, 1929.

Mr. William B. Kunz,  
509 Richmond Ave.,  
Maplewood, N. J.

Dear Mr. Kunz:

Your letter of October 29th addressed to Mr.  
20 Norman A. Graham has been called to the  
writer's attention.

We would be pleased to have you call at our  
offices, as we feel reasonably sure that if the  
property you now own on Map #12, Block #144,  
Lots #31 to 36 inclusive, is not, in your mind,  
satisfactory for the purpose of building, we can  
transfer you to a location that will meet your  
requirements. As you can readily realize, we  
are very much interested in the erection of bun-  
30 galows in Barnegat Pines.

If you will get in touch with the writer either  
by mail or 'phone and make a definite appoint-  
ment, he will be only too glad to sit down and  
discuss the matter in detail with you.

Awaiting your reply, we remain

Very truly yours,

BARNEGAT PINES REALTY CO., INC.

EDWARD F. DILLON,  
Vice-President.

40 EFD:BEJ

*Exhibit C. 6.*

**EXHIBIT C. 6.**

BARNEGAT PINES REALTY CO., INC.

THE DEVELOPMENT DIFFERENT

17 Academy Street, Newark, New Jersey

Telephone Mulberry 4820

Suite 1208

10

Post Office Building  
Forked River, N. J.

925-929 Market St.  
Wilmington, Del.

December 26th, 1929.

Mr. William B. Kunz,  
509 Richmond Ave.,  
Maplewood, N. J.

Dear Mr. Kunz:

This is to confirm our conversation of a few days ago regarding the decision of our Executive Committee on the question you brought up relative to your property in Barnegat Pines, known as Map 12, Block 144, Lots 31 to 36 inclusive. Your contention was that owing to the fact that your property was located adjacent to a red gravel pit, you were fully justified in asking for the return of your money.

20

I have taken the matter up with the Committee, as I informed you over the 'phone, and their decision was that we would transfer you to a more suitable location in our development, if it was agreeable to you. However, I have already made you this offer, and you have declined it; yet, we stand ready and willing to make the transfer at any time agreeable to you.

30

40

*Exhibit C. 7.*

However, the question of the return of the money is impossible, as the Executive Committee will not sanction the said return.

Very truly yours,

EDWARD F. DILLON,  
Vice-President.

10 EFD:BEJ

**EXHIBIT C. 7.**

File #845.

Newark, N. J.,  
Jan. 6th, 1930.

20 Barnegat Pines Realty Co., Inc.,  
17 Academy Street,  
Newark, New Jersey.

Gentlemen:—

I beg to inform you that I represent Mr. William B. Kunz, whom you were under contract with to sell lots 31, 32, 33, 34, 35 and 36 in Block 144, on Map #12 of property belonging to the Barnegat Pines Realty Co., Inc. This contract was an installment one and when the last installment was paid you delivered a deed to Mr. Kunz under date of September 20th, 1929, covering these lots. At the time you delivered this deed, you tried to persuade Mr. Kunz to give up these lots mentioned in your deed and take some other lots. As Mr. Kunz purchased these lots after a personal inspection and picked them out on account of their picturesque location and on account of the trees thereon etc., he did not care to follow any suggestion on your part to give them up; but this attempt on your behalf to

30

40

*Exhibit C. 7.*

induce him to give them up arose suspicion in his mind and he, therefore, made a personal inspection of the lots immediately thereafter, and found that you had dug a sand pit on the same, some five or six feet deep and running practically half the length of the lots.

Upon discovering this fraud Mr. Kunz took matters up with you and personally tendered back the deed covering said lots, which had not been recorded, to your Mr. Edward F. Dillon, Vice President, and demanded the return to him of the purchase price that he paid for said lots. You refused to take back your deed and also refused to refund his money, but you did offer to exchange the lots mentioned in the deed for six other lots, but demanded additional money as you claimed they were worth more money than the lots mentioned in the deed.

Several attempts since have been made by Mr. Kunz to get you to straighten this matter out, but you seem to be unwilling to rectify the situation.

File #845.

Newark, N. J.,  
Jan. 6th, 1930.

Barnegat Pines Realty Co., Inc., #2.

In your letter of December 26th, 1929, addressed to Mr. Kunz, which is before me, you allege as follows:

“Your contention was that owing to the fact that your property was located adjacent to a red gravel pit, you were fully justified in asking for the return of your money.”

Mr. Kunz wishes me to correct you on this. It is not his contention that he is located along-

*Exhibit C. 7.*

side of a gravel pit. It is his contention that you have dug a gravel pit on lots which you had contracted to sell to him. The gravel pit is not only on his lots, but also on adjacent lots. You very carefully framed this clause so as not to show the true state of facts. Mr. Kunz has  
10 surveyed this property and the pit is on his property.

When these lots were sold to Mr. Kunz and when he signed the contract, no gravel pit had been dug. We have proof to this effect. You had absolutely no right to dig any sand from these lots which were under contract to be sold to Mr. Kunz and your doing so amounts to a fraud. When you delivered the deed to Mr. Kunz you failed to disclose the fact that you had dug  
20 the sand therefrom, but tried to induce him to take other lots. Mr. Kunz has tendered back his deed to you and demanded the return of his money. I hereby again tender back this deed to you and offer to return the same to you and hereby demand the return of the purchase price.

The deed has not been recorded and is not acceptable to Mr. Kunz. Your proposition for Mr. Kunz to take six other lots in exchange for the ones mentioned in the deed and pay you an  
30 additional sum of money to boot, is equally unacceptable to him.

I shall expect this matter straightened out promptly by return mail as the situation warrants criminal action, in my opinion, and I certainly will not leave a stone unturned

*Exhibit C. 7.*

File #845.

Newark, N. J.,  
Jan. 6th, 1930.

Barnegat Pines Realty Co., Inc., #3.

to see that you are punished for selling my client  
lots under a deferred plan and then handing him  
a deed at a time when you dug away tons of sand  
from his lots, leaving a hole some five or six feet  
deep and running half-way the length of the lots.

10

If I do not hear promptly from you, I will  
take such action as the law allows in cases of  
this kind.

Yours very truly,

Aquila N. Venino.

ANV:MLG

20

30

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*Exhibits C. 8, C. 9.*

EXHIBIT C. 8.

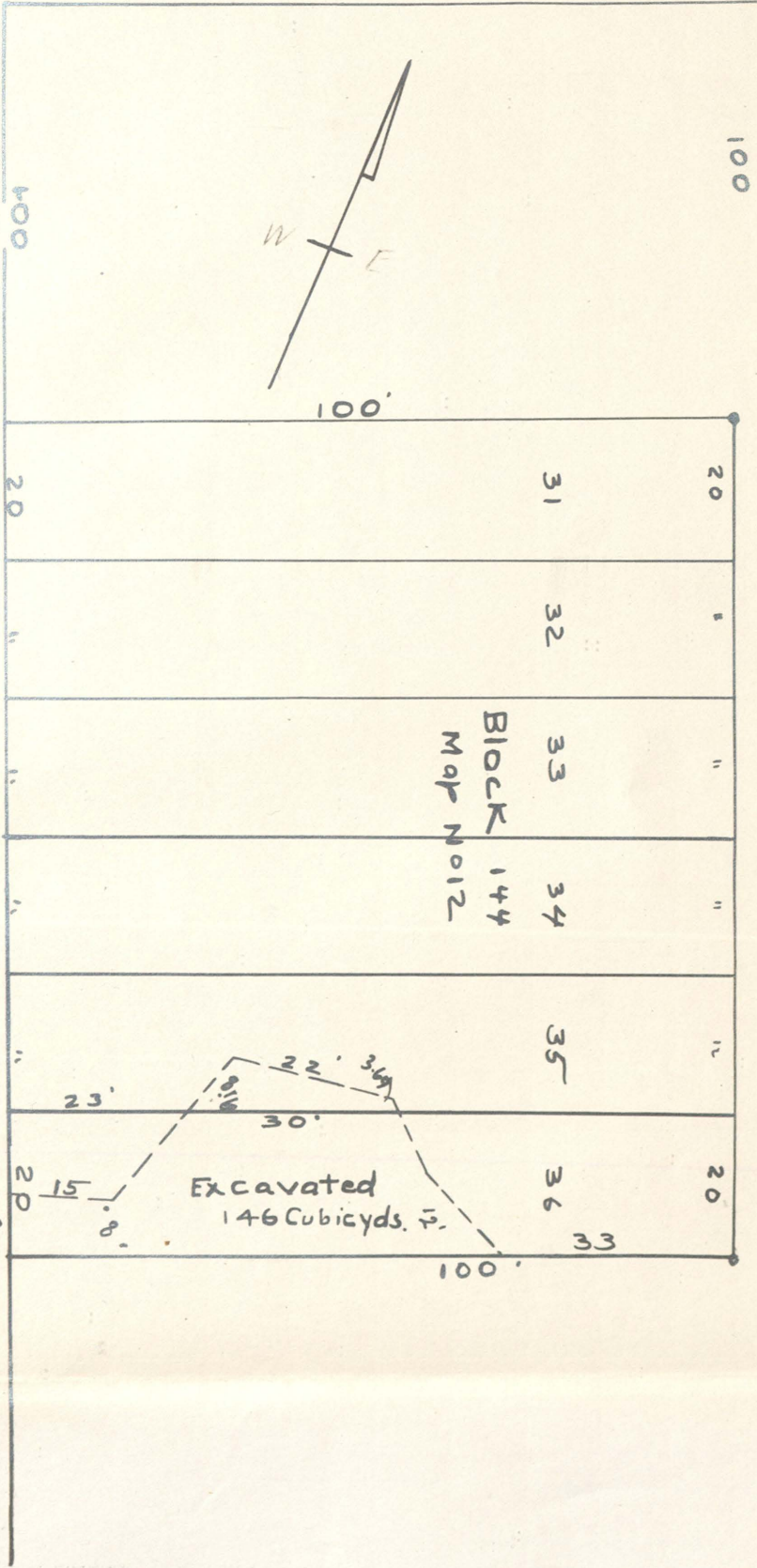


EXHIBIT C. 9.





HOLMES AVE.



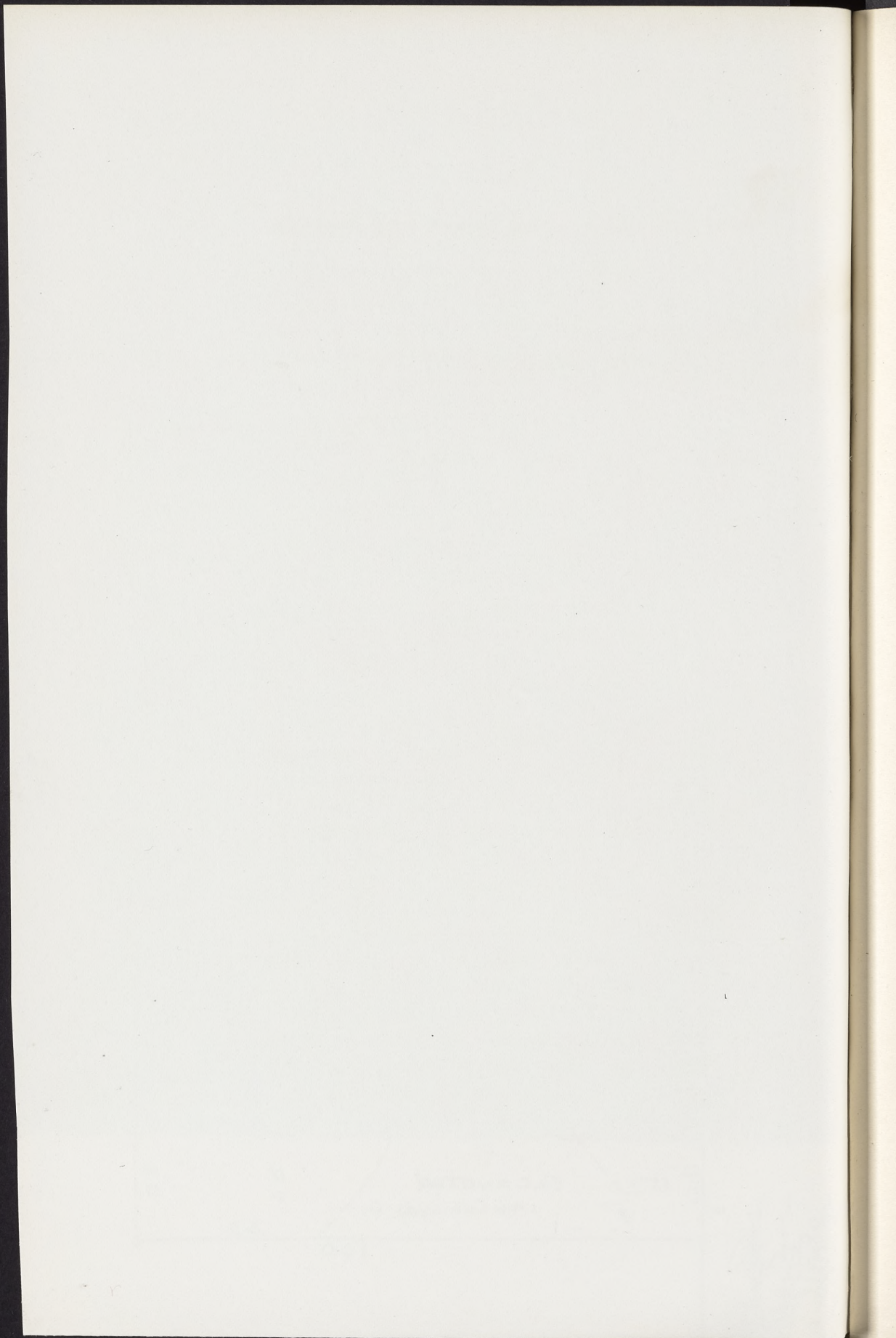
ALPINE

ST

EXHIBIT C. 10.

Scale 1" = 20'

*Geo. H. Bradman*  
*Eng'g & Surveyor*  
 Feb - 11 - 1938  
 207 Market St.  
 Newark, N. J.



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

## New Jersey Court of Errors and Appeals

WILLIAM B. KUNZ,  
Complainant-Appellant,

vs.

BARNEGAT PINES REALTY Co.,  
INC., a corporation,  
Defendant-Appellee.

*On Bill for  
Rescission  
and Cancellation  
of Deed.*

*On Appeal  
from Court  
of Chancery.*

*Sat Below  
ALONZO  
CHURCH,  
V.-C.*

### BRIEF OF THE COMPLAINANT-APPELLANT.

#### Statement.

This action was one for the rescission of an eighteen (18) months' installment contract for the sale and purchase of certain unimproved real estate lots and the cancellation of the deed given thereunder, on the ground that the defendant wilfully, wrongfully and unlawfully entered in and upon the premises after it had entered into the contract to sell the same to the complainant, and before the deed was given thereunder, and unlawfully removed one hundred and forty-six (146) cubic yards of gravel and removed and destroyed numerous beautiful trees and shrubbery, leaving an excavation and hole on said premises some eight or twelve feet deep, which action was commenced by the filing of a bill of complaint.

The case after having been referred to the Honorable Alonzo Church, Vice-Chancellor, was tried and heard by him, and after trying the

case and only hearing the complainant's testimony, on his own initiative, and without a motion to that effect made on behalf of the defendant, directed the entering of a final decree dismissing the bill of complaint, which was subsequently, on October 31, 1930, entered as directed. Whereupon the complainant appeals from the said order, in the form of a final decree, made in the above-entitled cause on October 31, 1930, and from the whole and every part thereof.

#### Abstract of the Case.

The Barnegat Pines Realty Co., Inc., a corporation, the defendant in this action, was the owner of a large tract of land located in the Township of Lacey, Ocean County, New Jersey (Exhibit C. 2, page 88), and in connection with the sale of lots out of said tract it had its own busses running from the City of Newark, County of Essex and State of New Jersey, to take prospective purchasers to and from the said property (page 31, folio 20, also page 76, folios 30 and 40), which is distant between sixty (60) and sixty-five (65) miles from the City of Newark.

That the complainant's father and his friend had purchased from the defendant corporation certain lots which were designated by lot numbers on a map. That the complainant, who resides at 509 Richmond avenue, Maplewood, Essex County, New Jersey (page 29, folio 40), was interested in purchasing some lots, but wanted to be alongside of his father's and his friend's lots.

On February 23, 1928, the complainant took one of the Barnegat Pines Realty Co., Inc.'s busses at Newark, in accordance with a prear-

ranged appointment made with him by the defendant company, through its sales agent, a Mr. Antonio Petrone, who was on the bus with the complainant. When they reached the property the bus drove through a road called Lacey Road, the Barnegat Pines Realty Co., Inc. property being on the westerly side of this road. The bus came to a stop on said westerly side of the road near a gravel pit and at which point Mr. Petrone explained that the defendant company would not have to purchase any gravel to develop the tract as it had it right on the ground. They then drove through the tract and finally came back on Lacey Road and then drove to a hotel where Mr. Petrone got out a map and on which he showed the complainant the six lots which he was interested in and which were alongside of his father's and his friend's lots, Mr. Petrone stating that these lots were in the neighborhood of where the bus had stopped at the gravel pit, on the westerly side of Lacey Road (page 31, folios 20, 30 and 40). This pit, on the day that the bus stopped, was about one hundred and fifty (150) feet wide on Lacey Road and extended back in a westerly direction about sixty-five (65) feet (page 32, folios 10 and 20). The lots which were shown to the complainant on the map fronted on Alpine street, which was two hundred (200) feet in from Lacey Road, in a westerly direction (page 32, folio 20).

As the property in the neighborhood of the gravel pit was a nice location, on account of the pine trees thereon, which appealed to the complainant, he entered into a contract to purchase six of the lots, namely, lots thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), thirty-five (35) and thirty-six (36), on Map 12, Block 144, which were alongside of his

father's and his friend's lots, by entering into a written contract (page 31, folio 40; also Exhibit C. 1, page 84), which was an installment contract, and called for the payment of Six Hundred Dollars (\$600.00) for said lots, which was to be paid Fifty Dollars (\$50.00) upon the signing of the order and One Hundred Dollars (\$100.00) on March 17, 1928, and the balance of Four Hundred and Fifty Dollars (\$450.00) to be paid at the rate of Twenty Five Dollars (\$25.00) per month for eighteen (18) consecutive months, with six per cent. (6%) on the unpaid balance, at the Newark office of the company, the first monthly payment to be due and payable on the first of the next month following the date of the agreement, the defendant company agreeing to sufficiently convey to the complainant a Warranty Deed for the said premises when the payments had been made.

That at the time when the complainant inspected the tract (not the lots), on February 23, 1928, and at the time he entered into the contract, it was impossible for either he or Mr. Petrone, the defendant's salesman, to identify or locate the lots as no streets had been laid out or opened up, and no lots were staked out or, in any way, marked so they could be located or identified by the said complainant or Mr. Petrone (page 34, folios 20 and 30; also page 76, folios 20 and 30).

That after the contract was entered into, the complainant visited the tract three or four times to see whether any developments had taken place, or any streets laid through, which would make it possible for him to locate his lots, and that on these occasions he roamed around the neighborhood where this gravel pit was, but was unable to locate his lots on any of these visits as

there were no streets laid through or staked out and no lots were staked out, and that on these occasions he discovered that there was no other gravel pit on this tract at the time in the neighborhood where the gravel pit on Lacey Road was located (page 34, folios 30 and 40; also page 35, folio 10).

That on these occasions, when he visited the tract, as above stated, he noticed that the Barnegat Pines Realty Co., Inc. was developing the tract near the lake, which was distantly removed from the gravel pit on Lacey Road, and that they were enlarging the gravel pit on Lacey Road by removing the gravel from said pit to the part of the tract that they were developing which was, as above stated, distantly removed and nowhere near the complainant's lots. In other words, they were using the gravel out of this pit to lay out streets and sidewalks in another section of the tract, and that the complainant saw the gravel removed by means of trucks and carried to the lower section of the tract, and by doing so were enlarging the gravel pit on Lacey Road (page 35, folios 20, 30 and 40).

That the complainant made his payments under the contract in the form of checks, which were mailed to the Barnegat Pines Realty Co., Inc., at its Newark office (page 35, folio 40; also page 36, folio 10). That the last payment made by the complainant under the contract was on September 11, 1929 (page 36, folio 40). That he did not receive his Deed on that date. That he received his Deed on October 12, 1929, when it was delivered to him at his home by a Mr. Bruen, who was a salesman of the defendant company (page 36, folio 40; also page 37, folio 10).

After the complainant received this Deed, and as soon as he was able to find time, which was around October 27th or 28, 1929, about two weeks after the Deed was delivered, he visited the tract again and found for the first time that Central Lake Drive had been roughly cut through, but unfinished, and a clearance made a certain distance in on Alpine street from Central Lake Drive and as he knew he was a certain distance in from Central Lake Drive on Alpine street, he measured a certain number of feet in to get a rough idea as to where his lots really were located, and discovered that his lots had been cut out, that is, the gravel pit on Lacey Road had been enlarged to such an extent that the enlargement took in part of his property, causing an excavation in and upon the complainant's lots from which one hundred and forty-six (146) cubic yards of gravel had been removed and numerous beautiful trees and shrubbery had been removed and destroyed, leaving an excavation and hole on said premises some eight or twelve feet deep (page 38, folios 30 and 40; also page 80, folios 30 and 40; also Exhibit C. 10, page 103).

Upon discovering this he immediately went to Mr. Jacobus, who is the property manager, and had a conversation with him (page 38, folio 40; also page 39, folio 10). The appearance of this excavation on the complainant's lots was of recent origin as the ground was fresh and clear and because the complainant saw the defendant enlarge this pit, but, at that time, did not know that they were enlarging it on his property, he not knowing, when he saw the pit enlarged, where his lots were, there being no streets laid out and no lots laid out or staked out, and that Central Lake Drive had not been laid through

at the time that he made these visits to the tract (page 40, folios 20 and 30).

That after discovering this excavation on his property, besides having a conversation with the property manager on that same day, he sent a letter on October 29th, to Mr. Norman A. Graham, one of the officers of the defendant company, which is Exhibit C. 4, page 95, in which he lays his discovery before Mr. Graham and informs him that Mr. Jacobus stated that the property would be put in good condition by next summer, which the complainant alleges cannot be done as trees had been removed (page 40, folio 40).

This letter was answered by the Barnegat Pines Realty Co., Inc., under date of November 6, 1929 (Exhibit C. 5, page 96), acknowledging receipt of the complainant's letter of October 29th, and advising the complainant to call at their office and stating that if the property was not satisfactory for building purposes that they could transfer him to a location that would meet with his requirements, and that if he got in touch with the writer, who was Mr. Edward F. Dillon, the Vice-President, he would be glad to sit down and discuss the matter in detail with him.

After receiving this letter of November 6, 1929, from the Barnegat Pines Realty Co., Inc., namely, Exhibit C-5, the complainant made an appointment over the 'phone to meet Mr. Dillon at the Barnegat Pines Realty Co., Inc. office in Newark, to discuss the matter as he suggested in his letter, Exhibit C. 5. This appointment was arranged for some time the latter part of December (p. 41, folios 30 and 40), (see reference C-6, which refers to this conversation).

At this conference with Mr. Dillon the complainant explained to Mr. Dillon that he had been down to the property and discovered that a gravel pit had been enlarged upon his property and that he went to see Mr. Jacobus, the property manager on the ground, and informed him that he discovered that the gravel pit had been enlarged upon his property and that Mr. Jacobus stated that it was not on his property, but if it had been enlarged upon his property that they would go ahead and take care of it; that he should not worry and that they would put it in A-#-1 shape before he would build on the property; that he was sorry that it had happened, but that they could probably fix it up; the complainant also told Mr. Dillon that Mr. Jacobus could not fulfill his promises as Mr. Jacobus could not replace trees that had been removed and that the property could not be put in its original condition. The complainant further stated that Mr. Dillon said that he did not think that the gravel pit had been enlarged on the complainant's property, but that they could come to a reasonable agreement. Mr. Dillon then offered to exchange the complainant's lots for six other lots in a different location, on condition, however, that the complainant pay an additional sum of money. The complainant informed Mr. Dillon that these lots were purchased on account of his desire to be near to his father's and his friend's lots and because he liked the trees and location of the spot where these lots were represented to be located, and that he did not want his lots separated from his father's or his friend's lots; that he did not think it was fair and square for Mr. Dillon to ask him to pay an additional sum of money. The complainant then tendered back the deed to

Mr. Dillon, the vice president, which was unrecorded, and demanded the return of his money. Mr. Dillon informed him that he would have to take the matter up with the executive board and would let him know later (p. 43, folios 20, 30 and 40 also p. 44, folios 10, 20, 30 and 40; also p. 45, folios 10 and 20).

The complainant did not hear from Mr. Dillon again until he received a letter from the Barnegat Pines Realty Co., Inc., under date of December 26, 1929 (Exhibit C-6, p. 97). In this letter the Barnegat Pines Realty Co., Inc. alleges that it was the contention of the complainant that his lots were adjacent to a red gravel pit. Also stated that the committee decision was that they would transfer the complainant to a more suitable location in its development if it was agreeable to the complainant, and that he had already made this offer to the complainant and that the complainant declined the same.

The complainant testified that this letter, Exhibit C. 6, wrongly expresses the complainant's contention. That the complainant's contention was that the gravel pit was on his property, but the gravel pit had been enlarged to such an extent that besides being on the complainant's lots, it was also adjacent to his lots, as it took in his father's lots and part of his friend's lots. The letter also wongfully states that the defendant had offered to transfer the complainant to a more suitable location. The letter fails to state that this offer was connected with a demand for additional money (p. 45, folio 40; also p. 46, folios 10 and 20).

When the complainant received this letter he consulted his lawyer, who took the matter in

charge (p. 46, folio 20), and answered the defendant's letter of December 26, 1929, Exhibit C-6, by writing a letter under date of January 6, 1930 (Exhibit C-7, p. 98), in which letter his attorney calls to the Barnegat Pines Realty Co., Inc.'s attention the misstatements made by them in their letter of December 26, 1929, Exhibit C-6, and again offered the return of the deed, which has not been recorded, and demanded the return of the complainant's money (p. 46, folio 20; also p. 47, folio 10).

When the complainant discovered for the first time that the gravel pit had been enlarged upon his property, he took two photographs of his lots showing the nature of the excavation (Exhibit C-8 and Exhibit C-9, p. 102). He also hired a surveyor to make a survey showing the nature and extent of the excavation (see Exhibit C-10, p. 103).

**Specification of the Grounds of Appeal showing in what respect the Order, in the form of a Final Decree in said cause, appealed from, is alleged to be erroneous.**

1. Because the order recites and adjudges that the complainant failed to prove any misrepresentation or fraud on the part of the defendant, whereas his Honor the Chancellor should have found that the case does not involve any fraudulent misrepresentation and was not based upon any misrepresentation or fraud, but that the same was based upon the defendant's wilful, wrongful and unlawful act in entering upon the premises after it entered into a contract to sell the same to the complainant, and unlawfully removing one hundred and forty-six (146) cubic yards of gravel and numerous beautiful

trees and shrubbery, leaving an excavation and hole upon said premises some eight or twelve feet deep and that this unlawful act gave the complainant the right to rescind the contract upon discovering this condition, which entailed the cancellation of the deed and the return of the purchase price paid under the contract.

2. Because the said order recites and adjudges that the complainant inspected the property prior to entering into the contract to purchase and four times while he was paying his installments and had knowledge and notice that there were or had been gravel pits in the immediate vicinity of the property purchased by the complainant and that notwithstanding such notice or knowledge complainant continued to make payments in accordance with the terms of his contract and on final payment accepted the deed when delivered by the defendant, whereas his Honor the Chancellor should have found that the complainant prior to entering into the contract to purchase, inspected with Mr. Petrone, the defendant's sales agent, the tract out of which the six lots which he purchased came and that he and Mr. Petrone, the defendant's sales agent, were unable to locate said lots because the streets laid out upon the map from which the complainant selected his lots, had not been staked out or opened, nor had any of the lots which he purchased or which were shown on the map, been staked out or in any way marked so they could be identified by an inspection, but that he had been informed by Mr. Petrone, the said sales agent of the defendant, that his lots were near a gravel pit on Lacey Road, which gravel pit was about one hundred and fifty (150) feet wide on the westerly side of Lacey Road and ran back in a westerly direction between

sixty-five (65) and one hundred (100) feet from Lacey Road, and that the lots purchased by the complainant were on Alpine street, an unopened street two hundred (200) feet west of Lacey Road, and that said lots were only one hundred (100) feet deep running in an easterly direction, and that on February 24, 1928, the complainant entered into a written contract with the defendant to purchase six lots from a map, the purchase price of which was to be paid Fifty Dollars (\$50.00) upon the signing of the order, One Hundred Dollars (\$100.00) on March 17, 1928, and the balance at the rate of Twenty-five Dollars (\$25.00) per month for eighteen consecutive months, to be paid at the Newark office of the Barnegat Pines Realty Co., Inc., a corporation, and that the premises purchased were located in the Township of Lacey, County of Ocean and State of New Jersey, and that after the signing of the contract the complainant made three or four trips to the Barnegat Pines property to ascertain whether the tract had been improved to such an extent that he would be able to locate and identify his lots and that on none of these occasions was he able to locate his lots as no streets had been laid out or staked out, nor any lots staked out, and that on one or two of these occasions the complainant noticed that the defendant was enlarging the gravel pit on Lacey Road and using the said gravel to improve a part of the tract distantly removed from the property in question and that at the time the complainant saw the gravel pit enlarged he did not know where his lots were and could not identify his lots from inspection as there were no streets staked out or laid out, or any of the lots marked. That on these occasions the complainant roamed

around the neighborhood of the gravel pit on Lacey Road and saw that there were no other gravel pits in or near this section of the property of the Barnegat Pines Realty Co., Inc., and that the complainant fulfilled his part of the contract by making his monthly payments, which were made by mailing the same to the defendant, and that the last payment under the contract was made on September 11, 1929, some eighteen months after the contract was entered into, and that at the time these payments were made the complainant did not know where his lots were located and could not identify them on account of no streets having been laid out or staked out or no lots staked out. That the complainant received his deed on October 12, 1929, and that on October 27 or 28, 1929, which was the first opportunity the complainant had to inspect the premises after he got the deed, he discovered that Lake View Road had been cut through, which gave the complainant his first opportunity to locate his lots by measuring a certain distance from this road. That he measured the required number of feet from Lake View Road and that, for the first time, he discovered that the gravel pit on Lacey Road had been enlarged by the defendant to such an extent that it took in part of lots thirty-five (35) and thirty-six (36), which was part of the property covered by the contract and the deed, and that the pit was so enlarged after the contract was entered into. That the gravel pit took the form of an excavation on the complainant's property, from which one hundred and forty-six (146) cubic yards of gravel had been removed, leaving a large hole eight to twelve feet deep. That the excavation was of recent origin as the color of the soil was fresh and the photograph shows this same condition.

That the complainant upon learning of this condition promptly went to the defendant and tendered back the deed and demanded the return of his purchase price, thus electing to rescind the contract on the ground that the defendant, after entering into the contract with the complainant wilfully, wrongfully and unlawfully removed one hundred and forty-six (146) cubic yards of gravel from the premises mentioned in said contract, and also destroyed and removed scores of beautiful trees and shrubbery, which were upon the premises at the time the contract was made, leaving a large hole or excavation, changing the character and appearance of said property and decreasing the value of the same materially. That the complainant did not record the deed and that the defendant, at the time it delivered the deed to the complainant, did not disclose to the complainant the changed conditions which it wrongfully created. That the defendant wrongfully refused to take back the deed and wrongfully refused to repay the purchase price, but offered to give complainant six other lots in another location, provided the complainant would pay an additional sum of money, which the complainant refused to do, and that the above mentioned deed is null and void and of no effect, and that the complainant be permitted to return the deed to the defendant for cancellation and that the defendant repay to the complainant the purchase price received by it under said contract; that the defendant pay to the complainant such other damages as he suffered by reason of the breach of contract on behalf of the defendant, and that the amount found to be due from the defendant to the complainant be imposed upon the above mentioned premises as a lien.

3. Because the testimony, evidence and proofs do not warrant the conclusions of his Honor the Chancellor nor the order made by him.

## **BRIEF OF THE ARGUMENT.**

### **POINT I.**

**Does the testimony, evidence and proofs warrant the conclusions arrived at and warrant the entering of the Order, in the form of a Final Decree?**

The three grounds of appeal set forth under the heading "Specification of the Grounds of Appeal, etc.," in this brief, are of such a nature that they can be consolidated and argued under the above heading.

The facts set forth under the heading "Abstract of the Case" in this brief, which have been testified to on behalf of the complainant, corroborated, and remain undenied as the defendant put in no evidence, clearly establish the fact that the testimony, evidence and proofs in the case did not warrant the conclusions arrived at by the Honorable Vice-Chancellor and did not warrant the entering of the order, dismissing the bill of complaint.

In the decision rendered by the Vice-Chancellor who heard the case, he states and finds:

"The sole question is whether this man bought this property in good faith—whether there was any misrepresentation or fraud in the matter" (p. 82, folio 30).

The complainant does not contend or claim, either in his pleadings or testimony, that there was any misrepresentation or fraud in the procuring of this contract or that the contract was not entered into in good faith. These ques-

tions are foreign to the issue, yet the Vice-Chancellor claims it is the only question in the case and bases his decision upon his erroneous assumption and conclusion.

It is fair to assume, from the above remark and finding that the Vice-Chancellor decided this case upon the wrong theory and by applying the wrong principle of law. Our law books are full of elaborately decided cases, which hold that a contract may be rescinded for such grounds as misrepresentation or fraud in procuring the contract, invalidity of contract, failure of consideration, failure of performance or breach, and wrongful acts or fraudulent acts, etc. But, from the above finding, only one of these principles of law or grounds for rescission was considered and the rest were not even given a thought or considered by the Vice-Chancellor.

In *Corpus Juris* under the heading "Cancellation of Instruments," 9 *Corpus Juris*, page 1154, on page 1159, it says:

**SEC. 1-A. WHAT INCLUDED IN THE REMEDY.**

Cancellation, rescission, surrender up and discharge of instruments are one and the same remedy; the decree for cancellation generally includes a direction for surrender up and if necessary for a discharge of record. Citing *Pomeroy Eq. Jur.* secs. 1375, 1377.

**SEC. 4. INTRODUCTORY STATEMENT.**

The jurisdiction of a court of equity or of a court exercising the powers of a court of equity to direct and to enforce the rescission of contracts and the surrender and cancellation of

written instruments for due cause and to grant such other relief as the party may be entitled to is settled beyond question. Citing *Van Houton v. Van Houton*, 68 N. J. Eq., 358; *Young Lock Nut Co. v. Brownley Mfg. Co.* (Ch.), 34 Atl., 947; *Burrows v. Wene* (Ch.), 26 Atl., 890; *Patterson v. Baker*, 51 N. J. Eq. 49; *Smith v. Smith*, 30 N. J. Eq., 564; *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188 (aff. 29 N. J. Eq. 651); *Monmouth County Mut. F. Ins. v. Hutchinson*, 21 N. J. Eq., 107; *Metter v. Metter*, 18 N. J. Eq., 270 (aff. 19 N. J. Eq., 457); *Cornish v. Bryan*, 10 N. J. Eq., 146, and see *Garrison v. Technic Electrical Works*, 55 N. J. Eq., 708.

The Vice-Chancellor further states and finds:

“He stopped in front of a sand pit of some kind, old or new, and he must have known—or, it was his duty to have known that there were sand pits or had been sand pits in that immediate vicinity” (p. 82, folio 40).

There is no evidence in the case to support the Vice-Chancellor in the above conclusion. We are not concerned in this case as to whether or not there were any gravel pits in the immediate vicinity of the property purchased by the complainant. That is entirely foreign to the issue. We are only concerned with whether the defendant company had a right, after entering into the contract, which was an eighteen (18) months' installment contract to sell the complainant six lots which were free and clear of any excavations or gravel pits, to deliberately go in and upon those lots after the contract was made, and wrongfully and illegally remove one hundred and forty-six (146) cubic yards of valuable gravel and destroy and remove numerous trees and shrubbery and leave in its place an excavation

or hole some twelve (12) feet deep. The complainant's testimony shows that there was no gravel pit or excavation in the vicinity of the lots which he purchased, except the gravel pit on the westerly side of Lacey Road (p. 35, folio 10; also p. 50, folios 20 and 30). That there was no gravel pit on the lots which he purchased at the time that he entered into the contract (p. 35, folio 10), and that the dimensions of the gravel pit on Lacey Road, which was the only one on the property shown on Map #12 of the Barnegat Pines Realty Co., Inc., were one hundred and fifty (150) feet side on Lacey Road and extended in a westerly direction for about sixty-five (65) feet; also shows that the lots fronting on Alpine street, which he purchased, were shown on the map to be two hundred (200) feet from Lacey Road (p. 32, folios 10 and 20). He further testifies that after the contract had been entered into, the defendant company wrongfully and illegally enlarged this gravel pit on Lacey Road, by digging the same in a westerly direction until it reached Alpine street and then along Alpine street in a northerly direction (p. 35, folios 20, 30 and 40; p. 38, folios 30 and 40; p. 40, folios 10 and 20; p. 52, folios 20, 30 and 40, and p. 53, folio 10), and by so doing they not only affected the complainant's lots, which he was under contract to purchase, but took in the two lots owned by the complainant's father and the two lots owned by the complainant's friend, alongside of which the complainant's lots lie (p. 52, folio 40). The testimony of Mr. Petrone, the defendant's own salesman, and who sold these lots for the defendant company to the complainant, shows that the only gravel pit in the vicinity of the lots which he sold to the complainant was the gravel pit

on Lacey Road, testified to by the complainant, and that this gravel pit was about one hundred and fifty (150) feet side on Lacey Road and extended westerly for about one hundred (100) feet, and that there were no other gravel pits, to his knowledge, on property shown on map #12, which is the map from which the complainant purchased his lots. He further testifies that there were no gravel pits or excavations on the lots that he sold to the complainant, at the time the complainant entered into the contract to purchase the lots. He further testifies that he has reason to believe that the gravel pit on Lacey Road was enlarged from time to time after the entering into of the contract, because he saw the machinery there on the job and that he, Mr. Petrone, was instructed to tell people that they were fortunate in having the gravel right on the property and that they would not have to purchase it (p. 76, folio 40; also p. 77, folios 10, 20 and 30).

The Vice-Chancellor further finds:

“His own witness testified that, at the time this property was pointed out to him, the street or proposed street, was monumented” (p. 83, folio 10).

There is no evidence in the case to support this finding. The witness referred to by the Vice-Chancellor was Mr. Petrone, who was the salesman employed by the Barnegat Pines Realty Co., Inc., and who made the sale to the complainant. The only testimony on the question of monumenting was as follows:

“Q Were any of the streets shown on the map from which these lots were sold staked out or laid out, that is Map 12? A The only work done on Map 12 at the time was the monumenting, but no staking” (p. 76, folios 20 and 30).

“Q I see. Was it possible to definitely identify the lots or their location at the time? A Not without a survey (p. 76, folio 30).

Under cross examination the following evidence of the monumenting was given by this witness:

“Q Mr. Petrone, you say that it was monumented, wasn't it?” (p. 78, folio 20).

“The Court: He has already said that” (p. 78, folio 20).

“Q This property? A All the maps were monumented” (p. 78, folio 30).

From the above it can be seen that there is no testimony to support the Vice-Chancellor's conclusion that any streets were monumented. The streets were paper streets and were only shown on the map but were, in reality, not existing. No streets had been laid out or staked out and even Mr. Petrone, the defendant's salesman, whom the complainant found it necessary to subpoena, testified that not even he was able to locate the lots and that they could only be located by means of a survey (p. 76, folio 30). There is no evidence in the case that the complainant knew that there were monuments in or upon the property; even if he did know, which is not a fact, these monuments would not make it possible for the complainant to locate his lots without hiring an engineer or surveyor (p. 76, folios 20 and 30). There is no obligation on the complainant's part to have his property surveyed at a time when he is not ready to build and when the contract under which he is purchasing gave him eighteen (18) months' time to pay the same.

The Vice-Chancellor further states and finds:

“He went down there four times, while he was paying his installments, he knew that

there were sand pits there. He made absolutely no effort to find out whether the sand pits were on his property or not. The monuments were there. If he could not accurately determine by his own measurement, he should have gotten an engineer—which, after the beginning of this case, he appears to have done—to locate his lots. He was clearly in *laches* in paying his money. He made no effort—he says himself he didn't know where his lots were, excepting in a general way. He knew, however, as he testified, that there were sand pits there and he saw them working, and it was up to him to find out whether they were working on his lots" (p. 83, folios 10 and 20).

The Vice-Chancellor is not supported by the evidence in connection with the above findings. On the contrary, the testimony offered by the complainant and his witnesses, which uncontradicted and undenied, shows that the complainant made three or four trips to the tract to see whether he could locate his lots and to see what developments had taken place, if any. That on all these occasions he found no streets or lots laid out or staked out and that he was unable to locate the whereabouts of his lots, but that he did roam around the vicinity where his lots were represented to be located by Mr. Petrone, namely, near the gravel pit on the westerly side of Lacey Road, and that there were no other gravel pits in or near the vicinity where his lots were represented to be and where his lots finally turned out to be (p. 34, folios 30 and 40; also p. 35, folio 10), and that the gravel pit on Lacey Road was not on his lots, because, at the time the contract was entered into, this gravel pit was one hundred and fifty (150) feet wide on Lacey Road and only extended in a westerly direction some sixty-five (65) feet (p. 32, folios 10 and 20). The complainant's lots fronted

on Alpine street and were two hundred (200) feet westerly of Lacey Road (p. 32, folio 20; Exhibit C-2, p. 88). That this gravel pit was unlawfully enlarged by the defendant after the contract was signed and by so enlarging it broke in on the side of lots thirty-six (36), which is one of the lots owned by the complainant, from a point which is one hundred and thirty-three (133) feet westerly from Lacey Road (p. 35, folios 20, 30 and 40; p. 38, folios 20, 30 and 40; p. 40, folio 10; p. 43, folios 20, 30 and 40; also page 44, folios 10, 20, 30 and 40; also see Survey, Exhibit C-10, p. 103). The complainant also testified that on the occasions that he visited the premises in order to locate his lots, he saw the defendant company enlarge this gravel pit on Lacey Road, but that on none of these occasions did he know where his lots were nor did he know that the defendant would eventually break in and upon his lots (p. 40, folio 30). Mr. Petrone, the defendant's salesman, whom the complainant had to subpoena, testified that at the time the contract was entered into there was no gravel pit on the lots sold to the complainant and that there was no other gravel pit on the property represented by Map #12, except the gravel pit on Lacey Road (p. 77, folio 20), which was testified to by the complainant, and which Mr. Petrone testifies was one hundred and fifty (150) feet wide on Lacey Road and extended back in a westerly direction for about a hundred (100) feet (p. 76, folio 40; also p. 77, folios 10 and 20).

I do not agree with the Vice-Chancellor that because there may have been monuments in or upon the property, their whereabouts, however, not known to the complainant, that it was incumbent upon him to hire a surveyor or engi-

neer for the purpose of ascertaining whether or not the defendant was wrongfully and unlawfully excavating on the property which he was under contract to purchase. Surely, any knowledge on behalf of Mr. Petrone as to these monuments is not chargeable to the complainant. There is no evidence in the case that the complainant knew about any monuments. Even if he did know that monuments were there, it would take a skilled engineer or surveyor to know why the monuments are there and what they are there for; whether they are properly in their place or whether they are wrongfully placed.

It is true that the complainant finally obtained the services of a surveyor, but only after he discovered that the gravel pit on Lacey Road had been enlarged upon his property. I do not see the force of the argument set forth in the Vice-Chancellor's opinion, which holds that it was incumbent upon the complainant to procure the services of a surveyor for the sole purpose of finding out whether or not the defendant company was illegally trespassing upon the property which he was under contract to purchase and for which he had no deed at the time; especially when you consider that the complainant had eighteen (18) months to pay for his property under the contract, and especially when he did not intend to build immediately and, therefore, did not have any use for a surveyor. But, I do see force in the argument that it was incumbent upon the defendant company to definitely determine either the location of the gravel pit or the location of the complainant's lots, when they decided to enlarge the gravel pit, especially after they had sold every lot out of Block 144 on Map #12, in which block the

gravel pit was. They have no right to assume that the gravel pit belongs to them, when they have been selling property from the map to divers persons, and they have no right to enlarge this gravel pit without making sure that they are not affecting property which they have sold. On the other hand, the complainant had a right to assume, and the complainant did assume, that the defendant corporation was honorable and honest enough not to commit a wrongful act and that the defendant company would definitely determine the whereabouts of the complainant's lots or definitely determine the pit in comparison with the complainant's lots before proceeding in a haphazard way to enlarge the gravel pit and thus effect property sold. While the complainant knew of no monuments in and upon the premises, the defendant did know of these monuments as it is their property and they had it monumented, if it is monumented, as they had the map made from which the lots were sold. They had the knowledge and the means to definitely locate either the complainant's lots or the gravel pit, which it was their duty to do before commencing to enlarge the pit. Surely it is not up to the complainant to do this as he was not about to enlarge the pit or to do an act which might turn out to be a wrongful act if he did not definitely locate his lots or the gravel pit. Surely, the defendant cannot put in, as a defense in this suit, its own wrongful act.

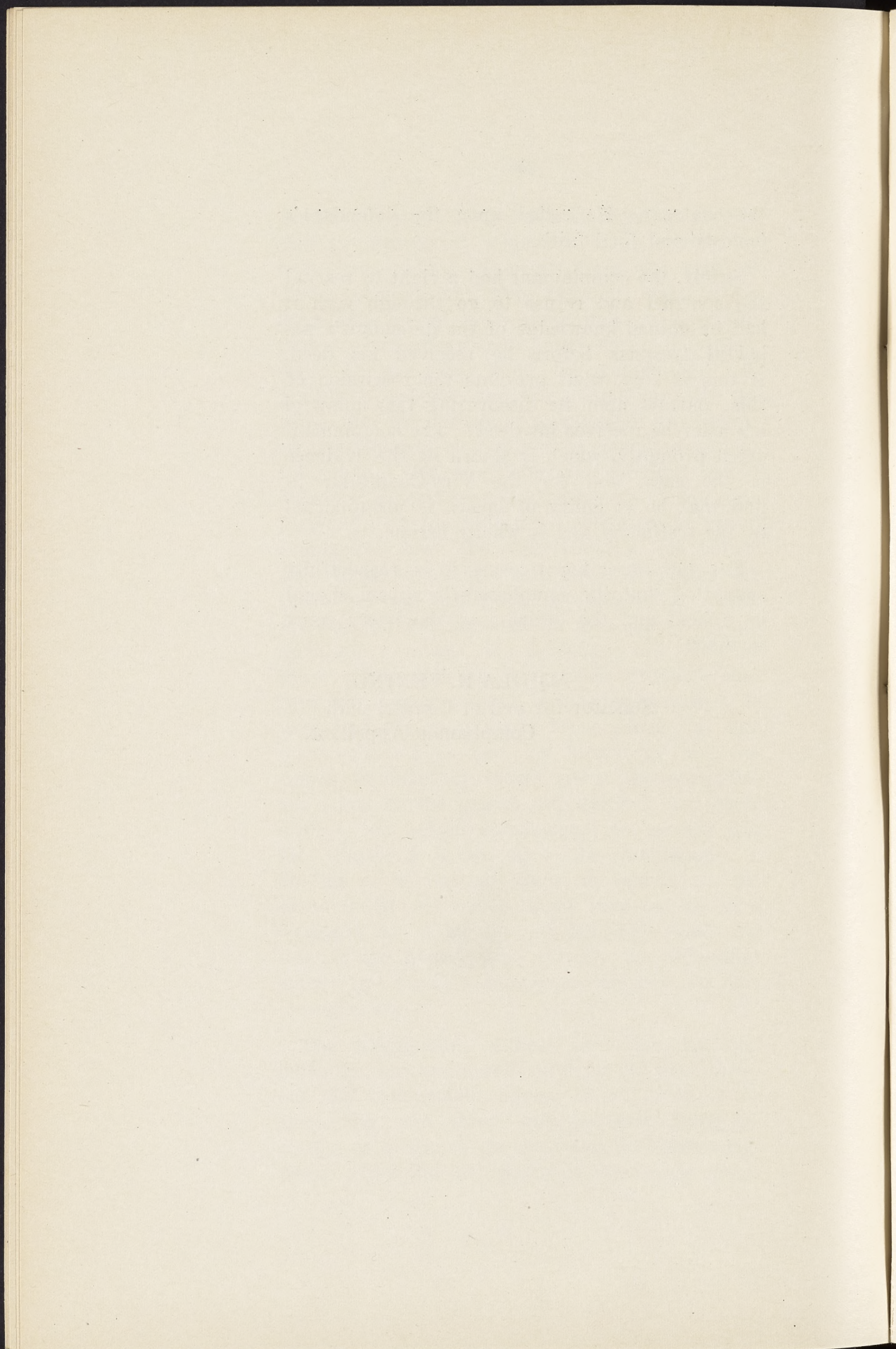
The complainant entered into this contract, made his payments and received his deed without the independent advice of an attorney or counsellor, and there was no such thing as closing of a title as the deed was delivered some weeks after the last payment was made under

the contract. He relied upon the defendant's honesty and good faith.

Surely, the complainant had a right to rescind the contract and refuse to go through with it had he gained knowledge of the defendant's unlawful trespass before he received his deed. If this is true, what prevents the rescission of this contract upon his discovering this unlawful act after he receives his deed? The complainant acted promptly, which is shown by the evidence in the case, and for the Vice-Chancellor to find that he is guilty of laches is unsupported by the testimony and is wholly erroneous.

For the foregoing reasons it is respectfully submitted that the complainant's appeal should be upheld and the decision of the lower court reversed.

AQUILA N. VENINO,  
Solicitor for and of Counsel with  
Complainant-Appellant.



## New Jersey Court of Errors and Appeals

WILLIAM B. KUNZ, Complainant-Appellant,  vs.  BARNEGAT PINES REALTY Co., INC., a corporation, Defendant-Appellee.	}	On Bill for Rescission and Cancellation of Deed.  On Appeal from the Court of Chancery.
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### BRIEF OF DEFENDANT-APPELLEE.

William B. Kunz, the complainant-appellant, seeks to have cancelled a certain deed dated September 20, 1929, duly executed and delivered by the Barnegat Pines Realty Co., Inc., defendant-appellee, but not recorded, and the consideration of \$600.00 paid thereunder returned to him, basing his action on the ground

(a) "that the defendant, without knowledge or consent of the complainant, entered into and upon the said premises, and wilfully, wrongfully and unlawfully removed \* \* \* gravel", and

(b) "destroyed and removed \* \* \* trees and shrubs."

The case was heard by the Honorable Alonzo Church, Vice Chancellor, who advised a decree dismissing the bill.

## The Bill of Complaint should have been Dismissed.

The bill of complaint should have been dismissed for the following reasons:

1: Complainant has a complete and adequate remedy at law.

2: The pleadings and proofs fail to disclose any cause for the equitable remedy of rescission and cancellation.

3: The testimony, evidence and proofs warrant the conclusions arrived at, and the entering of the order in the form of a final decree.

### REASON ONE.

The cause of action presented by the complainant is purely one of legal cognizance, i. e., trespass and damage to property, and is so called by the complainant in his bill of complaint (page 3, lines 22, 23) and in his brief (page 23, line 24; page 25, lines 5, 6), for which there is a plain, complete and adequate remedy at law.

*9 Corpus Juris, page 1163: Right to Relief as Affected by Fact that Complainant has Remedy at Law:*

“While there is authority for the proposition that the existence of the jurisdiction to cancel an instrument does not depend on the inadequacy of the complainant’s legal remedy, it is almost universally held, except in a number of decisions in which fraud was the ground on which relief was sought, that the jurisdiction of a court of equity, as a general rule, will not be exercised when complainant’s remedy at law, either by way of

action or defense, is plain, adequate and complete.

Ordinarily resort to a court of equity for relief is not permissible, unless complainant is prepared to allege and to prove some special circumstances to show that he may suffer irreparable injury if he is denied that preventive remedy. Where no injury at all is caused or threatened to the complainant by the existence of the instrument uncanceled, a court of equity will not interfere.

The mere fact that it is more convenient for parties to maintain an action or to make a defense in equity than law, will not justify a resort to the former jurisdiction, if the remedy is complete and adequate in the latter."

If the defendant were guilty of the act of trespass and damage set forth in the bill of complaint, which has not been proved, it would be an illegal act, having no connection with the making of the contract, and would not constitute grounds for cancellation.

9 *Corpus Juris*, page 1162:

"Some substantial reason for relief must be shown and the courts will not act when kept in ignorance as to the reasons and purposes of the contract sought to be rescinded, some useful purpose accomplished by the rescission must be shown, and *illegal acts having no connection with the making of a contract do not constitute grounds for cancellation.*"

## REASON TWO.

In order to obtain relief in a court of equity, the case presented must embrace facts to bring it within some of the recognized heads of equity jurisdiction, such as fraud, accident, mistake, misrepresentation, duress, concealment, failure of consideration, illegality, and the like. There is nothing in the pleadings or proofs to bring this case within any of the heads of equity jurisdiction, for which cancellation or rescission can be granted. The point at issue is not (as complainant's brief set forth p. 16, Section 1-A) what is included in the remedy for cancellation or rescission, or that the jurisdiction of a court of equity to enforce cancellation and rescission of instruments for *due cause* is questioned, (Brief, pp. 16, 17, Sec. 4). The complainant cites no cases in support of his contention in this matter, whatever the same may be, but the only cases cited in his brief (p. 17) support the general rule, which is undisputed, that equity will grant the remedy of cancellation and rescission for *due cause*. All of the cases cited are based on misrepresentation or fraud, failure of consideration, defect in title, undue influence, concealment of facts, and the like.

The only point at issue in this cause is—does the complainant by his pleadings and/or proofs, present a case for which equity can and will grant rescission and cancellation?

*9 Corpus Juris*, page 1162. *Cancellation of Instruments—Specific Grounds for Granting or Denying Relief:*

“Generally speaking, in order to obtain relief in a court of equity, the case presented must embrace the facts bringing it within

some of the recognized heads of equity jurisdiction, such as fraud, accident, mistake, duress, undue influence, or the like; or it must at least be shown that the complainant, if denied equitable relief, will sustain an injury for the redress of which a court of common law can afford no adequate remedy".

*Snider v. Freehold Theatre Co. et al.*  
150 *Atlantic Reporter*, 415.

Page 416: "Equity held not to have jurisdiction of bill for cancellation of breached lease; no fraud or illegality in its making being alleged."

"Equity jurisdiction to rescind or cancel contracts arises only where transaction is vitiated by illegality, fraud, or mistake of material facts."

In the third edition of Adams' Doctrine of Equity, p. 174, it is said, "The jurisdiction for rescission and cancellation (of contracts) arises where a transaction is vitiated by illegality or fraud, or by reason of its having been carried on in ignorance or mistake of facts material to its operation", and in a footnote it is added by Henry Wharton, the American editor, "*A contract can never be rescinded except in case of fraud or palpable mistake.*"

*United Wool Co. v. Werner Company*,  
102 N. J. Equity, 322.

Chancery will dismiss a bill for the rescission of a contract, for want of equity, in the absence of any allegation of fraud, mistake or menace if the contract is permitted to remain in force.

Chancery has no jurisdiction to rescind a contract, inasmuch as the complainant has a complete and adequate defense at law.

*Commercial Co. v. Southern Surety Co.*,  
100 N. J. Equity 92.

Page 96: "When the primary right is legal, as it is here, and the jurisdiction of the law courts is concurrent and if the remedy at law is adequate, certain and complete, equity remains passive."

The complainant has failed to show any grounds which would entitle him to the relief of rescission and cancellation, which he seeks.

### REASON THREE.

The complainant attempted to show, by his evidence and proofs, that he was entitled to the relief prayed for, in spite of the fact that his pleadings failed to show any ground for the application of the equitable remedy of rescission.

At the hearing of this cause he accused the defendant of fraud in a letter from the complainant's solicitor to the defendant (Exhibit C-7, page 99, line 10; page 100, line 18); his bill of complaint sets up "wrongful acts" to be interpreted to mean fraud or misrepresentation, and he attempted to prove fraud and concealment by the fact that he testified that he did not know there were any gravel pits on his property until after he had received the deed for the same, and that he was unable to locate his lots. There was no attempt to prove mistake, invalidity of contract, failure of consideration, defect in title, or the like, but there was an attempt to prove fraud and misrepresentation. In this the complainant failed, and he now admits that there was no misrepresentation or fraud in the procuring of the contract:

(Brief p. 15) "The complainant does not contend or claim, either in his pleadings or testimony, that there was any misrepresenta-

tion or fraud in the procuring of this contract, or that the contract was not entered into in good faith. These questions are foreign to the issue”.

He now states that the Vice Chancellor decided the case upon the wrong theory, and applied the wrong principle of law, and that he erred in not finding that this action was founded upon the wilful, wrongful and unlawful acts of the defendant in removing gravel and trees from the lots after the same had been sold to the complainant. This is exactly what the Vice Chancellor did consider as shown by his opinion (p. 82, line 35 to page 83, line 10).

“He was clearly in laches in paying his money. \* \* \* He knew, however, as he testified, that there were sand pits there, and he saw them working, and it was up to him to find out whether they were working on his lots.”

The Vice Chancellor thereupon dismissed the bill, as the complainant's action, if any, was not founded upon any cause for which a court of equity could grant relief.

The testimony shows that the complainant purchased these lots because he was enticed to do so by his father, (p. 29, lines 35-40; p. 31, lines 1-5) and after he had made an inspection of the entire property. He testified that the lots were part of a large undeveloped tract of land, and he had knowledge that there were gravel pits in the immediate vicinity, because he stopped with the salesman at a gravel pit, and the salesman explained to him that the gravel from this pit was used by the defendant in developing the property, (p. 31, lines 17-25). He visited the tract three or four times after signing the contract (p. 34, lines 19-21) and

he noticed that the streets in the tract were being developed, and that the gravel was being used in this work (p. 35, lines 11-36), and he continued to make his regular monthly payments, (p. 36, lines 4-12).

The complainant testified that the removal of gravel from this pit was simply removing a higher ridge of gravel to bring the property to the street level; that they did not go below the level of the street, and that the removal of the gravel was a preliminary step to the development of the street (p. 63, lines 10-37) and did not diminish the value of the property, but was part of a plan and scheme of development (page 64, lines 1-2). Mr. Gardner testified that the elevation of complainant's lots, Nos. 35 and 36, where the gravel pit touched, was high, and that the digging was in an embankment (p. 80, lines 28-30).

It is untrue that the defendant removed any gravel from the complainant's lots, or any trees or shrubbery. Complainant testified that gravel was removed by the defendant by steam shovel, but that a steam shovel had not been used in his lots (p. 61, lines 15-27), which is corroborated by complainant's engineer, George H. Gardner (p. 82, line 4). The complainant also testified that there was shrubbery in the pit shown by his photograph (Exhibit C-8), indicating an old gravel pit. (p. 76, line 38) which had not been worked recently. Mr. Gardner, complainant's engineer, testified that he could not tell from his examination that the pit had been worked recently; he could not say that it had been (p. 81, lines 24-35).

The complainant testified that he was unable to locate his lots, yet the streets were monumented (p. 76, line 22) and the lots were 200 feet from Lacey Road, and he could have paced off 200 feet from Lacey Road to his lots, yet he made no at-

tempt to do so (p. 59, lines 18-26). He must have been able to locate them, however, to know that there were beautiful trees and shrubbery on his lots at the time of the purchase, which he claims the defendant has destroyed. The trees on this entire tract are second and third year growth, and are what is commonly called scrub pine and scrub ash, (p. 69, lines 3-7).

The defendant, not admitting that it had removed any gravel or trees from complainant's lots (p. 43, lines 15 and 31) offered to do everything they could for him, but the defendant wanted nothing but his money back, (p. 71, lines 19-22; p. 72, lines 16, 35-37).

It appears very conclusively from the evidence and proofs, and by the complainant's admission, that the contract for the purchase of these lots was entered into in good faith, with no fraud, misrepresentation or mistake, and that the terms of the said contract were fully performed by both of the parties thereto, the purchase price was paid, and the deed executed and delivered. After the contract had been fully completed the complainant, for no legal or equitable reason, wanted his money back. He first pretended that he wanted to build, and the development in the tract where his lots were located was not in a proper condition for building, and when the defendant offered to transfer him to a location in a developed section, he admitted he was not in a financial position to build (p. 66, lines 8-18). He then threatened the defendant with criminal action, and accused it of fraud (Exhibit C-7, p. 100, lines 17 and 35).

The complainant has not shown any ground for the application of the equitable remedy of rescission. He does not allege that he was induced to enter into the contract by any fraud or misrepre-

sentation on the part of the defendant, nor does he allege any mistake which would warrant the court of equity in cancelling the instrument, and the bill should be dismissed for the want of equity.

**CONCLUSION.**

**For the reasons above set forth, it is submitted that the decree appealed from should be affirmed.**

EGNER AND BEATTY,  
Solicitors for and of Counsel  
with Defendant-Appellee.

